THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 21

Case No. 12,137 — Case No. 12,805

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RUNAWAYS—SHORE

Case No. 12,137—Case No. 12,805

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FEDERAL CASES.

BOOK 21.

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

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

Case No. 12,137.

RUNAWAYS & PETITIONERS FOR FREEDOM.

[4 Cranch, C. C. 489.] [1]

Circuit Court, District of Columbia. Nov. Term, 1834.

MARSHAL'S FEES — IMPRISONMENT OF RUNAWAY SLAVES—PETITIONERS FOR FREEDOM.

1. The marshal has not a right to include, in his account against the United States, his imprisonment fees for persons committed as runaway servants or slaves, under the adopted laws of Maryland.

2. The marshal may include, in his account against the United States, his fees for the maintenance of petitioners for freedom committed by order of the court for safe keeping, if they obtain their freedom; otherwise, their owners must pay the marshal's fees for their maintenance in prison.

The following questions were submitted to CRANCH, Chief Judge, by the attorney of the United States and the marshal: Whether the United States are liable to the marshal for the maintenance of free colored persons committed by justices of the peace as runaways, and discharged on habeas corpus; and also for the maintenance of petitioners for freedom, committed by order of the court to attend the trial, &c. 1st. As to those committed as runaways. (1) Is the marshal bound to receive and feed them? (2) If so, are the United States liable to him for his fees for keeping and feeding free persons committed as runaways, and discharged on habeas corpus.

CRANCH, Chief Judge. By the act of congress of the 27th of February, 1801 (2 Stat. 103), the laws of Maryland, as they then existed, were continued in force in the county of Washington. By the seventh section the marshal is to "have the custody of the gaols of the counties, and to be accountable for the safe keeping of all prisoners legally committed therein;" "and shall have the same powers, and perform the same duties as is by law directed and provided in the cases of marshals of the United States;" and by section 9, he is entitled to the same fees, perquisites, and emoluments, which are by law allowed to the marshal of the Maryland district.

By the act of congress of the 8th of May, 1792, § 4 (1 Stat. 275), the compensation to the marshal for the maintenance of prisoners confined in gaol for any criminal offence, and for the commitment and discharge of such prisoner, shall be included in the account of the marshal; and the same having been examined and certified by the court or one of the judges, in which the service shall have been rendered, shall be passed in the same manner, at, and the amount thereof paid out of, the treasury of the United States to the marshal.

By the act of the 28th of February, 1795, § 9 (1 Stat. 424), "the marshals of the several districts and their deputies shall have the same powers in executing the laws of the United States as sheriffs and their deputies in the several states have, by law, in executing the laws of the respective states."

The question is: Were those prisoners legally committed for any criminal offence? For if they were, the act of congress is imperative that the compensation of the marshal for their maintenance, and his fees for their commitment and discharge, are to be included in his account; which, when examined and certified by the court, or one of its judges, must be passed and paid at the Treasury.

By the act of Maryland, 1715, c. 44, § 2,

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

it is enacted, that no servant, whether by indenture or otherwise, according to the custom of the country, or hired for wages, shall travel ten miles from the house of his master without a note under his hand, under the penalty of being taken as a runaway, and to suffer such penalties as are hereafter provided against runaways. And by the third section of the same act, any servant unlawfully absenting himself from his master, shall make satisfaction, by servitude or otherwise, at the discretion of the justices of the county court where such runaway servant did dwell, not exceeding ten days' service for any one day's absence, with such reasonable costs for his taking up, as the court should think fit, be it before or after the expiration of such servant's first time of servitude by indenture or otherwise. The fourth and fifth sections prohibit the harboring of servants or slaves. By the sixth section of the same act, it is enacted, that, "for the better discovery of runaways," "any person travelling out of the county where he shall reside or live, without a pass under the seal of the said county, if apprehended, not being sufficiently known, or able to give a good account of himself, shall be left to the discretion of the magistrate before whom he shall be brought, to judge thereof; and if, before such magistrate, such person, so taken up, shall be deemed and taken as a runaway, he shall suffer such fines and penalties as are hereby provided against runaways." The seventh section of the same act: "For the encouragement of all persons to seize and take up such runaways travelling without passes as aforesaid, not being able to give a sufficient account of themselves as aforesaid, shall have two hundred pounds of tobacco, to be paid by the owner of such runaway servant, (negro or slave.) And if such suspected runaways be not servants, and refuse to pay the same, they shall make satisfaction by servitude or otherwise, as the justices of the provincial and county courts where such persons are so apprehended and taken up, shall think fit." The eighth section gives a reward to Indians for apprehending runaway slaves. The ninth section provides that the person taken up shall be brought before the next magistrate, who is empowered to take him into custody, or otherwise secure him until he shall give "security to answer the premises," at the next court in the county; which court shall secure him until he can make satisfaction to the person who apprehended him. And the county commissioners are to cause a note of his name to be set up at the next adjacent court, and at the provincial court and secretary's office, that masters may know where to find their servants. The tenth section ascertains the freedom dues of servants according to the custom of the country. The eleventh, twelfth, and thirteenth sections forbid all persons to trade or deal with servants or slaves. The fourteenth, fifteenth, sixteenth, seventeenth, eighteenth and nineteenth sections regulate the time of service of imported servants. The twentieth section gives a reward for taking up such servants and slaves, in Pennsylvania and Virginia, to be paid by the master or owner; but if the person so taken up be a freeman and refuse to pay the reward, the magistrate before whom he shall be brought shall forthwith commit such person to prison till he shall give security or make full satisfaction by servitude or otherwise. The twenty-first section provides for the humane treatment of servants by their masters, and limits their correction to ten lashes, unless by order of a magistrate, who cannot order more than 39. The twenty-second section declares all slaves imported and to be imported, and their children, to be slaves for life. The twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, and twenty-seventh sections relate to marriage and sexual intercourse between whites and blacks. The twenty-eighth and twenty-ninth sections relate to female servants having bastard children. The thirtieth and thirty-first sections authorize the provincial and county courts to hear and determine complaints between masters and servants by way of petition without a jury. The thirty-second section prohibits slaves from carrying guns. The thirty-third section makes it felony in a servant to take and purloin his master's goods and prescribes the punishment. The thirty-fourth section enacts, that no sheriff or gaoler shall hold any suspected runaway longer than six months, he serving the sheriff or gaoler or his assigns so many days as he was in custody; or paying ten pounds of tobacco per day to the sheriff for his imprisonment fees, and no more, and paying to the person who took him up two hundred pounds of tobacco, or serving him twenty days in lieu thereof.

The act of May, 1719, c. 2, after premising that by the act of 1715, c. 44, relating to servants and slaves, "there is no provision made what shall be done with such runaway servants and slaves that now are or hereafter shall or may be taken up and committed to the custody of any sheriff within this province, where the master or owner of such servant or slave having due notice of such servant's or such slave's being in the custody of such sheriff, refuses or delays to redeem such servant or slave by paying their imprisonment fees, and such other charge as has or may accrue for taking up such servant or slave," enacts, "that every sheriff that now hath, or hereafter shall have, committed into his custody any runaway servants or slaves, after one month's notice given to the master or owner thereof, of their being in his custody, if living within this province; or two months' notice if living in any of the neighboring provinces, if such master or owner of such servants or slaves do not appear within the time limited as aforesaid and pay or secure to be paid all such imprisonment fees due

to such sheriff from the time of the commitment of such servants or slaves; and also such other charges as have accrued or become due to any person for taking up such runaway servants or slaves; such sheriff is hereby authorized and required, (such time limited as aforesaid being expired,) immediately to give public notice to all persons by setting up notes at the church and court-house doors of the county where such servant or slave is in custody, of the time and place of sale of such servants or slaves by him to be appointed, not less than ten days after such time limited as aforesaid, being expired; and at such time and place, by him appointed as aforesaid, to proceed to sell and dispose of such servant or slave to the highest bidder; and out of the money or tobacco which such servant or slave is sold for, to pay himself all such imprisonment fees as are his just due for the time he has kept such servant or slave in his custody; and also to pay such other charges, fees, or reward as has become due to any person for taking up such runaway servant or slave, and after such payments made, if any residue shall remain of the money or tobacco such servant or slave was sold for, such sheriff shall only be accountable to the master or owner of such servant or slave, for such residue or remainder as aforesaid, and not otherwise."

By the act of 1751, c. 14, § 8, it is enacted, "that where any slave shall be guilty of riding, rambling, or going about in the night, or riding horses in the daytime without leave, or running away, it shall and may be lawful for the justices of the county court, and they are hereby obliged, upon the application or complaint of the master or owner of such slave, or to his, her, or their order, or on the application or complaint of any other person who shall be any ways damnified or injured by such slave, immediately such slave to punish by whipping, cropping, or branding in the cheek with the letter R; or otherwise, not extending to life or to render such slave unfit for labor."

By the act of May, 1766, c. 6, it is enacted, that all legal fees that shall arise on the prosecution of any negro or other slave in any county court, whether such slave shall be convicted or acquitted, shall be chargeable to and paid by, the respective county where such prosecution shall be had, and assessed in the county levy of such county.

The act of 1792, c. 72, is entitled "An act to restrain the ill practices of sheriffs, and to direct their conduct respecting runaways," and enacts as follows:

"Whereas, it is represented to this general assembly, that the sheriffs of the respective counties have neglected to advertise runaways to the great injury of the owners, therefore:

"2. Be it enacted, &c., that it be the duty of the several and respective sheriffs, and they are hereby required and directed, upon any runaway being committed to their custody, to cause the same to be advertised in some public newspaper, within twenty days after such commitment; and to make particular and minute description of the person, clothes, and any bodily marks of such runaway."

"3. And be it enacted, that if no person shall apply for such runaway within thirty days from such commitment, then it shall be the duty of such sheriff, if residing on the western shore, to cause the said runaway to be advertised, as heretofore directed, in the Maryland Journal and Georgetown Weekly Ledger; and if residing on the eastern shore, to cause the same to be advertised in the Maryland Herald, and Maryland Journal, within sixty days from such commitment, and to continue the same therein until the said runaway is released by due course of law.

"4. And be it enacted, that if any sheriff shall refuse or neglect to comply with the directions of this act he shall for every such refusal or neglect, forfeit and pay the sum of £20, current money, to the owner of such runaway."

By the act of 1715, c. 26, §§ 8, 9, it was enacted, "that no sheriff or other officer should charge the county or the public with any fees for any criminal committed to his charge having sufficient estate wherewith to pay the same, or being capable to pay the same by servitude; but that such criminals, being discharged by order and due course of law, shall pay their own fees to the officers out of his estate, or by servitude, or otherwise; provided that this act shall not extend to servants, criminals for whom the county shall pay such fees as are due to the officers." And by section 10, of the same act, all officers' fees due by law from criminal servants shall be paid by the county where the facts shall be committed; and such criminal servants shall, at the expiration of their time of servitude to their masters, pay the same to the commissioners of the county, (for the use of the county,) who shall make rules for the servants to make such reasonable satisfaction to the county as they shall think fit, and in such manner as they shall find convenient. And by the 11th section, the masters of such servants are required to deliver them up to the sheriff at the expiration of their servitude, under the penalty of paying the fees themselves; and the sheriff is to secure the servant to appear before the next county court to be disposed of as the court shall consider.

The act of 1727, c. 2, is entitled, "An act directing the payment of fees arising due on the prosecution of white servants which shall hereafter be imported into this province," and has the following preamble: "Forasmuch as it is evident to this present general assembly, that the charges of late arising to the public and several of the counties within this province, on the prosecution of servants, have been a very great burden to the public; and

whereas it is manifest that several felonies and other offences have been frequently committed which might have been prevented by their masters by taking care to keep them in due order and subjection; and sometimes servants have been induced by the encouragement, and sometimes by the severity of their masters, to commit felonies and other crimes, the masters well knowing that in case of prosecution the expense thereof must have been borne by the public, or the inhabitants of the county or counties where the acts have been committed; for remedy of which evils, be it enacted," &c., "that it shall be lawful for the officers to whom any fees shall arise due on any prosecution of the lord proprietor against any servant that shall be imported into this province after the end of this session to recover the same from the masters as if they were their proper debts; and that it shall not be lawful for any officer to charge the public, or any county, for any fees on the prosecution of such servants, any law to the contrary notwithstanding." By the 3d section, it is provided, "that the owners of such servants, (unless the offence be capital, and the offender actually executed for the same,) at or before the expiration of the servant's servitude may carry him before the county court, who are to judge what time, not exceeding three years, the servant shall serve his master in recompense of the fees paid by the master."

The above seems to be all the statute law bearing upon the question. None of the laws of Maryland authorize the sheriff to charge the state or any county with the maintenance of persons committed as runaways. If the person committed be a servant, the fees are to be paid by the master, or by the prolonged servitude of the servant; if he be a slave the fees are to be paid by the owner; or by a sale of the slave; but if he be neither a servant nor a slave, and consequently not a runaway, there is no means provided by the law of Maryland for the recovery from the state, of the expenses of his maintenance in prison. The 7th, 9th, and 20th sections of the act of 1715, c. 44, authorize the condemnation of a free person to servitude only in case of refusal to pay the reward for apprehending him; not for the sheriff's fees for his imprisonment. The 34th section of the act, however, impliedly subjects him to servitude to the sheriff or his assigns for the imprisonment fees and to the taker up, for the reward; but gives no authority to charge the state or the county with those fees. The act of 1719, c. 2, applies only to servants and slaves whose masters are known and have had notice. The act of 1766, c. 6, charges the county with the fees of prosecuting slaves in the county court, but does not apply to those taken up for running away, and punishable therefor under the act of 1751, c. 14, § 8. The act of 1715, c. 26, §§ 8, 9, only charged the county with the fees of prosecution of criminal servants; not with the imprisonment fees of runaways, and was repealed by the act of October, 1727, c. 2, which authorizes the officers to recover the fees of prosecution from the masters only, who are to be reimbursed by the prolonged services of the servants. The act of 1792, c. 72, is merely directory to the sheriffs to give certain public notices in addition to those previously required by the act of 1719, c. 2, but gives no new authority to sell, or to charge the fees to the state or to the county. There is nothing, therefore, in the laws of Maryland which authorized the sheriff to charge the imprisonment fees of runaways to the public, or even to the county, in any case. It is under the Maryland law only that suspected runaways are liable to imprisonment in the county gaol. The same law directs the manner in which the sheriff is to recover his fees for the imprisonment, as far as it has made them recoverable at all. By the act of congress the law of Maryland is continued in force. To say that the sheriff, or the marshal who is substituted for the sheriff, shall have another remedy than that which is given by the Maryland law, is not to continue the old law, but to give a new law. But, by the act of congress of the 8th of May, 1792, § 4 (1 Stat. 275), the compensation of the marshal, for the maintenance of prisoners confined in gaol for any criminal offence, shall be included in his account, and paid out of the treasury of the United States.

Is this offence of running away, which is made such by the Maryland law only, such a criminal offence as is contemplated by the act of congress? Did congress intend to relieve the master of the servant, and the owner of the slave, and the servant and slave, also, from the payment of those fees? The act of congress, in terms, applies, at least, as strongly to the case of a servant or slave who is actually a runaway, as to a person who is wrongfully committed as such. The law of Maryland imposes no fine on a runaway, for the benefit of the state or county, and gives the state no right to costs against him; indeed, it does not subject him to a public prosecution. The punishment of a slave, for running away, is to be inflicted by the justices of the county court, under the act of 1751, c. 14, § 8, only upon the application, complaint, or order of the master or owner, or upon the application or complaint of some person damnified or injured by such slave; and by the words of the act, the justices are obliged, immediately upon such application, to inflict the punishment in a summary way, without a trial. Such a proceeding cannot be called a prosecution, within the meaning of the act of 1766, c. 6. The law of Maryland was evidently made for the sole benefit of masters, and the public was no otherwise concerned, than as the law tended to give a greater security to that kind of property which a master has in the services of his servant or slave. The only penalty upon a runaway servant was compensation to the master for the loss

of his service, and the payment of his imprisonment fees, and a reward to the person who apprehended him. All this enured to the benefit of individuals, not of the public. I do not think that running away is such a criminal offence as is contemplated by the act of congress of the 8th of May, 1792, § 4 (1 Stat. 275). It seems to me that the law of Maryland, which was continued in force, should be executed, after the separation, in the same manner as it was executed before; and that the marshal has no more right to look to the United States for payment of his fees, than the sheriff had to look to the state of Maryland, before the separation. Such was the construction of the adopted laws, by the judges of this court, immediately after the separation, and acquiesced in by the respective marshals, as I believe, up to the present time —a period of twenty-four years. In point of fact, I believe there have been very few, if any, legal commitments of persons, as runaways. I have seen many of the warrants of commitment, and I do not remember to have seen one which would, in my opinion, justify the marshal in detaining the prisoner. The justice, generally, only says that the person was brought before him as a runaway, and requires the marshal to receive and keep him until discharged in due course of law. The justice does not state that he has good cause, supported by oath, to believe that the person is a servant or slave, (without which he cannot be a runaway,) nor even that he has adjudged him to be a runaway; at least, I have never seen a warrant of commitment which states that the person has been convicted, before the justice, of being a runaway. Before a justice of the peace can lawfully commit a person as a runaway, I imagine the justice must have examined the circumstances and the evidence, and must have exercised his judgment; and must be satisfied, by testimony, upon oath or solemn affirmation, that the person is really a runaway. If a person be found travelling out of the county where he resides, without a pass, under the seal of the county, he may, under the 6th section of the act of 1715, c. 44, be taken up and carried before a justice of the peace; but the circumstance of travelling without a pass, is not, of itself, sufficient to justify the magistrate in committing him as a runaway. He is still to inquire whether the person is sufficiently known, and what account he can give of himself, and not to commit him unless he shall be satisfied by the evidence, and shall adjudge that he ought to be deemed and taken as a runaway. Color is said to be evidence of slavery; and a slave found abroad, without a pass, is liable to be taken up, as a runaway, and carried before a justice of the peace; but the circumstance of his being found without a pass, is not alone sufficient to justify the magistrate in committing him as a runaway. The justice is still bound to inquire into the circumstances, and to exercise his judgment; and must adjudge him to be a runaway before he can lawfully commit him. Color is only prima facie evidence of slavery, and may be rebutted by other evidence, such as, that the prisoner has long lived and acted publicly as a free man, or evidence that his mother was a free woman, &c. In all cases of commitment the justice ought to be satisfied, by evidence, as I apprehend, that the person is a runaway servant or slave. Upon the whole, I am of opinion that the marshal has not a right to include, in his account against the United States, his imprisonment fees for persons committed as runaway servants or slaves under the adopted laws of Maryland.

The other question submitted, is whether the United States are liable to the marshal for the maintenance of petitioners for freedom, committed, by order of the court, for safe keeping, because their pretended masters or owners will not give security for the petitioners' appearance in court, to attend the trial, &c. When a petition for freedom is filed, it has been long the practice of the courts in Maryland, before they will permit the defendant or respondent to appear in the cause, to require him to give security, by way of recognizance, for the appearance and security of the petitioners. If the defendant should refuse to give such security, there might be a failure of justice, by the defendant seizing the petitioners and removing them from the jurisdiction of the court. To prevent this failure of justice, the court, where they have had reason to believe that the defendant would be guilty of such a contempt, have ordered the marshal to take and safely keep the petitioners until the trial, or until the defendant will give the security required by the rules of the court. The expense of maintaining them in the custody of the marshal, for that purpose, is one of the reasonable contingencies accruing in holding the court, and ought to be allowed if the petitioners gain their freedom; otherwise, that expense must be paid by their owners.

Case No. 12,138.

In re RUNDLE et al.

[2 N. B. R. 113 (Quarto, 49); 1 Chi. Leg. News, 30.] [1]

District Court, S. D. New York. Oct. 3, 1868.

BANKRUPTCY—DEBT CREATED BY FRAUD—ACTION IN STATE COURT TO DETERMINE AMOUNT OF CLAIM.

A debt created by fraud is provable under the bankrupt act [of 1867 (14 Stat. 517)]. Where amount due to a creditor is in dispute in a state court the court of bankruptcy may allow the suit to proceed for the purpose of ascertaining the amount due, but execution will be stayed if the debt is such as will be discharged by a discharge in bankruptcy.

[Cited in brief in Scott v. Olmstead, 52 Vt. 212.]

[1] [Reprinted from 2 N. B. R. 113 (Quarto, 49), by permission. 1 Chi. Leg. News, 30, contains only a partial report.]

[In the matter of Rundle & Jones, bankrupts.]

Vose & McDaniel, for bankrupts.
Weeks & Forster, for creditor.

BLATCHFORD, District Judge. Schedule A to the petition in bankruptcy sets forth the debt of twenty-six thousand two hundred and eighty-nine dollars and fifty-seven cents to George Rudge, Jr., as being in suit in the state court, and states that the amount of the debt is contested. Whether the debt be or be not, as it is claimed to be by the creditor, a debt created by the fraud or embezzlement of the bankrupts, or by their defalcation while acting in a fiduciary character, it is a debt provable under the act (sections 19 and 33). The twenty-first section provides that if the amount due to a creditor claiming a provable debt is in dispute, "the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid." I think this a proper case in which to allow the suit in the state court to proceed, for the purpose of ascertaining the amount due. The bankrupts, by their answer in that suit, wholly deny the indebtedness alleged in the complaint in the suit. If it should be adjudged, as the result of the litigation in the suit, that there is no debt, the whole question will be disposed of. If a debt should be established, the question as to whether it will or will not be discharged by a discharge granted to the bankrupts, can be raised and disposed of on a motion which can then be made to this court to stay execution on any judgment which may be recovered for the debt in the state court.

Case No. 12,139.

RUNDLE v. DELAWARE & R. CANAL.[1]

[1 Wall. Jr. 275.][2]

Circuit Court, E. D. Pennsylvania. April Term, 1849.[3]

COURTS — JURISDICTION — LOCAL ACTIONS — CORPORATIONS — RIGHTS OF PENNSYLVANIA AND NEW JERSEY IN THE DELAWARE — LICENSE AS DISTINGUISHED FROM GRANT.

1. A Pennsylvania plaintiff may sustain an action in this court in New Jersey against a corporation chartered by the latter state, for consequential injuries done to the plaintiff's real property lying in Pennsylvania, the cause of the injury—a canal—being in New Jersey.

[Cited in Manville Co. v. City of Worcester, 138 Mass. 90. Cited in brief in Mason v. Warner, 31 Mo. 509.]

2. A corporation is private, as distinguished from publick, unless the whole interest belongs to the government, or the corporation is created for the administration of political or municipal power.

[Cited in Putman v. Ruch, 56 Fed. 418.]

3. The proviso in the Pennsylvania and New Jersey act of 1771 (section 7), by which those states, in declaring the Delaware river a common highway, and authorising the improvement of it by commissioners, provided that no power given by the act should give power "to remove, throw down, lower or impair, or in any manner to alter" certain mill dams, nor to obstruct or "in any manner hinder" the owners of them, or "their heirs and assigns, ... from taking water out of the said river for the use of the said mills," is not a grant of the water, but the toleration of a nuisance, and a mere license, revocable at pleasure, to use the water.

[Cited in Backus v. City of Detroit, 49 Mich. 114, 13 N. W. 382.]

In the year of 1771, the provinces of Pennsylvania and New Jersey respectively passed an act—Act Pa. March 9, 1771 (1 Smith's Laws, 322); Act N. J. Dec. 21st (Allinson's Laws, 347)—declaring the river Delaware which separates them to be "a common highway, for the purposes of navigation," and appointing commissioners with full power and authority to remove all obstructions in the channel, whether natural or artificial. One section of the law enacts that no person shall presume to divert, lead or draw, by any race or other device, any of the water of the river from its natural course for the use of any mill or water work. Another section authorises an indictment for maintaining any dam, with a proviso, however, in the act, that nothing in it should give power or authority to the commissioners to remove, throw down, lower, impair, or in any manner to alter a mill-dam erected by Adam Hoops, in the said river; or any mill-dam erected by any other person or persons in the said river, before the passing of this act, "nor to obstruct, or in any manner to hinder the said Adam Hoops, or such other person or persons, his or their heirs and assigns, from maintaining, raising, or repairing the said dams respectively, or from taking water out of the said river for the use of the said mills and water works." The mill and water works of Mr. Hoops were on the Pennsylvania shore, just opposite Trenton, and were fixed there before the passage by either state of the act of 1771.[4]

In the years 1830 and 1831, the state of New Jersey incorporated the defendants, giving them power to make a canal from the waters of the Delaware to the waters of the Raritan (that is across the state of New Jer-

[1] For the report of the following case the author is indebted to the excellent brief and notes of A. I. Fish, Esq., of the Philadelphia bar, one of the learned counsel who assisted in the case at Trenton.

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

[3] [Affirmed in 14 How. (55 U. S.) 80.]

[4] At Trenton the stream of the river meets the tide, and there is a fall of over nine feet when the tide is out, and over five feet at high water. A small island lies near the Pennsylvania shore, extending from tide water toward the head of the falls. Mr. Hoops owned the land on the western margin of the river, and erected a dam between this island and the shore, in the margin of the tide water. The island thus served as a wing dam, and gave him the benefit of the fall of the river for the mills which he had erected on his land.

sey,) and "to supply the said canal with water from the river Delaware by constructing a feeder, which shall be so constructed as to form a navigable canal not less than thirty feet wide and four feet deep, and to conduct the water from any part of the river Delaware."

The corporation, besides the usual powers of corporations, and particularly of those relating to corporations for internal improvements, had generally such power as was "necessary to perfect an expeditious and complete line of communication from Philadelphia, and to carry the objects of this act into effect." The capital stock was fixed at one million of dollars, with right of increase to a million and a half; divided into shares of a hundred dollars each; three-fourths of which were opened to be subscribed for by the publick generally; the state of New Jersey reserving a right to subscribe for one-fourth, or any less sum. There were nine directors, of whom the state was to appoint two, if she subscribed for a fourth part of the stock, or one, if for a less sum. The state has the right of taking possession of the canal, if the company abandoned or failed to keep it in repair for three successive years: and also at the end of thirty years to take possession of it on paying its worth at an appraisement to be provided for. The company did accordingly make a canal, diverting the water from the river Delaware about twenty miles above Mr. Hoops' mill dam, that is to say, about twenty miles above Trenton, the place to which the tides in the Delaware are able to rise. The plaintiffs who had succeeded to Mr. Hoops' right, now brought this action on the case, in the New Jersey district, for injury to their mills in Pennsylvania, by the consequent diversion of the water.

On demurrers these three points arose:

I. Whether the action was properly brought in the New Jersey district; or whether, as the real estate, the subject of the injury, was in Pennsylvania, and the injury was experienced there, the suit ought not to have been brought in the Pennsylvania district.

II. Whether, admitting the jurisdiction, the defendants were not a publick corporation, as distinguished from a private one;—and so, the agents and officers of the state of New Jersey discharging a duty imposed upon them by publick law, and thus not liable to action from individuals in the courts.

III. Whether, admitting both the jurisdiction of the court and the general liability of the defendants for injuries done by their canal, the act of 1771 gave Mr. Hoops and his assignees any such grant of the water of the Delaware as enabled him or them to recover damages for a diversion of it injurious to his property, it not being admitted by the defendants that the navigation of the river was injured by the diversion.

To understand this last point fully it is necessary to make a short historical statement concerning the river and the appropriation of its water.[5]

It has been generally understood by the profession that the river Delaware and its islands were not included in the royal proprietary charter of either Pennsylvania or New Jersey, but that the property in them remained in the crown, till by the Revolution of 1776 they passed equally to New Jersey and Pennsylvania. After this event, that is to say, in 1783, the two states, entered into an agreement by which, among other things, it was declared that the river from the north-west corner of New Jersey, southwardly, to the circular boundary of the state of Delaware, "in the whole length and breadth thereof, is and shall continue to be and remain a common highway, equally free and open for the use, benefit and advantage of the said contracting parties." It was also declared by this agreement that each state should "enjoy and exercise a concurrent jurisdiction within and upon the water" of the said river.

Under these notions and enactments, both states it appeared, and Pennsylvania in a particular degree, had used the waters of the river by common agreement until 1815 without dispute. On the 4th Feb. in the last named year New Jersey passed an act authorizing Coxe and others to erect a wing-dam in the river, and divert the water for the purpose of turning mills and other machinery. This seemed to be the first exercise of an authority over the river by one state without the assent and ratification of the other. It called forth a protest from the legislature of Pennsylvania, on the 21st of February, 1815; followed by a

[5] The following statements and public proceedings illustrative of the whole river history from 1761 to 1848, were collected and cited by J. M. Read, Esq., and are here arranged and preserved for reference by the profession in future cases: 1 Smith, Laws Pa. (1761) 235; Id. (1768) 280; Id. (1771) 324; Id. (1773) 406; Id. (1774) 416; Id. (1776) 363; Id. (1781) 515; 2 Smith, Laws Pa. (1782) 43; Id. (1784) 90; Id. (1785) 311; 3 Smith, Laws Pa. (1791) 24; Id. (1793) 93; Id. (1801) 462; 4 Smith, Laws Pa. (1803) 20; Id. (1804) 118; 5 Smith Laws Pa. (1809) 5; Pa. H. J. (1814–15) pp. 537–557; Pamph. Laws N. J. (1815) p. 190; Pa. H. J. (1816–17) pp. 537–557; 6 Smith, Laws Pa. (1817) 422–503; Pa. H. J. (1817–18) p. 131; Pamph. Laws Pa. (1819) 261; Pamph. Laws N. J. (1820); 7 Smith, Laws Pa. (1821) p. 393; 2 Harr. Comp. N. J. (1824) 71; Pamph. Laws Pa. (1825) 144; 9 Smith, Laws Pa. (1826) 103; Id. (1827) 332; Pa. H. J. (1827–28) p. 101; 10 Smith, Laws Pa. (1828) 112–175; Pa. H. J. (1828–29) p. 312; 2 Harr. Comp. N. J. (1829) 246; N. J. Ass. Min. (1829) pp. 126–141; 10 Smith, Laws Pa. (1829) 408; Pa. H. J. (1829–30) pp. 198, 204, 209, 225, 293; Pamph. Laws Pa. (1830) 129–218; Id. (1831) 216; 2 Pa. H. J. (1831–32) pp. 117, 123, 227; Pamph. Laws Pa. (1832) 638; Pa. H. J. (1832–33) p. 184; Id. (1833–34) Append. 209; N. J. Ass. Min. (1834) p. 19; 2 Pa. S. J. (1834–35) pp. 50–52, 74, 105, 106, 663, 664; N. J. Ass. Min. (1835) p. 228; Pamph. Laws Pa. (1839) 371; Id. (1841) 344–437; 3 Pa. H. J. (1842) p. 49; Pamph. Laws Pa. (1843) 237–241; Id. (1844) 554; Id. (1845) 502; Ex Doc. Pa. (1846); 2 Pa. Sen. J. pp. 25, 26; Pamph. Laws Pa. (1846) 408; Id. (1847) 355; Ex. Doc. (1847); Pamph. Laws Pa. (1848) 46.

second remonstrance in 1816, and a proposition to submit the matter to the supreme court of the United States, which was refused by New Jersey. After numerous messages and remonstrances between the governors and legislatures, commissioners were mutually appointed to compromise the dispute; but they failed to bring the matter to any conclusion. The dispute was never settled, and the wing-dam remained in the river.

In 1824, the state of New Jersey passed the first act for the incorporation of the Delaware and Raritan Canal Company, for which the company gave a bonus to the state of $100,000. [Laws 1824, p. 175.] This act required the consent of the state of Pennsylvania; and on application being made to her legislature, she clogged her consent with so many conditions, that New Jersey refused to accept her terms, returning the bonus to the company; and so the matter ended for that time.

Both parties then appointed commissioners to effect, if possible, some compact or arrangement, by which each state should be authorized to divert so much of the water, as should be necessary for their contemplated canals. After protracted negotiations, these commissioners finally in 1834 agreed upon terms, but the compact proposed by them was never ratified by either party.

In the meantime each state appropriated to itself as much of the waters of the river as suited their purpose. In 1827 and 1828, Pennsylvania diverted the stream of the Lehigh, a confluent of the Delaware, and afterwards finding that stream insufficient, took additional feeders for her canal out of the main stream of the Delaware. On the 4th of February, 1830, the legislature of New Jersey passed the act under which the defendants were incorporated, and in pursuance of which they have constructed the dam and feeder, the subject of the present suit. [Laws 1830, p. 73.]

It did not appear that after this date, either state had strongly interfered to prevent the use of the water by the other: though the abstract right to do so had never been relinquished by Pennsylvania. The tide not flowing above Trenton, and ordinary boats not being able, in consequence of a fall in the river there to go above that place, the upper part of the river had become of comparative unimportance as a common highway: being important chiefly for bringing lumber down in the spring of the year, when the rains always make the river full, in spite of all artificial diversions which it would be possible to make. While on the other hand, the canals in both states supplied from the river, are intimately and extensively connected with their trade, revenues, and general prosperity.

Mr. Vroom and Mr. Ashmead, for plaintiff.

I. As to the jurisdiction: It is conceded that the river is a common boundary, and of common jurisdiction; that the water drawn off is drawn off from Pennsylvania, and that the canal which draws it lies in New Jersey. If this were an ejectment for the mill, or any other action in rem, the suit would have to be brought in Pennsylvania. But it is not so. It is a suit for damages caused by digging a canal; and that canal lies in New Jersey. Even admitting that the action were local, yet, says Lord Coke, "where the action is founded on two things done in several counties and both are material and traversable, and the one, without the other, does not maintain the action, the plaintiff may bring his action in which of the counties he will." [6]

II. As to the character of the corporation. The Delaware and Raritan Canal Company is not the state of New Jersey, nor the agent of the state. It is a mere collection of individuals erected into a corporation for the more easy transaction of their business. These individuals, at their own suggestion, and for their own benefit, have obtained a capacity of perpetual existence with other incidents of corporate character, and that is all. Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 518; Bonaparte v. Camden & A. R. Co. [Case No. 1,617]. The state has imposed no duty upon them. They are not acting for the state, nor by any order of the state. They are therefore not protected as public agents. The case of Ten Eyck v. Delaware & R. Canal Co., in the supreme court of New Jersey, is upon the same charter, and decides the exact point. 3 Har. [18 N. J. Law] 202. And see Governor, Etc., v. Meredith, 4 Term R. 794; Boulton v. Crowther, 2 Barn. & C. 703; Hall v. Smith, 2 Bing. 156; Sutton v. Clarke, 6 Taunt. 29.

III. As to the right of the defendants to take the water: Mr. Hoops, by the proviso to the act of 1771, had a grant from both states prior to the act of partition between them in 1783. The former act, while giving power to the commissioners to improve the channel, provides that nothing in the act should give any power or authority * * * "in any manner to alter" this dam * * * "nor to obstruct or in any manner to hinder" Mr. Hoops, his "heirs or assigns," from maintaining, raising or repairing the said dam, or from taking water out of the said river for the use of said mill and water works."

The construction of this is, that it was a right to place in the river a dam to be raised, repaired and maintained. It is not a mere license; nor temporary and personal. The

[6] Syllabus to Bulwer's Case, 7 Coke, 2. And see Mayor, etc., of London v. Cole, 7 Term R. 583, and Oliphant v. Smith, 3 Pen. & W. 181. Cases bearing incidentally upon the subject so far as to prove the right to make an election in many cases sounding in damages, between the place where the injury was sustained and the place where the person is,—are: Gawen v. Hussee, 1 Dyer, 38; Earl of Shaftsbury v. Graham, 1 Vent. 364; Thursby v. Plant, 1 Saund. 237; Russel v. Succlen, 1 Sid. 218; Gregson v. Heather, Fortes. 366; Bellasis v. Burbriche, 1 Ld. Raym. 171; Scott v. Brest, 2 Term R. 240; Rex v. Burdett, 4 Barn. & Ald. 95. And American cases, Foster v. Baldwin, 2 Mass. 569; Marshall v. Hosmer, 3 Mass. 23; Smith v. M'Iver, 9 Wheat. [22 U. S.] 532.

subject to be protected was permanent, requiring great outlays to profit by the privileges of the proviso. The object was permanent. "Heirs and assigns" are words of permanency. It is not necessary, in construing an act of legislation that there should be technical words of grant. Both states, by the act of 1771, surrendered their right to Hoops. That is enough. When acted upon, the right became an executed grant, and was the property of Hoops forever. As a "contract," it could not be "impaired." Fletcher v. Peck, 6 Cranch [10 U. S.] 87, 135; New Jersey v. Wilson, 7 Cranch [11 U. S.] 164; Green v. Biddle, 8 Wheat. [21 U. S.] 92; People v. Platt, 17 Johns. 195,—the last a case protecting the grant of a river.

Even if the proviso in the act of 1771 were a license only, yet having been acted upon and been the subject of great outlays, it is irrevocable. Winter v. Brockwell, 8 East, 308.

If the proviso were not itself a grant, yet in favour of so ancient and uninterrupted a possession and so long an enjoyment it will be held to be evidence of a grant, or of a right as good as grant. We claim by prescription for between seventy and eighty years. Twenty years are enough for presumption of a grant. Bealey v. Shaw, 6 East, 208; Balston v. Bensted, 1 Camp. 463; Tyler v. Wilkinson [Case No. 14,312]; Haight v. Morris Reservoir [Id. 5,902],—cases all of them, relating to the enjoyment of waters.

But even if the act of 1771 had never been passed we deny the right of New Jersey, or its creatures or agents, to drain the Delaware of its waters. In the river there is a community of rights, interests and privileges. The waters are indivisible. Both states hold them, all and every part of them, "per my and per tout," in trust as a publick highway for the benefit of the citizens of the Union. Neither state has a right to impair the navigation in any degree. The withdrawal of water to any appreciable amount impairs the navigation, and the amount here is clearly appreciable, for it has confessedly injured the plaintiff's mills. The navigation may not be practically injured now. Boats which now navigate might still navigate in a stream of half the size. But how will it be with larger boats, which future times may require? The river in future times will probably be navigated by the very largest boats that can navigate it at all. The least appreciable diminution of water may then be important. The right to lower the stream the hundredth part of an inch carries a right to divert or drain the river dry. There is but one rule on the subject, that is not to impair it at all.

J. M. Read, Mr. Green, and A. I. Fish, for defendant.

In an action on the case for injuries to real property, the party must seek his remedy where the injury is committed, and must lay his venue there. The distinction between local and transitory actions,—that is to say between such actions as operate in rem and such as sound in damages, merely,—is thoroughly settled, and cannot be shaken. Livingston v. Jefferson [Case No. 8,411]. That this is a local action, and as such subject to the laws which regulate that class of actions, is settled in Watt v. Kinney (23 Wend. 484; same case on appeal, 6 Hill, 82) in New York. C. J. Nelson, in the case says: "It appears to be conclusively settled that an action on the case for diverting a water course, so far savours of the realty as to be classed with local actions, and must be tried in the county where the injury happens."

The corporation is a publick one. Its purposes are publick. The state owns a large proportion of its stock and may before long become the proprietor of it all. The case of Ten Eyck v. Delaware & R. Canal Co., 3 Har. [18 N. J. Law] 200, in the supreme court of New Jersey, relied on by the other side, has not the highest authority. Vanderveer v. Same Defendants (Ms. Min. Ct. App. 1842) involved the same questions, and on an appeal from the decision of the supreme court which made a similar decision, the court of appeals was equally divided;—standing nine to nine. In a leading case in Pennsylvania (Monongahela Nav. Co. v. Coons, 6 Watts & S. 101, 114) the state had incorporated a canal company in no respect more public in its character than this one. See Act Pa. Leg. March 31, 1836 (Pamph. Laws, p. 282). It destroyed the plaintiff's mill-dam. The court held that however morally bound, there was no legal obligation to pay. "If the state," says C. J. Gibson, "would not be bound to pay, how is the defendant bound? The company acted by her authority." Yet the act of incorporation imposed no obligation to destroy the dam; nor was the company the agent of the state, any more than the defendants.

Unless Mr. Hoops has some such grant of the water as amounts to contract within the meaning of the constitution, he cannot sustain this suit any where. Now, on general principles, both of the common and the civil law, running water is common to all. Mason v. Hill, 5 Barn. & Adol. 1. And see Mayor, etc., v. Commissioners Spring Garden, 7 Pa. St. 355. The doctrine is recognized in the supreme court of New Jersey (Arnold v. Mundy, 1 Halst. [6 N. J. Law] 1, 61, 71, and 76), where it is said that by the law of nature navigable streams are common to every body, subject only to laws regulating their use, and that they cannot be aliened. The validity of even an express grant of the specific water might be questioned. But Mr. Hoops had no grant of any thing. The case is this: The act of 1771 declares the river a highway, and makes maintaining of any dam there an indictable offence. The proviso is but the exception of Mr. Hoops' dam from the general liability. If the proviso had not been insert-

ed the commissioners would have been bound to destroy the dam and indict Mr. Hoops for obstructing the highway which it was the object of the act to clear. The proviso then is but a license. It is moreover in derogation of general and paramount right in the community, and therefore must be construed strictly. But the value of this so called "grant" is not open to controversy here at all. Its precise value is settled in Pennsylvania; the supreme court of which state has declared that a license given by publick law to a riparian owner to erect a dam in a large navigable river and conduct the water upon his land for his own private purposes, is subject to any future provision which the state may make with regard to the navigation of the river. (Susquehanna Canal Co. v. Wright, 9 Watts & S. 9; Monongahela Nav. Co. v. Coons, Id. 101); and "if the state authorize a company to construct a canal which impairs the right of such riparian owner he is not entitled to recover damages from the company." Now certainly the two states which tolerated the dam by the act of 1771 have made a new provision by the act of 1783, which parted the whole river between the two states. That act did in effect revoke the former license to Mr. Hoops.

The title by prescription which is relied on is equally unsound with that of express grant. "Like adverse possession, prescription does not prevail against sovereign powers who cannot apply the same vigilance which is reasonably required of private proprietors." Pea Patch Island Case [Case No. 10,872].

It is no part of this case that the navigation is impaired by the use which the defendants make of the river. They therefore trench upon no publick rights; and their private rights to use the water are just as good as those of any riparian owner. They may dip in the margin of the river, or draw the water in pipes or drains. So long as they do not impair the navigation of the river they are within the bounds of right.

The Delaware river being the joint property of both states, Mr. Hoops and his assigns own no part of it either above or below where the tide flows. [Case No. 474.] Navigable water in Pennsylvania does not mean tide water merely. Every part of the Delaware river—above Trenton as well as below it—belongs to the commonwealth, not to the riparian owner. The rule of the civil law, not of the common law, prevails in that state. Carson v. Blazer, 2 Bin. 475. If the water has been diverted to the injury of her citizens, the state of Pennsylvania alone would have a right to complain. But that state is estopped by her own acts. She has diverted entire confluent streams from the waters of the Delaware. She has taken directly from the main stream large supplies of water for her canals and publick improvements, without asking or obtaining the sanction of New Jersey.

GRIER, Circuit Justice. The first question in the order in which they have been argued with much learning and ability, is that affecting the jurisdiction of this court over the subject matter of the suit.

Originally all actions were tried in the proper county in which they arose, pursuant to the maxim, "Vicini vicinorum facta presumuntur scire." Now all personal actions, as debt, detinue, assault, deceit, trover, &c. may be brought in any county. But actions real and mixed, as trespasses quare clausum fregit, ejectment, waste, &c. must be laid in the counties where the land lies, and if not so laid, it is cause of demurrer. 1 Bac. Abr. tit. "Actions Local and Transitory," A. This distinction between actions local and transitory, is still maintained (Livingston v. Jefferson [Case No. 8,411]) even at the expense of a failure of justice. The present is undoubtedly to be classed with local actions. But it often happens that indictments for criminal offences, and actions on the case for injuries to real property and other cases local in their nature, are founded upon things done in two or more counties, which are necessary to constitute the offence. Formerly where a nuisance was done in one county to lands lying in another, an assisa in confinio comitatus lay at common law. Fitzh. Nat. Brev. 183, 184. "And albeit," says, Lord Coke. "the counties do not adjoin, but there be twenty counties mean between them, yet the assize in confinio comitatus doth lie, and the justices shall sit between the said counties." Co. Litt. 154a. And if a declaration contained matters lying in two counties, it was tried by both counties on a venire directed to the sheriff of both counties, who summoned six of each county. But such proceedings have long been obsolete and the doctrine established in Bulwer's Case, 7 Coke, 2a, has ever since been held as law both in England and this country: "That where the action is founded on two things done in several counties and both are material and traversable, and the one without the other doth not maintain the action, then the plaintiff may bring his action in which of the counties he will." Thus, if a man does not repair a well in Essex which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default as it is adjudged, in 7 Hen. IV. pl. 8, or I may bring it in Middlesex, for there I have the damage, as is proved by 11 Rich. II., 'Action sur the Case,' 36." Gawen v. Hussee, 1 Dyer, 38a; Scott v. Brest, 2 Term R. 241; Mayor, etc., v. Cole, 7 Term R. 583; Rex v. Burdett, 4 Barn. & Ald. 95; Oliphant v. Smith, 3 Pen. & W. 180.

It has been objected to the application of this doctrine, to the present case, that it refers to counties which adjoin, and not to sovereign states. This is a distinction, it is true, between the cases cited and the present, but we have heard no reason given why it should make a difference. Actions may be maintained in the courts of New Jersey by a Pennsylvanian to recover a debt or damage for a personal injury: And why not for an injury to real property? The answer must be, because

the action is local and not transitory. The difficulty is caused not by any principles of international law, but by the common law, which is the same in both states. By the common law then, it must be solved. The objection is founded not on the plaintiff's right to a remedy, but on the mode of trial; and is after all but an objection to the venire. But I have shown that the venire is well laid in New Jersey, (which as regards this court forms one county) because the nuisance complained of was created in that state. If then the action be local, and this its proper venue, what is the value of the distinction? The plea to the jurisdiction must therefore be overruled.

Are the defendants then a publick corporation and therefore as publick officers who have acted within the scope of their authority and without malice or oppression, not liable for consequential injury? Where a party attempts to justify under a publick law, for a consequential injury inflicted on the property of another, he must show that he was a publick officer, in the performance of a duty imposed upon him by law; that he did not exceed his authority, but acted according to the best of his skill and judgment, doing that only which it was his duty to do. Governor, etc., v. Meredith, 4 Term R. 794; Sutton v. Clarke, 6 Taunt. 29; Boulton v. Crowther, 2 Barn. & C. 703; Hall v. Smith, 2 Bing. 156.

In the popular meaning of the term nearly every corporation is publick, inasmuch as they are all created for the publick benefit. Yet if the whole interest does not belong to the government, or if the corporation is not created for the administration of political or municipal power, it is a private corporation. Thus all bank, bridge, turnpike, rail road, and canal companies are private corporations. In these and other similar cases, the uses may in a certain sense be called publick, but the corporations are private, as much so as if the franchises were vested in a single person. Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 669. The state by virtue of its right of eminent domain, may take private property for publick purposes upon making compensation. It may delegate this power to a private corporation by reason of the benefit to accrue to the publick, from the use of the improvements to be constructed by the corporation. But such delegation of power to be used for private emolument as well as publick benefit, does not clothe the corporation with the inviolability or immunity of publick officers performing publick functions.

In the case of Ten Eyck v. Delaware & R. Canal Co., 3 Har. [18 N. J. Law] 204, the supreme court of New Jersey in their opinion delivered by Nevius, J., speaking of the corporation defendant in this case, very correctly say: "Whatever may have been the objects of this corporation, whether to erect a publick navigable highway, or to improve the navigation of the Raritan river, or whether the publick have the right to the use and enjoyment of these improvements when made or not, the company are essentially a private company, and are not the agents of the state. Their works are not constructed by the requirement of the state. The state could not compel the company to construct this canal. It has permitted them to do so at their own request. The whole scope of their charter indicates clearly, that the legislature did not intend to interfere with private and vested rights, without providing a recompense to be paid by the company and not by the state; and if the injury or damage has accrued to the private property or rights of others, which could not be foreseen or anticipated, and are therefore not provided for in the charter of the company; this constitutes no reason why the party thus injured should not be compensated."

As an exposition of the law of this state, this case is binding on this court; and we fully concur in the principles of law laid down by the judge who delivered the opinion of the court. And see Sinnickson v. Johnson, 2 Har. [17 N. J. Law] 150; Stevens v. Proprietors of Middlesex Canal, 12 Mass. 466; and Crittenden v. Wilson, 5 Cow. 165.

The case of Monongahela Nav. Co. v. Coons, 6 Watts & S. 101, in Pennsylvania, has been relied upon as establishing a contrary doctrine. It is true, that in that case, the Monongahela Navigation Company was a private corporation. They had power to make a slack water navigation in the Monongahela river, by the erection of dams and locks in the same; and the act of incorporation required them to make compensation for injuries done to private property on the Monongahela, but made no provision for compensation for like injuries on the Youghiogany its confluent, because the company were not empowered to back the water or affect its natural flow in the Youghiogany. But the company by the erection of a dam in the Monongahela below the mouth of the Youghiogany, destroyed a mill erected on that stream, under a license from the commonwealth, and were held not liable to make compensation. But this case seems founded on doctrines peculiar to the courts of Pennsylvania; and although in the determination of points hereafter to be considered in this case, it will be quoted as binding authority; for the purposes of the question now under consideration, we must be governed by the law as established by the courts of New Jersey.

If therefore, the plaintiff's claim for damages in this case, had arisen from the flooding of his land either on the New Jersey or Pennsylvania side of the river, by the dam or wing wall erected by defendants for the purpose of feeding their canal; or for injury to a mill erected on a private stream by flowing back the waters of the river; the case would probably have ended here, and the plaintiff been entitled to judgment.

But the injury alleged does not arise from either of these causes. The plaintiff's mill

is situated twenty miles below the head of the canal or feeder and the dam erected by defendants; and the injury complained of arises from the diversion of the water of the Delaware and its confluents; thereby diminishing the flow of water to the plaintiff's mill.

By the section of their charter quoted in Rundle v. Delaware & R. Canal [Case No. 12,139] the defendants have the authority of the state of New Jersey, for diverting the water of the river Delaware for the purpose of canal navigation.

In order then to ascertain the plaintiff's right to recover for any injury alleged to be consequential upon such diversion, we must enquire: 1. To whom do the channel and waters of the river Delaware belong? 2. What are the rights of the plaintiff as riparian owner, in the said river, according to the laws of Pennsylvania? 3. Have they any title to the waters of said river or the use of their mills, by grant from the states of Pennsylvania and New Jersey, or either of them? 4. Had the state of New Jersey a right to divert the waters of the Delaware for the purpose of canal navigation without the consent of Pennsylvania? 5. And whether or not, has the plaintiff a right to dispute their power or to raise that question in the present controversy?

The river Delaware is the boundary between the states of Pennsylvania and New Jersey. The tide ebbs and flows to the part of the Trenton Falls where the Trenton bridge crosses the river. Above that point it is a fresh water stream. Previous to the Revolution, the channel and waters of the river below Trenton, so far as the river was navigable in the common law sense of the term, were vested in the king of England. The grant both for New Jersey and for Pennsylvania was bounded by the river Delaware. So far as the tide ebbed and flowed, these proprietors had no title to the bottom of the river below low water mark. But above the bridge and the flow of the tide, the proprietors of each province, held ad filum medium aquæ, by the established principles of the common law, according to which their respective grants must be construed. So far as the river was the property of the crown, it devolved on the two states by the Revolution, and the treaty of peace with Great Britain. Immediately after the treaty of peace, the states of Pennsylvania and New Jersey entered into the compact of April, 1783, making the Delaware a common highway for the use of both states.

Without referring to the very numerous acts of assembly of the two states with regard to this river, which have been brought to our notice by the industry and research of the learned counsel, it will be necessary for the purposes of this case, to notice only a few of the more prominent points of its history from that time till the present.

For thirty years after the compact the states appear to have enjoyed their common property without any dispute or collision. When the legislature of either state passed any act affecting it, they requested and obtained the consent and concurrence of the other. The first dispute which arose on the subject was caused by an act of the legislature of New Jersey, passed on the 4th of February, 1815. His honour here went into a short narrative of this part of the river history, in very nearly the same words in which it appears in the statement of the reporter, who has adopted it in the preliminary part of the case. His honour then continued: Indeed it would seem as if the river had become of little comparative importance, as a common highway, being used only for descending navigation in the spring of the year, when the banks are full and the subtraction of the water for artificial navigation causes no sensible diminution, or materially affects the navigation of the stream. The practical benefits resulting to both parties from their great publick improvements have convinced them that further negotiations, complaints or remonstrances are useless and unreasonable; and thus by mutual acquiescence and tacit consent the necessity of a more formal compact has been superseded.

After the brief summary presented by the reporter's statement, and in the remarks which I have just made of the transactions between the states concerning this river, their common boundary and property, let us now inquire whether the plaintiffs have shown any title to the channel of the river and the use of the waters flowing therein which will enable them to support an action against persons authorized by either of the states to divert the waters of the river for the use of their great publick improvements.

In 1771 Mr. Hoops, at that time owning the Pennsylvania shore, and having erected his dam there, in the manner already described, the legislatures of the provinces of New Jersey and Pennsylvania passed concurrent acts declaring the river Delaware a "common highway for the purposes of navigation." By these acts commissioners were appointed and authorized to remove all obstructions in the channel, whether natural or artificial, with the proviso whose effect has been one of the subjects of argument.

By the common law of England a river is defined as navigable so far only as the tide flows. The soil under a navigable river does not belong to the owners of the adjoining banks. But fresh water streams of what kind soever belong of common right to the owners of the adjacent soil.

The water may be under a servitude to the publick as a highway, but still the channel of the river to its central line belongs to the riparian owner who by reason of his title to the land over which it flows has an usufruct in the water as it passes, provided he does not obstruct the publick use as a highway. And if before it was declared a highway,

he had erected mills or made other use of the stream as it flowed over his land, and his mills or other works are injured or impaired by such seizure to a publick use, he is entitled to remuneration as much as if houses or other land had been so taken. And if an individual or a corporation should divert the water flowing on his land to his injury, they could not plead this exercise of the eminent domain granted to them by the state as a justification for taking the private property of the citizen without compensation.

But the law of Pennsylvania by which the title and rights of the plaintiffs must be tested, differs materially from that of England and most of the other states of the Union. As regards her large fresh water rivers she has adopted the principles of the civil law in preference to that of England. In the case of Carson v. Blazer, 2 Bin. 475, the supreme court of that state decided that the large rivers, such as the Susquehanna and Delaware, were never deemed subject to the doctrines of the common law of England applicable to fresh water streams, but that they are to be treated as "navigable" rivers: that the grants of William Penn, the proprietary, never extended beyond the margin of the river, which belonged to the publick, and that the riparian owners have therefore no exclusive rights to the soil or water of such rivers ad filum medium aquæ.

In Shrunk v. President, etc., of Schuylkill Nav. Co., 14 Serg. & R. 71, 80, the same court repeat the same doctrine; and Chief Justice Tilghman in delivering the opinion of the court observes: "Care seems to have been taken from the beginning to preserve the waters of these rivers for publick uses both of fishery and navigation; and the wisdom of that policy is now more striking than ever from the great improvements in navigation, and others in contemplation, to effect which it is necessary to obstruct the flow of the water in some places and in others to divert its course. It is true that the state would have had a right to do these things for the publick benefit even if the rivers had been private properties; but then compensation must have been made to the owners, the amount of which might have been so enormous as to have frustrated or at least checked these noble undertakings."

In the case of Monongahela Nav. Co. v. Coons, 6 Watts & S. 101, before referred to, Coons had erected his mill under a license given by an act of the legislature in 1803, riparian owners to erect dams of a particular structure, "provided they did not impede the navigation," &c. The Monongahela Navigation Company, in pursuance of a charter granted them by the state, had erected a dam in the Monongahela which flowed back the water on the plaintiff's mill in the Youghiogany and greatly injured it. And it was adjudged by the court, that the company were not liable for the consequential injury thus inflicted. Chief Justice Gibson speaking of the rights of plaintiff consequent on the license granted by the act of 1803 observes (page 112): "That statute gave riparian owners liberty to erect dams of a particular structure on navigable streams without being indictable for a nuisance, and their exercise of it was consequently to be attended with expense and labour. But was this liberty to be perpetual and forever tie up the power of the state? Or is not the contrary to be inferred from the nature of the license? So far was the legislature from seeming to abate one jot of the state's control, that it barely agreed not to prefer an indictment for a nuisance except on the report of viewers to the quarter sessions. But the repeal of a penalty is not a charter, and the alleged grant was nothing more than a mitigation of the penal law. The statute is pro tanto a repealing one, which offers no express compact to any one. It was ruled in Charles River Bridge v. Warren Bridge, 11 Pet. [36 U. S.] 420, that the state is not presumed to have surrendered a publick franchise, in the absence of proof of an unequivocal intention to do so. It would seem that the publick dominion may be parted with, but not without an explicit renunciation of it. And this relieves the case from the pressure of that clause of the constitution, which declares that no state shall pass a law impairing the obligation of contracts."

The case of Susquehanna Canal Co. v. Wright, 9 Watts & S. 9, confirms the preceding views and decides that the state is never presumed to have parted with one of its franchises in the absence of conclusive proof of such an intention. Hence a license accorded by a public law to a riparian owner to erect a dam on the Susquehanna river and conduct the water upon his land for his own private purposes is subject to any future provision which the state may make with regard to the navigation of the river. And if the state authorize a company to construct a canal which impairs the rights of such riparian owner, he is not entitled to recover damages from the company. In that case Wright had erected valuable mills under a license granted to him by the legislature; but the court say (page 13): "He was bound to know that the state had power to revoke its license whenever the paramount interests of the publick should require it. And in this respect a grant by a publick agent of limited powers, and bound not to throw away the interests confided to it, is different from a grant by an individual who is master of the subject. To revoke the latter after an expenditure in the prosecution of it would be a fraud. But he who accepts a license from the legislature, knowing that he is dealing with an agent bound by duty not to impair a publick right, does so at his risk; and a voluntary expenditure on the foot of it gives him no claim to compensation."

Without expressing any approbation of the doctrines established in the two last cited

cases, we are nevertheless bound to say, that they settle authoritatively and conclusively the question now under consideration. They apply also with double force to the present case, as no valuable improvements have been made by the plaintiffs on the faith of a legislative license. It has been contended that the proviso in the joint acts of the legislatures of Pennsylvania and New Jersey of 1771, already referred to, operated by way of grant to Adam Hoops, his heirs and assigns, of a right to divert the water of the river Delaware to his mills. But we can discover nothing in the nature of a grant in the words of this proviso. It amounts to no more than the present toleration of a nuisance previously erected; and at most to a license revokable at pleasure. The doctrine of the cases which we have just quoted, applies to it with full force and conclusive effect.

Nor can the plaintiff claim by prescription against the publick for more than the act confers on him, which, at best, is but impunity for a nuisance.

We are of opinion also, that it is not competent for the plaintiff to question the authority of New Jersey to take the waters of the Delaware for her publick improvements without the consent of Pennsylvania. The channel and waters of this river are vested in the two states as tenants in common, as we have already seen; and no one can question the authority of either to divert its waters but the other. Pennsylvania was the first to seize on a portion of their joint property, for her separate use, and is estopped by her own act from complaint against New Jersey, who has but followed her example. Besides this, mutual consent may be presumed from mutual acquiescence. At all events the plaintiff, who is shown to have no title to the river or any part of it, and whose toleration or license could at best only protect him from a prosecution, is not in a situation to dispute the rights of either, or claim compensation for a diversion of its waters for the purpose of the publick improvements, of either of its sovereign owners.

It will be unnecessary to inquire whether the compact of 1783, operated as a revocation of the toleration or license granted by the act of 1771, to the dam of Adam Hoops; as that question can only arise in case of an indictment of it as a publick nuisance.

Judgment for defendant.

[This judgment was affirmed by the supreme court, where it was carried on writ of error. 14 How. (55 U. S.) 80.]

NOTE. The reporter is sure that no apology is requisite for appending to this report, and as connected with one point in the case, the following opinion of the late Richard Stockton, Esquire, of New Jersey; one of the ablest lawyers and statesmen whom our country has produced, and whose lofty honour both in his professional and political career deserves to be held in even higher remembrance than his uncommon abilities. The opinion is derived from the MS. collection of A. J. Fish, Esq. of the Philadelphia bar. Its value in connexion with the present case, is increased from the fact, that it was one of the opinions upon which the company proceeded upon their enterprize, and that it was not known to the court when its judgment was given. As Mr. Stockton died in March, 1828, it was, of course among the last opinions which he ever gave:

On the right of New Jersey to make a canal without first obtaining the consent of Pennsylvania to use the waters of the Delaware. The following positions it is believed are undeniable:

1. The river Delaware was not included in the ancient grants of the King of England and the Duke of York, either to the proprietors of New Jersey, or to William Penn, the proprietor of Pennsylvania, but the property therein and its islands, remained in the crown of England until the Revolution. The rights of private property claimed by individuals, on either side of the river, had no other legal foundation but occupation or possession.

2. By the war of the Revolution, and the treaty of peace, New Jersey and Pennsylvania acquired a property therein equally; namely each state to the channel or middle of the river on its own side. The agreements between the two states as to jurisdiction, and the partition of the islands, recognize this position, and are bottomed upon it.

3. The property of each state to the middle of the river is as absolute as the subject matter permits. To the shores and the ground covered with water to the channel, it is as perfect and unlimited, as to other parts of its territory. The agreements referred to amount to a partition. Each holds its own in severalty; fully and entirely independent of the other.

4. There is nothing since remaining in common but the waters of the river, which are incapable of division. But a right of property in the waters of a river can only exist for appropriate uses, namely for navigation and transit—therefore the rights of navigation and passage remain common to the citizens of both states, over the entire river, and would have so remained without an express stipulation.

Then may not either state appropriate the waters washing her own shores to publick improvements? And what is the just limitation of the right if it exists? These questions depend upon the received law of nations—the only rule of action between independent states, and upon a just application of its principles to the subject before us. The most approved writers on the law of nations, consider the property in a river belonging to two states, as absolute in each, to its own half part—and content themselves, with laying down the limitations, to such absolute property, which rightfully arise out of the common claim to the waters of the river—and these limitations are made to depend upon that great principle of justice, adopted by all codes of law, that each must so use his own right as not to destroy or materially injure the right of the other. Vattel (Law Nat. bk. 1, c. 22, § 271) goes over these limitations. He says: "It is not allowable to raise works on the bank of a river to turn its course, and turn it on the opposite bank. In general, no person ought to build on a river or elsewhere, any work which is prejudicial to the right of another. If a river belongs to a nation, and another has the right of navigation, the first cannot form a dam or mill that shall stop its being navigable. Its right in this case is only that of limited property, and it cannot exert it, but by respecting the rights of others. Id. § 272. The right of navigation necessarily supposes that the river shall remain free and navigable, and therefore must exclude every work that will entirely interrupt its navigation." Id. § 273.

I am therefore of opinion that the state of New Jersey is under no legal necessity of asking the permission of the state of Pennsylvania to use the waters of the Delaware, for publick improvements, provided, that the navigation

and the right of passage are not thereby injured or interrupted.

This opinion has not been hastily formed, but is the result of as full an investigation as I could bestow upon the subject. It is believed that Pennsylvania has substantially acted upon this principle. It is said that from the Trenton Falls upwards, the waters are in many places diverted from their natural courses, for the accommodation of mills, without the consent of New Jersey. The Bristol canal is to be supplied by tapping the Lehigh river, near to the place where it empties itself into the Delaware. Now the principle that the owner of a river, has a right to insist that the waters of a tributary stream, shall not be diverted from its natural course, until it reaches its destination, is as fully established, as that the course or waters of the main river, shall not be altered or diverted: and the injury to New Jersey is precisely the same in this case as if the water was taken from the Delaware itself.

29th January, 1828.

RUNDLE v. JONES. See Case No. 12,138.

RUNDLET (JACKSON v.). See Case No. 7,145.

RUNDLETT (UNITED STATES v.). See Case No. 16,208.

RUNION (VARNUM v.). See Case No. 16,892.

RUNKLE (HERRON v.). See Case No. 6,428.

Case No. 12,139a.

In re RUNZI et al.

[See 3 Fed. 790.]

Case No. 12,140.

The RUPEE.

[1 Haz. Reg. U. S. 202.]

District Court, D. Massachusetts. 1839.

SEAMEN'S WAGES—DISCHARGE IN FOREIGN PORT.

[A seaman discharged in a foreign port, without his consent, because his vessel was condemned as unseaworthy, is not entitled to recover three months' extra wages, under the act of congress (1 Stat. 131), if the vessel was seaworthy on commencing the voyage, but was rendered unseaworthy by injuries sustained through violent weather.]

[This was a libel in rem for seamen's wages.] The mate of the brig Rupee libelled the vessel for wages, at the rate of twenty-five dollars a month, for several months beyond the time specified in his first article, in which that sum was stipulated, no stated wages having been stipulated in the two subsequent articles under which he served. At Liverpool, whither she had sailed from Boston, the vessel was condemned as unseaworthy, in consequence of injuries she sustained in a storm which she encountered after leaving the former port for Boston, and which compelled her to put back; and he sought, also, to recover three months' wages, as provided by the act of congress, for being discharged in a foreign port without his consent.

THE COURT decided that he was entitled to the rate of wages claimed, up to the time of his discharge at Liverpool, but decreed that his claim for three months' extra wages after his discharge could not be sustained, as the brig was seaworthy when she sailed on her voyage, and the discharge of the libellant at Liverpool having been occasioned by the injury done to the brig by tempestuous weather; therefore the respondents were not bound to pay the three months' extra wages.

Case No. 12,141.

In re RUPP.

[4 N. B. R. 95 (Quarto, 25).] [1]

District Court, N. D. Ohio. 1870.

BANKRUPTCY — PARTNERSHIP — JOINT PROPERTY — EXEMPTIONS.

Joint assets are liable to the provisions of the bankrupt act [of 1867 (14 Stat. 517)], allowing exceptions. Where there are not sufficient individual assets, assignees cannot refuse to set aside exempt property out of joint property.

[Cited in Re Parks, Case No. 10,765. Cited contra in Re Blodgett, Id. 1,555; Re Handlin, Id. 6,018; Re Corbett, Id. 3,220. Cited in Re Melvin, Id. 9,406.]

In bankruptcy.

J. C. Hutchins and E. H. Ensign, for Geo. W. Rupp.

Geo. P. Hunter, for assignee.

SHERMAN, District Judge. This case comes up on exceptions to the register's report. Two questions are raised:

First. Was Samuel W. Rupp a partner in the firm of George W. Rupp & Co.? The testimony fully establishes the fact that he was a partner.

Second. Is George W. Rupp, the other partner, entitled to claim out of the partnership funds the exemption of three hundred dollars allowed by the laws of Ohio, in lieu of a homestead? This question has heretofore been before me, and I have decided it in the negative on the ground that partnership funds are in the nature of trust funds, and are not liable to the separate and personal claims of the partners, until the partnership creditors are satisfied. The question was not examined with that care that its frequency and importance demand. I have now examined it, and in view of late leading cases, have come to a different conclusion. By the common law, no exception or homestead is secured to a debtor. They both owe their creation to late legislation, both by state and national authority. The policy of both has been adopted by almost if not all the states. The object and policy of such laws, so universally adopted, cannot be disregarded. The whole series of laws on these subjects are remedial, not restricting any prior right, but securing to an unfortunate debtor some portion from the wreck of his

[1] [Reprinted by permission.]

property to save him and his family from immediate want, and to encourage him to further efforts. They have been adopted from the humane policy of the law, and dictated by the enlightened ideas of the present day, as distinguished from the severe and unhumane laws towards unfortunate debtors that prevailed at no very distant period. By them, the right of an individual debtor to the exemption is not disputed; and it certainly cannot be the policy of the law to permit the individual debtor to enjoy the exemption, while his joint liability with another would give the creditors the power to take the last cent of his property.

We find but few reported cases upon this point. In Radcliff v. Wood, 25 Barb. 52, the supreme court of New York, on a very similar statute with that of Ohio, held that joint ownership of property did not exclude the right; and the court of appeals, 37 N. Y. 356, say: "That the language of the act should be construed in harmony with its humane and remedial purpose. Its design was to shield the poor, and not to strip them. The interest that it assumes to protect is that belonging to the debtor, be it joint or several, absolute or limited." The United States district court in Missouri, has also decided the point. In re Mitchell [Case No. 9,656]. Judge Treat there says, "The policy of exemptions and the legal rules on which they rest, modify the strict technical rules by which the rights of creditors are otherwise enforceable." Such would also seem to be the policy of the bankrupt law. By the 14th section there is saved to the bankrupt, personal property not exceeding five hundred dollars, to be excluded from the general assignment of his effects; while section 36, which refers to partnerships and corporations, makes no distinction between that class of debtors and individuals, no language being used restricting in express terms or by implication the privilege secured by section 14. For the reasons above expressed, I am of the opinion that the exemption claimed by Geo. W. Rupp, bankrupt, should be allowed from the assets of the firm of Geo. W. Rupp & Co.

Case No. 12,142.

RUSCH v. DES MOINES COUNTY.

[Woolw. 313.] [1]

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

MANDAMUS—UNDER IOWA CODE—TAXATION—PROCEEDINGS TO ENFORCE LEVY—HOW LEVY TO BE MADE.

1. The chapter on the "action by mandamus," of the Revised Code of Iowa, changes the character of the writ to an action for the enforcing of any right to which it may be applicable.

2. This chapter has never been adopted by this court, as a rule of practice, and can have no force here.

3. This court, in applications for mandamus, has always proceeded according to the course of the common law.

4. Proceedings to enforce levy and collection of a tax should not be by appointment of commissioners.

5. Even under Iowa statute the aforesaid chapter does not authorize an order appointing a special commissioner to levy a tax upon a county, whose officers have, in disobedience to the command of a mandamus, neglected to levy a tax, to raise money to pay a judgment.

6. This chapter extends the remedy only to compel the performance of a duty, the breach of which is followed by damages.

7. The court should not appoint a person to discharge the official duties of an officer, whose appointment, functions, and qualifications are prescribed by law.

8. The application for the appointment of a commissioner to levy the tax is addressed to the discretion of the court, and will be declined on account of the difficulties attending it.

9. The county treasurer, whose sole duty it is to collect the tax, has never refused to perform his duty, and it cannot be assumed that he will do so. He has most important and delicate duties to perform in enforcing the tax. He should not be displaced by a court.

10. The assessors are not in default. They should not be displaced. Were the commissioner to attempt to levy the tax upon their last valuation of property, he would be powerless to compel the records of that assessment from the officer who had been summarily removed.

11. If the statute of Iowa confers such power, it is in conflict with the constitution of that state. That constitution declares that the three departments, the legislative, the executive, and the judicial, shall each be kept separate from either of the others. It also provides that no local or special law shall be passed relative to taxes.

The plaintiff having recovered a judgment at law against the county, applied to the court for a mandamus, directed to the supervisors, commanding them to levy a tax for the purpose of raising the money to pay the judgment. The supervisors made a return to the writ, setting forth matters by which they sought to excuse their disobedience of the order of the court. This return was quashed as insufficient in law, and the question presented itself, how they should be dealt with, and how the court should compel the levy of the tax? The relator moved the court to appoint George W. Clark, the marshal of the district, a commissioner to levy and collect the tax.

Mr. Rorer, Mr. Howell, and Mr. Edmunds, in support of the motion.

Mr. Tracey, contra.

MILLER, Circuit Justice. In this case, a peremptory mandamus was ordered at the last term of the court, directed to the defendants, commanding them to levy a tax sufficient to pay the debt of the relator. This mandate has not been obeyed, though the marshal's return shows that it was duly served upon the supervisors. Instead of levying a tax, they have made a return, which attempts to show matters in excuse for not complying with the command

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

of the writ. This return has been quashed, on the relator's motion, as insufficient in law.

The relator now moves the court to appoint Clark, the marshal of the district, a commissioner, with directions or orders to levy and collect a tax sufficient to answer the debt due to the relator, and to pay to him the amount of his debt, interest, and costs.

This motion has been fully argued by three eminent counsel in support thereof. I do not understand either of them to base it upon any common law power of the court to invade the legislative function of levying taxes. On the contrary, it is based by all the counsel solely on section 3770 of the Iowa Statutes (Revision of 1860). I believe it to be conceded, also, that it is optional with the court whether it will make this order, or will proceed by process of attachment to compel the supervisors to obey the mandate heretofore issued to them. The section referred to is a part of chapter 153 of the Revision, which chapter is headed in capitals "Action of Mandamus." This chapter is one introduced by the codifiers, and was new to our statutes. It changes the character of the writ of mandamus in many features, and makes it essentially an action for the enforcement of any right, to which, by its nature, it is applicable. It is no longer limited to cases in which there is no other remedy. Section 3767 provides, that the plaintiff in any action, except those of replevin, detinue, and to recover possession of real estate, "may also in aid of such cause of action, pray and have a writ of mandamus to compel the performance of a duty established in such action."

This chapter has never been adopted by this court as one of its rules of practice. So far, therefore, as the right to the order asked for is dependent upon the rules of practice governing this court, it can receive no aid from this provision of the statute. Pomeroy v. Manin [Case No. 11,261]; Catherwood v. Gapete [Id. 2,513]. The Revision of 1860 was passed by the legislature of Iowa long after any act of congress adopting the laws of the state as rules of practice in the federal courts; and when this court was established in 1862, the judges, in framing rules for the practice of the court, most of which were adopted from the revision of Iowa statutes, excluded all that related to the writ of mandamus. Accordingly, in applications for mandamus, we have proceeded in the usual common law mode by information and alternative writ in the first instance, instead of by petition, answer, and judgment prescribed in the statute. And the supreme court, in its several judgments, made in this class of cases at its last term, after a full review of the acts of congress concerning the practice of the courts, reached the conclusion that the issuing of the writ of mandamus was to be according to the common law forms, and in virtue of the inherent power of the court. Riggs v. Johnson Co., 6 Wall. [73 U. S.] 166. If the section under which this order is asked for, and which, at the most, is a mere rule of practice, has never been adopted by this court, nor by any law of congress, it can have no force here. Smith v. Cockrill, Id. 756.

But waiving this consideration, let us examine the language of the section on which this extraordinary power is claimed to rest. It reads as follows: "The court may, upon application of the plaintiff, besides, or instead of proceeding against the defendant by attachment, direct that the act required to be done, may be done by the plaintiff, or some other person appointed by the court, at the expense of the defendant, and upon the act being done, the amount of such expense may be ascertained by the court, or by a reference appointed by the court, as the court or judge may order, and the court may render judgment for the amount of such expenses and costs, and enforce payment thereof by execution."

We are of opinion, upon a fair and reasonable construction of this statute: 1. That it is inapplicable to such an order as the one now asked for. 2. That, if it could be held to apply to such a case as the one before us, it vests in the court a choice as to which of two modes of enforcing its judgment it will adopt; namely, attachment and imprisonment of defendants, or the appointment of a commissioner to do the acts required of defendants. 3. That if the act can be construed as conferring authority on the court to levy taxes by its officer or commissioner, it is unconstitutional.

We have already shown that this chapter on mandamus extends the remedy of that writ to many cases not previously embraced by it. Some of these are cases in which a mere ministerial, or, more strictly, a manual and personal act, not in any sense official, may be required of the party; as, for instance, the making of a deed, the removal of a nuisance, the delivery of property, &c. Section 3767, already referred to, not only shows this, but also takes a distinction between that class of duties and those which are official; for, after providing, as we have seen, for a liberal use of the writ, it adds: "But if such duty, the performance of which is sought to be compelled, is not one resulting from an office, trust, or station, it must be one for the breach of which a legal right to damages is already complete at the commencement of the action, and must also be a duty of which a court of equity would enforce the performance."

In the case of the abatement of a nuisance, the making of a deed, and the delivery of the possession of property, real or personal, we have instances in which courts of equity have been in the habit of enforcing the performance of the duty, and in which they have also acted, when they thought proper, by means of a commissioner appointed for that purpose. There is no reason why the acts to be performed in these cases may not be as well and effectually performed by a

commissioner as by the person whose duty it is to perform them. But in the case of an officer, upon whom exclusively certain public duties have been imposed by law, and whose mode of appointment is fixed thereby; who takes an oath that he will faithfully perform all his official duties, and who is removable from office only in a prescribed manner, there are many reasons why no one else should be appointed to discharge his duties, while he yet remains in office, and more especially why the court should make no such appointment.

The expressions in this section show clearly that the remedy by appointing a commissioner was not considered as applicable to all cases of mandamus. We are of opinion that this is one of a class to which it was never intended to be applied. But if we may, by virtue of this section, proceed to enforce the judgment by the aid of a commissioner, it is very clearly a discretionary power the exercise of which is confided exclusively to the court.

Besides the fact that we do not believe this section applicable to the case before us, another reason which determines us to decline the measure which the plaintiff has proposed, is the serious difficulty attending it. The first and only duty, in the performance of which the supervisors are in default, is the levy of the tax. The duty of collecting the tax when levied, is, by law, devolved on the treasurer of the county. This officer has never refused to perform any duty. No tax has been levied for the plaintiff's benefit which he could collect. He is, therefore, in no default; he has neglected no duty; he has not been required by the order of this court, nor even asked by the plaintiff, to perform any. Shall we then assume in advance that he will refuse, and appoint some one in his place? The duties of his office are too important, and too well defined by law, to justify a court in substituting any one in his stead, when there is no charge against him, and no pretence that he has done, or intended to do, any wrong. It is his duty to enforce the payment of the tax, first by sale of the personal property, if necessary, and next by sale of the real estate of the owner. He is also to make a deed to the purchaser, if land sold is not redeemed within three years from the day of sale. This deed is the title on which the purchaser relies. Surely an officer charged with powers which, without a trial in court, deprive one man of the title to land, and confer it on another, should not be displaced, and all his functions transferred, when he has failed to discharge no one of his appropriate duties.

Again, the tax must be levied on some valuation. Will the commissioner appointed by the court make a new valuation for himself? The assessors appointed by law have never failed to make such a valuation, and are in no default. Will the commissioner make his levy on the basis of the valuation already made? How will he obtain access to that valuation? It is under control of officers of the law, over whom he has no authority, and who will not be likely to render him any assistance in his assumption of the exercise of their functions. In short, to do what this motion asks of us, would be, by one despotic act of power, because the board of supervisors have failed in the one duty of making a levy for the benefit of this plaintiff, to supersede the treasurer, clerk, assessors, and perhaps other officers, and to disregard and overturn all the provisions of law for the levy, assessment, and collection of taxes.

But if we could see in the provision of the statute an intention to confer this extraordinary power on the court, we are of opinion that it is in violation of the constitution of Iowa.

That instrument declares (article 3, § 1): "The powers of the government of Iowa shall be divided into three separate departments,—the legislative, the executive, and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted."

That the authorizing of taxes is a function peculiarly and exclusively legislative, will hardly at this day be disputed among people of Anglo-Saxon institutions. Charles I. lost his head in vain, and Hampden and his associates resisted in vain, if the taxing power exists, among their descendants, in any other than a representative body. And though the primary legislative body of the state may confide a portion of that power to other bodies of similar character, this has not been established without a struggle. The great increase of corruptions in municipal bodies, growing out of the ability to create, by taxation, a fund which may be squandered, has made many thinking men doubt the wisdom of endowing them with the power.

The constitution of Iowa (article 3, § 31) has provided, as a further safeguard on this subject, that no local or special law shall be passed by the general assembly, for the assessment and collection of taxes for state, county, or road purposes.

What is it we are asked to do in this case? We are asked to set aside, in Des Moines county, the statute which confides to the supervisors exclusively the right to assess a county tax, and to assess such tax ourselves by our commissioner; to repeal the general law which makes the treasurer the only tax collector, and enact a special law by appointing our agent to sell the lands, make the deeds, and transfer the property of citizens under cover of the taxing power. And who are we, who, in the exercise of the assumed taxing power of the state of Iowa, are thus to levy and collect taxes, and, for their

non-payment, without giving the owners a day in court, to sell lands and divest titles?

In other times, when the functions and relations of the different departments of government were not so well defined and understood as they are now, the executive, invading the province of the legislature, usurped this power of levying taxes. It was never heard, even in those times, that the courts of law arrogated any such power to themselves. Rather were they the refuge of the Hampdens from the oppressions of the kings. If we grant this motion, we shall simply emulate the example, and we shall deserve the fate, of Charles.

Besides, we are the judiciary established by the federal government. We do not hold our commission from the state; nor do we sit generally to administer or construe her laws; nor are we amenable to her government. We being thus, in a measure, an authority foreign to her, are asked to invade her own proper and exclusive jurisdiction; not merely to act upon her officers by judicial process, a proceeding of which I have elsewhere expressed my views, but to assume the functions of her legislature, and, in a matter which most nearly touches the liberty of her people, overturn her laws and subvert her institutions. We must decline to do this. Motion overruled.

As to final process, Ross v. Duval, 13 Pet. [38 U. S.] 45; U. S. v. Knight [Case No. 15,539] Id., 14 Pet. [39 U. S.] 301; Amis v. Smith, 16 Pet. [41 U. S.] 303; In re Hopkins [Case No. 6,683].

RUSK v. The CHARLES MORGAN. See Case No. 2,618.

Case No. 12,143.

RUSK et al. v. The FREESTONE.

[2 Bond, 234.] [1]

District Court, S. D. Ohio. Oct. Term, 1868.

COLLISION—LOOKOUT—LIEN—PRIORITY—ASSIGNEE OF WAGES.

1. On all steamboats navigating the Western rivers there should be a competent and vigilant lookout.

[Cited in The Ancon, Case No. 348.]

2. The place of the lookout is on the forward part of the hurricane deck, where he can see approaching boats and other obstructions to navigation.

3. It is no excuse for the negligence of a lookout in failing to be in his proper place, that the upper deck was crowded with soldiers, and that there may have been difficulty in passing from one part of the boat to the other.

4. A lien by collision overrides and is paramount to all prior liens, including wages due.

5. The assignee of seamen's claims for wages has no maritime lien for those claims, and can have no standing in a court of admiralty.

[Cited in The R. W. Skillinger, Case No. 12,181; The Napoleon, Id. 10,011; The Champion, Id. 2,583.]

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

[This was a libel by William J. Rusk and Andrew Byers, owners of the steamboat Belle Creole, against the steamboat Freestone, to recover damages sustained by collision.]

Mr. Huston, for libellant.

Lincoln, Smith & Warnock, for respondents.

OPINION OF THE COURT. The original libel, in the cases before the court, was filed by the above-named Rusk and Byers, as owners of the steamboat Belle Creole, on December 17, 1861, in which they allege, as their cause of action, an injury sustained by their boat from a collision with the steamboat Freestone. Subsequently, separate libels were filed by the Eureka Insurance Company, the Central Insurance Company, and the Magnolia Insurance Company, to recover the sums alleged to be severally due for payments made by them respectively for injuries and damage sustained by the hull, machinery, and cargo of same steamboat Belle Creole, for which the owners held policies of insurance, and for which they claim that they have a maritime lien on the steamboat Freestone. There is also another libel, in the joint names of John Hopkins and numerous other claimants, to recover wages alleged to be due them from the owners of the Freestone, for which they assert they have a lien on said boat.

The Freestone was seized under process issued in the original case of Rusk and Byers. Subsequently, by an interlocutory decree, entered by consent of all the parties interested, the Freestone was sold at public sale by the marshal, and the proceeds—$3,400—paid into the registry, where it yet remains. The libels are in the usual form, each containing the allegation that the collision was owing solely to the fault and mismanagement of the Freestone, and that she is responsible for the injury and damage resulting from it. This allegation is denied by the owners of that boat in their answers; and thus the issue is presented for the decision of this court.

There are some facts in the case not controverted, or so clearly proved as to be beyond controversy, which may be briefly stated as follows: On November 29, 1861, between four and five o'clock p. m., the Belle Creole left the port of Cincinnati destined for Pittsburg, with a cargo estimated at about three hundred and fifty tons, consisting of wheat in sacks, flour in barrels, bacon in casks, and some other articles. From Columbia, a few miles above Cincinnati, she made a crossing to the Kentucky shore, and was running up that side within seventy-five or fifty yards of that shore. The Freestone, coming down the river, with some two hundred soldiers on board as passengers, the two boats came into collision, the bow of the Freestone striking the larboard bow of the Belle Creole between her stern and

the forward ringbolt, crushing and breaking her timbers, penetrating inward some five or six feet, and making a triangular-shaped opening in her bow from eight to ten feet long at the upper side, and extending downward below the water line from four to five feet, making, as the witnesses term it, a clean cut, through which the water had free admittance. After the collision, and as soon as the boats separated, the Belle Creole was steered directly to the Kentucky shore, and sunk with her bow quartering up stream, within twenty or twenty-five feet of the shore, a few minutes after the collision. She was much injured in her hull and boiler deck, as also in her machinery. A part of the cargo was recovered, but in a greatly damaged condition, and sold at a heavy loss. The wreck was also sold, and raised and repaired by the purchasers at great expense.

This brief statement of facts not in dispute will suffice to present the general aspect of this case, and prepares the way for the consideration of the main question, namely, whether the Freestone is so far in fault as to be responsible for the injury sustained as a result of this collision. The case has been most strenuously contested by the parties interested, and great efforts have been made on both sides to obtain testimony to sustain their respective theories of the collision. It is not deemed necessary to present a critical analysis of the evidence adduced. As usual in cases of this kind, it is, in some material points, in direct conflict. There are, however, some leading facts in the case reasonably clear of doubt, and which must control its decision.

In the first place, there is no ground to doubt that at the time of the collision, the Belle Creole was from fifty to seventy-five yards of the Kentucky shore, and from two hundred and fifty to three hundred yards below the mouth of the Little Miami river. All the witnesses for the libellants, and some of those of the respondents, concur in this statement. The witnesses who locate the collision at or above the mouth of the Miami, have testified under a misapprehension of the facts, or have recklessly falsified the truth. The evidence is clear and positive that the wreck of the Creole lay not less than three hundred and fifty yards below the mouth of that river, and that from her weighty cargo, and the size of the opening in her bow, she could not have floated more than seventy-five yards after she was struck. It is, in my judgment, clear from the evidence, that when the pilot of the Belle Creole first saw the lights of the descending boat, she was hugging the Kentucky shore, more than five hundred yards below the mouth of the Miami. The Creole, then, was in her proper place when the first signal was given, which, it is admitted by the proctor for the respondents, came from the Creole.

There is positive evidence that the Creole's signal was one sound of her whistle. The pilot swears positively that this was the signal given. The professional competency of this pilot is not only not impeached, but it is proved that he has a high standing as a pilot of experience and skill. And there is nothing in the evidence to justify any inference unfavorable to the truthfulness of his sworn statements. He is, moreover, directly corroborated on the point in question by the engineer on duty at the time the signal was given, and when the collision occurred, and also by the mate. With all the means of knowing what was done on the boat on which he was serving, these witnesses swear positively to the single signal from the Creole.

I have carefully considered the evidence by the respondents to sustain the opposite conclusion. But it is unsatisfactory and inconclusive. Even the pilot on the Freestone at the wheel at the time, is not positive as to the first signal given by the Belle Creole. In his examination in chief, he states it, not as a fact of positive knowledge and recollection, that the Belle Creole gave the double signal, but that such was his impression and belief. On his cross-examination he says he could not say whether there was one whistle or two from the Creole. And there is a fact in proof of great significance on this point, namely, that the master of the Freestone, who was in the pilot-house at the time, expressed to the pilot his doubt whether there was one or two sounds of the whistle from the Creole. The pilot, however, though himself in doubt, said he would reply by two, and they were given accordingly. And it is worthy of notice that several other witnesses for the respondents, as to the first signal from the Creole, are very guarded in their statements on the point in question, as if not clear in their own minds. It is true the depositions of six or seven soldiers on board the Freestone at the time have been taken, under the act of congress, while they were in camp in Kentucky, long after the transaction occurred concerning which they testify, who swear very nearly in the same words, that the first signal from the Creole was two sounds of her whistle, and that the response from the Freestone was the same. For obvious reasons but little weight can be given to the statements of these witnesses. Their depositions were taken ex parte under the act of congress, at a military post, at a distant point in Kentucky, where these soldiers were in the service. It was not possible under the circumstances for the libellants to re-examine them, and to test the accuracy of their statements. This fact alone would lead the court to regard their evidence with extreme caution. In addition, I may add that there is not a reasonable probability that these soldiers, under the circumstances existing on the boat, would have noticed the signals which passed, or recall them with any thing like accuracy

months after the occurrence. And I may add here, that the evidence of all the witnesses on the Freestone is less reliable than it would have been under a different state of things. The boat was excessively crowded by the soldier passengers, and there was much excitement, noise, and confusion on board. She was within a short distance of Cincinnati, and the officers and soldiers were in busy preparation for leaving the boat there. It is natural that all on board, even those officially connected with the navigation of the boat, should be affected more or less by these circumstances, and be less capable of noticing and remembering what occurred. This inference is strengthened by the fact before adverted to, that the officers of the Freestone, who have been sworn in the case, state with hesitancy and doubt as to the first signal from the Creole.

One phase of this case is obvious at the first glance, namely, that the collision in question was not the result of inevitable accident or necessity. There was fault somewhere, and there must be consequent liability for the result. The river was at a high stage, there being at least twelve feet of water in the channels. The navigable width of the river at the point of collision was from 300 to 350 yards, so that there was no conceivable necessity, that the boats should have come together in passing. Where, then, rests the blame of the collision? It is clearly not a case of mutual fault, calling for a division of damages. The Creole was in the proper place of an ascending boat, gave the proper signal, and steered accordingly. It moreover appears that as soon as her pilot was aware that the Freestone was not navigating according to the signal, and that there was danger of a collision, the order was given to stop and back, and she had actually backed some eighty feet, when struck by the descending boat. If the signal of the Creole was for the Kentucky side, the Freestone was wrong in signaling for the same side, and attempting to run inside of the Creole's line of navigation. The evidence is clear, that the Freestone was at the time pointed toward the Kentucky shore, and struck the Creole at an angle of thirty-five or forty degrees. If the Creole's first signal was not understood, the pilot of the other boat erred in not promptly taking the proper means to have the misunderstanding corrected. She did give a second signal of two whistles, but it was after the lapse of five minutes from the first signal, and when the boats were so near that a collision was unavoidable. Moreover, the Freestone erred in not giving the order to stop and back in proper time. Such an order was given, but it was too late; and all the facts show, that although the engine had been reversed, the boat had not actually backed when she struck the Creole. It is not to be supposed, from the force with which she struck the Creole, and the serious injury which the blow inflicted, that there was any material decrease in the forward motion of the Freestone.

There was another obvious fault on the part of the Freestone, which, in the absence of any fault in the management of the other boat, would be sufficient to charge her with the consequences of the collision. It has been often decided by this court, and by other courts of high authority, that there should be a competent and vigilant lookout on all steamboats navigating the Western rivers. On the Western rivers, this duty devolves on the master, when on watch. The evidence is very clear in this case, that the night was very dark, and all the circumstances required a constant and vigilant lookout. The master, however, was in the pilot-house, until the second signal was given by the Freestone, when the boats were so near that a collision was inevitable. Now his place was on the forward part of the hurricane deck, where he could see approaching boats or other obstructions to navigation. His failure to be in the proper place of the lookout was most probably the cause of this collision. If he had been there, attending strictly to his duty, and watching the course of the ascending boat, the collision would have been avoided. It is no excuse for this negligence that the upper deck was crowded with soldiers, and that there was difficulty in passing from one part of the boat to the other. No reason is given or attempted why he was not from the first in his proper place on the forward part of the hurricane deck.

In any aspect of this case, the facts point to the conclusion that the loss and damages resulting from this collision are chargeable to, and must be laid upon the Freestone as solely in fault, and a decree must be entered accordingly. But it is impossible, as this case is now before the court, to enter a final decree apportioning specifically the proceeds in the registry to the different claimants. Under any allowance that can be made to them, it seems clear the amount will exceed the sum in the registry, and that there must be a pro rata distribution among the claimants. But the court is furnished with no data on which this can be made. In relation to some of the claims, it is at least doubtful, on principle, whether they can be legally allowed, if proved by competent evidence. For example, in the original libel of Rusk and Byers, as owners of the Creole, a charge of upward of $1,000 is made for the loss of the freight which would have been earned if the trip had not been broken up by the injury to the boat. Without having looked into the authorities as to the validity of a claim on this basis, I suppose it to be unquestionable that the freight list must at least be subject to deductions for the expenses of carrying the cargo to the port of destination. The owners also insert a claim of $4,300, as the difference in the value of the Creole before the collision and after she was raised and repaired. Without deciding whether this claim

can be allowed in whole or in part, it is certain it can not be allowed to any extent, unless sustained by proof. And in regard to both the charges adverted to, I have not noticed among the papers any satisfactory evidence. And in reference to the claims of the insurance companies, I have found no evidence of the net sums paid by them on account of their policies.

I may remark, also, in reference to the intervening claims of John Hawkins and many others, set up in their joint libel, that there is no evidence before the court on which their claims can be definitely adjusted and allowed. They are evidenced by due-bills given by the clerk of the Freestone after the collision, for wages due. But some of these due-bills include wages earned prior to the collision. Now a lien by collision overrides and is paramount to all prior liens, including even wages due. So that these parties can only recover the proportion of their claims accruing for wages earned after the collision. As the fund in the registry will not discharge all the claims having a priority of lien, it is not necessary to inquire what rank of privilege or lien the claims for wages earned before the collision would occupy. It is certain they must be ranked as of an inferior order of liens to those for wages earned after the collision. It also appears, in reference to some of the claims set up in the last-named libel in the names of the hands or seamen by whom the wages were earned, that they have been paid by third parties, and the claims virtually assigned to those for whose benefit the libel has been filed. Now, these assignees have no maritime liens for those claims, and can have no standing in a court of admiralty. These views are thrown out for the purpose of showing the necessity of a reference of all the claims asserted in the various libels to a commissioner, to the end that the necessary proofs may be presented, and that the opportunity may be afforded of discussing before the court the principles on which their allowance is asked for. Unless, therefore, the proctors for the different parties in interest can agree on the sums to be decreed to each of the claimants, and the principles on which the fund in the registry is to be apportioned, the court will direct a reference of all the cases to a commissioner, to inquire and report on the matters indicated.

To avoid any unnecessary embarrassment, if the reference is made as suggested, it may be well, perhaps, now to pass on an objection made by the proctor representing the owners of the Creole, in the argument of this case, to all the various claims set up in the libel of Hopkins and others. The point of that objection was, that there was no evidence that these claimants had given their consent to, or authority for, the presentation of their claims in this proceeding, or had in any way authorized the filing of this libel. It would seem, as to the larger part of these claims, no such express authority is proved. The claims are very numerous, and many of them for very small amounts. They were placed in the hands of the proctor by the clerk of the boat for collection; and he understood that it was the wish of the claimants that they should be prosecuted in this proceeding. None of the claimants have signified any dissent to this course. The claims, as proved by the due-bills, are probably just and ought to be paid, so far as the claimants have a priority of lien. I am unwilling, under such circumstances, to turn them out of court, and leave them without remedy. In so far, then, as these claims are prosecuted in the names and for the benefit of the original claimants, for wages earned after the collision, they will be allowed their pro rata share out of the fund in court. This pro rata, however, can not now be determined for the reasons already stated, and these claims will all be referred to the commissioner for investigation as to the points indicated.

RUSS, The LAURA. See Case No. 8,120.

Case No. 12,144.

RUSSEL v. The ASA R. SWIFT.

[Newb. 553.] [1]

District Court, D. Michigan. March, 1857.

WHARVES — LIEN — DOMESTIC VESSEL — SUPREME COURT RULE — POSSESSION.

1. A wharfinger's lien cannot be enforced in admiralty against a domestic vessel.

[Cited in The Maud Webster, Case No. 7,302.]

[Cited in City of Jeffersonville v. The John Shallcross, 35 Ind. 23.]

2. Rule 12 of the supreme court only allows proceedings in rem in cases of domestic vessels, "where by the local law a lien is given to material men for repairs, supplies or other necessaries."

[Followed in The Gem, Case No. 5,303.]

3. A wharfinger is not a material man, but only a lessor, for the time being, of a part of his real estate to be used as moorage.

[Cited in The Kate Tremaine, Case No. 7,622. Approved in The Ottawa, Id. 10,616.]

4. The lien of the wharfinger is only enforceable as a common law lien; if he part with his possession of the vessel, his lien ceases.

[This was a libel for wharfage by George B. Russel against the Asa R. Swift.]

A Russel, for libelant.

J. M. Howard and J. S. Newberry, for respondents.

This case was fully argued with the following case of Russel v. The Empire State. For the arguments of counsel, see [Case No. 12,145].

WILKINS, District Judge. This libel is for wharfage. The libelant is the proprietor of a wharf erected by him, on his premises, adjacent to Woodward avenue, and bounded by

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

the same and the river Detroit. His wharf extends some twenty-four feet into the river. He is also in possession of a wharf in Canada, on the opposite side of the river. His deed calls for land "to the river Detroit." His title has been questioned; but that point, as well as the proof in relation to the use of either wharf by the Swift, need not form part of this opinion, as the decision turns upon other considerations. Fully recognizing the right of the owners of water lots, as riparian proprietors (although the river Detroit is, to all intents and purposes a national highway and boundary), to construct wharves, to any extent, in front of their premises, so as not to interfere with or obstruct the free navigation, and to charge wharfage for the use of the same; and disposed to sustain, until overruled by the appellate tribunal, every such claim against a foreign vessel; yet this issue must be determined adverse to the libelant, because the Asa R. Swift is a domestic vessel, as appears by her enrollment and license, and has her home port at Detroit. The local law gives a lien for wharfage, but such lien cannot be enforced in admiralty, under rule 12, prescribed by the supreme court of the United States. By the 6th section of the act of 1842 [5 Stat. 518], the supreme court was invested with the power to prescribe and regulate the whole practice of the courts of admiralty of the United States, thereby giving to this rule the force and effect of a statutory provision. It was also formally adopted by this court. And that rule directs, that proceedings in rem shall only apply to cases of domestic ships, "where, by the local law a lien is given to material men for supplies, repairs or other necessaries." A wharfinger is not a material man, within the spirit and intention of this provision. He furnishes no material that forms part of the ship. Material men, or such as supply the materials for the structure or repair of vessels, as the lumber merchant, who furnishes the timber, the artisan, who ornaments and preserves with paints and oils, the ship chandler, who supplies the canvas and cordage, or the manufacturer, who constructs the propulsion power. The wharfinger cannot be so considered, and is expressly excluded by the terms of this authoritative judicial regulation. He is only a lessor for the time being, of a part of his real estate, to be used as a moorage. He supplies the conveniences of dockage, and the facility of discharging passengers and freight, but no material for the use of the ship. Mr. Justice Story, who drew up these rules, makes this distinction, in Ex parte Lewis [Case No. 8,310]. But wharfage not being a lien under the general maritime law, and only such by the statute of the state, the claim as regards the occasional occupation of the Canada wharf, is only enforceable as a common law lien. As such, the wharfinger could detain the vessel until payment, but if he failed to do this, and parted with his temporary possession, his lien ceased, and such was the ruling of Mr. Justice Story, in the case already cited [supra]. This libel is therefore dismissed, with costs.

NOTE. This case was taken by appeal to the circuit court of the United States, and will probably be decided in June, 1857, and if reported will be found in 7 McLean.

[No report of this case in the circuit court can be found.]

RUSSEL (BANK OF COMMERCE v.). See Case No. 884.

Case No. 12,145.

RUSSEL v. The EMPIRE STATE.

[Newb. 541.] [1]

District Court, D. Michigan. March, 1857.

PUBLIC LANDS — CITY OF DETROIT — STREETS — RIGHT TO BUILD WHARVES—LEASE.

1. Whatever authority the city of Detroit, as a corporation, possessed over the premises in question, to dispose of or lease them, must be derived from the statutes of the United States.

2. The "town of Detroit" was laid out into lots and streets, and public squares, &c., under the act of congress of April 21, 1806 [2 Stat. 398], by the governor and judges; and on the 27th of April, 1807, they fully discharged their trust, and thus was Woodward avenue made a public highway, to the water's edge of Detroit river.

[Cited in The Gem, Case No. 5,303.]

3. By the act of 1842 [5 Stat. 541], "the lands" thus divided and remaining unappropriated under the act of 1806, were vested in the mayor, recorder and aldermen of the city of Detroit, to be disposed of by them, in their discretion.

4. The city obtained no title whatever to the soil of the streets, the fee of which continues in the original dedicator, unless the purchaser of the lots bounded thereby be considered as having the fee, under their respective grants, and therefore cannot occupy them, or give authority for others to do so.

5. Neither the governor and judges, as the old land board, nor their successors, the city authorities, as the new land board, have now any power, beyond that of the regulation of the streets and public squares; and this does not include the right to sell, or lease, or exercise any act of ownership.

6. The city authorities may erect wharves at the termini of their streets, suitable for landing, but by so doing such erections become free to the public, as extensions of the streets, and the city has no authority to exact toll for ingress or egress.

[Cited in The Ottawa, Case No. 10,616; The Maud Webster, Id. 9,302; The Geneva, 16 Fed. 875; The Mary Garrett, 63 Fed. 1,011.]

7. The intention of congress has been clearly manifested by the act of 18th of May, 1796 [1 Stat. 468], to ordain all rivers actually navigable, as common law rivers, whether or not the tide ebbs and flows.

8. Wharves or docks must be constructed so as not to impair, but to facilitate navigation and commerce, and as such be open to the landing of all—the moorage of all vessels, without "tax, impost or duty."

9. When a highway upon the land, and another upon the water, adjoin, the right of passage from one to the other is free to all. Fowler v. Mott, 19 Barb. 204.

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

10. A lease, giving the lessee "the sole and exclusive right to use the public wharf for his ferry boat," does not authorize the collection of toll for wharfage.

In Admiralty.

Walkers & Russel, for libelants.

J. M. Howard and Towle, Hunt & Newberry, for respondent.[2]

George B. Russel, libelant, was the lessee, from the city of Detroit, of the wharf at the foot of Woodward avenue, one of the principal streets of the city. When the city was originally laid out, under authority of congress, Woodward avenue was laid out and platted to the Detroit river. It has subsequently been extended by filling up, and the erection of a wharf, some 300 or 400 feet into the river, which wharf is the one in question. The Empire State, a large vessel used in navigating the lakes, while lying at the dock immediately below Woodward avenue, lapped on to the street, while engaged in unloading her cargo. Russel then brings his action for wharfage.

A. Russel, for libelants.

The right to build wharves in any manner, so as not to impede navigation, is disputed by no authority of the civil or common law. There is a distinction between the right to approach the shore where the river is in a wild state and the harbor of a crowded city. Inst. Just. lib. 2, tit. 1, 1, 4; Dig. 1, 8, 6; Bagott v. Orr, 2 Bos. & P. 472. See, also, 3 Kent, Comm. 417, note 6; Id. 413; and Blundell v. Catterall, 5 Barn. & Ald. 268. By the common law, navigable waters were those affected by the tide, and innavigable waters were tideless, although they were public rivers, and actually navigable. 3 Kent, Comm., ubi supra; Ang. Water Courses. § 596 et seq. On navigable rivers the adjoining proprietors took to the edge; on innavigable, to the centre of the stream. Howard v. Ingersoll, 13 How. [54 U. S.] 381; Berry v. Carle, 3 Greenl. 269; Spring v. Russell, 7 Greenl. 273; Simpson v. Seavey, 8 Greenl. 138; Wadsworth v. Smith, 2 Fairf. [11 Me.] 278; Claremont v. Carlton, 2 N. H. 369; Slate v. Canterbury [8 Fost. (N. H.) 198]; 3 N. H. 34; 9 N. H. 461; Lunt v. Holland, 14 Mass. 149; Id. 600; Id. 431; 20 Pick. 186; 2 Conn. 481; 9 Conn. 138; 7 Conn. 186; 8 Conn. 231; Ex parte Jennings, 6 Cow. 518, and note; Palmer v. Mulligan, 3 Caines, 308; Hooker v. Cummings, 20 Johns. 91; 17 Johns. 201; 26 Wend. 408; 5 Cow. 216; 11 Ohio, 311; Id. 138; 30 Ohio St. 496; 16 Ohio St. 540; 1 Rand. 417; 3 Rand. 33; 4 Call, 411; 3 Blackf. 193; 5 Har. & J. 195; 5 Scam. 500; 2 Swan, 9; 1 Ired. 395; Tayl. [N. C.] 196; 6 Mart. [La.] 119; Moore v. Sanborne, 2 Mich. 520; 2 Port. (Ala.) 436; 1 McCord, 580; 2 Bin. 475. But the definition of the term "navigable" has been altered to conform to the fact. Carson v. Blazer, 2 Bin. 475; 2 Swan, 9; La Plaisance Harbor Co. v. City of Monroe, Walk. [Mich.] 155; Moore v. Sanborne, 2 Mich. 520; Bowman v. Wathen [Case No. 1,740]. By the common law, the riparian proprietor upon navigable waters has the right of erecting wharves, and controlling the access to the river. Bowman v. Wathen [supra]; Blundell v. Catterall, ubi supra; Ang. Water Courses, § 55; Morgan v. Reading, 3 Smedes & M. 366; Ball v. Herbert, 3 Term R. 253; 7 Conn. 186; 2 Ohio, 307; 11 Ohio, 138; 2 Ohio, 403; 1 Yeates, 167; 9 Serg. & R. 26. The governor and judges so supposed. See their report to congress. State Papers, vol. 5, 1831. The United States passed a law laying a wharf in Detroit. 4 Stat. 455. The legislature of Michigan likewise. See Sess. Laws 1855, p. 291. The ordinance of 1787 was in the nature of a treaty, and was simply declaratory. Ang. Water Courses, § 556; Kent, Comm. 427; Strader v. Graham, 10 How. [51 U. S.] 82; Columbus Ins. Co. v. Curtenius [Case No. 3,045]; Jolly v. Terre Haute Draw Bridge Co. [Id. 7,441]; La Plaisance Harbor Co. v. City of Monroe, Walk. [Mich.] 155; 3 Ohio, 495; 5 Ohio, 410.

The next question as to the street is, has it been dedicated? Prima facie the fee to the centre of the street is in the adjacent proprietor, subject to the public easement. Livingston v. Mayor, etc., of New York, 8 Wend. 85, and cases cited; 20 Wend. 96; 7 Conn. 48; Pittsburgh Case, 6 Pet. [31 U. S.] 498; 3 Watts, 219; 9 Serg. & R. 296; Yeates, 167. Highways on land and water are not subject to the same principles of law, nor have they the same incidents. Ball v. Herbert, 3 Term R. 253. Dedication is not predicable of landing places. See 20 Wend. 131, 133, affirmed on error 22 Wend. 425; 8 B. Mon. 232. Granting, for the sake of argument, that the street has been dedicated, then the city has the power of regulating. As to the extent of this power, see Kennedy v. Jones, 11 Ala. 63; Rowan's Ex'rs v. Town of Portland, 8 B. Mon. 232; 7 Conn. 293; Dugan v. City of Baltimore, 5 Gill. & J. 357, overruling the wharf case in 3 Bland, 361. See Revised Charter Detroit, pp. 24, 30, 68.

J. S. Newberry, for respondent.

I. The entire right of soil in the bed of the Detroit river is in the government or the public, or it has been dedicated to the public, either of which precludes it from being exclusively appropriated by any private person or corporation. The ordinance of 1787 fully dedicates the Detroit river to the public. It is a great natural highway, and carries with it all the incidents and appurtenances of a highway. Spring v. Russell, 7 Greenl. 275, 290; 3 Shep. 269. The common law rule, that

[2] This case and the preceding case of George B. Russel v. The Asa R. Swift [Case No. 12,144], were, by consent of counsel, tried and argued together, and but one argument made. They were decided, however, upon different grounds, and a separate opinion rendered by the court.

the riparian proprietor of rivers where the tide does not ebb and flow, owns the bed of the river ad filum aquæ, has in no state been applied to rivers forming national boundaries. See 17 Wend. 597; 12 Barb. 201; 19 Barb. 490. The whole theory of navigable rivers, thus defined, arose in England, where, as a matter of fact, the ebb and flow of the tide was the criterion of navigability. The most enlightened jurists of this country have refused to apply to our vast rivers and inland seas the puny distinctions and doctrines which have been applied to their insignificant rivers. In New York, see 17 Wend. 597–599; 12 Barb. 201, 206; 19 Barb. 490. In Pennsylvania, see 2 Bin. 475, 483, 484; 14 Serg. & R. 71; Zimmerman v. Union Canal Co., 1 Watts & S. 351; Case of Philadelphia & Trenton R. Co., 6 Whart. 44; Bailey v. Philadelphia, W. & B. R. Co., 4 Har. [Del.] 389; Ball v. Slack, 2 Whart. 539; Bacon v. Arthur, 4 Watts, 439. In Alabama: Bullock v. Wilson, 2 Port. 436, 448; Mayor of Mobile v. Eslava, 9 Port. 577. In South Carolina: Executors of Cates v. Wadlington, 1 McCord, 580. In Virginia: Home v. Richards, 4 Call, 441. In Tennessee: 3 Yerg. 387; 2 Swan, 9. In North Carolina: Ingram v. Threadgill, 3 Dev. (1831) 59; Collins v. Benbury, 3 Ired. 277. In Michigan: La Plaisance Harbor Co. v. City of Monroe, Walk. 155; Bowman v. Wathen [Case No. 1,740]; Pollard v. Hagan, 3 How. [44 U. S.] 212, 229.

II. Granting that the adjacent owners have the fee of the bed of the river, then the public have the right to the free and unobstructed navigation of the river, in its entire breadth, as a highway. Hart v. Mayor of Albany, 9 Wend. 584, citing 6 East, 427, and 3 Camp. 226, 229; s. c. 3 Paige, 213, 217; Bacon v. City of Boston, 3 Cush. 174; 1 Cush. 443; 7 Wend. 291; 1 Johns. 509; 16 Pick. 175; 13 Mass. 115, 118. Therefore, docks built out to seventeen feet water are an encroachment.

III. All our great rivers are subject to the easement of navigation, which includes the right to moor and land at the bank, when necessary. Hanson v. City Council of Lafayette, 18 La. 295, 305; Trustees of Natchitoches v. Coe, 3 Mart. (N. S.) 140; O'Fallon v. Daggett, 4 Mo. 343, 345; 3 Smedes & M. 366, 408; 1 Camp. 517, note; 3 Scam. 521; 13 Wend. 371; Brown v. Chadbourne, 31 Me. 9, 24; Stuart v. Clark's Lessee, 2 Swan, 8, 3 Yerg. 307.

IV. Wharves may be built between high and low water, but no case can be found where they are allowed to go further, and a fee charged for the use of such erection, without express grant. Inhabitants of East Haven v. Hemingway, 7 Conn. 186; 9 Conn. 38; 5 Pick. 492–494; 3 N. H. 324; Arnold v. Mundy, 1 Halst. [6 N. J. Law] 1, and see pages 67, 76; 2 Zab. [22 N. J. Law] 441; Gunter v. Geary, 1 Cal. 463, 469; The Wharf Case, 3 Bland, 373, 374. See, also, pages 380, 382; 20 Pick. 186; 11 Ohio, 138.

V. A ferry or a wharf, &c., &c., with a right to take tolls, cannot be established by a private individual, but only by the sovereign power. 1 Yates, 167; 9 Serg. & R. 26; 3 Watts, 219; 8 Watts, 454,—cited by libelants, were, every one, cases where the ferry was established by an act of the assembly. 31 Me. 21; 2 Conn. 481; 8 Watts, 434; 10 Yerg. 280; 5 Yerg. 108; 1 Nott & McC. 387; 13 Ill. 27; 3 Mo. 470; 3 Scam. 53; 8 Greenl. 365. The last four cases seem to hold that a person cannot land a ferry on his own land without consent of the state or grant. 3 Bland, 380, 382; 3 Paige, 313; 9 Ohio, 165, 167.

VI. A ferryman has a right to land at a public highway. 2 Rob. (Va.) 209, 214; 1 Blackf. 43; 3 Bland, 375; 6 Shep. 433 (18 Me.); 19 Barb. 204, 220. Holding, also, that it is a public common right to pass from a highway on land to a highway on water, when they adjoin.

VII. The common council of Detroit has no power to grant the exclusive use of the highways, streets, &c., of said city, to any individual. People v. Carpenter, 1 Mich. 273.

In the case of Russel v. The A. R. Swift [Case No. 12,144] the two following additional points are taken:

I. By the general maritime law there is no lien created for supplies, materials, &c., or indeed for anything upon a domestic vessel. There is but one case where the admiralty courts have jurisdiction over domestic vessels; and that is by rule 12 of the supreme court, which provided that when the local law gives the material man a lien he may proceed in admiralty against domestic vessels. Conk. Adm. pp. 56, 61; Peyroux v. Howard, 7 Pet. [32 U. S.] 324; [The General Smith] 4 Wheat. [17 U. S.] 438; The Robert Fulton, [Case No. 11,890]; Davis v. New Brig [Id. 3,643].

II. The lien of the wharfinger is a common law lien, depending upon possession, and not enforceable if the possession has been parted with. Gardner v. The New Jersey [Id. 5,233]; Johnson v. M'Donough [Id. 7,395]; The Betsy [Id. 1,364].

The brief of the Hon. J. M. Howard was not furnished the reporter.

WILKINS, District Judge. Libel for wharfage, setting forth that the libelant is the lessee, from the city of Detroit, of a wharf situated at the foot of Woodward avenue, and extending beyond the terminus of the said avenue, into the river Detroit. The answer denies the authority of the city to execute such lease, and avers "that Woodward avenue as originally laid out by the governor and judges of the territory of Michigan, was dedicated to the public as a street and highway extending to the water's edge of the river Detroit, and was from the time of such dedication ever used as a public highway, and that the extension of the said

street towards the centre of the river, has also ever been used." This denial and averment presents the main issue, to which the court will solely direct its attention, considering the other points presented as of minor importance.

The answers of the libelant to the 3d, 5th and 6th interrogatories propounded by the respondents, admits that the wharf is held by him as an exclusive possession, under a conveyance from the city corporation; that that portion of the said Woodward avenue which lies between the original margin of the river, and the wharf leased, has been used as a public street for the space of more than twenty years, and that, during that time the terminus of the said avenue, as used by the public, extended to the water's edge of the river; and that the said wharf is "practically an extension of the said avenue." Satisfactory proof has been exhibited to the same effect; and that, for more than twenty-four years, Woodward avenue was always open to the river, and to the uninterrupted egress and regress of the inhabitants of both sides, and the unmolested arrival and departure of vessels. In September, 1832, large steamers landed there their passengers and discharged there their freight. The lease from the city was executed on the 1st of May, 1856. For the consideration of $350 it conveys to the libelant and his assigns for the term of one year "the sole and exclusive right to enter upon and use the said wharf at the foot of Woodward avenue," for the purpose of mooring his vessels and receiving and landing passengers and freight therefrom, as a ferry between Detroit and the neighboring province of Canada West, "and entitling him to use the same against all boats and vessels other than his own, engaged in any other employment whatsoever, and which may in any way obstruct or interfere in his use of the said wharf as a ferry landing."

Two questions of considerable interest are embraced in the issue: (1) The authority of the city. corporation to make the lease on which the libelant relies, and (2) the extent of the privilege conferred.

I. Whatever authority the city of Detroit as a corporation, possessed over the premises in question, to dispose of or lease the same, must be derived from the statutes of the United States. As a municipal government, it would have only power to regulate, and could only occupy or vacate a public street or highway, dedicated as such, antecedent to its existence as a corporation. Neither can the city be deemed as possessing a riparian right unless as proprietor of the fee. The "town of Detroit" was laid out and platted into lots by numbers, and into streets and public squares by name, under the provisions of the act of congress of April 21, 1806 [2 Stat. 398]. The governor and judges of the then territory of Michigan, were authorized to lay out a town "including the whole of the old town of Detroit," and ten thousand acres adjacent, and "finally adjust all claims to lots therein." Shortly after the authority conferred by this act, on the 27th of April, 1807, the governer and judges, as the agents of the government of the United States, discharged the trust committed to them; and those portions of the soil dedicated as public streets, became such for common use, and beyond the power of resumption by the original proprietor, with whom alone the fee continued. The dedicatory act of the agent was the act of the principal; the deed of the proprietor for the purposes expressed. And thus Woodward avenue was dedicated as a public highway to the water's edge of the river Detroit. By the act of 1842 [5 Stat. 541], "the lands" thus divided into lots, as by the original plat, remaining unappropriated under the act of 1806, were vested in the mayor, recorder and aldermen of the city of Detroit "to be disposed of by them at their discretion;" and the city was authorized to make deeds to purchasers, or "other sufficient conveyances."

The sole object of this act was to confer upon the city authorities, the power which had been exercised by the old territorial land board, and vest in the city the title to the lots remaining unsold, for purposes of improvement. By the act of 1806, the power of the governor and judges was limited to the grant of lots as numbered in the plat of the town which they were directed to "lay out," and no greater power is given to the city by the act of 1842. "To make deeds or other sufficient conveyances" of "the land remaining after satisfying all just claims, and the payment of expenses incurred," are terms in the last statute, not augmenting the power of the city beyond that of the governor and judges, but expressly limiting the donation to the fee of the lots remaining unappropriated. The city obtained no title whatever to the soil of the streets, the fee of which continues in the original dedicator, unless the purchasers of the lots bounded thereby, may be considered as having the fee of the same under their respective grants.

There is no ambiguity in the terms of the grant. One specific object is had in view. To grant the lands remaining unsold under the prior act to the city, to be applied to objects of public improvement: evidently meaning that the proceeds arising from the sale of the unsold lots should be so applied. The public streets remain as originally dedicated and no right of possession is given, and there is no transfer of the fee in them; and, consequently the city cannot occupy them, except for purposes of regulation, either by public buildings, for public use, or give authority to others to do so. The character of the use cannot vary the terms of the grant, or convey that which was expressly withheld. The public squares and streets thus dedicated, are beyond all subsequent change to another purpose, and the corporation is as much inhibited as the private citizen. Neither the governor and judges,

as the old land board had, nor their successors, the city authorities as the new land board, have now any power beyond that of regulation of the streets and public squares. In this is exercised the functions of municipal government, but the power to govern is not, nor does it include the right to sell, lease or exercise over the same any act of ownership.

In the language of the supreme court of the state in the case of People v. Carpenter [1 Mich. 273], "the common council of the city of Detroit have no power to grant the exclusive use of any of the streets to individuals." The exercise of such authority is injurious to public and private rights, and contrary to the act of dedication. Such rights are vested rights—the right of free passage over and through the dedicated public street; and it is not competent, even for the legislature of the state, much less for the common council of the city, to pass any act or ordinance, which would in any wise impair, restrict or defeat the right of way under the act of dedication.

By the recorded plan of the city, confirmed and made of record in 1807, Woodward avenue and most of the parallel streets running at right angles with Jefferson avenue, terminated south at the water's edge of the river Detroit; or, in other words, they run to the river. Such was the declared intention of the dedicator. To that extent they are common to all as highways. Any building, therefore, whether public or private, whether a court house, jail, city hall, market or wharf, erected upon them, either by the corporation or others under their authority, and defeating the main objects of dedication, would amount to an obstruction, and as a public nuisance would be liable to be abated. Unquestionably, the city may improve, ornament and grade for public convenience, either by enlargement or extension, the public streets; and with a view to public accommodation, erect at their termini, in the river, suitable wharves or landings, but, by so doing, such erections become free to the public, as extensions of the streets, and the city has no authority, and can confer none, to exact toll for egress or regress. But these streets are not only the dedicated highways of the city of Detroit, in which the city has no other power than that of regulation, but as highways they have their declared termini in connection with another public highway, national in its character, common to all the inhabitants of the United States, and, by treaty, free to the subjects of a foreign power.

The 4th article of the ordinance of 1787, in declaring the navigable waters leading into the Mississippi and the St. Lawrence, common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and all the states, "without any tax, impost or duty," comprehends the river Detroit, and negates the right of the United States, or of any state, or any subordinate power, by law or ordinance, to exact any fee, charges or impost in its navigation. It is free to all for the purposes of commerce and trade. And the 9th section of the act of the 18th of May, 1796 [1 Stat. 468], is not only declaratory of the same; but in making a distinction between the streams not, and those navigable, where the opposite banks belong to different persons, and enacting that their beds shall belong and be common to both, clearly manifests the intention of the law making power to ordain all rivers actually navigable as common law rivers above the flow of the tide. But the court does not consider this issue to involve the right of a riparian proprietor. The city corporation is not such, and the river being a national public highway, the city authorities cannot appropriate any portion of it to its use so as to obstruct its free navigation. Its wharves or docks must be so constructed as not to impair, but facilitate navigation and commerce; and, as such, be open to the landing of all and the moorage of all vessels, "without tax, impost or duty." The act of dedication of the streets, the declaratory ordinance of 1787, the treaty of 1794, are all in accordance with this position. The streets are free; the river is free. Both may be improved at the expense of the city, for the public benefit, as streets are graded and paved, but not to the detriment of private right thus solemnly and repeatedly established. Any other construction would seem to frustrate the intention of the dedication; for, should the city possess the power to wharf and lease the termini of all the streets communicating with the river, all access to the city from the latter would be subject to "tax, impost and duty," in contravention of the ordinance, and the right of way prescribed by the dedication of 1807.

The leading case cited in the argument, from 19 Barb. 204, of Fowler v. Mott, fully supports this view. The court there declares that "our public highways are equally free to all to the water's edge, if they extend so far. It is a common right to pass from one highway to another, when they adjoin each other. Such is the law of highways upon the land; and there can be no difference in principle, where one highway is upon the land and the other upon the water. Both are free for the passage of all."

Independent of these considerations, which are conclusive, the privilege granted to the libelant by the lease, would not warrant the collection of wharfage. But the lease, in giving him "the sole and exclusive right to use the public wharf for his ferry boats," does not authorize him to charge wharfage as to other vessels mooring there. Conceding the validity of his lease, any obstruction of his privilege, would make the trespasser amenable to another tribunal, and in another form of action. Libel dismissed, with costs.

Case No. 12,146.

RUSSEL v. UNION INS. CO.

[1 Wash. C. C. 409; [1] 4 Dall. 421.]

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

MARINE INSURANCE — INSURABLE INTEREST — INTEREST OF SURETY—FACTOR—ABANDONMENT.

1. Action on a policy of insurance, on the cargo of a vessel, in which the interest of the assured was that of a surety for the payment of the value of the same, in case of its condemnation by a court of appeals in Spain, the cargo having been delivered to him for his indemnity. This is an insurable interest, and may be covered by an insurance on the cargo, without the particular circumstances of the case having been communicated to the underwriters.

[Cited in brief in Hope Mut. Ins. Co. v. Brolaskey, 35 Pa. St. 283.]

2. A factor has an insurable interest in goods, on which he has a lien for advances.

[Cited in Seamans v. Loring, Case No. 12,583; Hancox v. Fishing Ins. Co., Id. 6,013.]

3. The restitution of the property to the original owners, and thus taking it out of the possession of the surety, and depriving him of his means of indemnity, was a loss by one of the perils against which the plaintiff had insured; and he was at liberty to abandon.

[Cited in Excelsior Fire Ins. Co. v. Royal Ins. Co., 55 N. Y. 357.]

4. After a record of the proceedings of a foreign court of admiralty have been read in evidence, without objection, it is too late to object to it in argument.

This was a policy effected by the plaintiff, for all persons interested, on goods on board the Hibberts, at and from Havana to New York, to the amount of ten thousand dollars. The vessel and cargo were taken by a British ship of war; and it appearing, that the vessel and cargo belonged to British subjects, that they had been captured and carried into the Havana, and there proceeded against, she was ordered to be delivered up to the original owners, on salvage. It appeared, by the record of the proceedings before the admiralty court at Halifax, where this sentence took place; that the vessel and cargo were delivered up, by order of the government, at the Havana, to a Mr. Cruset of that place, on his entering into a stipulation, secured by a mortgage on real property, to the amount 32,000 dollars; to be accountable for that sum, the valued amount of vessel and cargo, in case the vessel and cargo should, upon an appeal to the courts in Spain, be condemned as prize. This appeared, by the papers on board, and was confirmed by the depositions of the captain and mates, found in the Halifax record. The vessel and cargo were consigned to Mr. Henry Hill, of New York, by Mr. Cruset; who took a bill of lading in his own name, with orders to sell, and to retain the amount, to answer for his advances and disbursements in the ship, and for his indemnity against the stipulation, which he (Cruset) had entered into; and he was ordered to insure a certain sum on the vessel, and another sum on the cargo. Mr. Russel, for Mr. Hill, wrote to the president of the Union Insurance Company, to get this effected, and sent him a letter from Cruset, in which he mentioned the circumstance of the capture, and delivery to him, on entering into the stipulation; but did not specify precisely, that it was the special interest he (Cruset) had in the property, which he wished to insure. The defendants agreed to take 10,000 dollars on the cargo. As soon as the plaintiff heard of the capture, he gave notice to the defendants; and on hearing of the sentence, he abandoned. The proceedings were read by plaintiff's counsel, without objection; and the only proof of Cruset's interest, appeared from the documents found on board the vessel, and stated in the record. The action was brought for the benefit of Cruset, to recover the sum subscribed.

It was objected, by Dallas & Tilghman, for the defendants: 1st. That the plaintiff had not an insurable interest. 2d. That if he had, he could not cover it on a policy on the cargo. 3d. That, at any rate, he should have disclosed to the defendants the nature of the interest he meant to insure. 4th. That the sentence being, to restore to the original owners, Cruset's lien was not defeated; but he might still resort to them for reimbursement and indemnification; and therefore, there was not a loss. They also contended, that the record was not proper evidence to prove the interest of Cruset; but he ought to have proved it by depositions, or other evidence.

Rawle & Ingersoll, for the plaintiff, on the 1st point, relied on Park, Ins. 9, 12, 13, 270. A factor, having a lien on goods, may cover it under a policy on the cargo. The only instances, where the particular interest must be mentioned, are bottomry and respondentia. An expectation of profit may be insured. Grant v. Parkinson, 1 Marsh. Ins. 111. 3d. That the letter from Cruset, stating his engagement on account of this vessel and cargo, and the stipulation which he had entered into, which was shown to the defendants; was a sufficient disclosure of the interest he meant to insure. 4th. That the loss of the possession by capture, was a loss within the policy. As to the proof of interest, it was contended, that the record having been read without opposition, it was to be considered as evidence.

Ingersoll & Rawle, for plaintiff.
E. Tilghman & Daller, for defendants.

WASHINGTON, Circuit Justice (charging jury). The record of the proceedings in the court of admiralty, having been read without opposition, it is too late to object to it in the argument. Many inconveniences might happen, if the rule were otherwise. The party might be surprised, and lose the opportunity of supplying it by better evidence, if the ob-

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

jection had been made in time. From this record it appears, upon the papers found on board of this vessel, and which are copied into the record, that this vessel and cargo originally belonged to British subjects. That she was captured by a French privateer, brought into the Havana, and there proceeded against; but on what ground, does not appear. That, to avoid the expense to the captors of keeping her there, and the injury to the owners, an order was obtained from the government, to deliver her to a Mr. Frazer, on security, to abide the event of a final decision of the cause in Spain; and in case of condemnation, to pay the sum of 32,000 dollars, at which the whole was valued. Mr. Cruset being applied to, he gave the security, and took from the mate, (the captain having left the vessel,) a bill of lading in his own name. That this bill of lading was endorsed by Cruset, to Mr. Hill of New-York, with orders to sell the vessel and cargo, and to retain the proceeds, to reimburse and indemnify Cruset. This evidence proves the interest of Cruset; and the first question is, whether it was an insurable interest, or not? It is clear, that a factor, who has a lien on goods in his possession, has an insurable interest. It also appears, that even in England, where wager policies are prohibited, that an expected profit may be insured on a valued policy. So the captors of a vessel, who depend on a grant of the prize from the crown, have such an expected interest, that they may insure it: a fortiori, may a special interest, like the present, be insured here; where there is no law which prohibits wager policies. The reason why, in almost every case, the assured is required to prove an interest, arises from the forms of policies, which are generally upon interest, as it may appear. Cruset had complete possession of this property, and had a right to retain it, until he was relieved from his engagements on account of it. Whether he might ever be called upon, in consequence of the stipulation he had entered into, was not more uncertain, than was the interest of the assured, in the cases cited. But he certainly had an interest in the property insured, until he was discharged or indemnified.

2d. The court is of opinion, that this interest might be covered under a policy on the cargo.

3d. The interest which Cruset had, was a lien on this property in his possession, and which was to be sold for his indemnity. The risk insured against, was a loss of this property, and the means of his indemnity. This loss has actually happened by one of the perils insured against, though the property is restored to the original owners; and though the loss may not be total in its nature, if the sentence and restitution should not destroy the lien, yet it is such a loss as the assured might, by abandonment, throw upon the underwriters.

Verdict for plaintiff.

[For hearing on a motion for a new trial, see Case No. 12,147.]

NOTE. The averment of interest in the assured, may be either general or special. Under the former, the plaintiff may give evidence of any interest he may have. It is sufficient not only as to the title or claim of the assured; but also as to the quantum of interest. 2 Marsh. Ins. 509. In a policy on goods generally, the insured may give, as evidence of his interest, a mortgage or special lien. But, bottomry and respondentia, cannot be insured as goods. Id. 613.

Case No. 12,147.

RUSSEL v. UNION INS. CO.

[1 Wash. C. C. 440.] [1]

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

NEW TRIAL — ERROR — WHEN APPLICATION TO BE MADE.

Motion for a new trial, on the ground that the court had allowed a record of a foreign court of admiralty, to go to the jury as evidence; the same not having been legal testimony. The record had been read on the trial, without objections. The court refused to grant a new trial, as the application is too late.

[Cited in Allen v. Blunt, Case No. 217.]

This cause came on upon a rule for a new trial. [Case No. 12,146.] The ground was, that the court was mistaken in point of law, in stating that the papers, which respected the interest of the plaintiff, in the record of the admiralty court at Halifax, was evidence, and therefore, that the plaintiff, not having proved his interest by other evidence, ought not to recover.

Tilghman & Dallas, in favour of the motion, contended, that as the sentence and proceedings, were clearly legal evidence, the defendant's counsel, could not properly have objected to the reading of the whole record; but still, the papers found on board, were not proper evidence, and their omitting to object to the reading of them, did not make them evidence. That in argument, this was contended for, and that that was the proper stage of the cause, to make the objection. Where a record is offered in evidence, the whole must be read. Gilb. Ev. 19, 23. We informed the plaintiff's counsel, before the trial came on, that we should object to their proving the interest by that record.

Ingersoll & Rawle, against the motion. The time to object to improper evidence, is, when it is offered; but it comes too late, after the counsel have begun to sum up; and if part of a record be improper, the objection should be made when it is offered to be read.

Before WASHINGTON, Circuit Justice, and PETERS, District Judge.

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

WASHINGTON, Circuit Justice. I am sorry that this motion is made; for, though every care should be taken to protect insurance companies against frauds, and to give them every legal advantage, where they are legally exonerated from the risk, yet they ought, I think, to refrain from objections which have an appearance of being captious. If, however, they choose to make such, they must, like all other suitors, be entitled to the benefit of them, where they are well supported. It was on this account, that I thought it highly proper, at the trial, that they should allow the record to be read through, without objection, as it was plain, that the defendants relied upon a legal question of great difficulty, connected with the merits; which was, whether the plaintiff had an insurable interest or not? I think the counsel are not obliged, in any case, to make objections, which go merely to form, and which are only calculated to produce delay, or to turn the other party around, to bring another action: and, one or the other of these, would have been the case, had the objection been made in time. The case might have been different, had there been any well grounded reason to question the authenticity of these papers. But, who could doubt, that the papers found on board this vessel, showing the interest of Cruset in the cargo, in consequence of the responsibility he had entered into for the owners, were true and genuine? How else could she have been released? Having a bill of lading for the whole cargo, why should he send with it papers, to prove that he had only a special interest, unless such was the fact? I do not admit, that all the papers and evidence, found in a record of a court of admiralty, form a part of that record, or must necessarily be read, in an action between insured and insurer, because the sentence is read. The sentence and proceedings are certainly proper, to show the condemnation, and the grounds upon which the court proceeded. But, it does not follow, that every paper stuffed into the record, unconnected with the condemnation, and affecting third persons only, must of course be read, if the sentence be.

If an objection was intended to be made to the evidence of the papers found on board, and set forth in the record; it ought to have been taken, when an attempt was made to read them; or at any rate, before the counsel for the plaintiff had finished his opening. Were a different rule to be pursued, great inconveniences and irregularities would follow. If it appeared, that injustice had been done, in consequence of the reading of these papers, it would be a sufficient reason for setting aside the verdict. But there is no ground laid for such a suggestion; and therefore, the verdict ought to stand.

PETERS, District Judge, concurred. He added, that he thought, as Cruset had, in his letter, which was shown to the company, stated, that these papers would be on board, that he was bound to have them there; and, it appearing by the record that they were so, strengthened the position of the plaintiff's counsel, that they were proper evidence.

Rule discharged.

Case No. 12,148.

Ex parte RUSSELL.

In re PAUL et al.

[16 N. B. R. 476.] [1]

District Court, D. Massachusetts. Dec., 1877.

BANKRUPTCY — NOTE INDORSED — PROTEST AND NOTICE—PROOF AGAINST JOINT ASSETS.

Where a firm, which has indorsed a note of one of the partners, becomes bankrupt before the maturity of such note, protest and notice to the firm of its dishonor are not necessary in order to prove it against the joint assets.

In bankruptcy.

LOWELL, District Judge. This case has been submitted to me on a short statement of facts without argument. The note which Mr. A. W. Russell offers to prove against the assets of the firm was made by Joseph F. Paul, and indorsed by Joseph F. Paul & Son. The partners were made joint bankrupts before the maturity of the note, and it was not protested, and no notice was given to the firm of its dishonor. It is settled that where one partner accepts a bill drawn by his firm, or makes a note which his firm indorse, demand on him and notice of his default are unnecessary, because the knowledge of one is the knowledge of all. Porthouse v. Parker, 1 Camp. 82; Rhett v. Poe, 2 How. [43 U. S.] 457. It has been held that if one partner makes the note, and the other indorses it, though for a firm debt, there must be demand and notice, because they are binding themselves separately. Foland v. Boyd, 11 Harris [23 Pa. St.] 476. Here, however, that point does not arise. When the parties, or any of them, to the note or bill are bankrupt, notice is not dispensed with. In the leading case on this subject, Bayley, J., expressed himself somewhat cautiously: "It is not necessary to decide in this case whether, in the event of the bankruptcy of a party entitled to notice, the holder is bound to endeavor to find out his assignees; nor is it necessary to say what would be the case, if such a party's house was shut up, and there were no means afforded there of discovering him or his representatives; for, in this case, the bankrupt's house continued open; the agent of his representatives, the messenger, who was also in some degree his representative, was there, and a notice there would have reached the assignees, etc." Rhode v. Proctor, 4 Barn. & C. 517, 523. Since the decision in that case, it has usually been laid down in the books that before the appointment of assignees there should be notice to the bankrupt, or to the messenger or registrar (in England), and, after the appointment, to the assignees. In a late case, it is held that no-

[1] [Reprinted by permission.]

tice to the bankrupt will in all cases be enough, whether the assignees have been appointed or not. Ex parte Baker, 4 Ch. Div. 795. I suppose the result of the decisions is that notice may be given either to the assignees or to the bankrupt, as the holder may find most convenient. Whichever way it is taken, there would be no necessity for notice here, because the same person is assignee of both the bankrupts; and as to the bankrupts themselves, if they remain capable of receiving notice, they must retain their right to waive it or their liability to having it taken for granted. See, also, as directly in point, Fuller v. Hooper, 3 Gray, 334. Debt admitted to proof.

Case No. 12,149.

RUSSELL v. ALLEN.

[5 Dill. 235; 8 Cent. Law J. 314; 7 Reporter, 614.] [1]

Circuit Court, E. D. Missouri. March 17, 1879.[2]

CHARITIES — CONVEYANCE IN TRUST — BENEFICIARIES.

A conveyance of realty and other property, in trust, "for the purpose of founding an institution for the education of youth in St. Louis county, Missouri," sustained.

Charitable trust for the education of youth in St. Louis county, Missouri, sustained.

This is a bill in equity by the heirs of William Russell, deceased, to subject to their demands certain funds in the hands of Allen, by him received in connection with the grants made. A demurrer to the bill is interposed.

In 1855 the decedent executed to Horner certain conveyances of realty and other property, in trust, "for the purpose of founding an institution for the education of youth in St. Louis county, Missouri." The deed prescribed the manner in which said trustee should execute his trust. The deed expresses that the conveyances were "for the use and benefit of the Russell Institute, of St. Louis, Missouri," and directed that the proceeds of said property should be paid over, "in cash, as often as once in each year, or oftener, if convenient, to Thomas Allen, president of the board of trustees of the said Russell Institute, at St. Louis, Missouri, and his receipt therefor shall be a full discharge of the said" trustee, Horner. There were several deeds executed by the grantor, at the same time, for property in different counties in the state of Arkansas, and the deed before us, of July 19th, 1855, declares as follows: "And, whereas, the said party of the first part hath, by three several other deeds, bearing even date herewith, conveyed to the said party of the second part all his property in the counties of, etc., in the like manner and for the like uses and purposes as herein, now it is hereby declared that all of said conveyances, together with the present one, are made to one and the same person, Horner, for one and the same use and purpose; and that the same are, and are to be deemed, and taken, and accounted for as one trust, according to the conditions of the deeds respectively—it having been intended by said deeds to convey all the remaining property of the said William Russell in the state of Arkansas to the said party of the second part, to and for the use and benefit of the said trustees of the Russell Institute, of St. Louis, Missouri, represented by their president as aforesaid." The bill charges that said Horner paid to said Allen divers sums of money, etc.; that no such institute existed at the date of the grants, or has since been created; that the purposes of the charity are too vague to be enforced, etc., and asks that said Allen be compelled to account for and pay over the funds, etc., so received by him to said heirs.

William Brown, for plaintiff.
Thoroughman & Warren, for defendant.

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

TREAT, District Judge. The legal and equitable propositions involved have been discussed at great length in many English and American decisions, a review of which would require more time and labor than are at our command. Many of those decisions pertain to the force and effect of the statute of Elizabeth, the doctrine of cy-pres, and the power "parens patriæ." In this country, after long doubt and disputation, the doctrine has been established that where a grant or devise for charitable uses is made, and the donee is capable of executing the trust vested in him, the grant or devise should be upheld if the beneficiary or charitable object is stated in such a manner or with such distinctness that chancery can ascertain what it is, so as to enforce the trust. In construing such instruments, equity adopts, not the old rule favoring the heir, as in England, but the juster rule of effecting the intent of the grantor or devisor. In England, the doctrines of cy-pres and of "parens patriæ" were resorted to mainly to overcome the general rule which, under British institutions, favored the heir and perpetuation of estates. Under American institutions, no such policy, and, consequently, no such general rule, ever obtained. The just rule worked out in English courts, through the doctrines or powers named, although such powers do not exist in this country, is, as to charitable uses made, though not technically, yet, to a large extent, practically, applicable in this country. By this it is not meant that the cy-pres doctrine has any force here, but merely that, for the purpose of upholding conveyances for charitable uses, American courts of equity will, wherever by a liberal construction it can be done, ascertain the designated or de-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 7 Reporter, 614, contains only a partial report.]

[2] [Affirmed in 107 U. S. 163, 2 Sup. Ct. 328.]

signed charity, and enforce the intention of the grantor. The various decisions of the United States supreme court, and of other courts, particularly within the past decade, are based on the sound and just doctrine that the intention of the grantor or devisor shall prevail. Hence, when, by the terms of the grant, it is clear that the heir was to be cut off, he will be held to be cut off if the trust can be, under even a liberal construction, upheld for its designed charitable purpose.

Of course, if the grant is too vague and indefinite to enable the chancellor to detect to what charity the grant referred or was applicable, then, as the estate was not conveyed away, it (the estate) would necessarily follow the prescribed course of descent. In other words, if the decedent had not disposed of his property otherwise, the law of descents and distributions would govern. In the light of these doctrines, now fully recognized, this court must look to the conveyances in question. The purpose of the grantor was to found the Russell Institute—to have the avails of the property conveyed vested ultimately in a board of trustees for said institute, and, in the meantime, to have yearly and other payments of said avails or proceeds paid over to Allen, president, and, what is very significant, to him as representing said trustees.

It is obvious that the grantor knew that no such institute existed at the date of the grant; for the grant was to found such an institute in the future. In that condition of affairs, he expressed, with sufficient clearness, that, as the fund should be created from time to time by Horner, the trustee, it was to be paid over to Allen, as president, whose "receipt therefor was to be a full discharge;" and that, at the expiration of the ten years named, Horner's trust was, as soon as practicable thereafter, to cease, and all funds then in his hands to be paid, in the same manner as prior payments had been made, to said Allen, who, as president, was to represent said board of trustees.

It is obvious that the intention of the grantor was to have the proceeds of the property lodged in the hands of Allen, not for his individual benefit, but for the purpose of founding thereafter the designated institute, of which Allen was to be president.

In the discharge of his trust, then, it is for Mr. Allen, at the proper time, to cause such an institute to be organized, whose trustees will shape the institute and determine the persons to whom and the manner in which endowment shall be applied.

It is obvious that the grantor placed the largest measure of confidence in Mr. Allen with respect to the manner of founding such institute or calling it into corporate existence. Until sufficient funds were received therefor, such an institute could not be beneficially founded. Of course, Mr. Allen could not unreasonably delay action, nor postpone the time indefinitely. In other words, the confidence reposed, if abused by unnecessary delay or otherwise, could be controlled by the supervision of the proper court of equity, when thereto duly called upon to act. It seems that the purpose of Mr. Russell, in creating or providing for the needed endowment, did not contemplate that the result could be achieved before the lapse of ten years; for the annual payments to Allen from the date of the conveyances, it is obvious, would not furnish funds sufficient for founding such an institute at the expiration of the first or of any succeeding year prior to the expiration of the tenth year, when Horner's trust was to cease by forced sales of the property, with the exceptions named. In the meantime, Allen, receiving the annual payments and giving to Horner acquittances, was to retain the accumulating funds, until, at the expiration of the ten years, he should be able to ascertain the aggregate amount applicable to the charitable use. He could not ascertain the amount before that time, and, hence, any previous attempt to call such an institute into corporate existence would have been premature. It appears that the controlling intent of the grant is that the accumulating funds should be placed in Allen's hands, so that at the expiration of ten years he could cause such an institute to be founded, under the corporation laws of Missouri, with a board of trustees, of which he was to be president; and that when said corporation had been so created, he should turn over to it the aggregate funds in his hands. The board would thus be enabled to determine, in its discretion, with due regard to the intent of the founder, what should be the scope and details of the institute. The ultimate determination of the mode of administering the charity, whether by free or paid instruction to pupils, etc., would be for that board's action and discretion when organized.

There are many interesting questions involved in the administration of such charitable uses which are not before us for decision, such as the proper forum and parties to compel due and prompt administration of the "use" when the person charged to act fails to do so—that is, whether a United States court, before which the subject comes incidentally, can lay hold of and compel the proper administration, under its supervision, or whether application therefor must not be made exclusively to the more appropriate state courts. However that may be, in the absence of any proceeding by Allen in the nature of a cross-bill, asking the direction of this court as to the manner in which he shall execute his trust, and in the absence of any prayer of the plaintiffs in this case looking to that end, we are not called upon to decide with respect thereto. We must dispose of the questions before us as they are presented, and not go beyond them. The plaintiffs are here in hostility to the existence of the indicated fund, denying that there is such a fund for the alleged charitable uses, and claiming that the funds rightfully belong to them, per-

sonally. They do not ask for the administration of the fund to charitable uses, whereby their personal claim thereto would be defeated; and, consequently, this court has only one proposition to decide, viz.: whether, under the grants made and the allegations of the bill, the plaintiffs have shown any right in themselves, personally, to the fund in question. From what has already been stated, it is clear that they have no such personal right —that it is evident the grantor meant to cut off his heirs as to the property granted, and that the charity which was to be the object of his bounty is sufficiently defined to enable the funds created to be definitely applied to the charitable use contemplated.

The demurrer to the bill is sustained. Bill dismissed.

[On appeal to the supreme court, the decree of this court was affirmed. 107 U. S. 163, 2 Sup. Ct. 328.]

Case No. 12,150.

RUSSELL v. ASHLEY.

[Hempst. 546.] [1]

Circuit Court, D. Arkansas. May, 1847.

DEPOSITION—WITNESS MOVING INTO JURISDICTION AFTER DEPOSITION TAKEN—COSTS.

1. The deposition of a witness, residing more than one hundred miles from the place of trial, may be taken de bene esse in or out of the district, in suits at common law, under the judiciary act of 1789 (1 Stat. 88).

2. After it is taken, and before trial, if the witness moves within one hundred miles, still the deposition may be read, unless the party objecting, shall show that fact, and that it was known to the opposite party, in time to have had the witness subpœnaed. [Patapsco Ins. Co. v. Southgate] 5 Pet. [30 U. S.] 613.

[Cited in Merrill v. Dawson, Case No. 9,469; Whitford v. Clark Co., 119 U. S. 525, 7 Sup. Ct. 308.]

3. A witness residing more than one hundred miles from the place of trial, is beyond the coercive power of a subpœna, whether he resides in or out of the district; and the party who issues a subpœna for him, must pay the costs attending it, and cannot throw them on the opposite party.

4. The officer taking depositions should certify each item of costs, and transmit the evidence of services rendered, so that the court may see that the services have been performed, and that the charges are such as the law allows.

5. Costs retaxed, on the principle above stated, and errors ascertained.

6. Process act of 1828, law of Arkansas as to subpœnas; those addressed to the marshal adopted by usage of the court.

7. Mode of taking depositions under 30th section of act of 1789; subpœnaing witnesses, and rules of court, explained in note.

[This was an action by William Russell against Chester Ashley. Heard on a motion for retaxation of costs.]

Daniel Ringo and F. W. Trapnall, for plaintiff.

Chester Ashley, in pro. per.

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

JOHNSON, District Judge. The defendant objects to the costs taxed against him upon the subpœnas, and the service thereof upon witnesses in the case, upon the ground that the subpœnas are void on their face, being directed to the marshal instead of to the witnesses themselves. By the act of congress of May 19, 1828 (4 Stat. 278), to regulate the processes in the courts of the United States, and made applicable to Arkansas by the act of August 1, 1842 (5 Stat. 499), it is enacted in substance, that the forms of mesne and final process, except the style, shall be the same in the courts of the United States, as in the highest state courts of original and general jurisdiction; subject, however, to such alterations and additions, from time to time, as the courts of the United States shall, in their discretion, deem expedient. The forms of subpœnas, as well as every other process, then, must conform to those used in the circuit courts of this state, unless this court has deemed it expedient, under the power vested in it by congress, to alter the same. A subpœna for a witness, by the laws of this state, is to be directed to the person to be summoned, and not to an officer commanding him to summon the witness. Rev. St. p. 774. The subpœnas which have issued from this court, since its first organization, have uniformly been directed to the marshal of the district, and not to the witnesses themselves. Although this form of subpœna has not been prescribed by an express rule of this court, yet it has received its sanction ever since its creation, and the legality of this form has never been called in question until the present time. The power of this court to adopt the form of a subpœna cannot be disputed, for it is expressly conferred by act of congress. The question then is, Has this court adopted this form? Uniform practice in the use of this form, from the origin of the court to the present time, would seem to be sufficient to establish the fact that the present form of the subpœna had been adopted. Uniform practice, acquiesced in by the bar, and never contested by any one, for a period of ten years, as firmly establishes that practice and makes it the act of the court, as if it had been prescribed by the written rules of the court. The subpœnas were not void. But the variance between the subpœna provided by the state law, and that used in this court, is in form only. They are substantially the same. In each of them the witness is commanded to appear at court and testify, and each may be served by an officer of the court or by a private person, the latter making oath to the service. They are, in fact, precisely the same, except in form. But even if they were substantially different, it is clear that the court has the power to alter the form of the writ; and the court in effect has exercised that power in the manner alluded to.

The defendant objects to the item in the taxation of costs against him for the subpœna and its service on William F. Moore, a

witness who resided more than one hundred miles from this place, and whose deposition the plaintiff had taken before the service of the subpœna on him. This objection is well taken. The deposition of a witness residing more than one hundred miles from the place of trial, is to be taken, not de bene esse, but in chief, and he cannot charge the defendant with the costs of taking his deposition, and also the costs of summoning him as a witness. Having used the deposition, he cannot charge the defendant with having him summoned to appear and give evidence orally in court. This item is disallowed. He also objects to the costs incident to suing out two commissions for the purpose of taking Moore's deposition. This objection is also well founded. I can perceive no necessity for more than one commission. These costs are disallowed. He also objects to all the costs incident to the taking the rejected deposition of Moore, including the fees of the clerk of this court. I deem this objection well taken, and these costs are disallowed as against the defendant. The certificate of the justice of the peace of the costs of taking depositions before him, is to be regarded so far only as it states legal items of costs incurred before him. All beyond that is disallowed. Let the costs be retaxed in accordance with this opinion. Ordered accordingly.

The plaintiff moved for a reconsideration.

JOHNSON, District Judge. Upon reconsidering the opinion previously given in this case, I am satisfied I erred in stating "that the deposition of a witness, residing more than one hundred miles from the place of trial, is taken, not de bene esse, but in chief." In a suit at common law, the deposition of a witness so residing, is taken de bene esse, or conditionally; the only condition, however, being, that the witness shall remove to a place less than one hundred miles to the place of trial, before the deposition is offered to be read; and, unless this shall be shown by the party objecting, the deposition may be read at the trial, without the service of a subpœna upon the witness. Merrill v. Dawson [Case No. 9,469]. Indeed, a witness residing more than one hundred miles from the place of trial, is beyond the coercive power of a subpœna. The party may take his deposition, but cannot compel him to attend at court, and give oral testimony. This had been expressly held by the supreme court of the United States, in the case of Patapsco Ins. Co. v. Southgate, 5 Pet. [30 U. S.] 615. The party desiring his testimony has no right to issue a subpœna to coerce his attendance, and if he does he must pay the costs incident thereto, and not throw them upon the other party.

One other principle stated in the former opinion requires explanation. It relates to the costs of taking depositions. It is the duty of the person before whom depositions are taken, to state and certify each item of costs before him, that the court may see that the charges are such as the law allows, and that the services have been performed. In this case, the justice before whom the depositions were taken has not sent up a statement of the items of costs before him, but has certified them as follows:—"Justice's fees, $3.17; constable's, $2.18; witnesses', $2.50." This certificate is inadmissible to prove the amount of costs incurred before him. He should have stated the items of costs, and transmitted the evidence of the services rendered, that this court might see that the charges were legal, and such as the law allows. This certificate, however, is evidence that he claimed the fees allowed him by law. It is proper, then, to look at the services rendered by the justice to ascertain the amount of fees to which he was entitled; and in doing so, it appears he was entitled to the sum of $3.17 for taking the five depositions. Rev. St. p. 395. It is contended that the fees to the constable of $2.18, and to the witnesses of fifty cents each, ought to be allowed. There is no proof that the constable rendered any service; nor is there any proof that the witnesses were summoned to testify before the justice, and that they claimed to be paid therefor, except the statement of the justice, of $2.18 as constable's fees, and $2.50 as witnesses' fees. This is not sufficient. He should have certified the items of the services performed by the constable, and that the witnesses were summoned before him to testify, and that they claimed to be paid for their attendance. Governed by the principles stated in this opinion, and looking into the taxation of the costs, I find that the defendant has been illegally taxed with costs, to the amount of eighteen dollars and forty-six cents, which he has paid upon the execution against him. The plaintiff must refund and pay to the defendant that sum, together with the costs of the motion for a retaxation. Ordered accordingly.

NOTE. The mode of obtaining proof by depositions in suits in equity and at law, in the courts of the United States, depends upon various enactments of congress, not altogether clear and explicit. In the common law courts of England, the practice was this: When a material witness resided abroad, or was going abroad, or from sickness, age, or infirmity, was unable to attend the trial, the party needing his testimony might move the court in term time, or apply to a judge in vacation, for an order or rule to examine him on interrogatories de bene esse before any of the judges of the court, if he resided in London, or if in the country or abroad, before commissioners specially appointed. The rule or order, however, for this purpose, could not be obtained, unless by the consent of the opposite party; and hence, if such consent was withheld, the common law courts possessed no power to permit the testimony to be taken. The most that the court, in the exercise of a sound discretion, could do, was to postpone the trial for a reasonable time, to afford the party an opportunity of applying to the court of chancery for a commission for that purpose. 2 Tidd, Prac. 740; 1 Bos. & P. 210; 3 Bl. Comm. 383; 1 Phil. Ev. 16. When con-

sent was given and a deposition taken, it was considered as being taken de bene esse, or conditionally, that is, that the deposition might be read at the trial by first showing reasonable exertions to obtain the personal attendance of the witness. The death of the witness, inability to find him after diligent search; residence or absence beyond the jurisdiction of the court; incapacity to testify, as where he had become a lunatic, or infamous, or interested; or inability to attend at the trial, from age, sickness, or infirmity, were among the instances which authorized the reading of the deposition as testimony. 1 Starkie, Ev. 264 et seq., and authorities there cited; 2 Tidd, Prac. 741. When consent was withheld, the party was then obliged to resort to a court of chancery for a commission to take the deposition of the witness. It was a proceeding in which equity had a general jurisdiction to prevent a failure of justice. It was a regular bill, praying for a commission to examine witnesses in aid of a trial at law; and it was necessary to show the pendency of the action, the materiality of the testimony, and due diligence and inability to procure it by any of the means which the common law court was competent to afford. The commission was not grantable of course; but rested in the sound discretion of the chancellor, in view of all the circumstances of the case. And it was competent for the court, by injunction, to stay proceedings at law, to afford time to obtain the testimony. Eden, Inj. 112. But that circuitous mode has been shortened in England by statute 1 Wm. IV. c. 22, § 4; and now the common law courts are authorized, upon the application of either party, to issue a commission for the examination of witnesses at places out of their jurisdiction. But the jurisdiction of courts of equity is not taken away, but still exists. 2 Daniell, Ch. Prac. 1097; 4 Sim. 546.

The principal provision, as to taking depositions in the courts of the United States, is to be found in the judiciary act of 1789 [1 Stat. 88] § 30, and is as follows: "That the mode of proof, by oral testimony and examination of witnesses in open court, shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law. And when the testimony of any person shall be necessary in any civil cause depending in any district in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient or very infirm, the deposition of such person may be taken de bene esse before any justice or judge of any of the courts of the United States, or before any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court, or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause, provided that a notification from the magistrate before whom the deposition is to be taken to the adverse party to be present at the taking of the same, and to put interrogatories if he think fit, be first made out and served on the adverse party, or his attorney, as either may be nearest, if either is within one hundred miles of the place of such capture, allowing time for their attendance after notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles travel. And in causes of admiralty and maritime jurisdiction, or other cases when a libel shall be filed, in which an adverse party is not named, and depositions of persons circumstanced as aforesaid, shall be taken before a claim put in, the like notification as aforesaid shall be given to the person having the agency or possession of the property libelled at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid shall be carefully examined and cautioned and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they were taken, or until they shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any given to the adverse party, be by him the said magistrate sealed up and directed to such court, and remain under his seal until opened in court. And any person may be compelled to appear and depose as aforesaid, in the same manner as to appear and testify in court. And in the trial of any cause of admiralty or maritime jurisdiction in a district court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court that probably it will not be in his power to produce the witnesses there testifying before the circuit court, should an appeal be had, and shall move that their testimony be taken down in writing, it shall be so done by the clerk of the court. And if an appeal be had, such testimony may be used in the trial of the same, if it shall appear to the satisfaction of the court which shall try the appeal that the witnesses are then dead or gone out of the United States, or to a greater distance than as aforesaid from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at court; but not otherwise. And unless the same shall be made to appear on the trial of any cause, with respect to witnesses whose depositions may have been taken therein, such depositions shall not be admitted or used in the cause. Provided, that nothing herein shall be construed to prevent any court of the United States from granting a dedimus potestatem to prevent a failure or delay of justice, which power they shall severally possess; nor to extend to depositions taken in perpetuam rei memoriam, which if they relate to matters that may be cognizable in any court of the United States, a circuit court, on application thereto made as a court of equity, may, according to the usages in chancery, direct to be taken." 1 Stat. 88–90. The commissioners appointed under the act of congress of February 12, 1812 (2 Stat. 679), by the courts of the United States to take affidavits and acknowledgments of bail, were expressly authorized by the act of March 1, 1817 (3 Stat. 350), to take depositions under the foregoing section; and so they are to be added to the number of those competent to take depositions. Conk. Prac. 56, 253. Thus it will be seen that the 30th section of the judicial act of 1789 [supra] authorizes the deposition of a witness to be taken "who shall live at a greater distance from the place of trial than one hundred miles;" and this provision applies equally to the depositions of witnesses living within or without the district. [Patapsco Ins. Co. v. Southgate] 5 Pet. [30 U. S.] 616. Notice of time and place must be given to the opposite party, or his attorney, whichever may be nearest, provided either is within one hundred miles of the place where the testimony is to be taken, and after notification time is allowed for attendance, which is prescribed to be not less than at the rate of one day for every twenty miles travel, excluding Sundays. If neither the adverse party nor his attorney is within that distance, notice is not necessary; and if the deposition is in other respects regular, it is admissible as evidence. 1 Stat. 89.

The main feature in a deposition of this kind is the distant residence of the witness, and which is the reason of resorting to this mode of procuring testimony. The authority to take the written testimony of a witness is given for

the convenience of suitors; but as that authority is in derogation of the rules of the common law, it must be strictly pursued, and it is therefore necessary to show that the requisites of the law have been complied with before such testimony is admissible. The certificate of the officer who takes the deposition is good evidence of the facts therein stated; and if the facts necessary to bring a case within the provisions of the law are sufficiently disclosed in such certificate, the deposition is entitled to be read; but no presumption can be admitted to supply any defects in taking the deposition. Pettibone v. Derringer [Case No. 11,043]; U. S. v. Smith [Id. 16,332]; Jones v. Neale [Id. 7,483]; Bell v. Morrison, 1 Pet. [26 U. S.] 355, 356; Patapsco Ins. Co. v. Southgate, 5 Pet. [30 U. S.] 617. The witness must be sworn or affirmed to testify the whole truth, the testimony reduced to writing by the magistrate, or by the deponent in the presence of such magistrate, and then subscribed by the witness. It has accordingly been held, that a deposition reduced to writing by the witness himself, and formal in every respect, with the exception that the magistrate did not certify that the deposition was reduced to writing by the witness in the presence of the magistrate, was inadmissible; the court remarking, that where evidence is sought to be introduced contrary to the rules of the common law, something more than a mere presumption should exist that it was rightly taken, and that there ought to be direct proof that the requisitions of the statute have been fully complied with (Bell v. Morrison, 1 Pet. [26 U. S.] 356), which proof, as will be perceived from the same case, is properly made by the certificate of the magistrate taking the deposition (Conk. Prac. (2d Ed.) p. 255; U. S. v. Smith [supra]). The act of congress then proceeds to declare, that a deposition so taken shall be retained by the magistrate until he deliver the same with his own hand into the court for which it was taken, or shall, together with a certificate of the reasons of taking the same, and of the notice, if any was given to the adverse party, be by such magistrate sealed up and directed to such court, and remain under his seal until opened in court. 1 Stat. 89. The mode of transmission is not prescribed by the act; and it was doubtless intended to be left to the ordinary and usual means of conveyance resorted to in the business affairs of life. In practice, it is usual to employ the mail for that purpose; and perhaps it would be most prudent to do so where the mail facilities will allow it. In the treatise of Judge Conkling, it is, however, stated, that a suitable private agent may be employed. That is undoubtedly within the spirit and intention of the act of congress. Conk. Prac. (2d Ed.) 255. A deposition, therefore, may be transmitted by the mail, by a steamboat or vessel, or a private individual; for these are means of conveyance indiscriminately used in business transactions, and it is not to be supposed that congress intended to provide for a different or exclusive mode of transmission. If that had been the intention, the mode would have been specifically designated.

The deposition cannot be opened out of court, except by consent of parties; and if it is, it is a fatal objection to its admissibility, as was decided in the case of Beale v. Thompson, 8 Cranch [12 U. S.] 70; 3 Pet. Cond. R. 35.

A deposition taken on account of the residence of a witness more than one hundred miles from the place of trial, cannot be considered as taken de bene esse, according to the usual meaning of that term. The only contingency on which a deposition thus taken cannot become absolute, is where the witness moves within one hundred miles before trial, and that fact is known to the opposite party in time to subpœna him to testify. The onus of proving this rests on the party opposing the admission of the deposition. [Patapsco Ins. Co. v. Southgate] 5 Pet. [30 U. S.] 617. But in the other instances mentioned in the 30th section of the judicial act, the party offering the deposition must show that the disability of the witness to attend personally still continues, the law presuming it temporary. Id. In Evans v. Eaton, 6 Wheat. [19 U. S.] 426, a deposition had been taken according to the state practice, instead of being taken pursuant to the provisions of the act of congress of 1789, and had been excluded. The supreme court, in passing upon this point, said: "It is not pretended that the deposition was admissible according to the positive rules of law, or the rules of the circuit court. No practice, however convenient, can give validity to depositions which are not taken according to law, or the rules of the circuit court, unless the parties expressly waive the objection, or by previous consent agree to have them taken and made evidence." Without pretending to determine the precise scope of power which is thus recognized in the circuit courts to adopt rules with regard to taking testimony, it is clear enough that it recognizes the power to adopt the state practice on that subject, by appropriate rules for that purpose. The exclusion of the deposition in that case was vindicated on the ground that it was not taken pursuant to any rule of court, nor the act of congress; thus admitting that if it had conformed to a rule of court, it would have been admissible. In Buddicum v. Kirk, 3 Cranch [7 U. S.] 293, Chief Justice Marshall says there are two modes of taking depositions under the act of congress. By the first, notice in certain cases is not necessary; but the forms prescribed must be strictly pursued. By a subsequent part of the same section, depositions may be taken by ded mus potestatem, according to the common usage. Of the deposition in that case, which was taken by dedimus potestatem in Virginia, he says: "The laws of Virginia are to be referred to on the subject of notice. Those laws do not authorize notice to an attorney at law. The word attorney in the act of assembly means attorney in fact." This case shows satisfactorily the meaning that is to be attached to the mode of taking testimony by dedimus potestatem, according to common usage. The phrase, "common usage," cannot refer to any common law usage or custom, because the taking of testimony in writing, so far from being a common law right, depends upon statutory provisions. It must necessarily refer to state usage, sanctioned by statute law, pointing out a particular mode of taking testimony. And accordingly, in the case last cited, the then chief justice proceeded to determine the validity of a notice according to the law of the state of Virginia, where the deposition was taken, and to give a construction to the state law with regard to the point of notice.

By referring to the rules of the district court for the Northern district of New York, it will be perceived that commissions to take the examination of witnesses resident without the district might issue in the manner and subject to the regulations, so far as the same were applicable, mutatis mutandis, prescribed by the Revised Statutes of New York (Conk. Prac. Append. p. 540); and it is likely that most if not all the courts of the United States have a rule of the like character, adopting the state practice as to taking depositions. The circumstances under which a dedimus potestatem will be issued, and the mode of obtaining, executing, and returning it, in the several districts, depend upon the laws and practice of the several states, and the rules of the several courts of the United States. Conk. Prac. 258; [Buddicum v. Kirk] 3 Cranch [7 U. S.] 293. On the 26th June, 1839, the following rule was adopted by the circuit court of the United States for the district of Arkansas: "13. It shall be lawful for the clerk of this court, in vacation, to make and enter rules, and issue commissions for taking the depositions of witnesses, to be read as evidence in any suit pending, or which may hereafter be pending in this court, upon the application of either party interested." And on the 19th July,

1841, adopted the following additional rule: "16. Ordered, that from this time, either party to any suit pending in this court shall be at liberty to take depositions, either in the manner prescribed by the laws of this state, or in conformity to the several acts of congress in that regard, as well before as after issue joined in such suit; and depositions taken at any time after suit commenced, either under the laws of the United States, or by rule entered in open court, or in vacation, may be used on the penal trial or hearing of such suit, in the same manner as though such depositions had been taken after issue joined." The law of Arkansas, as to taking depositions, will be found in the Digest, pp. 431–435, c. 55. The forms for taking depositions and giving notices, where notice is necessary under the 30th section of the judicial act, will be found in Conk. Prac. Append. pp. 571–574; also the form of a dedimus potestatem, page 561; and the form of subpœna to compel attendance of witnesses before commissioners, p. 562. By the act of March 2, 1793 (1 Stat. 335), subpœnas for witnesses may run to all places in or out of the district, not more than one hundred miles distant from the place of holding the court, at which the attendance of the witness is required. [Sergeant's Lessee v. Biddle] 4 Wheat. [17 U. S.] 511. And by an act of congress of January 24, 1827, "to provide for taking evidence in the courts of the United States in certain cases" (4 Stat. 197), provision is made for issuing subpœnas, and subpœnas duces tecum, for witnesses to appear and testify before commissioners, and punishing witnesses for disobedience. But they are not required to go out of the county where they reside, nor more than forty miles from their residences, for that purpose. And they cannot be punished for contempt, unless their fees for going to and returning from, and one day's attendance at the place of examination, shall be paid or tendered at the time of serving the subpœnas.

The act of August 23, 1842 (5 Stat. 517, 518), provides as follows:—

"Sec. 5. That the district courts, as courts of admiralty, and the circuit courts, as courts of equity, shall be deemed always open for the purpose of filing libels, bills, petitions, answers, pleas, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings whatever, preparatory to the hearing of all causes pending therein upon the merits. And it shall be competent for any judge of the court, upon reasonable notice to the parties in the clerk's office, or at chambers, and in vacation as well as in term, to make and direct, and award all such process, commissions, and interlocutory orders, rules, and proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

"Sec. 6. That the supreme court shall have full power and authority, from time to time, to prescribe and regulate and alter the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings in suits at common law or in admiralty, and in equity, pending in said courts; and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering, and enrolling decrees; and the forms and modes of proceeding before trustees appointed by the court, and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein."

Under this authority, the supreme court, on the 2d of March, 1842, promulgated "rules of practice in suits in equity in the circuit court," which took effect on the 1st of August, 1842.

The following relate to testimony in equity causes:—

"67. After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same, in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue ex parte. In all cases the commissioner or commissioners shall be named by the court, or by a judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.

"68. Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition, taken under the acts of congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable."

"70. After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged or infirm, or going out of the country, or that any of them is a single witness to a material fact, the clerk of the court shall as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners, as a judge of the court may direct, to take the examination of such witness or witnesses de bene esse, upon giving due notice to the adverse party of the time and place of taking his testimony."

"78. Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon, by order of the court, or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in court. But nothing herein contained shall prevent the examination of witnesses viva voce, when produced in open court, if the court shall in its discretion deem it advisable." These rules sufficiently indicate the mode and manner of taking testimony in suits in equity in the courts of the United States, and need no comment.

Case No. 12,151.

RUSSELL v. BARKMAN.

[Betts, Scr. Bk. 139.]

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

ADMIRALTY—JURISDICTION—WAGES—CHARACTER OF SERVICE—STATE STATUTE.

[This was a libel by Anthony Russell against Frederic J. W. Barkman.]

Held that a person not employed as a

mariner, and merely placed on a vessel secured to the wharf, as a keeper, cannot sue in admiralty for his compensation. Held that the state statute giving a lien on the vessel, for such services, imparts no jurisdiction to the U. S. courts in admiralty.

The court will only execute the statutes in cases which in their nature are of maritime jurisdiction. Also held upon the testimony, that the libellant does not prove anything due him beyond the amount paid him for his services by the respondents. Libel dismissed, with summary costs.

RUSSELL (BARBOUR v.). See Case No. 971.

Case No. 12,152.

RUSSELL v. BARNEY.

[6 McLean, 577.] [1]

Circuit Court, N. D. Illinois. July Term, 1855.

EJECTMENT—DEFENSES—LIMITATION — CERTAINTY OF CLAIM.

1. The 8th section of the revised statute of the 3d of March, 1845 [Rev. St. Ill. p. 104], requires three things to protect the tenant in possession. 1. He must have entered upon the land in good faith, under color of title. 2. He must have been in possession for seven years, before suit was brought. 3. He must have paid all taxes assessed on the land during that period.

2. To protect the possession under the ninth section, two things only are required: 1. Color of title made in good faith. 2. He must have paid all taxes assessed on the land seven years before suit was brought. The above sections impose a limitation on titles.

3. On the grounds stated, they declare the land shall be held and adjudged to belong to the occupant or the person who has, for seven years, paid the taxes.

4. The act does not operate directly on the title, but conditionally. It is a statute of limitations, and therefore, does not impair the obligation of the contract.

5. An individual must claim under one section, and cannot claim under both. Having been in possession less than seven years, he cannot claim under the 8th section, nor can he claim under the 9th section where the land is not vacant and unoccupied for seven years. Under this section, the tenant must bring himself strictly within the statute.

[This was an action in ejectment by James B. Russell against John Barney.]

Mr. Weed, for plaintiff.

Mr. Peters, for defendant.

BY THE COURT. This is an ejectment brought to recover a tract of land in the possession of the defendant, and which he claims under a tax title, having paid the taxes thereon for seven years before the institution of this suit. It is admitted the defendant, resting only on his deed from the auditor on the tax sale, could not maintain his right, as there are in the proceedings prior to the sale, certain defects, which would be fatal to his title. But he does not rest his defence on his tax deed, although upon its face it is prima facie a good title; but he relies on the act of 1839, republished in the Revised Statutes of 1845, the 8th section of which provides, that "every person in the actual possession of lands or tenements, under claim or color of title, made in good faith, and who shall for seven successive years, continue in such possession, and shall also, during said time, pay all taxes that are legally assessed on such lands and tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession by purchase, devise, or descent, before said seven years shall have expired, and who shall continue such possession, and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section." There are three essential requisites, under the above section to constitute a valid defense in this case. First, the defendant, in the purchase at the tax sale and obtaining the deed, must have acted in good faith. He must have made the purchase with the belief that he was acquiring a good title under such sale; and the deed upon its face must purport to convey a good title. And this is wholly inconsistent with any fraudulent contrivance or unfairness in the purchase, or any knowledge, at the time, that the sale was void. In the second place, he must have entered into the possession with an honest intention to occupy it, believing it to be his, and that possession must be continued by him or his assignee for the term of seven years, before an action for the title shall be brought. In the third place, he or his assignee must not only have remained in possession for seven years, but he must have paid all taxes legally assessed thereon. These three requisites having been complied with, the statute declares, "he shall be held and adjudged to be the legal owner of the land."

What is the character of this act. It varies somewhat in form from an ordinary statute of limitations. But in considering an act we must regard its effect rather than its phraseology. A statute of limitations in regard to real estate generally provides that "every real possessory action shall be brought within —— years next after the right or title accrues, and not after." Now the right of action accrues so soon as an adversary possession is taken, and the effect is, if the action be not brought before the expiration of the time specified, that the right of entry is gone. In other words, his right is declared to be unavailable.

The above, does not in terms render the title of the original owner inoperative and void, but it takes from him the means of recovery. The right of entry is gone, and without this his interest in the land, in effect, is extinguished. And this consequence results from

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

the adversary possession of the defendant. The eighth section above cited provides, that the person whose possession and payment of taxes bring him within its provisions, shall "be held and adjudged the legal owner." In both cases the claim of the occupant is protected, and the effect to both parties is the same. The former owner has lost his right of entry on the premises, and is barred; and in the other case the owner is barred, by the right given to the occupant under the statute. In both cases the title of the former owner is barred. Barred from bringing his action, in the one case, and in the other, by the paramount right of the occupant. Statutes of limitations are founded upon public policy. They have been adopted in all civilized countries, whether under the civil or the common law. They have had a salutary effect in giving quiet and greater certainty to titles of real estate.

The objection that this section acts upon the title and not upon the remedy of the owner, is more specious than sound. Whether the statute operate upon the right of remedy or the right of property, in a case stated, it produces the same result to the original owner. In either case his title is without effect. The objection that the statute cannot operate except on titles acquired subsequent to its date, is not sustainable. Statutes of limitations affect all titles to real estate without having regard to their dates, as they have upon personal obligations. The question is, has the statute run the time limited, against the title claimed, or the chose in action declared on. Whether the statute provide any savings for disabilities, is a matter of policy, addressed to the discretion of the legislature, but does in no respect affect its power. The 8th section is not indefinite as to time. It provides that if any person shall remain in possession of lands or tenements seven successive years, under a color of title made in good faith, and shall pay the taxes during that period, he shall be held and adjudged to be the legal owner. If he remain in possession a less number of consecutive years, or shall fail to pay the taxes for the same time, he has no claim under the section. But in this case, although the defendant may have paid the taxes for seven successive years, it is admitted that he has occupied the premises in controversy only a part of that time. He, therefore, cannot defend his possession under the 8th section of the act. The claim he asserts, must rest upon the 9th section, or, partly, on both. The 9th section provides that, "whenever a person having color of title, made in good faith, to vacant and unoccupied land, shall pay all taxes legally assessed for seven successive years he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land, to the extent and according to the purport of his or her paper title." And the benefits of the statute are extended to purchasers under the tax payer. This section dispenses altogether, with an adversary possession, by which notice to the original owner is presumed. This is a new and an extraordinary provision in a statute of limitations. It requires only a color of title for the land made in good faith, and the payment of the taxes assessed upon it, for seven successive years, to protect the possession of the occupant. The title must be of the same character, as the title under the 8th section, as above described. And this title, under the 9th section is avoided, if it shall appear that the owner has paid the tax in any one or more years, within the successive seven years, for which the taxes are alleged to have been paid, by the claimant. Under the provisions of the statute, this title may be acquired, without notice to the owner, either express or implied. No act is required to be done, from which any presumption of notice can arise. The payment of the taxes cannot be construed into notice to the owner, as is often done by different claimants of the same land without notice to either. The only negligence chargeable to the owner is, that for seven successive years he has failed to pay the tax. No sale of the land for taxes is necessary. The payment of the tax prevents the state officers from taking any steps against the land, for the collection of the tax, which would require public notice to be given. The acts of the party who seeks to appropriate the land, are necessarily known only to himself and the person to whom he pays the tax. And indeed the person receiving the tax, may suppose it to have been paid for the owner.

Under neither of the above sections need the color of title emanate from the state. It must be made in good faith, by a person who believes himself to have a title; and the deed, upon its face, must purport to convey a good title. If it be defective upon its face, in this respect, it does not convey a title within the statute. But it is not necessary that the fee should actually pass by the deed, for in such a case the statute would be unnecessary. It was intended to protect the right of the occupant who cannot trace his title to a legitimate source, or which may be defective in the deraignment of title behind the instrument under which he claims.

Do either of the above sections impair the obligations of the contract within the 10th section of the first article of the federal constitution, which declares "no state shall pass any law impairing the obligation of contracts"? If these sections operate as limitations, they cannot be held to impair the obligations of the owner's title. He is bound under the 8th section, by a failure to pay his taxes for seven years in succession, and his presumed acquiescence in the adversary occupation by the claimant. Under the 9th section, the bar is made complete by the defalcation of the owner to pay the tax in any one year for seven successive years; and in the payment of those taxes for that term by the claimant. The law is founded upon a public policy, and does not act di-

rectly upon the title in either of these cases, but conditionally. There must be great negligence, on the part of the owner, in a public duty, and there must be positive action by the claimant. On the concurrence of these two conditions, under the 9th section, the possession is protected; and under the 8th section or third requisite, possession is required.

The case of Fletcher v. Peck, 6 Cranch [10 U. S.] 87, does not apply to the facts in this case. The legislature of Georgia declared the grant to Peck, made by a prior legislature, void. And the supreme court held, "a grant made in pursuance of a contract, is an executed contract, and its obligations may be impaired by a law of a state." It is argued that the above act is in violation of article 5 of the amendments to the constitution, which declares, "Nor shall any person be deprived of life, liberty, or property, without due process of law." This provision is intended to restrain the action of the federal government, and like the 7th article, secure, in cases, at common law, a trial by jury, where the controversy shall exceed twenty dollars, and is not obligatory on the states. But if the above restriction did apply, it would not nullify the law, as it contemplates an inquiry and the establishment of the facts required to protect the right of the occupant. There is no power in the federal constitution, or the laws of congress made under it, to set aside the provisions of either of the above sections, and their construction must rest with the supreme court of the state. I regret that this question has not been decided by the judiciary of Illinois, as I should follow such decision as a part of the statute of the state. This is uniformly done in the construction of statutes which do not conflict with the constitution or laws of the Union. The right of the claimant under the 9th section is technical, and without any other merit than that of contributing in a very small degree to the revenue of the state. And this act, though legal, is stript of all merit when the motive which prompted it is considered. It is a mode of acquiring real estate, not dishonest, because legal. This being the aspect in which I feel bound to consider the claim, the most rigid technical rules of construction shall be applied to it. As the acts to sustain the claim are without merit, the right must be maintained by a strict compliance with every tittle of the statute. No implication can arise in favor of the right set up; no waiver of the letter of the act for a substantial compliance with it. The claimant rests upon the letter, and by the letter his right should be adjudged. The right of the defendant cannot stand this test. His claim under the 8th section cannot be sustained, as his possession of the premises was only a part of the seven years required. He cannot sustain it under the 9th section, as a part of the seven years the land claimed was not "vacant and unoccupied." He must claim under one of the sections, as he cannot claim under both. It was competent for the legislature to provide for the operation of the right under the 9th section although the claimant occupied the premises a part, of the time. But as the statute now stands, the land was not "vacant and unoccupied," if occupied by the claimant or any other person. It may be said that the occupancy of the land by the claimant is more favorable to the owner, as it may be notice to him; but the answer is, in the words of the statute, the land must be "vacant and unoccupied." The facts bring the case within the reason of the 9th section, but not within its words. In such cases the supreme court of Illinois has held that the statute does not constitute a bar, but they may be considered omitted cases, which the legislature has not deemed proper to limit. Bedell v. Janney, 4 Gilman, 194. A special power granted by statute, affecting the rights of individuals, and which directs the title of real estate, ought to be strictly pursued, and should so appear on the face of the proceedings. Smith v. Hileman, 1 Scam. 323.

Upon the whole, my opinion is, that a judgment should be entered for the plaintiff.

RUSSELL (BARTLETT v.). See Case No. 1,080.

Case No. 12,153.

RUSSELL v. BEEBE et al.

[Hempst. 704.] [1]

Circuit Court, D. Arkansas. April, 1855.

PUBLIC LANDS — PRE-EMPTION — JOINT TENANTS — FRAUD.

1. Public officers, when acting under the scope of their duty, must be presumed to have fulfilled every requisite which the discharge of their duty demands.

2. Rights of pre-emption cannot be acquired to lands whilst the Indian title to occupancy still remains.

3. But conceding the title thus acquired invalid, yet if A. and R. hold under it jointly, the acts of the former in destroying it, and subsequently acquiring a better title, and claiming exclusively for himself and adversely to his associate, will be considered as fraudulent as against R., and title will be decreed to him.

4. This case distinguished from that of Cunningham v. Ashley, 14 How. [55 U. S.] 377.

[This was a bill in equity by William Russell, against Roswell Beebe, George C. Watkins, Mary W. W. Ashley, executrix of Chester Ashley, William E. Ashley, Henry C. Ashley, and Mary A. Freeman.]

A. Pike, for complainant.

George A. Gallagher, George C. Watkins, and S. H. Hempstead, for defendants.

DANIEL, Circuit Justice. Between the case of Cunningham v. Ashley, 14 How. [55

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

U. S.] 377, which has been referred to, and the case now under consideration, there are some differences of fact which materially distinguish them. In the former case the right of Cunningham was not impeached upon the grounds of the exemption of the territory from all claim from settlement and pre-emption, or of the absolute incompetency of the land-officers to receive proofs of pre-emption, or to issue patent certificates; but the impeachment of Cunningham's title rested upon the allegations that the individual from whom Cunningham claimed as assignee, never had, in truth, entitled himself by actual settlement, and that the certificate granted to the agent of Cunningham was signed by the receiver alone, when it should have been the joint act of both the register and receiver. The court, acting upon the principle repeatedly sanctioned by them, that public officers, when acting within the scope of their duty, must be presumed to have fulfilled every requisite which the discharge of their duty demands; or that at any rate in such cases the maxim applies, "Omnia rite acta donec probetur in contrariam," and especially as the receipt for the dues to the government was given by the officer authorized to receive those dues, it was proper to conclude that the proceedings were all regular, and had been concurred in by both the agents appointed to conduct them; disallowed the exception.

In the present case the impeachment of the complainant's title begins a step higher. It strikes at the competency of the parties. It alleges the absolute nullity of the origin of the title of the complainant, and as a consequence of that nullity, insists that such a title could never be transmissible to any person under any circumstances. True, it denies the fact of settlement by Lewis, but insists that conceding the fact of such a settlement, it was an intrusion merely upon the right of occupancy by the Indians, and upon the right, too, of the government, and absolutely void unless subsequently recognized and ratified by the latter. This is certainly an imposing aspect of this case, and if it rested simply and confessedly upon the allegations thus relied on, and was wholly unaffected by the acts of the parties and the relations they sustained to each other arising from their own acts, might, perhaps, be decisive of this controversy; for the interpretation placed by law-officers of the government seem quite explicit to the effect, that rights of pre-emption cannot be acquired to lands whilst the Indian title to occupancy still remains. But conceding this to be the law to its fullest extent, does it conclude the rights of the parties to this cause? It is not denied by the complainant that the defendant holds the legal title to the property in dispute. This is conceded, and is a main ground of complaint. The inquiries are, whether the defendant, after being united with the plaintiff in pursuit of what the complainant certainly believed and what the defendant Ashley professed to believe to be the regular and legal acquisition of the property; after recognizing the legality of the acquisition by participating in the distribution of the property between himself and others standing upon the same grounds; after undertaking to perfect the title by possessing himself of what may be termed the muniments thereof, has he not by lulling the complainant into security by a reliance on his co-operation and aid, by a breach of trust and confidence, circumvented and deceived the complainant, and endeavored to obtain exclusively for himself advantages which his previous association with the plaintiff, and all his acts conjointly with the plaintiff, bound him to share with him? Such appear to be the legitimate inquiries presented by the pleadings and testimony of the cause, and if answered in the affirmative, it would seem to be unimportant whether the Indian title was extinguished or not, or whether or not the land was subject to pre-emption. For, suppose the Indian title to occupancy existed in full force, suppose the land was not subject to settlement; could these things justify the defendant after embarking bona fide with the complainant in an effort to acquire the land, after sharing it with him and making himself his agent for the completion of the title, in violating every relation he filled to the complainant, and in cutting him off from every benefit of their compact as evidenced by their acts as well as their language? Was he not bound, holding the receipts for the money paid in the complainant's name, to put him in possession of those documents to enable him to perfect his title if he could? Admitting the irregularities of the original entry, it is as probable that the government would confirm a title to a bona fide claimant under a pre-emption, though informal, especially where the property had been extensively improved, as that they would lavish it upon the holder of a floating warrant to the injury of those who actually held and had improved the land.

In this view of the case, the question whether the deeds from Ashley do or do not contain covenants for warranty of title, becomes one of little importance. Russell is not now suing upon a covenant of warranty. He is complaining of a fraud, and seeking protection against it; and in such a state of the case, the deeds from Ashley are conclusive to show that he held the property in common with Russell, and held it under the very title which Ashley subsequently attempted to destroy. Nay, the deed to the corporation of Little Rock implies all this; for no comprehensible meaning or purpose can be ascribed to that transaction except it be taken as an acknowledgment that Ashley had held the town under the title described from Murphy, and that it was the purpose of the grantor in that deed to assure and quiet the purchases of property under that title. It is, perhaps, unnecessary, and might be extrajudicial, to

express an opinion upon the validity of the patent beyond the right in opposition thereto claimed in this cause; but it would seem, were the question before the court as a general one, or were directly in point in the case, to reconcile with the law the entry of these floating warrants upon property not merely settled upon but extensively improved at a great cost; and it is manifest, from the assurances given by the defendants, that it was to enure to the benefit of all the occupants of property, and not to the exclusive benefit of Ashley and Beebe, and of those with whom they were in amity. Nothing can be more explicit than the declaration of the officers of the general land office, that they considered the petition and declared purpose of Ashley and Beebe as securing the right of all holders of property, and for that reason, and that only, regarded the grant to them as a virtual compliance with the law which protected settlers against the location upon their possession and improvements by floating warrants. The opinion of the court is designed to embrace only this cause and the parties regularly before it; and upon the consideration which it has been enabled to bestow upon the very voluminous papers in the case, it has been led to the conclusion that the patent possessed by the defendants, or under which they claim, should, as regards the complainant and the property embraced within his bill, be held as void, and as having been obtained in fraud of the rights of the complainant, and that the defendants should be decreed to assure to the complainant by proper and sufficient deeds, his title in and to said property, and to remove, so far as on them may depend, all obstruction to his possession to that property. Decreed accordingly.

[NOTE. The defendants appealed to the supreme court. The appeal was dismissed for want of jurisdiction, it being held that the decree entered was not a final decree. 19 How. (60 U. S.) 283.]

RUSSELL (BLUE v.). See Case No. 1,568.

RUSSELL (BUTLER v.). See Case No. 2,243.

RUSSELL (DRIGGS v.). See Case No. 4,084.

RUSSELL (ENGLISH v.). See Case No. 4,491.

RUSSELL (FAXON v.). See Case No. 4,707.

RUSSELL (FLINT v.). See Case No. 4,876.

Case No. 12,154.

RUSSELL et al. v. FORTY BALES COTTON, Proceeds of.[1]

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

DERELICT — RIGHT OF UNITED STATES AS AGAINST SALVORS — RESOLUTION OF JUNE 21, 1870.

[1. The uninterrupted continuance for 30 years of a custom of a certain district court in regard to rights to derelicts raises an inference of the legality thereof.]

[2. None of the prerogatives of the English crown devolved by succession upon the United States government, but all powers of the latter spring from the grant expressed in their written constitution.]

[3. As against salvors the United States are not entitled to derelict, either by the resolution of June 21, 1870, or the English rule on this subject, or otherwise. Peabody v. Proceeds of Twenty-Eight Bags of Cotton, Case No. 10,869, disapproved.]

[4. The resolution concerns property illegally used or enjoyed during the Rebellion, and not ordinary derelict.]

[This was a libel for salvage by William Russell and others against the proceeds of 40 bales of cotton, derelict. The United States intervened praying a decree in their favor for the remnant after payment of salvage.]

W. C. Maloney and Winer Bethel, for libelants.

C. R. Mobley, U. S. Atty., for interveners.

LOCKE, District Judge. The motion filed herein by the district attorney for and in behalf of the United States opens in full the question of derelicts, and the proper manner of disposing of the final residues after the payment of salvage, expenses, &c., and is intended as a test for several cases of like nature now pending herein. There is no question of fact as to the condition of the property from the sale of which the proceeds have arisen, nor as to its having been a wreck of the sea, driven on shore, and properly coming under the term "wreccum maris" or "derelict."

In support of the motion an able argument has been made claiming that all such residues belong to the sovereign power, and should be paid into the treasury of the United States. On the other hand, it has been claimed that, in the absence of any municipal or national law on the subject, the rule to be followed is that of the law of nations that the finder is entitled to possession and control as against the whole world except the original owner. Each of these positions have been ably argued, and many authorities cited.

The present condition of the question as determined by judicial decisions of the courts of this country is quite unsettled, and no sufficiently distinct ruling has been made and sustained as to preclude the necessity of going back of the courts for authority. In this court the practice of delivering the residue, in the absence of any claimant, to the finder, after the lapse of a year and a day, has been universally followed, and a standing rule of the court to that effect been in force. In reply to this it is urged in support of the motion that the power that makes a rule can unmake it, and the court has the same authority to unmake or change rules, when convinced of their impropriety, that it had to make and ordain them. This position is readily admitted, and the right and power is well understood, but the existence of a rule for

[1] [Not previously reported.]

the last thirty years, and the enforcement of a principle under it by three predecessors, the judgments and decisions of each one of whom I am bound to recognize and respect, compel me to throw the burden of the contest upon him who moves to change or annul it.

In opposition to this practice and rule the case of Peabody v. Twenty-Eight Bags of Cotton [Case No. 10,869], involving the same question, which was decided by Judge Davis of the district of Massachusetts (1829), decreeing the residue therein to the United States. This is the only case referred to in the argument, or which I have been able to find, as having been decided in this country in that manner. That the honorable judge of this court was well aware of the decision in that case and informed of that opinion, upon which it is based, is clearly shown by his mention of it in his work on Wreck and Salvage (Marv. Wreck & Salv. p. 144), but even after that he was never so far convinced of the impropriety of his course as to make any change therein, although he was on the bench many subsequent years, and decided many cases of a similar nature.

Going back of any judicial decision and seeking legislation upon the subject, my attention is called to the joint resolution of congress (1870), approved June 21, 1870 [16 Stat. 380], which authorizes the secretary of the treasury "to make such contracts and provisions as he may deem most advantageous for the interest of the government for the preservation, sale, or collection, of any property, or the proceeds thereof which may have been wrecked, abandoned, or become derelict, being within the jurisdiction of the United States, and which ought to come to the United States, and any moneys, dues, and other interests, lately in the possession of, or due to the so called Confederate States or their agents, and now belonging to the United States, which are now held or retained, by any person or municipality whatever." In connection with this statute two questions arise: First, is this resolution intended to apply to such cases as the present, and to declare that property wrecked, abandoned, or become derelict "ought to come to the United States"? and, secondly, whether, if such was the intention, the language is sufficient to declare that property which would not otherwise be so decreed, "ought to come to the United States." There seem to be several classes of property mentioned in the objective clause which are to be effected by this resolution, to either one of which the term "ought to come to the United States" could apply with equal aptness, namely, property wrecked, "that ought to come to the United States," property abandoned, "that ought to come to the United States," or property become derelict "that ought to come to the United States." If the term "that ought to come to the United States" is intended as a declaratory phrase, intending to declare that the kinds of property mentioned ought to come to the United States, the error of that construction is at once apparent when we apply it to either of the other classes, as it cannot be claimed that all wrecked property, nor that all abandoned property should come to the United States, and that construction cannot be held to be applicable to one class and not the other, and I am therefore convinced that the clause is not intended as a declaratory clause, but as a descriptive and limiting one, —limiting the operation of the law to those classes of property wrecked, abandoned, or become derelict, "that ought to come to the United States."

Again, should this construction of this resolution be incorrect, is the language sufficiently plain, distinct, and declaratory to give to government the possession custody and control of property which the courts would, or had otherwise decreed to another party? The main question at issue in the pending motion is, "ought the residues in these cases to come to the United States"? Should the decision thereon, in the absence of this resolution, be that these residues ought not to come to the United States, is the language of the resolution sufficient to defeat such a decree? I am of the opinion that it is not. It may be asked, to what, then, does the resolution apply? for no act of any legislative body should be so construed or interpreted as to render it fruitless. The naval and military operations, both of the United States and the so-called Confederate States during the late war, had strewn the harbors of the entire coast with numerous wrecks, and also many portions of the country with abandoned or derelict property, that rightfully "should come to the United States," either from being originally the property of the United States, or the property of the public enemy, or from having been engaged in violating the blockade. The continuation of the resolution points more plainly at the fact that in the mind of the legislator the property, dues, and claims "that ought to come to the United States" through the late war were intended, and no others. Again, the property "which may have been" (at that time) and the money, dues, and interest "now" (at that time) held, are alone referred to; and I cannot believe that, had congress intended to establish a final law for the disposition of all derelicts within its jurisdiction, it would have confined its language only to the past and present, and the property then in condition to be claimed, omitting all that might become derelict, and on that account alone would I consider that the resolution could not be held to apply to this case, more particularly as at the approval of that resolution none of the proceeds now claimed were in the hands or control of any party, the property not having been found until several months afterwards.

Finding, then, no final disposition of the question by the judicial decisions or the

legislative enactments of our country, we are compelled to go elsewhere, and inquire how this question has been treated by the courts of other countries. There have been two arguments advanced in support of the motion, independent of any decision or law of our country, namely: First, that by the general principle of perpetuation, continuance or succession of laws in conquered provinces,—a species of subrogation of power,—the laws of England remained in force in the United States; that the laws of the mother country survived to the sovereignty of the United States, and became attached to all the rights and prerogatives of sovereignty in or under the laws of the government from which the provinces had been conquered, or had withdrawn themselves; that the laws of England recognized the proceeds of all derelict as attached and belonging to the sovereignty power of the nation, and hence this same right now exists without the requirement of any legislation. Perhaps I have stated the matter somewhat more broadly than was done in the argument, but, I consider, none too broad for the fair examination of this question. There is no question or doubt regarding the law in England upon the subject, and that it has been correctly stated. The case of The Aquila, 1 C. Rob. Adm. 37, settles that beyond any dispute. But whether the same laws must be in force in this country to-day on account of the laws of the mother country remaining in force after a change of government, or whether the United States succeed to the prerogative of the British crown, is the question to be considered. Again, to whom do these said prerogatives of sovereignty attach or belong, the United States or each separate state? The first form of union was a confederation or union of the several states in their sovereignty, and the rights of sovereignty attaching thereto were plainly and distinctly expressed and laid down. The rights pertaining to the admiralty with which congress was invested were "power to deal with all captures and prizes made by the land or naval forces of the United States. Curtis, Const. 1-145; to grant letters of marque and reprisal in times of peace, and to establish courts for the trial of piracies and felonies committed on the high seas, and for determining appeals in case of capture."

It is claimed in the argument that admiralty power must necessarily be annexed to the general government whose power it is to decide peace and war. In the absence of all mention of the subject in the articles of confederation, this might be claimed with propriety, but where the admiralty powers necessary for the purposes of war, and convenient in time of peace, are so plainly and expressly set forth, I do not consider that the argument, although plausible, will hold good as to other admiralty privileges not necessarily connected with the warmaking power, but merely touching the relations existing between sovereign and subject. The supreme court, in Martin v. Hunter, 1 Wheat. [14 U. S.] 325, says: "It is perfectly clear that the sovereign powers vested in the state government by their respective constitutions remained unaltered and unimpaired, except so far as they were granted to the government of the United States." Also, in Wheaton v. Peters, 8 Pet. [33 U. S.] 658, it says: "It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states, each of which may have its local usages, customs and common law. There is no principle which pervades the Union and has the authority of law that is not embodied in the constitution or laws of the Union." I am well aware that these opinions were given upon questions differing somewhat from the ones under consideration, but on the one point, namely, the continuation of the laws of the land, the succession of one national government to the prerogatives of the other, and the relations existing between the people and sovereign power, I consider them parallel. This is the only prerogative of the crown to which it is claimed the United States has succeeded by the mere force of national succession. At least I have been unable to find any other right or prerogative claimed for, or assigned to the government without constitutional provisions or legislative enactments. The powers of peace and war are conferred upon congress, but it has never been assumed that the droits of admiralty in prize under the English law belonged to the United States, and our own prize laws have been enacted. The same with regard to royal fishes, which were made a source of revenue, and provided for in the same act (17 Edw. II. c. 11) as derelicts, based, as Blackstone says, on the same reasoning, namely, to yield a revenue to the crown. 1 Bl. Comm. 290. The Adventure, 8 Cranch [12 U. S.] 221, has been referred to. In that case I can find nothing establishing, or even implying, the right of the United States to droits of admiralty, but on the contrary, the supreme court declares that, although enemies' property, found in the country, is liable to be disposed of by the legislative power of the country, yet, until some act is passed, it is under the protection of the law, and may be claimed after the termination of the war. The questions of right of admiralty or of the government to the residue were not considered, save as to its being enemy's property, found in the country at the declaration of war.

Mr. Benedict, in his able and valuable work on Admiralty, says: "A fruitful source of error in regard to the government of the United States is its supposed relation to the British government. The United States is sometimes said to be, and in a limited historical sense is, an offspring from Great Britain; and most of the people of the colonies at the time of the Revolution were the descendants

of British subjects." But he says: "The government and laws of the United States as established by and under the constitution cannot in any proper sense be called an offshoot from those of Great Britain, nor have they any relation or similarity to them. Our constitution was a new creation, made after the Revolution, after twelve years of actual independence under the confederation, and was derived not from any parent state, but from ourselves, and nowhere else; * * * and the institutions of Great Britain cannot justly be considered as in any manner the exponents of our own. Our constitution and laws are written in the English language, and of course to that language we must look for the proper meaning and force of their terms, and this is the only link that connects the laws and institutions of the general government with those of any other nation. When therefore the constitution or laws use the terms, 'equity,' 'common law,' 'admiralty,' 'maritime law,' etc., it is to English law and to English dictionaries we must resort for the meaning of those terms, but it by no means follows that we must look to the same source for the rules of decisions our courts are to follow." These remarks express so clearly and distinctly my own views on this question that I will merely say that I cannot consider that there is any authority for the doctrine that the United States have succeeded to rights of the English sovereignty or droits of admiralty as a national prerogative.

Thus being satisfied, first, that the only act of congress of which I have any knowledge that could possibly be construed as relating to this subject is neither intended to apply to such cases, nor is sufficient to influence a decision herein; secondly, that I do not consider that the droits of admiralty, as prerogatives of sovereignty attaching to the crown of England, were succeeded to by the United States as a nation,—the only remaining question is whether, by the general maritime law of nations which the courts of this country are bound to recognize, the residue in such cases should be paid into the public treasury, or be left in control of the finder. As the possession of personal property is prima facie evidence of ownership, and occupation gives such a right of possession as to force the contestant to show a better title, I consider it binding upon the government to show such superior title to the amounts in question herein.

In the case of American Ins. Co. v. Three Hundred & Fifty-Six Bales of Cotton, 1 Pet. [26 U. S.] 546, Chief Justice Marshall says: "A case in admiralty does not in fact arise under the constitution or laws of the United States. These cases are as old as navigation itself, and the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise." Judge Davis says: "The rules and usages of nations on this head I consider to be a portion of our maritime law, giving authority to the national courts to judge, award, and decree respecting causes of admiralty and maritime jurisdiction as such maritime laws and usages shall direct or authorize." This is admitted wherever the rights or interests at stake in any way relate to or concern the property or persons of any subjects of any other nations. But there are in the admiralty laws of every nation rules and regulations concerning municipal rights and powers that cannot affect the general maritime law of nations, any more than can the different regulations in regard to liens of material men, quarantines, or harbor or coast regulations. Judge Benedict, before referred to, says in chapter 4, § 39: "Every maritime nation has certain rules or laws in relation to ships, shipping, and maritime matters which are peculiar to itself,—such as its navigation acts, the municipal regulations, of its harbors, creeks and bays, * * * obstructions in rivers, prohibited nets, royal fisheries, and other droits of the admiralty constituting its maritime police. These were originally enforced by the admiral exercising in part a high executive and administrative function, which was a portion of the royal prerogative, and was in substance confined to the waters and the vessels of his own nation. * * * These are properly the admiralty law of any country. * * * Each nation has its own system of admiralty law, which it changes and modifies at pleasure." It has been remarked that the mere executive functions of the admiral, his prerogatives and perquisites, have no existence here. "The words 'admiralty' and 'maritime,' as they are used in the constitution and acts of congress, are by no means synonymous." "Maritime cases, or more properly those arising under the maritime law, which is not the law of a particular country, and does not rest for its character or authority on the peculiar institutions and local customs of any particular country, but consist of certain principles of equity and usages of trade which general convenience and a common sense of justice have established to regulate the dealings and intercourse of merchants and mariners in matters relating to the sea, in all the commercial countries in the world." To which of these two classes does this question belong,—the admiralty of local character and national interest, or maritime in its nature and of general application.

It has been ably argued in support of the motion that the title of occupancy no longer exists. Had the argument been that the title by occupancy has been greatly modified and restricted, I would have admitted it at once; but that it no longer exists, as between the occupant and every one else except the original owner, especially in the absence of any municipal regulations, is, as I consider, an unauthorized conclusion. The title by occupancy I consider still to exist,

although much limited, and subject to many equitable conditions and restrictions, and to apply to all classes of property, subject only to restriction which change with the circumstances under which possession is acquired. I am unable to perceive that reading why the title by occupancy in derelict or abandoned property, as long as unclaimed or voluntarily forsaken, was against every one but the rightful owner, in the absence of particular laws to the contrary, is not of as much force as ever. Society has demanded a more extensive and thorough notice of the finding and more careful observations of the rights of others in the thing before there can be considered to be an implied abandonment, but I do not consider that that divests a finder of all right of occupancy. Kent says: "Another instance of acquisition by occupancy which still exists under certain limitations is that of goods casually lost by the owner and unreclaimed or designedly abandoned by him, and in both cases they belong to the fortunate finder." He modifies this by stating that certain classes of goods have been excepted from this general rule, but cites none but those excepted by positive law. This is not a question of divesting an original owner of his rights, nor as to the perfection of the title acquired by occupancy, but as to in whom the limited title given by occupancy until a claimer may appear vests.

It is claimed that there is at present no such condition of things known as derelict in the sense of that term as used in the civil law. Judge Bee says in British Consul v. Twenty-Two Pipes and Ten Hogsheads of Wine [Case No. 1,900]: "I continue to think there is no difference between wreck and derelict, except the property is in the one instance found on land, in the other at sea. In both, the original owners, if they can be found, have a paramount claim upon payment of reasonable salvage."

The special rights given a first occupant of derelict under the civil law are at this age of the world denied in all cases except when they are claimed by an action of a state or nation to be forfeited. And now such special rights and prerogatives, namely, as a positive title as against even the original owner, are seldom insisted upon; and, although no such voluntary abandonment is presumed at first, yet almost every nation has decided that the absence of a claimant or the neglect to claim is an implied abandonment, which places such property in the position of derelict. Justinian, lib. 2, tit. 1, § 47. Except from the list of derelict which may belong to the first occupant things thrown overboard from vessels in a storm, "for they remain the property of the owner as though they were not thrown away through dislike, and whoever takes them up with guilty intent is guilty of theft." But that does not change the character of a derelict of the sea, but shows that the law of to-day has greatly restricted the rights of the finder of derelicts found on land, as the same law then applied to derelicts at sea now holds good to derelicts found on land. Puff. Law Nat. bk. 4, c. 6, § 12, says: "We likewise acquire by occupancy things in which the dominion they before lay under is extinct; and this happens if a person either openly throws aside a certain thing with sufficient indications that he desires it should no longer be his own, but should lie free for the first taker, without designing hereby to gratify any one else; or if, having at first lost possession against his will, he afterwards gives the thing over either as despairing to recover it, or because the recovery of it is not tantamount. This is certain: That if we lose possession of anything against our will, or suppose we drop a thing by the way, the property does not pass from us, or accrue to the finder, till it appears we absolutely give it over for lost, which is usually understood by our forbearing to search or inquire after it. Hence, if a man finds somewhat which it is not probable the owner should voluntarily reject, he ought to give fair notice that upon a just claim it may be reassumed. But if the owner cannot be discovered, then it is but right the thing should be kept by him that found it." Yet Aelian reports it the law of the Stagarytes: "Take not up what you lay not down." The same of the Biblians, and among Solon's laws were those of the same import. These evidences of such a particular regard for the rights of others to their property could of course have no weight in considering a question where the property has been rescued from certain destruction by the sea. Mr. Seldons informs us that among the ancient Jews articles marked were presumed not to be voluntarily surrendered; therefore when such were found proclamation was made from a platform in the suburbs of their cities, that if claimed by those of the same nation they should be returned, but property belonging to Gentiles they considered themselves under no obligation to restore. In Barbeyrac's note to the section of Puffendorf quoted he says: "Those things which are forsaken having once belonged to a private person cannot be thought to belong to the state in general, but it is natural to suppose them to belong to nobody, and consequently they become the first occupants, at least if there is no law to hinder private persons from making them their own." Vatt. Law Nat. bk. 1, c. 23, § 293, speaking of the rights of nations, says: "It is necessary to mention the right to shipwrecks, the unhappy fruits of barbarism, and which almost everywhere disappeared with it. Justice and humanity cannot sanction it, except the only case where the proprietors of the effects saved from the wreck cannot be certainly known In this case these effects belong to the first possessor, or to the sovereign if the laws give him a right to them."

From these and the writings of other numerous eminent authors it appears that the only distinction, in the absence of positive law, between derelicts found at sea and those

found on land, has arisen from the presumed intent of the original owner to voluntarily abandon or not. If in the case of property found on land a claimant appears, the presumption is done away with, and the title by occupancy disappears; but if, on the other hand, no claimant appears for property found at sea, the implication and presumption of abandonment is established. This original presumption of voluntary or involuntary abandonment cannot, in my opinion, affect in the least the final disposition of residue or the question of custody during the pendency of a notice or claim. And in the absence of this presumption, either for or against abandonment, the law of nature applies as directly to one class as the other, and by that law derelict property whose owner is unknown belongs to the finder. Chancellor Kent lays it down as a principle of natural law "that if the articles are not demanded in a reasonable time they become the property of the finder, unless some other appropriation be directed by private enactment;" and I consider that this is generally conceded to be the law of nature. And it only remains for us to examine how far this law has been changed, and how far such changes are binding upon the court.

The Laws of Oleron have been cited in argument to show that the finder was not entitled to the residue, but the section quoted positively prohibits the sovereignty from assuming any part of such goods. The article reads as follows: "If a ship is lost and all on board drowned, the lord should send out persons who should save the goods, to whom a salvage should be paid; and what remains must be kept safe a year or more, and, if no one appear and claim, they should be sold, and the proceeds given among the poor and to charitable uses; but if he (the lord) assumes such goods, either in whole or in part, to himself, he shall incur the curse and maledictions of our church." Article 32: "When goods are thrown overboard for the safety of the vessel, they become the property of him who can first possess himself of them and carry them away." "Nevertheless this holds true only in such cases as where the master, merchant, and mariners have so ejected and cast out such goods as they give over all hope or desire of ever recovering them again, and so leave them as things utterly lost and given over by them, without ever making any inquiry or pursuit after them. In which case only the first occupant becomes the lawful proprietor thereof." The five subsequent articles provide that if any property is especially locked, clasped, and protected from damage by salt water, the finder shall restore them to the owner, or put them to pious uses, according to his conscience, and the advice of some prudent neighbor. That if one finds precious stones, gold, or silver, he ought to restore it all, deducting something for his own pains, or, if he be poor, he may keep it, if he knows not to whom it belongs. In the observation of Cleirac upon these articles it is said: "There are three sorts of goods which the sea naturally drives to land. (1st) Entire wrecks, for which the cruel droit de bris (or admiralty of the seacoast) was in old times established by pernicious and barbarous custom, but humanity, license and passports have abolished it in ours. (2nd) Goods thrown overboard for the preservation of men's lives, the ship and cargo. Neither of these by law or the custom of the country change their proprietors, but may be claimed and recovered by them even while the goods are in being and unsold, as appears by what has been said. The third sort comprehends the two first which are not owned and demanded by the proprietor, and besides that includes all the treasures of the sea. The property of such things is in the finder or the first person who first takes them from off the ground. This is the law of nature, but princes and lords of the coast have usurped this privilege and laid claim to all the treasures of the sea that is thrown on their royalties." The lords of the coast were notorious usurpers in this till the reign of Louis XIII. when Cardinal Richelieu, by an order of the council (1629), much abridged them, but did not restore the law of nature, but only enlarged his and his successor's privileges. This produced much displeasure, but it was in vain, as the French kings were now masters of the lives and fortunes of their subjects, and their edicts were. "Car tel est notre plaisir," the standing reason of the French laws at that time. This seems to have been the inauguration of this prerogative of sovereignty in France, and this is the reason of the law. This order in council was re-enacted in the Ordinance of Louis XIV., and placed under the protection of the crown all wrecks, and gave one third to the salvors, one third to the admiral, and one third to the king.

The Laws of the Hanse Towns and the Laws of Wisbuy are silent upon the subject, and we are therefore to presume that, in the absence of law to the contrary, where these laws were the controlling authority, the law of nature prevailed. The decree of Adrian, referred to as meritorious in Justinian, lib. 2, tit. 1, § 39, which I consider relates only to treasures found, as the same section declares that if any treasures be found in a man's land it shall belong to the finder; if in the land of another, one half shall belong to the finder and one half to the owner of the land; but if in public domain, one half shall go to the emperor, or in any place owned by the city the one half shall go to the city; while subsequently speaking of goods found thrown out of vessels it says distinctly: "This law does not refer to them as they belong to the owner, or if goods have fallen from a carriage in motion they shall be considered in the same light." On the other hand, Loccenius says that in regard to shipwrecked goods it seems to be in accordance with equity and the jure gentium, or law of

nations, that in case no owner appear in a given time the greater part go to the public treasury and the lesser part to satisfy the finder for his care and custody. Locc. De Jure Mar. c. 7. The laws of France upon the subject have already been cited, and we now come to the decisions of English courts, and such intimations as have been given from time to time by the courts of our country upon the question.

The case of The Aquila, reported 1 C. Rob. Adm. 37, has been quoted as the leading case wherever the question of derelict has arisen. In that case Mr. Scott says: "It is certainly true that such property may be so acquired (by occupancy), but the question is, to whom is it so acquired? By the law of nature, to the individual finder or occupant. But in a state of civil society, although property may be acquired by occupancy, it is not necessarily acquired by the occupant himself, for the positive regulations of the state may have made alterations on the subjects, and may, for reasons of public peace and policy, have appropriated it to other persons; as, for instance, to the state itself, or to its grantees. It will depend, therefore, on the law of each country to determine whether property, so acquired by occupancy shall accrue to the individual finder, or to the sovereign and his representatives, and I consider it to be the general rule of civilized countries that what is found derelict on the seas is acquired beneficially for the sovereign if no owner shall appear. In England this right is as firmly established as any prerogative of the crown."

The only question now is whether the customs and laws of other nations, and the positive regulations of other states are to be taken and accepted as the positive laws of this country upon this point. We may first consider the origin and cause of the establishment of the claims of sovereignty. Chancellor Kent, in his Commentaries (section 1), recites fully the barbarities practiced towards shipwrecked persons and the systematic plundering and robbing resorted to, until finally, for the sake of humanity, the persons and property of those shipwrecked were placed under the special protection and safeguard of the crown. The prevention of the barbarous practice of destroying the property of the shipwrecked was the object of the law in conferring this prerogative on the king. Cro. Jur. Belli, 117, 132, 141, 142; Inst. 167; Moll. De Jure Mar. 237; Moor, 224; Hale, De Jure Mar. 40. This prerogative of the crown has not been considered sufficiently definite, regular, and certain to establish a principle of national law beyond this: that the protection of shipwrecked person and property is in the national sovereignty. Beyond this, all is uncertain and diverse. In this all commercial nations are interested, but not as to whether the sovereign or finder gets the residue. Constantine demands: "What right has a sovereign in another's calamity, so that it should hunt for gain in such a woful case as this?" Under the Laws of Oleron the shipwrecked were protected in both person and property, but the sovereign claimed no advantage or gain from their misfortunes. In England protection of the crown is granted to all, but the residues are disposed of in different ways. The posthumous treatises of Lord Hale expressly states that by the general law things found in the open seas common to all nations still belong to the first occupant. Flotsam, jetsam, ligan, or other sea estray, if taken up in the wide ocean, belong to the taker of them, if the owner of them cannot be found, limiting the right of the crown to such things as are taken up within the king's seas. Hale, De Jure Mar. c. 7; Harg. Law Tracts, p. 41; Bl. Comm. bk. 1, p. 295; Id. bk. 2, p. 402; Palmer, Wreck. 8. By the order in council, 6th March, 1605, it was declared that derelict belong to the lord high admiral, wreccum maris, or property thrown ashore or resting in the bottom goes to the lord of the manor. King v. Forty-Nine Casks Brandy [3 Hagg. Adm. 282]; King v. Two Casks Tallow [Id. 298]. In Jersey, Guernsey, Alderney, and Sark, all wrecks that could be reached by a person standing on shore belong to the lord of the manor. Until recently the proceeds of derelicts were considered as perquisites of the admiralty and now pertaining to the crown as droits of admiralty. In France one third goes to the king, one third to the admiral; in Spain there is a portion goes to the king and a portion to the admiral.

Now, from these numerous diverse laws, no one of which is common to any two nations, but every one the positive result of legislative enactments or orders in council, applicable to the locality of which made, what are we to select as the general rule of civilized countries? There is one principle of equity and justice pervading the laws of all civilized nations upon this subject, not inconsistent with the laws of nature, and that is a prerogative of sovereignty to step in between the loser and the finder, the shipwrecked and the salvor, and protect both in their rights, to see that the distress of one is not taken advantage of by the cupidity of the others, but further than this I do not consider that we are bound by the maritime laws of the several nations to go. The reason for sovereign interference is satisfied and the wrong originally complained of remedied. For more than that I consider there is no binding authority, or general maritime law.

Although I have stated in the beginning of this opinion that I consider the question unsettled in the courts of our country, there have been certain dicta touching directly upon this point that I would not pass unnoticed. Judge Peters, in his notes attached to his opinion in the cause of Taylor v. The Cato [Case No. 13,786], and again in notes

attached to opinions in Brevoor v. The Fair American [Id. 1,847], states distinctly that "ships and goods deserted and found at sea, are national droits, if no owners appear. Also the produce of ships and goods unclaimed is, it should seem, also a national droit," and cites The Aquila [supra] as authority. Taylor v. The Cato, and Brevoor v. The Fair American [supra]. These, as being the opinions of so eminent an admiralty judge, although extrajudicial, I cannot pass without notice. He gives no reason or authority for his conclusions any further than citing the case mentioned; but upon a further examination of his decisions we find that his judgments upon this point was probably founded upon his opinions as to the succession of the United States to the laws, prerogatives, and droits of the English crown. In his notes to opinion in the case of Jennings v. Carson [Case No. 7,281], he says: "The practice and laws of the admiralty of England as they existed before our Revolution are particularly imperative to us." Again, in Thompson v. The Catharina [Id. 13,949], he says: "The change in the form of our government has not abrogated all the laws, customs and principles of jurisprudence we inherited from our ancestors, and possessed at the period of our becoming an independent nation. The people of these states, both individually and collectively, have the common law in all cases consistent with the change of our government and the principles on which it is founded. They possess in like manner the maritime law, which is part of the common law existing at the same period. It is then not to be disputed on sound principles that the court must be governed in its decisions by the maritime code we possessed at the period before stated." We see at once, from these quotations, upon what his opinions were based in the question under consideration. Chancellor Kent, in his Commentaries (lecture 36), also excepts wrecks from the general rule of occupancy, referring to Davie's Abridgement of American Law, which has also been referred to in the argument of this case, saying they are "to belong to the United States, as succeeding in this respect to the prerogatives of the English crown."

In the absence of the best authority, I should be loath to question for a moment the decisions of these able and learned gentlemen, but I consider that the opinion of the supreme court in the case of Wheaton v. Peters [8 Pet. (33 U. S.) 591], already referred to, in which it is declared that "there is no principle which pervades the Union and has the authority of law that is not embodied in the constitution or laws of the Union, and that the common law could be made a part of our federal system only by legislative adoption," so positively overrules this doctrine that I am justified in not adopting it. In the case of Peabody v. Twenty-Eight Bags of Cotton [Case No. 10,869], Judge Davis seems to rest his decisions —First, upon the utter absence of all precedents for giving the residue to the salvors; secondly, the succession of the United States to the rights prerogatives of the British crown; and, thirdly, the rule which he considered so fully established by the custom and usage of commercial nations as to be binding upon the admiralty courts in this country. Mr. Benedict says in his work on Admiralty (page 21, § 33): "The admiral in many countries had numerous powers, duties, and rights, which sprang from and relate to his military or naval character. All these portions of the power of the admiral which may be properly called executive or administrative are unknown to American admiralty; the trappings, perquisites, prerogatives, and droits of the admiralty are left to governments with which they are in harmony." Mr. Parsons, in his treatise on Maritime Law (volume 2, pp. 617, 618), says: "What disposition is to be made of property found abandoned when no one appears to claim it, cannot be said to be settled in this country. In an early case in Massachusetts it was held that after salvage was paid the property belonged to the government, to hold in trust until the owner should appear. In another district the practice, however, is to keep the proceeds a year and a day after the salvage is paid, and, if no owner then appears, to pay them to the finder. This, we think, is the more correct doctrine." We have been informed that subsequent to Peabody v. Twenty-Eight Bags of Cotton, supra, Judge Sprague has permitted the entire proceeds to be taken by the finder upon his filing a bond to respond to any subsequent order of the court. The rule and long-continued practice of Judge Marvin while on this bench in this district shows plainly that he was well satisfied with his opinion that "until some law is passed providing for the dispositions of derelict they belong, upon principles of national law, to the finder.

The supreme court, in the case of The Mary Ford, 3 Dall. [3 U. S. 188], intimates that on the principles of abandonment, the whole property might have been decreed, not to the United States, but to the libellants, and in the case of The Harrison it directed that the cause should be continued for a year and a day, and, if no claimant appear in that time, the property is presumed to be abandoned, and condemned to the captors. The reason urged for paying the proceeds into the treasury is that they may be more readily recovered by the claimants when claimed if ever. By the present rule the amount is by law deposited with some assistant treasurer of the United States to the credit of this court, and due publication made, and notice given. After the lapse of the time that has been decided by the supreme court as sufficient to raise presumption of an abandonment, the court may, at its option, deliver the property to the finder, or may, if there appear any probability of a claim, still retain charge of it, or acquire security from the finder to respond to any claim that

may be made. I can see no advantage to any subsequent claimant by a paying of the amount into the treasury of the United States. This court could compel no security from the government, and, if the property once passed from its control, the claimant would be forced to seek his rights in another court by a new suit, while, if left in control of this court, a simple order made herein would be sufficient.

It has been suggested as a prudential reason for making a change in the practice of this court in this matter, irrespective of the law, that it would remove the temptation that now exists to erase and obliterate marks and conceal facts and circumstances of finding by which a claimant might be discovered. On the other hand, it was, I believe, one reason assigned by Judge Marvin at the time he established the rule in accordance with the then existing practice, that such would tend to remove the temptation to conceal and convert to their own use many articles found derelict, which, if reported, might be claimed and returned to their owner. As prudential reasons, each of these has its weight; but it is not for me to decide what the law should be. That belongs to the legislative department. It is impossible to remove all temptations for avarice to commit crime, and this court, believing that it has a right of protecting absent owners in all cases of shipwrecked goods found derelict in this district, and will endeavor so to use that right, in either case avarice will learn that the safest way is to avoid crime, and not readily yield to slight temptations. Should the law of England prevail in this case here is a question whether, being wreck maris, or wreck of the sea, the state laws should not control, as there the proceeds would not go to the sovereign, but to the lord of the manor, and were held to be beyond the admiralty jurisdiction.

I have thus at length reviewed the question under consideration with attendant questions arising by the way at a far greater length than I had at first contemplated, and have embodied much that might by some be considered but ill befitting a judicial opinion, but in arriving at my conclusion I have examined carefully both sides of the question, and quoted largely, rather reviewing the whole question than confining myself to my opinion on it. Finally, I would hereby state the conclusion I have arrived at.

First. That the United States has not, by any positive enactment or regulation, claimed the proceeds of derelict.

Second. That the prerogative rights or national droits of the English sovereignty have not been succeeded to by the United States by rights of succession merely.

Third. The admiralty rules, regulations, and laws of England are only binding upon the admiralty courts of this country so far as they are in unison and harmony with the maritime law of all nations, and in none of their local municipal features.

Fourth. That the only principle in the maritime law in regard to estrays of the sea or derelicts common to civilized nations, or binding as such, is that the sovereign power shall protect the persons and property of all who may have suffered shipwreck, and see that they have a fair opportunity to claim and obtain the same.

Further than this, the usages and customs are diverse, local, and municipal, and not binding as a portion of the maritime law of nations. That a certain time is sufficient to warrant the presumption of abandonment, and that time has been fixed at a year and a day. That after that it is within the power of the sovereign to grant the natural rights of occupants to the finder or claim the property, but such natural rights cannot be overcome but by positive law.

The court will in its judicial capacity protect in every way possible absent owners, and does not consider it binding to make any order at the lapse of a year and a day if sufficient notice has not been given, or there is a probability of a claim being filed; and although by the rule of the court the residue may be paid the finder, it is within the option of the court, and not obligatory.

I may be wrong in these conclusions, or any of them upon which this question depends. It affords me satisfaction to know that there are higher tribunals who may correct any error I may have made. The prayer of the motion must be denied.

Upon appeal to the circuit court, judgment was given for appellees by Justice Woods without opinion.

RUSSELL (FRAYSER v.). See Case No. 5,067.

RUSSELL (GRAY v.). See Case No. 5,728.

Case No. 12,155.

RUSSELL v. GREGORY.

[Nowhere reported; opinion not now accessible.]

RUSSELL (HALL v.). See Case No. 5,943.

RUSSELL (HAMILTON v.). See Case No. 5,989.

Case No. 12,156.

RUSSELL v. HOWARD et al.

[2 McLean, 489.] [1]

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

MORTGAGES—JUNIOR MORTGAGEE—EQUITABLE RELIEF.

1. A mortgagee has a right to pay off prior incumbrancers, and be substituted to their rights.

[Cited in Kittering v. Parker, 8 Ind. 53, note 1.]

2. Where two persons have liens on the same property for different debts, and one of them

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

has, also, a lien on other property, chancery will direct such property to be first sold, before that which is common to both liens.

In equity.

G. T. M. Davis, for complainant.
Mr. Hall, for defendants.

OPINION OF THE COURT. This is a bill to foreclose a mortgage executed by Howard to the complainant. The other defendants are judgment creditors, except the State Bank of Illinois, which is a subsequent mortgagee. The bank alone has answered, and states that it has a mortgage on a part of the premises, and prays that the other part may be first sold in satisfaction of the complainant's mortgage. To this the complainant objects, on the ground that the statute regulating the sale of real estate, which has been adopted by this court, gives to the complainant a right to elect what property shall first be sold in satisfaction. It is a well settled principle in equity that a subsequent incumbrancer may discharge prior liens, and be substituted to all the rights arising under such liens; and where two persons have a lien on the same property to secure different debts, and one of them has, also, a lien upon other property, a court of chancery will direct such property first to be sold in satisfaction of the separate lien, before that which is common to both liens. Findlay's Ex'rs v. Bank of U. S. [Case No. 4,791], and the authorities there cited; 2 Story, Eq. Jur. 480. In adopting the state rule, in regard to sales like this, the court did not change, or intend to change, this principle of equity. So far as the state practice can be followed, without counteracting any established rule of equity practice, it is adopted.

[For an action of ejectment, brought by the same parties, see Case No. 12,163.]

RUSSELL (KELLOGG v.). See Case No. 7,666.

RUSSELL (LANE v.). See Case No. 8,053.

Case No. 12,156a.

RUSSELL v. LUCAS.

[Hempst. 91.] [1]

Superior Court, Territory of Arkansas. July, 1830.

PAYMENT — HOW APPLIED — PRINCIPAL AND INTEREST.

1. Payments should be applied to extinguish the interest, and then the principal.

2. Proper mode of computing interest stated.

[This was a judgment at law, obtained by William Russell against James H. Lucas. Heard on motion for a scire facias.]

Scire facias to revive judgment.

Before JOHNSON, ESKRIDGE, and CROSS, JJ.

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

OPINION OF THE COURT. The only question to be decided is as to the mode of calculating interest. We are of opinion that the correct mode of casting interest when partial payments have been made is to apply the payment in the first place to the discharge of the interest then due, and, if the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal unpaid. If the payment be less than the interest, the surplus interest must not be taken to augment the principal, but interest continues on the principal until the period when the payments taken together exceed the interest due, and then the surplus is to be applied towards discharging the principal, and the interest is to be computed on the balance of the principal as above stated. [Tracy v. Wikoff] 1 Dall. [1 U. S.] 124, 6 N. J. Law, 408; Smith v. Shaw [Case No. 13,107]; 5 Cow. 331. Judgment for plaintiff.

Case No. 12,157.

RUSSELL v. McCORD.

[2 Flip. 139; 17 N. B. R. 508; 3 Cin. Law Bul. 594.] [1]

District Court, N. D. Michigan. March 15, 1878.

BANKRUPTCY — FRAUDULENT SALES TO PARTNER — ATTACHMENT.

1. When a firm is insolvent and there is a sale by one partner to another for a valuable consideration, this does not of itself constitute fraud.

2. Where an execution is levied after the defendant is adjudicated a bankrupt, no lien attaches on the property so levied upon.

[William Brummeller and Vanderwerp were partners in the boot and shoe business. Thomas Griffin was a creditor, as was also Henderson & Co., and others. On the 24th of August, 1870, Henderson & Co., by their agents, applied to the debtor firm for a statement of their affairs, and obtained an exhibit showing that they owed three thousand dollars, and had assets amounting to two thousand one hundred dollars. On this showing, Henderson & Co. advised that Brummeller purchase Vanderwerp's interest in the firm assets, representing that the business would not support both partners, and that if Brummeller should take the business alone, thus reducing expenses, he would probably be able to work out and pay the debts. Henderson & Co. represented they would then give time; and by a friendly course by creditors, Brummeller might be enabled to keep on in business. Accordingly, Vanderwerp transferred and surrendered the firm assets to his partner, who agreed to pay all firm debts, and gave Vanderwerp his notes, aggregating three hundred dollars, for the interest transferred.

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 3 Cin. Law Bul. 594, contains only a partial report.]

This took place August 28th. On the same day, by Henderson & Co.'s advice, and on their request, Brummeller & Vanderwerp gave their note to Henderson & Co. for one thousand and forty-two dollars, the amount of their claim, payable on demand without grace, signed by the firm, and by Brummeller and Vanderwerp individually, and also gave a warrant of attorney with the note. This was done on the representation by Henderson & Co. that they would not use the warrant of attorney and take judgment, unless other creditors gave trouble and made it necessary for Henderson & Co.'s protection. Nevertheless, on the same day, Henderson & Co. caused judgment to be entered on the note, and August 29th execution was levied on the stock of goods then in Brummeller's possession. September 5th, Griffin commenced suit against Brummeller & Vanderwerp, who appeared and contested the claim. October 11th, Griffin obtained judgment for four hundred and twenty-three dollars and thirty-two cents, and caused execution to be levied on the same goods then held by the sheriff's deputy under Henderson & Co.'s execution. September 6th, the day following the commencement of Griffin's suit, a petition in bankruptcy was filed by firm creditors, in which Vanderwerp joined, against Brummeller alone, and he was adjudicated September 15th, nearly a month prior to the time when Griffin obtained judgment, and made his levy. Defendant Thomas McCord was chosen assignee, October 12th, and subsequently received the usual transfer of the bankrupt's estate.

[A bill was filed in this court by McCord, assignee, against Henderson & Co. and the officer holding their execution, to set aside the execution lien claimed by Henderson & Co., on grounds of fraud. McCord was appointed receiver in that suit and, by order of court, converted the property covered by the levy into money. That suit was settled on terms which relieved the assets practically from Henderson & Co.'s levy. The funds in the receiver's hands were then ordered to be turned over to McCord, as assignee in bankruptcy of Brummeller. Griffin having been adjudicated bankrupt in the Eastern district of this state, his assignee [Frank Russell] brought the present suit to establish a lien by virtue of the levy under Griffin's judgment, hereinbefore mentioned, upon the proceeds in the hands of McCord, assignee, and also for an injunction restraining McCord from paying out the funds in dividends or otherwise.] [2]

Chas. W. McLaren, for complainant.
N. A. Fletcher, for defendant.

WITHEY, District Judge. The case is before me on motion for an injunction. It is claimed that Griffin's execution created a valid lien on the goods as the property of the firm of Brummeller & Vanderwerp, because the transfer by one partner to the other of the firm effects was fraudulent, being intended to hinder, delay and defraud creditors, and also was without consideration. The bill and an affidavit made by Brummeller constitute the showing. The affidavit of Brummeller negatives all charges of positive fraud, or fraud in fact, on the part of the partners, in the sale of the firm effects by Vanderwerp to his partner. The transfer was made in the hope and expectation that Brummeller would be able, by the indulgence of their creditors and a reduction of expenses, to work through and pay the debts of the firm. Henderson & Co.'s agent had encouraged this view; they were the largest, or among the largest, creditors, and recommended the course which was pursued. The agent represented to the debtor firm Henderson & Co.'s disposition to be indulgent as creditors, and not press payment, and that they would not make use of the warrant of attorney to take judgment unless driven to do so by other creditors. It appears that both Brummeller and Vanderwerp placed implicit reliance upon those representations and assurances, and as debtors are naturally inclined, they took the most hopeful view of their affairs, and acted with the best intention, with no view to hinder, delay or defraud creditors. It may be, and probably is, true that Henderson & Co.'s agent was acting in bad faith, but they gained nothing by the course pursued.

Was, then, the sale by one partner to the other of the firm assets, a fraud in law upon the firm creditors, of whom Griffin is one? This question is raised under the statute of frauds, and not under the bankrupt act.

It is undoubtedly the rule, when the statute of frauds is under consideration, that positive intent to commit fraud—fraud in fact, as it is called—and also constructive fraud, denominated fraud in law—that is, when the necessary effect of a transfer is to hinder or delay creditors, without positive intention—alike render a sale void as to creditors, who, through judgment and execution, or by bill in equity, attack the transfer. It appearing there was no actual fraud, was there constructive fraud? A transfer by one member of firm to his co-partner, of firm assets, under ordinary circumstances, is as permissible and valid as a transfer by one individual of his property to another individual. Such transfer passes title, and is good against all the world unless the necessary effect is to defraud creditors. It has often been held that where a firm is insolvent, that of itself will not avoid a bona fide sale to one of the partners of the joint assets, and it cannot be necessary to refer to the judgments which have so determined. Ex parte Peake, 1 Madd. 346; Lindl. Partn. 758. What is claimed is, that the transfer, by one partner, of the firm property was necessarily fraudulent, because it hindered and delayed the joint creditors in the collection of their debts. We

[2] [From 17 N. B. R. 508.]

are unable to understand how the effect claimed by complainant necessarily resulted from the transfer. The goods and entire assets in the hands of Brummeller, after the sale to him, were liable for the debts of firm creditors who should come armed with judgment and process as much as before the sale. Both partners, and each are liable to the joint creditors, and the individual property of both partners remained liable for joint debts after, as before, the transfer. No part of the firm property had been withdrawn from the reach of firm creditors. Vanderwerp withdrew no assets of the firm from the business, and he is not shown to owe individual debts. How, then, does it appear that the firm creditors were hindered or delayed in the collection of their debts by the mere act of one partner selling to the other? It is claimed that Brummeller owed $300, private debts, besides the notes given Vanderwerp, aggregating $300 for his interest in the firm property, and that in view of the firm's insolvency, the effect in consequence of bankruptcy is to postpone firm creditors to these individual creditors. If we concede such to be the effect in the bankruptcy, which would not be the case as to the $300 indebtedness to Vanderwerp, as he should not be allowed, being one of the debtors, to share in dividends as against firm creditors, how does the effect produced by the bankruptcy proceedings commenced after the transaction we are investigating, render the previous sale, constructively fraudulent, as hindering or delaying creditors? Bankruptcy, which followed very soon after the sale, was not the necessary result of the sale.

It was the entering of judgment against both members on the note, and warrant of attorney by Henderson & Co., and their levy on the goods in Brummeller's possession, in violation of Brummeller & Vanderwerp's understanding of the treatment they were to receive from those creditors, which precipitated the bankruptcy proceedings.

The sale was prior to, and should be judged independently of the subsequent bankruptcy proceedings, caused by the action of one of their creditors, and not by one partner selling to the other. The bankruptcy was not the result of the sale, and if not, there was no constructive fraud in the sale.

The following judgments fully sustain the views we have expressed: Ex parte Ruffin, 6 Ves. 119; Ex parte Williams, 11 Ves. 6; Howe v. Lawrence, 9 Cush. 553; Robb v. Mudge, 14 Gray, 534.

But it is said the sale was without consideration. There is no ground for this proposition, inasmuch as Brummeller's agreement to pay all the firm debts was a good consideration, and further, he gave his notes to his partner for $300.

Complainant's execution was levied after the petition in bankruptcy was filed by firm creditors against Brummeller, on which he was adjudicated, and when the goods were in the latter's possession. No lien could therefore attach against the assignee in bankruptcy, unless the sale to Brummeller was fraudulent in fact, or by necessary construction of law, so that the goods still remained at the date of the levy, firm assets and firm property. Such not being our view of the facts, the injunction asked is denied.

Case No. 12,158.

RUSSELL v. McLELLAN et al.

[3 Woodb. & M. 157.] [1]

Circuit Court, D. Maine. May Term, 1847.

DEPOSITIONS—INTERROGATORIES—EFFECT OF AFFIDAVIT—SUBPŒNA DUCES TECUM.

1. A party may be allowed to take depositions before a master in chancery, after due notice, but without filing the usual interrogatories previously, if the evidence is to be derived from books, chiefly, not yet examined.

2. An order is proper in a bill in chancery, to produce books before a master, or in court, which may be in the possession or control of the respondent, and be referred to, though generally, in the answer.

3. If the respondent offer an affidavit that he has no such books in his possession, it will not prevent the order, but may be satisfactory to the master in his favor.

4. If it turn out to be so, the court will not, in ordinary cases, recommit them to the master for further interrogatories, but consider his decision final unless specific mistakes are pointed out.

5. But the court will give a subpœna duces tecum, for any witness to bring in the books who is supposed to have them, and will aid to ferret out and punish any evasion of its order.

[Cited in Johnson Steel Street-Rail Co. v. North Branch Steel Co., 48 Fed. 192.]

6. Rules of the court may be waived or modified for good reasons.

This was a bill in equity to compel a further account by [Isaac] McLellan, who had been joint owner with the complainant, [Joseph Russell,] either as co-partner or member of a corporation in a factory situated in Framingham, in this state, and had been agent for it many years.

After an answer to the bill, denying any partnership, and a replication, the plaintiff proposed to require the respondent to produce all his books and accounts connected with that agency; and moved for an order on him to that effect, and also for leave to take depositions before a master in chancery in respect to the books and accounts, on giving due notice, but without filing interrogatories, or cross-interrogatories, previously; yet allowing each party at the taking to put such questions as he might wish answered.

Ch. B. Goodrich, for complainant.

Mr. Osgood, for defendant.

The latter filed, likewise, an affidavit by the respondent, that he had in his possession, or under his control, no books nor ac-

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

counts as to that agency, except such as the defendant already had copies of.

WOODBURY, Circuit Justice. The motion so far as regards the leave asked to take testimony before a master in respect to the books and accounts of the parties, seems reasonable, considering the nature of the case. It asks a departure from the 47th rule of the court, which allows depositions to be taken if notice is given and written interrogatories and cross-interrogatories are first filed with the clerk. But a departure seems here useful to both parties, where so many unexpected questions may grow out of the examination of long accounts, as it will save the delay and expense in filing new interrogatories and taking additional depositions, several times, if books are produced and they are found to contain material facts. This is the only variance made from the rule, as a master can ordinarily take depositions when the usual interrogatories are filed, and this variance from one of our own rules we not only possess the right to allow beforehand, for good cause, but it is our duty, and in this instance is likely to save time and expense to both parties in eviscerating the real facts of the case. See cases in Allen v. Blunt [Case No. 217]. The proviso to the 30th section of the judiciary act of September, 1789 (1 Stat. 90), recognizes the power of this court to allow depositions to be taken "whenever it may be necessary, to prevent a failure or delay of justice." It is a mistake, as the counsel for the defendant seems to apprehend that this is trying any part of the case before a master, or referring it to him for that purpose, or for a report of any kind. That course this court has refused to permit in this cause on a previous motion, because the testimony in the cause is not yet put in. The present motion is merely for the purpose of taking some of that testimony, and the master is to act in this respect as an officer of the court to reduce the evidence to writing and administer the proper oaths, and not to report on any question of law or facts in the cause. In respect to the second branch of the motion, that the respondent be required to produce any books or accounts in his possession or control, relative to the matter in controversy, it seems well founded under the 15th section of the judiciary act of 1789 (1 Stat. 82). It is there authorized, even in trials at law, as fully as in chancery, and ample power given to enforce it, by nonsuit, or default of the disobeying party. Those powers exist fully in this court in cases in equity like this without the aid of statute. The United States courts have been very ready always to enforce this provision after reasonable notice, in actions at law. Hylton v. Brown [Case No. 6,981]; Bas v. Steele [Id. 1,088]; Dunham v. Riley [Id. 4,155]. In chancery in England, the motion is not an unusual one, and is substantially in the form adopted here in chancery cases. 1 Hoff. Prac. 306; 3 Daniell, Ch. Prac. 2038; 1 Smith, Ch. Prac. 661, 666; 2 Smith, Ch. Prac. 155; 6 Madd. 340; Wig. Disc. 119, 199. The rights of the respondent are well guarded, as the books must be in his possession or control, and must contain charges relative to the matter in controversy; or he is not required to produce them. Eager v. Wiswall, 2 Paige, 369. He has here put in an affidavit that he has no such books and no accounts of that character, except such as the complainant already has copies of. But this should be used rather as a reply to the order than a reply to this motion. If he makes such an affidavit in answer to the order after one is given and served upon him, and no exception is taken to the affidavit, he will, of course, be considered as exonerated from doing anything more under the order. And if the books wanted are in the hands and control of some partner of McLellan, or of the Framingham Factory Corporation, or some other person, the complainant must get access to them by a subpœna duces tecum to the true possessor of them. If the accounts as to these matters are mingled with others, the court will protect the latter from examination. 9 Sim. 261. The motion is then granted.

On the same day, the time for taking testimony having expired while this motion was pending, the court extended it sixty days longer, being a period less than what had elapsed since the original motion was filed in February last. At a subsequent day the commissioner reported that the defendant, in answer to the order, had filed an affidavit, denying that he had in his possession or control any books containing matter relative to the subject of the bill in this case. That thereupon the commissioner considered the respondent not amenable to any further proceeding as to the books before him; and the complainant not being ready to take any evidence before the commissioner, the order was reported back to the court. The complainant then moved—1st. That the report and order be recommitted to the commissioner, with instructions to allow interrogatories to be put to the defendant, explanatory of his affidavit. 2d. That if not doing this, the defendant be required by this court to answer such cross-interrogatories as to the subject of his affidavit as the complainant wished to propound.

These motions were resisted by the counsel for the defendant, and after being fully heard the court refused them for the following reasons:

The court did not apprehend that its power to let depositions be taken before a commissioner was doubtful in a case like this. It was not a case under the general provision of the act of 1789, when a witness was infirm, or bound to sea, or living over a hundred miles distant, &c., &c. Nor is it a case under the act of April 29th, 1802 [2 Stat. 156].

of taking depositions in equity, in conformity to the state mode of doing it in like cases. But, as remarked at the former hearing, it is taking them under the proviso to the act of 1789, in order to prevent delay, as is there expressly authorized. 1 Stat. 82; [Sergeant's Lessee v. Biddle] 4 Wheat. [17 U. S.] 508. And the mode of doing it departs from the 47th and 48th rules of this court, only in respect to the filing, previously, of interrogatories. All our rules are open to such departures, by leave of the court, on good cause shown, as all rules are established to facilitate and promote justice and not to embarrass or defeat it. Such good cause was shown here originally, and hence we do not refuse these motions, because entertaining a belief that the original order issued improperly, so far as regards the form of permitting depositions to be taken here under the special circumstances of this case.

Another reason urged against these motions, is, that it was not a proper case for compelling the production of books. But it seems to be forgotten that the bill averred and the answer admitted quite enough to render it probable the defendant had in his control books pertinent to the subject of the controversy. Long accounts had existed in respect to it. The defendant had enjoyed access to them, if not made them up. He had furnished copies of them on a previous inquiry. He and the complainant were mutually interested in them, either as partners or members of a corporation—one claiming it to be in the former capacity, and one in the latter. There seemed, then, to be no reason in equity, why the defendant should not be required to produce the books in which those accounts were kept, if he had the possession or control of them, and this as well before a master or commissioner as before this court itself. 2 Daniell, Ch. Prac. 1361; 4 Mylne & C., 263; 2 Paige, Ch. 432. The order was, therefore, made conditional, and passed, leaving him to be exonerated, of course, if he satisfied the commissioner that he had no control over any such books. He could be injured by no such order, and has satisfied the commissioner of his inability to produce any such books within his own custody.

The next inquiry then, is, whether a power exists in this court to recommit the case to the commissioner, in order that the defendant may be interrogated further as to the books, with a view to see whether his affidavit be not evasive or false. I entertain no doubt as to this power, or as to our own authority to let him be interrogated further here in respect to the subject matter. Hallett v. Hallett, 2 Paige, Ch. 432; Turn. & R. 195, note. But I do not feel entirely satisfied that this is a proper case for the exercise of such a power. To commit the cause again to the commissioner for such interrogatories, or to allow them here, after what has already taken place, and satisfied him, would be to cast some imputation on the correctness of his decision. No particular data are referred to, justifying such imputation. Both parties were heard before him, and both must acquiesce in his report, unless specific errors can be designated. The case is rem judicatam unless new facts are discovered or special mistakes made by him are assigned and supported. I can well conceive, that the general result reached by him might be correct in this particular case; while in others he or we ought, in the exercise of a sound discretion, to go further and allow detailed interrogatories, and even counter-affidavits to be filed, if desired. The defendant, in some cases, might be known not to be entitled to full credibility. The affidavit on the face of it might be equivocal. The circumstances of the case might render its contents presumptively evasive or incredible. Other modes of redress or of eliciting the truth might not be easily accessible. But none of these grounds are shown to exist here. On the contrary, if the books belonged to a corporation whose agent he has ceased to be (which seems probable, from 14 Pick 63), the new clerk or agent could be summoned into court, or before a commissioner, with a subpœna duces tecum, and access be thus had to all their contents. So, if the books are in other person's possession, and not the defendant's, that other person can be compelled to bring them in as a witness. So, if the affidavit be false or evasive, and the books have merely been put aside or handed over to others to avoid their production in this suit, proceedings can be had on this affidavit, for perjury, and the whole authority of this court and of the laws of the Union will cheerfully be lent to ferret out and punish, signally, such evasions and wickedness. The possession by an agent, or attorney, or partner, is possession by himself. 1 Mylne & C. 534; 4 Johns. Ch. 383; 11 Sim. 391; 7 Beav. 354; 2 Hare, 540; 3 Daniell, Ch. Prac. 2043.

Considering, therefore, that all these collateral modes of reaching like relief are open, and that the commissioner, after his positive oath they are not in his custody, (3 Daniell, Ch. Prac. 2049,) and after a full hearing of the parties, has decided the question in favor of the defendant, I do not think this a case of such strong and peculiar features as to require the allowance of either of the new motions made by the plaintiff. Much less is it one, when we advert to the fact that the books supposed to exist in this case are not so specifically pointed out in the bill as the old practice may at one time have required (Watson v. Renwick, 4 Johns. Ch. 381); and the defendant now consents to an amendment of the bill, putting there more specific interrogatories concerning them, like what are now proposed to the affidavit, and giving to the defendant an opportunity to reply by an amendment of his answer. This seems reasonable, and accords with the suggestion of there being another feasible mode of obviating the necessity for these motions. See, al-

so, Princess of Wales v. Earl of Liverpool, 1 Swanst. 114; 4 Johns. Ch. 386; 2 Cox, Ch. 226.

RUSSELL (MILLS v.). See Case No. 17,247.

Case No. 12,159.

RUSSELL v. The ORIENTAL.

[See Case No. 10,569a.]

Case No. 12,160.

RUSSELL v. PERKINS et al.

[1 Mason, 368.] [1]

Circuit Court, D. Massachusetts. May Term, 1818.

GUARANTY—CONSTRUCTION—RENEWED NOTES.

1. A guaranty of the notes of A cannot be applied as a guaranty of the notes of A and B.

[Cited in Wilcox v. Draper, 12 Neb. 143, 10 N. W. 579.]

2. Upon a guaranty to the plaintiff of all notes of A, which he should endorse, to the amount of $10,000, the plaintiff endorsed notes of A to the stipulated amount at several banks; and when the notes became due, they were taken up at the banks, and new notes, signed by A and B his partner, and endorsed, were received by the banks in their stead. It was held, that the guaranty did not apply to the new notes; and that by such substitution the old notes were extinguished.

[Cited in First Nat. Bank v. Hall, 101 U. S. 51.]

[Cited in brief in Bank of U. S. v. Beirne, 1 Grat. 248; Keith v. Goodwin, 31 Vt. 272. Cited in Locke v. McVean, 33 Mich. 482. Cited in brief in Michigan State Bank v. Peck, 28 Vt. 205.]

3. Of the effect of laches in giving notice under a guaranty.

Assumpsit on a letter of guaranty, addressed by the defendants [James and T. H. Perkins] to the plaintiff, at Charleston, S. C., as follows: "Boston, December 9, 1802. Nathaniel Russell, Esq.—Dear Sir: Should our friend, Mr. Josiah Sturgis, require your support in his negotiations at the banks, we hereby agree to guarantee any notes you may endorse for him to the amount of ten thousand dollars. And we shall feel ourselves obliged by any kindness or favors you may think proper to afford him. We are," &c. The cause came on to be tried upon the plea of the general issue; and upon the statute of limitations pleaded by the defendants. At the trial it appeared that Mr. Sturgis was the brother-in-law of the defendants, and that at the time of the writing the letter of guaranty, was in insolvent circumstances; but contemplated renewing business at Charleston, S. C. The letter of guaranty was delivered to the plaintiff, who, upon the re-commencement of business by Sturgis, upon the faith of the letter of guaranty, endorsed notes of Sturgis at the banks at Charleston from time to time during the year 1803, for sums exceeding in the whole, ten thousand dollars. In January, 1804, Sturgis formed a partnership with a Mr. Lovell, under the firm of Sturgis and Lovell, which partnership was well known to the defendants, and continued until dissolved on their failure in August, 1816. After the formation of the partnership, the various notes of Sturgis, endorsed by the plaintiff, were taken up at the several banks, as they became due, and new notes in the partnership name, endorsed by the plaintiff, were given to the same banks by way of renewal, in lieu of the old notes. And these last notes were renewed from time to time in the same manner, until the dissolution of the partnership in 1816. After the dissolution of the partnership, Sturgis made the three several notes, on which the suit was brought, viz. one dated 5th October, 1816, for $2565, endorsed by the plaintiff, payable at the Union Bank; a second, dated the 7th of October, 1816, for $5900, endorsed by the plaintiff, payable at the State Bank of South Carolina; and a third, dated 31st December, 1816, for $1535, endorsed by the plaintiff, payable at the South Carolina Bank. These notes were paid by the plaintiff as they became due; and they were made for the purpose of taking up notes for lesser sums, then due to the said banks, on the notes of Sturgis and Lovell, endorsed by the plaintiff, which had been given in the manner before stated, in lieu of the notes of Sturgis, endorsed by the plaintiff before the partnership. After payment of these three notes, the plaintiff in March, and again in June, 1816, gave notice thereof to the defendants, and claimed an indemnity for the amount under their letter of guaranty. The defendants never returned any answer. The plaintiff never at any prior time gave any notice to the defendants, that he had made any advances under the guaranty; or that he had endorsed the partnership notes of Sturgis and Lovell, under the faith of the guaranty. But there was some evidence in the case, from which, if believed, it might be inferred, that the defendants as early as 1806 knew, that the plaintiff did continue to endorse the papers of the firm, and that in the opinion of the firm of Sturgis and Lovell it was done under the guaranty.

Hubbard & Webster, for plaintiff.
Gallison & Prescott, for defendants.

STORY, Circuit Justice. I am of opinion, that the plaintiff is not entitled to recover. Independently of every other objection, it is decisive against the plaintiff, that the case is not brought within the terms of the guaranty. The guaranty cannot in reason be construed beyond the plain and obvious import of its language. The letter imports, that the defendants will guaranty any notes endorsed by the plaintiff for Mr. Sturgis to the amount of ten thousand dollars. It does not cover any notes endorsed for the firm of Sturgis

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

and Lovell. Nothing can be clearer, than that a guaranty of the notes of A cannot be applied to the notes of A and B. It is wholly unimportant to the defendants, whether the notes would have been more or less safe under such circumstances. They have a right to stand upon the terms of their contract, and declare, "non in hæc fœdera venimus." The original notes of Sturgis, endorsed by the plaintiff under the guaranty in 1803, were taken up and extinguished by the new partnership notes, endorsed by the plaintiff. When once extinguished, the title under the guaranty was gone; and a continuing liability could not be afterwards created without the express or implied consent of the defendants. The notes, on which the present action is brought, were indeed made by Sturgis, and endorsed and paid by the plaintiff. But there is no pretence, that they were made upon the faith of the guaranty. Supposing they were now for the first time made after so great a lapse of time, upon a new consideration, the defendants would not be liable on their guaranty; for the guaranty could not be applied to endorsements made for the first time at such a distance of time. Much less could these notes be sustained under the guaranty, when they were made for the express purpose of changing partnership transactions into individual negotiations, so as to shape a case within the terms of the guaranty. If, indeed, these notes could be referred back (as they certainly cannot be) to the original transactions in 1803, the facts would be equally fatal to the plaintiff, for he would be guilty of gross laches in not giving notice of the endorsements to the defendants during the space of twelve years; and in giving credit to the firm during all that time, without any communication with the defendants, on account of debts incurred under the guaranty. It is not, however, necessary to dwell on this view of the cause, because it is plain, that the original notes of Sturgis in 1803, to which alone the guaranty ever attached, were duly paid and extinguished, as they became due, at the several banks, by the substitution of new notes in the partnership name, which the defendants never undertook to guaranty.

Verdict for the defendants.

Case No. 12,161.

RUSSELL v. PLACE et al.

[9 Blatchf. 173; 5 Fish. Pat. Cas. 134.] [1]

Circuit Court, N. D. New York. Oct. 10, 1871.[2]

PATENTS—NEW TRIAL—EXCESS OF VERDICT—INCREASE OF DAMAGES.

1. In an action at law for the infringement of letters patent, the jury found a verdict for the plaintiff, for $700 damages. On a motion by the defendant for a new trial, the court was of opinion that the evidence, tending to prove actual damages sustained by the plaintiff, did not warrant a verdict for a greater amount than $562-50: *Held*, the plaintiff might be allowed to remit the excess, instead of being required to submit to a new trial.

[Cited in Warren v. Robertson, Case No. 17,198a.]

2. It appearing that the infringement was deliberate and intentional, and the plaintiff asking, under the statute, for an increase of the actual damages found, the court awarded judgment for $1,200 and costs.

[Cited in Burdett v. Estey, 3 Fed. 571.]

3. The defendant was allowed to require the plaintiff to first remit the amount of the excess of the verdict, or submit to a new trial, the order of the court thereupon to award the plaintiff judgment as aforesaid.

This was a motion by the defendants [Isaac V. Place and others] for a new trial, in an action at law, brought for the infringement of letters patent [No. 93,910, granted to Nathan C. Russell, August 17, 1869, reissued February 1, 1870, No. 3,816] for an invention connected with the treatment of bark-tanned skins, to make them suitable for the manufacture of gloves. At the trial the plaintiff had a verdict for $700. The plaintiff also moved to increase the amount of the verdict.

Horace E. Smith, for plaintiff.

Matthew Hale and James M. Dudley, for defendants.

WOODRUFF, Circuit Judge (after holding, that, on other grounds urged, a new trial ought not to be granted). The proof of damages sustained by the plaintiff did not, I think, justify so large a verdict. Although the action is, in form, tort, the verdict should be for actual damages only. Where the circumstances of the case make it just and proper, the court are authorized to award, in the judgment, not exceeding three times the actual damages found by the jury; and this furnishes ample opportunity to the plaintiff to obtain whatever greater sum the court may deem reasonable. But the duty of the jury was to find the actual damages, and the burthen was upon the plaintiff to establish those damages by proof.

Yielding full weight to the presumption, that, in a community where the improved leather was in great use and demand, the plaintiff would have realized the profit of preparing the skins, or an equal number of skins to those, which the infringing defendants prepared by the use of the invention, the case, on the proof, stands thus: Taking the testimony most favorably for the plaintiff, the profit he lost was $1 87½ on each dozen of skins. The defendants, in their estimate of the quantity they manufactured after the patent was re-issued, made not exceeding three hundred dozen. The plaintiff's loss, on this most favorable view of the evidence, did not exceed $562 50. I apprehend, however, that this does not necessarily require that a new trial should be granted. The plaintiff may, if he sees fit, remit the excess.

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

[2] [Affirmed in 94 U. S. 606.]

Besides this, where the court has power, and is called upon, to grant treble damages, this excess may be considered, and, in the discretion of the court, the error be fully corrected by such enhancement of damages as may seem just, to indemnify the plaintiff for the expenses of prosecution, especially where, as in this case, the infringement seems deliberate and intentional, though it may have been done under an erroneous estimate of the plaintiff's rights. The plaintiff seeks a reasonable increase of the sum found by the verdict; and I think it is a proper case for such an allowance. It is not reasonable that an inventor of a useful improvement should be compelled to spend his means in protecting himself without indemnity, and so practically lose the benefit of the invention which the law is designed to secure to him.

I am disposed to award judgment for $1,200 and costs of suit; but, if the defendants prefer that course, and that the record may conform to my views of the evidence, the plaintiff may first be required to remit the excess before mentioned, or submit to a new trial, and the order of the court thereupon will award him judgment as just stated.

[On appeal to the supreme court, the decree of this court was affirmed. 94 U. S. 606.]

[For other cases involving this patent, see Russell v. Klein, 19 Wall. (86 U. S.) 433; Russell v. Dodge, 93 U. S. 460; Russell v. Place, 94 U. S. 606.]

RUSSELL (SAXONVILLE MILLS v.). See Case No. 12,413.

RUSSELL (SCOTT v.). See Case No. 12,546.

RUSSELL (SPRING v.). See Case No. 13,261.

Case No. 12,162.

RUSSELL v. THOMAS.

[10 N. B. R. 14; 10 Phila. 239; 31 Leg. Int. 189.] [1]

Circuit Court, E. D. Pennsylvania. Jan. 31, 1874.

CONSTITUTIONAL LAW — OFFICERS — APPOINTMENT BY PRESIDENT.

The provision of the act of March 2, 1867 [14 Stat. 543], entitled "An act supplementary to the several acts of congress abolishing imprisonment for debt," authorizing such proceeding to be had before a United States commissioner appointed by the president alone, without the consent of the senate, does not violate the constitutional provision vesting the judicial power of the United States in officers appointed by the president with the consent of the senate. Const. U. S. art. 2, § 2.

To the Honorable the Judges of the said Court: Craig Biddle, a commissioner duly appointed by your Hon. Court to take bail and affidavits, respectfully represents: That one John L. Thomas, on the 20th day of October, A. D. 1873, presented to him a petition, alleging that he was held in custody by the marshal of this district, by virtue of a capias ad satisfaciendum issuing out of your Hon. Court, to collect a debt of $935.38, and asking that he be discharged from said custody, on giving bond to comply with the provisions of the act of congress approved March 2d, 1867, entitled "An act supplementary to the several acts of congress, abolishing imprisonment for debt." The said petition was granted, and a bond given to the plaintiff in the suit by the petitioner, for his appearance before your commissioner to apply for his discharge under the provisions of the insolvent laws of the state of Pennsylvania. In accordance with the condition of his said bond, the petitioner presented himself on January 19th, 1874, at eleven a. m., before your commissioner, accompanied by his counsel, Mr. Sellers; filed proof of the publication of the notice required, and asked that the final hearing be proceeded with.

Mr. Sharpless, for W. D. Russell, the plaintiff, on whose execution the petitioner was in custody at the time of the filing of the original petition, moved the commissioner to decline to take further jurisdiction in the case, on the ground that the act of congress already referred to, is unconstitutional and void in this, that it attempts to confer the judicial power of the United States, upon a judicial officer holding his office by other tenure than that of good behaviour.

Mr. Sellers requests, in view of this objection, that the further hearing of the case be postponed until Monday, February 2d, 1874, at eleven a. m., and that the proceedings be reported to the circuit court, for such instructions as they may deem meet.

Your commissioner, therefore, in accordance with said request, hereby submits the question to your honorable court for its decision thereon. All of which is respectfully submitted by your commissioner.

January 20th, 1874. Craig Biddle.

BY THE COURT. Capias ad satisfaciendum. On defendant's petition for liberation and commissioner's report thereon. The question certified arises upon the concluding words of the act of congress of 2d March, 1867, supplementary to the several former acts abolishing imprisonment for debt. The former acts to be considered, are not only those of 28th February, 1839 [5 Stat. 321], and 14th January, 1841 [5 Stat. 321, 410], "to abolish imprisonment for debt in certain cases," but also those of 6th January, 1800, and 7th January, 1824, "for the relief of persons imprisoned for debt." The acts of 1800 [2 Stat. 4] and 1824 [4 Stat. 1] made certain functions exercisable by commissioners of insolvency specially appointed for each case in which relief might be affordable. The intervening acts of 1839 and 1841, contain no such express provision. But their execution might have required the occasional intervention of such specially appointed commissioners. The words in question at foot of the supplementary act of 1867, are, "But all such proceedings shall be had before some one of the commissioners appointed by the

[1] [Reprinted from 10 N. B. R. 14, by permission.]

United States circuit court to take bail and affidavits." The objection certified, assuming that these words confer an independent judicial function upon such a commissioner, is that congress cannot constitutionally make such a function exercisable by any officer who is not appointed by the president with the consent of the senate. If the objection would otherwise prevail, the assumed construction of the words must, for that very reason, be rejected, and they must be understood as having a constitutional meaning and application. They might then reasonably be understood as importing that wherever proceedings before a commissioner, under this supplementary act of 1867, or any former act, should thereafter be necessary or otherwise proper, they should be had before one of the standing commissioners. Legislative precedents for such an enactment might be mentioned. One of them occurred under the bankrupt law of 1800 [2 Stat. 19]. By that act (section 2) commissioners of bankruptcy had been specially appointable, for every case, by the judge. The act of 29th of April, 1802, to amend the judicial system, (section 14 [2 Stat. 164]), substituted general commissioners appointable by the president, without requiring any consent of the senate. It may be suggested that if such were the true and only application of the words in question, the present proceedings ought to have been commenced by a petition to the court or to the judge; and that the reference to one of the standing commissioners, if proper, ought to have followed. In future, this will probably be considered the more convenient course in ordinary cases. The present certificate of the commissioners having been made at the debtor's instance, may be so acted upon by the court as to be of equivalent effect to an initial petition, and a reference under it.

But there may perhaps be extraordinary cases in which the exclusion of a standing commissioner's initial cognizance of the application for relief, would prevent seasonable liberation of a prisoner. We may, therefore, consider whether the constitutional question which has been suggested could then properly arise. That congress may vest the appointment of such an inferior judicial officer as the commissioner in the president alone, or in the court alone, is, under the second section of the second article of the constitution, indisputable, and is not here disputed. The objection is, that the function here in question, is an independent one beyond the pale of an inferior officer's authority. But it is observable that the function is merely incidental to the execution of final judicial process. It is not necessary, however, to inquire whether congress should make such a function exercisable independently of revision by the tribunal which issues the process, because under these acts of congress, the commissioner's proceedings are, at every stage of them, amenable to such revision. His relation of a subordinate or inferior judicial functionary, if he proceeds without special preliminary authorization, may perhaps, warrant summary revision by the court on affidavit, showing that his proceedings are unwarranted or irregular. If this be otherwise it follows that there may be revision through process of habeas corpus, or certiorari, if not by both.

The jurisdiction of the court having already attached under the judgment and execution, the power to issue revisory and auxiliary process by habeas corpus or certiorari, is conferred by the 14th section of the judiciary act of 24th of September, 1789 [1 Stat. 81]. This enactment expressly names the former of these writs; and the latter is included in the words, "all other writs not specially provided for by statute which may be necessary for the exercise of" the "respective jurisdictions and agreeable to the principles and usages of law." The point, as to a certiorari to enforce revision, has been considered in another circuit; and has, in principle, been decided by the supreme court in the case of a mandamus. The circuit court has no original jurisdiction to issue a mandamus, and it is not named in the 14th section. But the decisions are, that it is, nevertheless, one of those other writs, which, in aid and furtherance of an execution, may under that section, be issued by the circuit court. In the present case, it will suffice to make an order directing the commissioner to proceed in like manner as if the petition had been presented in the first instance to the court, and had been afterwards referred to him for provisional action, subject to exception, &c.; provided that the petitioner's right of liberation, and every incidental, and other question shall be open to consideration, and that either party may apply to the court for directions, &c. The nature of this proceeding would be misconceived if it were understood as affecting any other party than the execution creditor, or as depriving him of any recourse against the debtor, except that of imprisonment. No federal court can interfere with any independent process of a state court. Nor can a state court interfere with the execution of judicial or other process of a federal court. A discharge by the insolvent court of a state, therefore, has no force or effect of its own to liberate the insolvent from custody, under mesne or judicial process of this court against his body. But under acts of congress, ordinarily called the "Process Acts," which have not been as yet cited, a rule or practice of a court of the United States that "under neither mesne, nor final process, shall any individual be kept in prison who under the insolvent law of the state, has for such demand, been released from imprisonment," was held valid. This was not generally understood until the decision of Beers v. Houghton, 9 Pet. [34 U. S.] 329, in the year 1835. Such a rule or practice was afterwards adopted in the courts of the United States in most of the judicial districts, including those of Penn-

sylvania; and it was the purpose of some of the subsequent acts of congress which have been cited to facilitate such discharge from imprisonment. It thus became the practice in this court to discharge a prisoner, as in the state courts, on his giving a bond with the usual condition to take the benefit of the insolvent law of the state at the next term, &c. This insolvent law of the state authorizes the discharge of an insolvent debtor, on different conditions, in three different cases; the first where he is arrested or detained under process in any civil suit or proceeding for the recovery of money or damages, or for the non-performance of any decree or sentence for the payment of money; the second, where he is held on a bail-piece; the third where he is not arrested, detained, or held in custody in any manner. A person arrested or detained in a civil suit, under mesne or final process of this court, or under a bail-piece issued in any suit in this court, cannot obtain his liberation from such custody by a proceeding of either the first or the second kind in a state court of insolvency. Nor in a proceeding of the third kind, will the state courts have cognizance of any ulterior purpose of such a party to make the discharge when obtained, available for his liberation in this court. The present petitioner is reported to have proceeded in the insolvent court of the state to obtain, not a general discharge in the third of these modes, but a special discharge from the process of this court in the first mode. Of course he failed to induce the exercise of such a jurisdiction. In re Thomas [10 Phila. 82].

Whether his present application is rightly conceived, and if not whether the mistake will prevent him from obtaining relief under a simpler view of the legislation of congress which may be applicable, are questions for preliminary consideration and provisional decision by the commissioner. One of the questions may possibly be whether the provision of the law of the state that a prisoner, such as this defendant, who was in custody under process upon a judgment in any action for deceit, shall not be discharged until after an actual confinement of sixty days, qualifies the right of liberation which would otherwise be available to him under the acts of congress of 1800 and 1824. If the right is thus qualified, it must be through the effect of the acts of 1839, 1841 and 1867. These laws were enacted in the spirit of decision of Beers v. Houghton, with a general purpose to enlarge exemption and facilitate discharge from imprisonment. It is true, that in extending the relief to the full extent of that affordable under the laws of the respective states, these acts of congress require observance of the respective state laws, and expressly provide that all existing modifications, conditions and restrictions upon imprisonment for debt under the laws of any state, shall be applicable to process of the courts of the United States therein, &c. But the question to be considered will be, whether these requirements and conditions are not limited to the cases in which this adoption of state laws by congress gave exemption or relief not otherwise obtainable under any positive law of the United States; and, therefore, whether the positive enactments of 1800 and 1824 in favor of personal liberty, are impliedly repealed or qualified by the subsequent statutes. I do not mean to intimate any present opinion as to their operation in these respects.

The act of 1867 was passed on the same day as the present bankrupt law. The insolvent laws of the several states variously differ from one another, and provisions of some of them could not co-exist with the bankrupt law. But I do not perceive that the act in question is interpretable, in anywise, with reference to the bankrupt law. Nor do I perceive any important bearing, positive or negative, of any of the provisions of the 5th, 6th or 14th sections of the act of June 1, 1872 [17 Stat. 196], "to further the administration of justice," though the general purpose of its 5th section is to promote conformity in the practice and modes of proceeding in the state and the federal courts. But here again what I suggest will not preclude further argument. I make the suggestions because their subjects were more or less fully argued on the application of the execution creditor for a writ of prohibition to the commissioner, and because they serve to explain my reasons for not granting that writ.

Case No. 12,163.

RUSSELL v. TOPPING et al.

[5 McLean, 194.] [1]

Circuit Court, D. Illinois. Dec. Term, 1850.

CORPORATIONS — RIGHT TO HOLD REAL ESTATE — ESTOPPEL — MORTGAGES — FORECLOSURE.

1. A person mortgaged certain tracts of land to the plaintiff, and afterwards mortgaged some of the tracts to the State Bank of Illinois. The plaintiff having foreclosed his mortgage, the court decreed a sale of the mortgaged premises. At the sale the plaintiff and the bank were competitors in bidding, but the bank became the purchaser of a lot not included in its own mortgage, in order to protect itself and prevent the property from being sacrificed. By its charter the bank was prohibited from purchasing real estate, except what was required for its business, or such as was mortgaged or conveyed for debts, or such as had been purchased by it on judgments, or obtained on debts: *Held*, that the bank had not the legal capacity to acquire the title to the lot at the sale.

[Distinguished in Blunt v. Walker, 11 Wis. 351. Cited in brief in Ray Co. v. Bentley, 49 Mo. 238.]

2. The plaintiff received the purchase money, and the mortgagor being otherwise indebted to him, he brought suit against him, recovered judgment, issued execution, levied on and sold the same lot. The plaintiff purchased the lot at this sale, and received a deed from the prop-

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

er officer. The plaintiff, notwithstanding his receipt of the purchase money, has the right to contest the validity of the sale to the bank.

3. The plaintiff and the bank being competitors at the sale, and the plaintiff having in no way induced the bank to bid in the property, the law of estoppel in pais does not apply to the case.

4. By the common law every corporation had the right to purchase, hold, and convey real estate. This right has been restricted in England by the statutes of mortmain. In modern times, however, the legislature generally prescribes in the charter some limits to the power of a corporation to purchase and transfer real property.

5. It is a principle universally acknowledged, that a corporation can only act in the manner indicated in its charter. Any thing absolutely prohibited by its charter, if attempted to be done, is a nullity.

[Cited in Alabama & C. R. Co. v. Jones, Case No. 126.]

6. A title by deed implies a contract, or at least, competent parties. A deed to a person having no existence, is generally inoperative, and passes no title from the grantor. If a man grant his estate to an imaginary corporation, no title passes, and it is precisely the same if it is granted to a real corporation, rendered incapable by its charter, of taking the grant. As to that particular faculty, it is not a corporation.

[Cited in Harriman v. Southam, 16 Ind. 190.]

7. Whatever may be the rule in some of the states, where the doctrine of strict foreclosure prevails, in Illinois, the uniform practice both at law and in equity is, to order a sale of the mortgaged premises.

8. The modern authorities regard a mortgage merely as a security for the debt, and until a sale takes place under an order of the court, the title to the mortgaged property is in the mortgagor, subject to the incumbrance.

At law.

Billings & Parson, for plaintiff.

Davis & Edwards, for defendants.

DRUMMOND, District Judge. This is an action of ejectment brought for a tract of land in Madison county. A question as to the admissibility of certain depositions taken on the part of the defendants, which the plaintiff seeks to exclude, has been argued before me, and this, by an understanding between the parties, has brought up directly for consideration all the merits of the cause, most of the facts upon which the controversy is to turn, being matters of agreement. The opinion of the court is desired upon the law of the case.

It appears that a man by the name of Howard, being indebted to the plaintiff, in 1835 gave him a mortgage on some real property to secure the debt, which included the tract in question. The plaintiff in 1841, foreclosed his mortgage by a proceeding on the equity side of this court. [Case No. 12,156.] The State Bank of Illinois was made a party defendant, and filed an answer to the bill, alleging that Howard was largely indebted to the bank, for which indebtedness a mortgage had been given by Howard, but subsequent to that of the plaintiff, and which included several parcels of land covered by the plaintiff's prior mortgage, but not the lot in controversy. At this time Howard was insolvent, and the bank asked that the lands not included in their mortgage should first be sold to pay the plaintiff's debt, and that the lands included in the mortgage of the bank (and which were also in the plaintiff's mortgage) should be sold only in the event of the other lands not being sufficient to pay the plaintiff's debt. The court decreed accordingly, and ordered, that unless the plaintiff's debt were paid within twenty days, the land should be sold by a commissioner. It was sold in pursuance of the decree. At the sale the bank purchased the tract in controversy, and a deed was made to the bank by the commissioners. The defendants claim through the bank. The plaintiff received the purchase money paid by the bank. Howard being liable to the plaintiff for other indebtedness, suit was brought against him by the plaintiff, judgment recovered, execution issued, and the tract in question levied on and sold. At that sale the plaintiff was the purchaser, and he now holds a deed for the premises. Both parties claiming through Howard, his title is not questioned. It is admitted that this tract of land was not required for the accommodation of the bank in the transaction of its business, and that the same was not mortgaged to the bank, but that the only title held by the bank was by virtue of the sale made under the decree already mentioned. The possession of the defendants is also admitted. The title depends upon the validity of the sale made to the bank under the decree. Could the bank become the purchaser of the lot in question at that sale? The bank was a corporation created by an act of the legislature of Illinois, passed 12th Feb., 1835, the 5th section of which was as follows: "The real estate which it shall be lawful for said bank to purchase, hold, and convey, shall be: 1st. Such as shall be required for its immediate accommodation in the transaction of its business; or such as shall have been mortgaged to it in good faith by way of security for loans previously contracted, for money due; or, 2d. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings; or, 3d. Such as shall have been purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts; and said bank shall not purchase, hold, or convey real estate in any other case, or for any other purpose," &c. The plaintiff contends that the purchase by the bank was made in violation of the express provisions of the charter, and was consequently void. It is admitted by the defendants, that it was contrary to the letter of the law, but it is insisted it comes within the equity of the statute, and even if this be not the case, the plaintiff is estopped from controverting the title of the bank.

By the common law every corporation had the right to purchase, hold, and convey real property. This right has been very much restricted in England by various statutes, passed from time to time, usually called statutes

of mortmain. In modern times the legislature generally prescribes some limits to the power of a corporation to purchase and claim real property, by the law of its creation. The charter is the source to which we must go to ascertain whether the corporation possesses a particular power. It is a principle universally acknowledged by all our courts that a corporation can only act in the manner indicated in its charter. Anything absolutely prohibited by its charter, if attempted to be done, is a nullity. The numerous authorities cited on the argument conclusively show this. New York Firemen Ins. Co. v. Ely, 5 Conn. 560, 566, 574; Head v. Providence Ins. Co., 2 Cranch [6 U. S.] 127; 8 Ohio, 288; 11 Ohio, 492; 9 Port. [Ala.] 467; 2 Kent, Comm. 298. Still, these authorities do not decide that we must give a narrow or illiberal construction to a charter; on the contrary, we must look to the object and intent of the law in this as in other cases, and so construe it as to carry out the object the legislature had in view in the enactment. And this very charter expressly provides that it shall be construed liberally for all beneficial purposes therein intended. But we must take it all together, and give effect, if possible, to all its parts. The land purchased by the bank in this case, was not for a debt contracted, directly or indirectly; the only ground upon which it has been put, is that the bank had a right to redeem the lands covered by its own mortgage, from the operation of the plaintiff's prior mortgage; that it could not redeem a part without paying the whole debt, and that the right to redeem implied the right to appear at the sale to protect itself, and prevent the property from being sacrificed; that being of the greatest importance to the bank. The object of the testimony is to show that the bank had no other motive than to protect itself, and save as much as possible from the wreck of Howard's estate, and that if the whole of the property were made available to the bank, there would yet remain a large deficit. The plaintiff had different parcels of land bound for his debt, some of which were included in the bank's mortgage. In such cases it is a rule well settled in equity, that the party who has the double fund shall resort, in the first instance, for payment, to that parcel which is not subject to the lien of the other party. The decree was in accordance with this rule. But did this give the bank the right to buy up land not included in its mortgage, for the mere purpose of saving the land which was included? We must look at the consequences of such a principle. In every instance where a man was indebted to the bank, it might be said, that in one sense, his ultimate ability to pay the debt would depend upon his property not being sacrificed. Suppose the case of an individual against whom judgment has been recovered, which is a lien upon his real estate, the bank holding a subsequent judgment binding the same lands. The charter gives it the power, in terms, to buy the lands at judicial sales made on its own judgment; but because it is a judgment creditor, is it permitted to become a purchaser at the judicial sales had on other judgments, merely thereby to strengthen its own fund? The object of the legislature in inserting such a provision in its charter, was to confine the bank to its proper and legitimate business of banking, and to prevent it from becoming a great land proprietor. But while this may be admitted, it is plain that to sanction the practice mentioned, would be to allow the bank to evade an express provision of law, by the questionable method of intention. In other words, the test would be its intentions, and not its acts.

An authority has been referred to by the plaintiff's counsel, which is relied upon as conclusively settling the question against the validity of the bank's purchase—a recent case decided by the supreme court of New York. Chautauqua Co. Bank v. Risley, 4 Denio, 480. An examination of it will show how near it approaches the present case. There were various judgments binding the real estate of one Sexton. The bank was a judgment creditor. The lot in question was sold on an execution issued on a judgment of older date than that of the bank, and one White became the purchaser. There was a judgment between this older judgment, and those held by the bank. The bank assigned their judgments to a creditor who held a judgment subsequent to that of the bank. This judgment creditor redeemed the land from the first sale to White, in his own name, as well as in the name of the bank. The creditor who held the judgment prior to that of the bank's, assigned his judgment to still another judgment creditor, whose lien was of the same date as his who had redeemed. This last judgment creditor also redeemed the land from the first sale to White. But neither of these persons redeemed from each other. The person who redeemed first, assigned his interest to the bank, having acted as their agent. The person who last redeemed also assigned his claim to the bank, which thus, under the law, was entitled to a deed. The sheriff executed a deed to the bank, which recited that the bank had redeemed the land as judgment creditors of Sexton. Under these circumstances, the bank brought an action of ejectment to recover the possession of the land described in the sheriff's deed, and the question arose, whether the bank could purchase the land. The charter of the bank contained a restriction, similar, in all respects, to that in the charter of the State Bank of Illinois, and the prohibition as to real estate, was in the precise words of the charter of 1835: "The said corporation shall not purchase, hold, or convey real estate in any other case, or for any other purpose." The court decided that the

redemption of the land was only valid by virtue of the bank being the representative and assignee of the judgment next preceding its own, that being the prior lien. And, therefore, the bank was in no sense a redeeming creditor, whatever the sheriff's deed might say, or whatever was the understanding of the parties. The case was, then, the same as though the bank was the assignee of one who had purchased the land at sheriff's sale. The court held that the bank had not the legal capacity to acquire the title. For a much stronger reason the bank could not purchase directly at the sale itself. The same argument was used there that has been urged here, that the bank having other judgments against the land which might be lost unless saved by the benefit to be acquired by the purchase, the case was brought within the statute; but the court ruled otherwise, declaring that circumstance would not bring it within the terms or spirit of the law. But an intimation was thrown out that the bank might have had the power to redeem within the equitable construction of the law.

In the case just referred to, the bank was a subsequent judgment creditor, having a lien upon property bound by a prior lien. It did not redeem, but chose to purchase at a sale made or redemption had under the prior lien. It is a stronger case than this, in favor of the bank's right to purchase, because here the bank had no lien upon the lot in controversy. It had merely the equitable right of compelling the plaintiff to resort in the first place to the property not held by the bank. It is said, however, conceding that the bank could not purchase, hold, or convey the property; that is, that the sale was illegal, it will not follow, the title of the bank and of its grantees is invalid, so long as no action is taken on the part of the state; that it may be likened to the case of an alien. Formerly, an alien could not hold or inherit real property, but it has been decided that an alien could hold it till a proceeding was instituted on the part of the sovereign power to deprive him of it. This old rule of the common law is now, in many of the states, changed by legislative authority, and aliens can hold real property as well as citizens. Several authorities have been adduced to show that the same principle was applicable to corporations, as to aliens, and that under such circumstances, they, or the third person to whom they may convey, hold a title defeasible by the sovereign power alone. Baird v. Bank of Washington, 11 Serg. & R. 418; Banks v. Poitiaux, 3 Rand. (Va.) 136; Silver Lake Bank v. North, 4 Johns. Ch. 370. But in the case of the alien, and in the authorities cited, it was so decided because the alien and the corporation could take or purchase real estate. In Baird v. Bank of Washington, the prohibition was to purchase and hold, and the supreme court of Pennsylvania decided that the bank might purchase, but could not hold, as against the state alone. It was a defeasible title. In the case in Virginia, the prohibition was to hold, and the court of appeals decided the banks might purchase. If, however, the prohibition is absolute as to the taking or purchasing, there is an entire incapacity to acquire the title. In this case the bank could neither purchase, nor hold, nor sell real estate, except under certain circumstances. These circumstances do not appear to have existed in this case; consequently the State Bank did not acquire any title at the sale. Where, then, was the title? It still remained in Howard. It had not been divested. A title by deed implies a contract, or, at least, competent parties. A deed to a person having no existence is generally inoperative, and passes no title from the grantor. Even in the case of an escrow, the title remains in the grantor till the condition is complied with, and the deed delivered, when it will relate back for certain purposes to the time when it was delivered by the grantor as an escrow. If a man grant his estate to an imaginary corporation which exists only in his own mind, no title passes, and it is precisely the same if it is granted to a corporation rendered incapable by its charter of taking the grant. As to that particular faculty it is not a corporation.

But is is contended that the decree of foreclosure divested the title of Howard. The language of the decree is in the form usually adopted in such cases—that the party be forever barred from his equity of redemption. However it may be in some of the states, where the practice of strict foreclosure prevails, that is, where the mortgagee takes the premises without a sale, in Illinois, the uniform practice, both at law and in equity, is to order a sale. It was the course pursued in this instance. It is said, if the money had not been paid within the twenty days, it might have been in the power of the mortgagee to insist on a sale. But I doubt whether he would even have had that right upon the tender of the debt, interest, costs, &c., before the sale. But there can be no doubt, if the money had been paid by the mortgagor, and received by the mortgagee before the sale, it would have extinguished the debt and the mortgage, and no conveyance would have been necessary to vest the property in Howard. To show that this view of the case is correct, it is only necessary to inquire where the title was after the event of foreclosure. It was certainly not in abeyance, for that is never true except in certain specified cases, as where the title remains in that condition till there is a grantee capable of taking, or where there is to be a grantee, in futuro. If the decree vested the title anywhere, it must have been in the mortgagee, and that would not help the defendants. The modern authorities regard a mortgage merely as a security for the debt, and with us, until there is a sale of the premises under a judgment at law or decree in chancery, the

title is in the mortgagor; to say nothing of the right of the party to redeem even after sale. If the debt is paid, he can maintain ejectment; he is entitled to the rents and profits of the estate. He is, in a court of law, even, to all intents and purposes, the owner of the land, subject to the incumbrance. If the time for the payment of the money secured by the mortgage is elapsed, it can hardly be pretended, under the law as it now stands, the mortgagee can recover the possession of the land mortgaged even for the mortgagor. He must, in the first place, resort to a court of law or equity, to foreclose the right of redemption, and that is uniformly done by a sale. Besides, a court of equity usually requires a return or report to be made by the master or commissioner, of the proceedings, and in some respects, the whole matter may be considered as in fieri, until the acts of the master are approved or confirmed by the court. The decree in this case directed such a report to be made, and it was made accordingly. It is the sale, then, and subsequent proceedings, that divest the title. In this case there was not, in law, any sale of the property which is here the subject of controversy. The relaxation which has gradually taken place upon the subject of mortgages, under the slow but sure progress caused by an advance in the arts of civilization and refinement, is a striking illustration of the amelioration given, by modern decisions, to the stern and inflexible rules of the ancient common law. The law of mortgages is now administered in our courts upon principles of equity and justice, which commend themselves to all. There being, then, no sale under this decree, and the decree itself not having divested the title, it still remained in Howard.

But it is insisted, that the plaintiff cannot avail himself of these principles, because, having received the money from the bank, sound policy requires that he should not set up the illegality of the sale, and the incapacity of the grantor, to defeat the title of the bank. The court has nothing to do with the propriety or delicacy with which parties may act. It can only look to their rights and their remedies. The question is, Is the plaintiff estopped by the mere receipt of the money under the circumstances of this case, from contesting the sale to the bank?

A very brief examination of this branch of the law will furnish us with an answer. It is not pretended that it is a case of technical estoppel by matter of record, or by deed; but it is said, it is an instance where the law of equitable estoppel, in pais, applies. The law of this last species of estoppel was fully investigated in a recent case in New York,—Dezell v. Odell, 3 Hill, 215. The court differed in opinion as to the application of the law to that case, which was, where a party had given an officer a receipt for goods seized on execution, promising to deliver them up on a certain day, and afterwards claimed them as his own; the majority of the court held he was estopped by his receipt. The court, however, agreed that the definition of an estoppel, in pais, given by Judge Nelson, in the case of Welland Canal Co. v. Hathaway, 8 Wend. 483, was correct: "A party will not be permitted to deny his own acts or admissions which were expressly designed to influence the conduct of another, and did so influence it, and when such denial operates to the injury of the latter." There can be no doubt, that while the courts in recent times have been inclined to restrict the law of technical estoppel, they have much enlarged the limits of the law of equitable estoppel. But let us take the most liberal view of estoppel in pais possible, and apply it to this case. What act did the plaintiff do, or what admission did he make, which was designed to influence the conduct of the bank? How was it influenced by the plaintiff? Granting that the plaintiff's denial of the right of the defendants to the property, may operate to the injury of the bank, the other ingredients, and the essential ones, of an estoppel in pais, are entirely wanting. So far from the bank making the purchase influenced by anything on the part of the plaintiff, it appears that they (the plaintiff through his attorney, the plaintiff himself not being present at the sale) were competitors at the sale in bidding, and it was only because the bank bid more than the plaintiff's attorney, that it became the purchaser. Was the plaintiff bound, through his attorney, to inform the bank that it could not legally become the purchaser? Certainly not. It does not appear that the slightest act was done on the part of the plaintiff to induce the bank to buy. Admitting that a case could be so presented that the doctrine of estoppel in pais, would apply, so as to enable the bank to hold land not authorized by its charter—as to which I express no opinion—it would have been necessary for the plaintiff to design expressly to influence the bank in this pretended purchase; and there cannot be the least pretext of anything of the kind on the part of the plaintiff. It can, in no sense, be considered the same as if the plaintiff had himself sold land to the bank.

It only remains to consider whether the mere fact of receiving the money estops the plaintiff from denying the validity of the sale, and of the title of the bank; and it would seem as though the mere statement of such a doctrine were enough to show its unsoundness. A has a judgment against B. The officer under the execution issued upon the judgment, levies on and sells the land of A, the plaintiff. He receives the money. It is said he is estopped from denying the title of the purchaser, and proving that it was his own land that was sold. This would be the result of the doctrine, even if it did not go further, and by implication, make every plaintiff in an execution, when he receives the purchase money, a guarantor of the pur-

chaser's title. This is a construction of the law of estoppel in pais which this court cannot sanction. It follows, then, that it is immaterial whether the depositions were admitted or excluded, as, upon the facts which have been submitted to the court as agreed on between the parties, the law of the case would be the same in either event.

Case No. 12,164.

RUSSELL et al. v. UNITED STATES.

[15 Blatchf. 26.] [1]

Circuit Court, S. D. New York. July 1, 1878.

CUSTOMS DUTIES—SHIPBUILDING MATERIALS—EXEMPTIONS—SHIP BUILT FOR FOREIGN USE.

Under section 10 of the act of June 6, 1872 (17 Stat. 238), now sections 2513 and 2514 of the Revised Statutes, which provides that certain materials necessary for the construction and equipment of "vessels built in the United States for the purpose of being employed in the foreign trade," may be imported in bond, and that, on proof of the use of such materials for such purpose, no duties shall be paid thereon, such materials, when used in the construction of a merchant vessel built in the United States for the Japanese government, and employed by it for service between Japanese ports, and not documented as an American vessel, are not free of duty.

[Error to the district court of the United States for the Southern district of New York.]

[This was an action by the United States against William J. Russell and others. There was a verdict for plaintiff in the district court, and defendants brought error.]

Horace W. Fowler, for plaintiffs in error.

J. Dana Jones, Asst. Dist. Atty. for the United States.

WAITE, Circuit Justice. This was an action upon a warehouse bond, given by the plaintiffs in error to the United States, on the warehousing of a quantity of composition metal and copper nails, imported by them in October, 1872. The goods were withdrawn in accordance with instructions issued by the secretary of the treasury, to carry into effect section 10 of the act of June 6, 1872 (17 Stat. 238), now found in sections 2513 and 2514 of the Revised Statutes. That section is as follows: "That, from and after the passage of this act, all lumber, timber, hemp, manila, and iron and steel rods, bars, spikes, nails and bolts, and copper and composition metal, which may be necessary for the construction and equipment of vessels built in the United States for the purpose of being employed in the foreign trade, including the trade between the Atlantic and Pacific ports of the United States, and finished after the passage of this act, may be imported in bond, under such regulations as the secretary of the treasury may prescribe; and, upon proof that such materials have been used for the purpose aforesaid, no duties shall be paid thereon: provided, that vessels receiving the benefit of this section shall not be allowed to engage in the coastwise trade of the United States more than two months in any one year, except upon payment to the United States of the duties on which a rebate is herein allowed; and, provided further, that all articles of foreign production needed for the repair of American vessels engaged exclusively in foreign trade, may be withdrawn from bonded warehouse free of duty, under such regulations as the secretary of the treasury may prescribe."

In the regulations adopted by the secretary of the treasury, pursuant to the authority of this act, it was provided, that no credit should be allowed upon the bond for the duties upon the goods withdrawn, until after the vessel had been registered or enrolled and licensed to engage in the foreign trade. With the exception of a small quantity, the goods, when withdrawn, were used in the construction of the steamers Capron and Kuroda, then being built in New York City, by Messrs. C. & R. Poillon, for the Japanese government. These steamers were merchant vessels, and were, on their completion, delivered to the Japanese government, and have, ever since, been used by that government in carrying freight and passengers between Japanese ports and Japanese and Chinese ports. They never took out any papers as American vessels. Upon this state of facts, the district court ordered a verdict in favor of the United States for the amount of the duties as liquidated by the collector, and gave judgment accordingly. This action of the court is now assigned for error.

It was manifestly the intention of congress, by this statute, to encourage the foreign carrying trade in American vessels. Such must have been the construction put upon the act by the secretary of the treasury when he adopted the regulations by which it was to be carried into effect, and such is the plain and obvious meaning of the language used: "Vessels built in the United States for the purpose of being employed in the foreign trade," cannot be made to refer to all foreign trade, without taking from one of the words its most appropriate effect. If all foreign trade was intended, why use the word "the" in that connection? "Employed in foreign trade" would have expressed that idea, without any ambiguity. Some effect, if possible, must be given to the additional word which has been used, and none seems so natural as that which particularizes the trade to be encouraged, and confines it to that of the country where the vessels are built. If the object of congress was to encourage American shipbuilding, why confine the exemption to such vessels as are employed in foreign trade; and if to protect the American shipbuilder, so that he may compete with foreign builders in constructing

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

vessels for sale abroad, why was it not so said in words?

The second proviso, which was relied upon, in the argument, as showing an intention to include in the body of the act other than American vessels, has, to my mind, the contrary effect. Without the proviso, the benefits of the act would have been confined exclusively to materials used in the original construction of a vessel. The American owner, who had been encouraged to build his ship and engage in the foreign trade, would have been compelled, when repairs were needed, to go abroad and have them made, or pay the additional cost caused by the duties upon imported articles, if obtained at home. Therefore, still to encourage him, these duties were remitted in his favor, if his vessel was engaged exclusively in foreign trade. So far as the body of the act was concerned, he was permitted to engage in coastwise trade two months in a year without forfeiting his privileges.

Upon the whole, I cannot entertain a doubt, that the mischief which congress attempted to remedy was the loss of the foreign carrying trade by American ship owners, and that its legislation has been adapted solely to that end. Such is the effect which has been given to the statute by Judge Shepley, in the First circuit (U. S. v. Patten [Case No. 16,007]), and such also was the opinion of the attorney general of the United States, as given in respect to this very case, June 2, 1876. The judgment is affirmed.

RUSSELL (UNITED STATES v.). See Case No. 16,209.

RUSSELL (WASHINGTON MILLS v.). See Case No. 17,247.

Case No. 12,164a.

RUSSELL v. WHEELER et al.

[Hempst. 3.] [1]

Superior Court, Territory of Arkansas. June, 1821.

FORCIBLE ENTRY AND DETAINER—APPEALS—SUMMONS—CONSTRUCTION OF STATUTE—VERDICTS.

1. In forcible entry and detainer, the right of having the proceedings reviewed by a higher tribunal in the mode pointed out by law, is allowed to the defendant as well as the complainant.

2. In forcible entry and detainer, if the summons contains the substance of the complaint so as to apprise the defendant of the nature and extent of the claim, it is sufficient without reciting the complaint fully.

3. Where a limited jurisdiction is conferred by statute the construction ought to be strict as to the extent of jurisdiction; but liberal as to the mode of proceeding.

4. Although a verdict is informal, yet if the substance of the issue has been found, it is good, for a verdict is not to be taken strictly like pleading, and courts will mould a verdict into form according to the real justice of the case.

[Error to Pulaski county circuit court.]

Before JOHNSON and SCOTT, JJ.

JOHNSON, J. William Russell sued out from two justices of the peace, a warrant of forcible entry and detainer against Amos Wheeler and others, and the jury having found a verdict against them, they obtained a certiorari and brought the case before the circuit court. On the trial in the circuit court, the proceedings of the justices' court were set aside and annulled. Many objections have been urged to the writ of certiorari granted by the court below, which from the view we have taken, we do not deem it material to decide. For the sake of the practice, however, we will consider the first.

It is contended that a writ of certiorari in a case of forcible entry and detainer, is, by the statute, allowed to the plaintiff only. If this construction be correct, it is believed that it would present a novelty in the history of judicial proceedings. What just reason can exist for permitting a plaintiff in a case of this kind to apply to a superior tribunal, to correct errors and annul proceedings by which he is prejudiced, and denying the same right to a defendant, we are wholly at a loss to discover. That a claim may be set up by a plaintiff which is neither supported by justice nor law, as well as that a defendant may have acted illegally, are abundantly manifest. We cannot suppose that because a complaint is made, and a suit instituted, that it therefore follows that the party has a just cause of action. Experience evinces that many claims are asserted which have no foundation in justice or in law. It would seem, therefore, as reasonable to extend to the defendant the same means for the correction of errors which may have been committed against him, as to the plaintiff when similarly situated. But from an examination of the statute, it is clear that it does not warrant the construction contended for. The right of having the proceedings reviewed by a higher tribunal is reciprocal, and is alike demandable by either party. Geyer, Dig. 204.

We will now proceed to what we deem the main question in the cause, namely: Whether the court below acted correctly in setting aside and reversing the judgment of the justices. The first error in the proceedings before the justices' court relied on by the counsel of the defendants in error is, "that the summons is not issued according to the form prescribed by the statute; it omits one half of the plaint; it omits the time the forcible entry and detainer was alleged to have been done; it omits the quantity of land, and the description of the boundaries as given in the plaint, and misrecites that part of the plaint which it purports to recite." It is true that the summons does not contain a literal copy of the complaint, nor do we apprehend

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

that it is necessary. All that is essential is, that the summons shall contain the substance of the complaint, and so describe the land in contest that the defendant may be apprised of the extent of the claim set up against him, and thereby be enabled on the trial to make his defence. That the summons contains a proper and definite description of the land, so as fully to apprise the defendant of the subject-matter in dispute, we think admits of no doubt. The complaint is upon a forcible entry and detainer upon the fractional quarter of section two, in township one, north of the base line of range twelve, west of the fifth principal meridian, containing about forty acres of land, bounded on the north by the Arkansas river, on the east by the Quapaw Indian line, on the west by the north and south line, between sections two and three in township aforesaid, on the south by the southwardly boundary of the north-west fractional quarter of section two. The summons describes the premises to be, "That part of the north-west fractional quarter of section two, in township one north of the base line, range twelve west of the fifth principal meridian that lies south of the Arkansas river, at a place called 'Little Rock Bluff,' in the county of Pulaski." It is easy to perceive that the summons describes the same fractional quarter section of land that is described in the complaint, and although the description is not made in the same words, yet they are substantially the same. It has been contended that the form of proceeding given by the act of assembly must be literally pursued. By adverting to the adjudications of other courts it will be seen, that a more liberal interpretation has been given to statutes analogous to the present. In the case of Barrett v. Chitwood, 2 Bibb, 431, upon a statute in many respects similar to the one under which these proceedings were had, the court says: "Where a limited jurisdiction of this sort is given by act of assembly to be exercised in pais, the correct rule appears to be, that as to the extent of jurisdiction the act should be construed strictly, but with respect to the mode of proceeding, a liberality of construction ought to be indulged." Other cases might be cited to show that where a statute prescribes a form of proceeding, a substantial, and not a literal compliance is all that is required. We are therefore of opinion that the summons in this case contains the essential part of the complaint, and that it is sufficient under the act of assembly.

The point mainly relied on by the defendants' counsel is, "that the verdict of the jury was fatally defective, and insufficient for the justices to enter a judgment thereon." It is in the following words: "The jury upon their oaths do find, that the lands or tenements in the county of Pulaski, bounded and described as in the complaint, upon the first day of January, 1820, were in the lawful and rightful possession of said William Russell, and that the said Amos Wheeler and others did, upon the same day, unlawfully with force and strong hand expel and drive out the said William Russell; wherefore the jury find upon their oaths, that the said William Russell ought to have restitution thereof without delay."

Several specific objections have been urged against the verdict, which we will proceed to examine: 1. It is insisted that the verdict does not pursue the form prescribed by the statute. This objection, as far as it regards form only, has been sufficiently remarked upon, and no further observations will be added. 2. "That it does not contain a description of the land in contest." By a reference to the verdict it will be seen, that although it does not itself describe the boundaries, yet it refers to a paper in the case, the complaint, for the boundaries, which renders it as certain and as definite as if those boundaries were again recapitulated in the verdict itself. The maxim of law, "Id certum est quod certum reddi potest," applies to cases like the present; we are therefore of opinion, that it is not defective on this account, but that it sufficiently describes the land in controversy. 3. "That it only finds a forcible entry into the premises, and does not find a forcible detainer by the defendants." Upon an examination of the verdict we are clearly of opinion, that it finds a forcible detainer as well as entry. What is the language of the verdict? It is, "That the jury find that the defendants did with force and strong hand expel and drive out the plaintiff; wherefore the jury find upon their oaths, that the said William Russell ought to have restitution thereof without delay." What is the conclusion that a mind unshackled by technical rules would draw from the latter clause of the verdict? Is not the inference irresistible, that the jury find a detainer when they say that the plaintiff ought to have restitution without delay? Why should he have restitution, unless he was kept out of possession? Upon any other supposition the language is more than unmeaning; it is absurd. If then the meaning of the jury is clear, and it is their intention to say, as it certainly is, that the defendants detain the premises, although it may not be expressed in technical language, or according to usual forms, yet the court are bound to work and mould the verdict into form according to the real justice of the case. The rule upon this subject has been long settled, and is supported by a uniform train of authorities. In the case of Worley v. Isbel, 1 Bibb, 251, it is laid down, "that though the verdict may not conclude formally or punctually in the words of the issue, yet if the point in issue can be concluded out of the finding, the court shall work the verdict into form and make it serve. Verdicts are not to be taken strictly like pleadings, but the court will collect the meaning of the jury, if they give such a verdict as the court can understand." The same

principle will be found decided in the case of Patterson v. U. S., 2 Wheat. [15 U. S.] 221. The same doctrine is to be found, only in a stronger point of view, in Crozier v. Gano, 1 Bibb, 257. And to the same effect are cases in 2 Bibb, 427; 3 Hen. & M. 309; Hawks v. Crofton, 2 Burrows, 698. In the case before the court, there can be no doubt as to the meaning of the jury. They have in substance found that the defendants detained the land in contest; we are therefore satisfied that this objection to the verdict ought not to be sustained. Upon a consideration of the whole case we are of opinion, that the circuit court erred in setting aside and reversing the proceedings of the justices, and the judgment, therefore, must be reversed and the cause remanded.

Case No. 12,165.

RUSSELL et al. v. WIGGIN et al.

[2 Story, 213;[1] 5 Law Rep. 533.]

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

BILLS OF EXCHANGE—PROMISE TO ACCEPT—LETTER OF CREDIT—LEX LOCI CONTRACTUS—DAMAGES.

1. By the law of England, it seems, that a promise to accept a non-existing bill of exchange, even though it be taken by the holder upon the faith of that promise, does not amount to an acceptance of the bill, when drawn in favor of the holder. But it has been held otherwise by the supreme court of the United States.

[Cited in note in Payson v. Coolidge, Case No. 10,860. Cited in brief in National Bank v. Millard, 10 Wall. (77 U. S.) 154. Cited in Morse v. Massachusetts Nat. Bank, Case No. 9,857.]

[Cited in Pollock v. Helm, 54 Miss. 1.]

2. A promise contained in a letter of credit, written by persons who are to become the drawees of bills drawn under it, promising to accept such bills when drawn, which letter is designed to be exhibited for the purpose of inducing persons to advance money on it and take the bills when drawn, is an available contract in favor of the persons, to whom the letter of credit is shown, who advance money and take the bills on the faith thereof.

[Cited in Barney v. Newcomb, 9 Cush. 53; Evansville Bank v. Kaufman, 93 N. Y. 285; Exchange Bank v. Rice, 98 Mass. 292, 293; First Nat. Bank v. Clark, 61 Md. 407; Lafargue v. Harrison, 70 Cal. 389, 11 Pac. 636; Lonsdale v. Lafayette Bank, 18 Ohio, 141; Nelson v. First Nat. Bank, 48 Ill. 40; Pollock v. Helm, 54 Miss. 1; Valle v. Cerre, 36 Mo. 591; Franklin Bank of Baltimore v. Lynch, 52 Md. 276; Whilden v. Merchants' & Planters' Nat. Bank, 64 Ala. 1.]

3. A. of Boston, the agent of a banking house in London, gave a letter of credit to B. authorizing C. who was about to proceed to the East Indies, to value on the said bankers to a certain amount, engaging that the bills should be duly honored when presented; B. at the same time made the usual arrangement to remit to the said bankers in London sufficient funds to meet the payment of all bills which might be drawn by virtue of the said credit; but failed to do so. The said letter of credit was taken to Manilla by C. to procure a cargo, and the plaintiffs, on the strength of the letter, furnished a cargo and received from C. bills on the said bankers to the amount limited in the said letter of credit. Most of the bills so drawn, were paid at maturity; others were protested for non-acceptance and for non-payment, and were returned to Manilla, and paid by the plaintiffs, who were also obliged to pay and did pay more than one re-exchange. It was *held*: that the said letter of credit was to be deemed to be made in Massachusetts, and as to its obligation, construction and character, was to be governed by the laws of Massachusetts, and not by the laws of England.

[Cited in Exchange Bank v. Hubbard, 10 C. C. A. 295, 62 Fed. 114.]

[Cited in brief in City of Aurora v. West, 22 Ind. 512. Cited in Goodsell v. Benson, 13 R. I. 234; Kupfer v. Bank of Galena, 34 Ill. 350.]

4. The plaintiffs were entitled to maintain an action against the said bankers, and to recover the amount of the damages sustained by the refusal of the defendants to accept the bills.

[Cited in Cassel v. Dows, Case No. 2,502; Pendleton v. Knickerbocker Life Ins. Co., 7 Fed. 172.]

[Cited in Franklin Bank of Baltimore v. Lynch, 52 Md. 276.]

5. The plaintiffs were entitled to recover the whole damages, costs, and expenses paid by them, including re-exchange, with interest of the place where the money was payable by the plaintiffs.

[Cited in Lodge v. Spooner, 8 Gray, 168.]

Assumpsit [by George R. Russell and others against Timothy Wiggin and others]. The declaration contained a count, upon a promise to accept certain bills of exchange stated therein; and also the money counts. The cause came before the court upon the following agreed state of facts:

On the fourth day of November, 1835, the defendants granted to Ebenezer Breed a letter of credit, of which the following is a copy: "Boston, Nov. 4, 1835. I hereby authorize Mr. William P. Endicott of barque Palinure to value on Messrs. T. Wiggin & Co., London, at six months' sight at any place in India, for account of Ebenezer Breed, Esq., of Charlestown, for any sums, not exceeding in all fifteen thousand pounds sterling. And I hereby engage, as the authorized agent of Messrs. T. Wiggin & Co., that the bills of Mr. Endicott shall be duly honored when presented, if drawn within twelve months from the date of this letter. In case of any accident, by which Mr. Endicott may be prevented from using this credit, I hereby authorize Captain Robert Henderson, Jr., of said barque, to use the same for account of Mr. Breed, for £15,000 sterling. (Signed) Robert Hooper, Jr., Agent, to T. Wiggin & Co." At the same time, Breed signed and gave to Hooper a contract of which the following is a copy: "Boston, Nov. 4, 1835. Mr. Robert Hooper, Jr., on behalf of Messrs. T. Wiggin & Co., of London, having at this date opened a credit on said T. Wiggin & Co., for my account, to be used in India by William P. Endicott, Capt. Robert Henderson, Jr., of barque Palinure, to the extent of fifteen thousand pounds sterling. In consideration thereof, I hereby agree to remit to T. Wiggin & Co., in London, suf-

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

ficient funds to meet the payment of all bills, which may be drawn by virtue of this credit, together with all charges on the same. I further agree with said T. Wiggin & Co., to give security here to the satisfaction of their agent, to the amount of fifteen thousand pounds sterling, at any time when required by them or their agent. (Signed) Eben. Breed." Letters of credit, so issued, were always accompanied by an engagement on the part of the person for whose account the credit was issued, to remit funds to the banker in London, in season to meet the bills, which should be drawn under the credit, unless the merchandise purchased was by the terms of the credit, to be shipped to the banker or his agent: such letters of credit being at that time never based on funds of the party receiving it, actually in the hands of the banker. Afterwards, the said Endicott proceeded in the said vessel to India, and wishing to procure a cargo at Manilla, consigned his vessel to the plaintiffs, then doing business there, exhibited and delivered to them the said letter of credit, and proposed to them to furnish a cargo, and receive bills on the defendants, drawn under the said letter;—and the plaintiffs, relying on the commercial standing of the defendants, and on their promise contained in said letter, agreed to, and did furnish a cargo for the vessel, and received bills on the defendants to the amount of £15,000 drawn payable in six months after sight, on account thereof. The bills so drawn were payable to the order of the plaintiffs, and were indorsed and negotiated by them as opportunities offered.

Mr. Breed failed in June, 1837, not having performed his contract aforesaid. Most of the bills so drawn, were accepted on presentation, and paid at maturity. One drawn Oct. 29th, 1836, for £373 3s. 6d., reached London by the way of Spain, was accepted on presentment, April 22d, 1837, was not paid at maturity, was duly protested for non-payment, and returned to Manilla by the same route, where it arrived in July, 1838, and was taken up and paid by the plaintiffs, February 11th, 1839: the principal, with reëxchange, damages, and interest, paid by them, amounting to the sum of $2,528.20. One drawn Oct. 29th, 1836, for £273 10s., reached London by the way of Cadiz, was accepted April 25th, 1837, not paid at maturity, protested for non-payment, and returned to Manilla by same route, where it arrived July, 1838, and was taken up by the plaintiffs, Nov., 1839, who paid the principal, damages, &c., $1,692.93. Two dated Nov. 3d, 1836, one for £436 15s. 6d., and one for £300, reached London by the way of Spain, were presented for acceptance, June 27th, 1837, protested for non-acceptance, and afterwards for non-payment, were returned to Manilla by the same route, where they arrived in June, 1838, and were paid with re-exchange, &c., in July and November, 1839, amount $4,865.77. One dated November 2d, 1837, for £407 11s., reached London by the way of Spain, and was presented for acceptance and protested for non-acceptance, June 12th, 1837, and for non-payment, December 15th, was returned by the same route, and the plaintiffs paid it, February 20th, 1839, $2,863.67. One dated November 3d, 1836, was presented in London, and protested for non-acceptance, July 4th, 1837, and for non-payment, January 6th, 1838, and was returned to Manilla September 1st, 1838, and paid by the plaintiffs in February, 1839, $558.34. The plaintiffs resisted payment of more than one re-exchange from London, and a suit was brought in a similar case at Manilla, the decision of which the holders of the bills and the plaintiffs agreed to abide; the decision was in favor of the holders of the bills, and the plaintiffs paid accordingly. The plaintiffs were duly notified of the dishonor of the bills. The defendants admit their liability on the two accepted bills for the face thereof, and the costs of protest and interest at the rate of 5 per cent. per annum; the plaintiffs claim also damages, and re-exchange they were obliged to pay. The defendants deny all liability on the non-accepted bills; the plaintiffs claim the whole amount paid by them on account thereof, with interest, at the rate of ——— per cent. The bills, protests, a copy of the record of the Spanish case referred to, and the laws of Spain, may be referred to by either party. The trustee admits assets. The parties agree, that the opinions of Sir William Follett, Sir Frederick Pollock, and Mr. M. D. Hill, upon certain questions of law submitted by the defendants' counsel, may be used upon the hearing of this case, in the same manner as if taken under a commission duly issued; but the plaintiffs do not by this consent waive any other objections to such testimony. The legal rate of interest at Manilla is six per cent. The plaintiffs had no actual knowledge of the above contract signed by Breed, nor his business relations with the defendants, except from the letter of credit, and no notice thereof, unless it is implied by law from the course of business. If the court shall be of opinion, that the plaintiffs are entitled to recover the whole or any part of their claim in this action, judgment shall be rendered accordingly; otherwise they shall be non-suited, costs to follow the result.

The facts in the case were submitted to eminent lawyers in England, upon the following questions stated: (1) By the law of England, do the letter of credit and the acts of the parties above stated create any contract between Russell, Sturgis & Co. and T. Wiggin & Co., to accept the bills drawn under the letter of credit? (2) By the law of England, could Russell, Sturgis & Co., upon the facts above stated, maintain any action against T. Wiggin & Co., founded on the said letter of credit, and if not, why not? (3) By the law of England, is a promise in writing, to accept a non-existing foreign bill drawn so as to be payable in six months after sight, equivalent to an acceptance, where the payee takes such bill on the faith of the written promise of the drawee to accept it? (4) By the law of Eng-

land, what damages, if any, would T. Wiggin & Co. be liable for to Russell, Sturgis & Co., upon the bills above mentioned, which were accepted by them, and protested for non-payment? (5) By the law of England, what damages, if any, would T. Wiggin & Co. be liable for to Russell, Sturgis & Co., upon the bills above mentioned, which were protested for non-acceptance?

Opinion of Sir William Follett and Sir John Bayley.

We are of opinion, that the letter of credit and the acts of the parties above stated, do not, by the law of England, create any contract between Russell, Sturgis & Co. and T. Wiggin & Co., to accept the bills drawn under that letter of credit. We are of opinion, that Russell, Sturgis & Co. could not, by the law of England, upon the facts above stated, maintain any action against T. Wiggin & Co., founded on the said letter of credit, because there is no privity of contract, or consideration moving between them. We are of opinion, that a promise in writing to accept a non-existing foreign bill, is not, under the circumstances stated, by the law of England, equivalent to an acceptance. The damages to which T. Wiggin & Co. would be liable to Russell, Sturgis & Co., by the law of England, for non-payment of bills accepted by them, would be the amount of principal, interest and expense of protest on each bill. But T. Wiggin & Co. would not be liable by the law of England to Russell, Sturgis & Co. for any damages upon bills which they did not accept. W. Follett. John Bayley. Temple, 9th April, 1842.

Opinion of Sir Frederic Pollock.

(1) I am of opinion, that according to the law of England, no contract was created between Russell, Sturgis & Co. and T. Wiggin & Co., to accept the bills drawn under the letter of credit in consequence of the letter of credit and the acts of the parties. (2) Nor could Russell, Sturgis & Co., upon the facts above stated, maintain any action founded on the letter of credit against T. Wiggin & Co. The reason is, that Russell, Sturgis & Co., are not parties to the contract. (3) According to the law of England, a promise in writing to accept a non-existing bill is not equivalent to an acceptance of it. It is merely a contract made by the party promising to the party to whom the promise is made. (4) The damages to be recovered from the drawer and indorsers, in the case of an accepted foreign bill, being dishonored, protested and returned, depend upon the usages of the place where the bill is dishonored, which I believe vary very much, but as against the acceptor, nothing is recoverable but the amount of the bill and interest. (5) As to the unaccepted bills, T. Wiggin & Co. would not be liable at all to Russell, Sturgis & Co. Fred. Pollock. Temple, 5th April, 1842.

Opinion of M. D. Hill.

(1, 2, & 3) I am of opinion, by the law of England, the letter of credit and the agreement would not constitute an acceptance of non-existent foreign bills of exchange. But this point, I apprehend, must be determined according to the lex loci contractus, and I have reason to doubt, whether the law of the United States agrees with ours on this question. If the case of Coolidge v. Payson, 2 Wheat. [15 U. S. 66], in the supreme court of the United States, be law in this country, the letter of credit operated as an acceptance, according to American law; but that case was decided entirely on the English cases, which are not considered here as authority to the intent required. If, however, the letter of credit and agreement do not amount to acceptance, I see nothing in these documents and the acts of the parties to raise a contract to accept, between Russell, Sturgis & Co. and T. Wiggin & Co., Russell & Co. not being any party to the contract between T. Wiggin & Co. and Breed. (4 and 5) Such losses as Russell & Co. were, without any fault of their own, compelled to sustain, will furnish the measure of damages in both cases. With respect to the bills protested for non-acceptance, and then returned to Manilla, and afterwards sent again to England for payment, if Russell, Sturgis & Co. can recover at all, I think they must recover according to the principle on which the court at Manilla acted; for even if that decision was wrong, still it was a decision binding on Russell, Sturgis & Co., and has wrought a damage to them, immediately flowing from the misconduct of T. Wiggin & Co. M. D. Hill. Chancery Lane. Nov. 31, 1842.

C. G. Loring and F. C. Loring, for plaintiffs.

Charles P. Curtis, for defendants.

The argument for the plaintiffs was as follows:

The general facts of the case make a prima facie case for the plaintiffs. The grounds of the defence are understood to be, 1st, that Breed did not keep his contract with the defendants, and, therefore, they are not bound to honor the bills; 2d, that there is no privity between the parties to this suit.

As to the first question, if Breed did not perform his contract, the defendants had the power to enforce performance, or obtain security. Having neglected to exercise this power, the loss should fall upon them, and not upon an innocent party. If the plaintiffs had knowledge of this contract, it would not alter the case: 1st, because its performance was not made a condition precedent to the honoring of the bills; 2d, because they could not know whether it was performed or not; 3d, because, in fact, there had been no breach committed when they received the bills; and 4th, because it was a contract between Breed and the defendants exclusively. But the case finds, that they did not know of its existence.

With regard to the second question, we say, that a privity of contract did exist between the parties. To this contract, Breed and the defendants certainly were parties; and the question now is, whether or not the plaintiffs are also parties. The letter of credit purports to be an engagement, that the bills drawn under it should be honored. It was the intention of both parties, that it should be carried to India, and shown to persons there, who would thereby be induced to receive the bills to be drawn under it, in payment for goods furnished. This is the definition of a letter of credit. Beaw. Lex Mer. pl. 470; 3 Chit. Com. & Man. 336. If this be not admitted, it must be inferred from the terms of the letter; it not being addressed to Breed, but being an open letter; and from the usage of merchants; and because it would have been wholly useless to Breed, if it were not to be shown to others. If the letter had been addressed to the plaintiffs, by name, it will not be denied, that it would constitute an express promise to them to honor the bills, for the breach of which, the defendants would be liable to them in damages. Nor does the fact, that they are not named in it, but that it is an open letter, make any difference. It is not essential to a contract, that all the parties should be named in it; or that they should be known, or even be in existence, when it is made Thus, where a reward is offered for the discovery of thieves, there is no contract with any one in particular; but any person giving the desired information, may claim the reward, and may maintain an action for it. Chit. Cont. p. 10, note 9; City Bank v. Bangs, 2 Edw. Ch. 95; Williams v. Carwardine 5 Car. & P. 566; Lancaster v. Walsh, 4 Mees. & W. 16. So, in cases of trusts created for the benefit of creditors, it is not usual to mention them by name, but any one of that character may become a party to the contract. So, in cases of marriage settlements, where trusts are created for the benefit of children to be born. This contract has grown out of the usages of trade, and the necessities of merchants, and its utility would be greatly impaired, if it were necessary to address it to a particular house. Such a contract has been well defined by Chief Justice Marshall as an "assumpsit to the world, entitling any one, who acts upon the faith of it, to an action."

In this country, the question, whether this action can be maintained, can hardly be considered an open one. Duval v. Trask, 12 Mass. 154; Carnegie v. Morrison, 2 Metc. [Mass.] 381; Ontario Bank v. Worthington, 12 Wend. 593; Goodrich v. Gordon, 15 Johns. 6; McKim v. Smith, 1 Hall's Law J. 486; Lawrason v. Mason, 3 Cranch. [7 U. S.] 493; Schimmelpennich v. Bayard, 1 Pet. [26 U. S.] 264; Townley v. Sumrall, 2 Pet. [27 U. S.] 170; Bryce v. Edwards, 4 Pet. [29 U. S.] 111; Edmonston v. Drake, 5 Pet. [30 U. S.] 624; Adams v. Jones, 12 Pet. [37 U. S.] 207; Wallace v. Agry [Case No. 17,096]; Wildes v. Savage [Id. 17,653]; Baring v. Lyman, [Id. 983]. But it will be argued, that the contract was to be performed in England, and is to be construed by the English law; and by that law, there is no privity of contract between the parties; and to prove this, the opinions of eminent English counsel are produced. This presents two questions: 1st, What is the law in England on this subject? 2d, If it be different from the law here, is it to govern this contract? There is not a decision to be found in the English reports, nor even a dictum, to the effect, that an action will not lie against a party promising to honor a bill in favor of one, who takes it on the faith of that promise. Whenever the question has been suggested, a contrary opinion has been expressed. Beaw. Lex Mer. 444, pl. 112; Id. 470, pl. 245; Miln v. Prest, Holt, N. P. 181; Byles, Bills 108; Chit. Bills, 313; 3 Chit. Com. & Man. 336; Mont. Prec. 450; Bouv. Law Dict.; Fell, Guar. c. 3, pls. 17, 18, 22; Coleman v. Upcot, 5 Vin. Abr. 527, pl. 17; Bayley, Bills (5th Ed. Boston, 1836) p. 167. This is better evidence of what the law is, than the opinions of counsel, however eminent. They are not the best evidence the case admits of.

But if it were shown, that this action, in its present form, could not be maintained in England, two questions remain: 1st, Whether this contract is to be governed by the laws of England, or of this state, where it was made; and 2d, whether the plaintiffs would be without any remedy in England. The first question is most elaborately discussed in the case of Carnegie v. Morrison, 2 Metc. [Mass.] 381, and the decision is, in point, in favor of the plaintiffs. As to the second question, there can be no doubt, but that the plaintiffs might obtain a remedy, in some other form, in England. They might maintain an action on the case for a deceit, alleging, that the defendants made this contract with Breed, with the intent, that it should be shown to the plaintiffs, and they be thereby induced to trust him; and that they did so, and that defendants neglected to perform their contract; and it would not be material, that the promise or representation was not made to the plaintiffs directly. Foster v. Charles, 7 Bing. 105; Corbett v. Brown, 8 Bing. 33; Polhill v. Walter, 3 Barn. & Adol. 114. Or a remedy might be obtained in equity, on the same ground of a constructive fraud (1 Story, Eq. Jur. p. 384); or for a specific performance of the contract (2 Story, Eq. Jur. c. 18); or on the ground of an equitable assignment of funds in the defendants' hands, of which the letter of credit is an admission (Id. pp. 1041–1047). If then, in England, at law or in equity, the plaintiffs might recover damages or obtain relief for the breach of this contract, the laws of England recognize its obligation. Whether that remedy should be enforced at law, or in equity, by an action of assumpsit, or on the case, is

to be determined by the lex fori, and by the lex fori, it is admitted, this action may be maintained.

The plaintiffs claim as damages the amount of all the bills dishonored by non-payment, whether accepted or not, with the re-exchange paid by them, and interest. The contract of the defendants was to honor the bills; which contract was not performed by accepting, and afterwards refusing payment. The plaintiffs are entitled to recover all the damage they suffered by the breach of the contract; which includes the re-exchange paid on the accepted bills; and they are not to be considered merely as holders of those bills. Riggs v. Lindsay, 7 Cranch [11 U. S.] 500.

C. P. Curtis, for defendants, stated, that he should rely on several well-settled principles of the law of contracts, which he thought would entitle the defendants to a judgment in their favor. The contract, relied on by the plaintiffs in this case, was that of November 4, 1835; by which the defendants authorized the agent of Mr. Breed to value (or draw) on them, in London, for not exceeding £15,000, and engaging that bills, drawn in conformity to the terms of that instrument, should be duly honored; that is, accepted and paid. The acts to be done by the defendants, according to said contract, were to be performed in England; namely, to accept and pay bills of exchange. That is the place of the performance of this contract. By the law of that place, and not by the law of Massachusetts, where the contract was entered into, is the contract to be governed. Where a contract is, expressly or tacitly, to be performed in any other place than where it was made, the general rule is, in conformity with the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance. Story, Confl. Laws, p. 280; Andrews v. Pond, 13 Pet. [38 U. S.] 65; Prentiss v. Savage, 13 Mass. 20. If a contract is to be executed in a foreign country, the place of the making of it is immaterial. Fanning v. Consequa, 17 Johns. 518. No act whatever was to be performed under the contract in this case, in Massachusetts. It was to be sent immediately to the East Indies, and it was only bills drawn in India, that the defendants engaged to honor; and these, no where but in London. This is a clear case of a contract made here, but to be executed in a foreign country. It looks, then, to the foreign law for its validity and interpretation. But what foreign law is to govern it; that of India, or of England? So far as relates to the defendants, the latter. All that they obligate themselves to do, is to be done in England. If it were a question, by what law the drawer or indorsers of the bills in question were to be governed, it would require a different answer. They are presumed to contract with reference to the law where their contracts were to be performed; namely, in India. If the law of England is to govern, as to the interpretation, nature, validity, and obligation of the defendants' contract, the next inquiry is, what is the law of that country in reference to such an instrument as constitutes the basis of this suit? The unwritten law of a foreign country is a fact to be proved by the opinions of judges and learned lawyers. Story, Confl. Laws, p. 638. For the purpose of showing, what the law of England is, we produce the opinions in writing of four of the most learned counsel at the English bar; Sir William Follett, Sir John Bayley, Sir Frederic Pollock, and Mr. Matthew Davenport Hill. They all concur in the opinion, that, by the law of England, the letter of credit, and the acts of the parties, do not create any contract between Wiggin & Co. and Russell, Sturgis & Co., to accept bills drawn under that letter; and that R. S. & Co. could not maintain in England any action against these defendants, founded on the said letter, for want of privity, or consideration passing between them. This evidence is uncontradicted, notwithstanding there has been ample time for the plaintiffs to procure the testimony or opinions of other learned counsel in England, if there were any doubt as to the accuracy and soundness of those produced by defendants. We must take it, then, to be the law of the place of the performance of this contract—which is the law of the contract—that the plaintiffs have no legal demand against the defendants in that country; and, therefore, as this court is to be governed by the law of that country, as to the validity and obligation of the contract, it seems to follow, of course, that they have no legal demand against the defendants here. If the premises are well founded, the conclusion seems to be irresistible. Most, or many of the authorities, cited by the plaintiffs' counsel, relate to the point, that a promise in writing to accept a non-existing bill, if shown to a third person, who takes the bill on the faith of such promise, is, in effect, an acceptance of the bill, and may be availed of as such by any subsequent holder of the bill. The authorities show this to be the law of the United States; but it is not the law of England, by which law this case is to be governed in this particular, as well as the former. Johnson v. Collings, 1 East, 98; Ex parte Bolton, 3 Mont. & A. 367. The opinions of Sir W. Follett and the others, are explicit on the point, that such a promise in writing is not equivalent to an acceptance, though the bill be taken on the faith of it. Qua cunque via data, therefore, the plaintiffs cannot prevail, if the law of England is the law of this contract.[2] That it is so, we have shown by the authorities before cited.

STORY, Circuit Justice. This cause has been very ably argued. There is no count in

[2] The views of the learned gentlemen, whose opinions are given above, have been confirmed by the court of exchequer in the recent case of Bank of Ireland v. Archer, 11 Mees. & W. 383.

the declaration upon any accepted bill of exchange; and, therefore, the whole class of authorities, English and American, so far as respects their direct bearing upon the question, whether a promise to accept a non-existing bill amounts to a positive acceptance thereof, when drawn, in favor of a holder, who takes the bill upon the faith of such promise, may be at once dismissed from our consideration, although they certainly must have a very forcible bearing upon one of the questions actually raised in the present case. In the case of Wildes v. Savage [Case No. 17,653], I had occasion to consider those authorities somewhat at large; and the result was, that although the English authorities might not now be deemed fully to support the doctrine, that such a promise would under such circumstances amount to an acceptance; yet the American were direct and positive to the purpose. Indeed, although there seems little doubt, what is the present inclination of opinion in England, yet there is no pretence to say, that there is any positive adjudication in England, in opposition to the doctrine; and I may add, that in one of the latest cases, in which the subject came before the court, that eminent commercial lawyer, Lord Chief Justice Gibbs, seemed to entertain an opinion directly in favor of the American doctrine; and he distinguished the case before him on that point upon the peculiar facts. Miln v. Prest, 4 Camp. 393, 1 Holt, N. P. 181. And it would be no matter of surprise to me, that if the doctrine contended for at the present argument, should be established to be the law in England (as it is affirmed by Sir Frederic Pollock and Sir William Follett, and the other learned gentlemen, whose opinions have been produced at the argument), that a promise to accept a bill would create no contract, except between the drawer and the promisor, although shown, and designed to be shown to induce the holder to take it, upon the ground of a want of privity between the holder and the promisor; I say, it would be no matter of surprise to me, that the courts of England should, whenever the question shall again arise, go back to the doctrine of Lord Mansfield in Pillans v. Van Mierop, 3 Burrows, 1663, and Pierson v. Dunlop, 2 Cowp. 571, as founded in a wholesome, nay, necessary justice, to prevent gross frauds, and manifest and irretrievable mischiefs in the intercourse of the commercial world.

There are two questions properly arising upon the state of facts presented to this court. The first is: Where is the contract of the defendants to be deemed to be made? Or, in other words, is it, as to its obligation, construction and character, to be governed by the law of Massachusetts, where it was signed and executed by the agent of the defendants? Or, is it to be deemed a contract made in England, where the acceptance was to be made; in which case, it is to be governed, in the like particulars, by the law of England, assuming that law to differ from the law of Massachusetts? The second question is: Whether a promise, contained in a letter of credit, written by persons, who are to become the drawees of bills drawn under it, promising to accept such bills when drawn, which letter, although addressed to the persons, who are to be the drawers of the bills, is designed to be shown to any and all person or persons whatsoever, to induce them to advance money on, and take the bills, when drawn, will be an available contract in favor of the persons, to whom the letter of credit is shown, who advance money and take the bills on the faith thereof, or is void for want of privity between them and the persons writing the letter of credit? I cannot say, that I entertain any serious doubts as to either question. As to the first, the letter of credit was executed in Boston, by the agent of the defendants, with full authority for the purpose; and it is, to all intents and purposes, the same, in legal effect, as if it had been there personally signed by the defendants themselves. It then created an immediate contract between the parties, in Boston, and it is to be governed, as to its obligation, construction, and character, by the law of Massachusetts, and not by the law of England; if, indeed, there be any distinction between them on this subject, which I am very far from believing there is. The contract was clearly valid and binding by the law of Massachusetts. It is true, that the contract is, to accept bills drawn on the defendants in London, and of course, the acceptance is there to be made. But that does not make it less obligatory upon the defendants to fulfil their promise to accept, although the acceptance, in order to be valid, must be made according to the requirements of the English law. Suppose a like letter of credit were executed in Boston, to accept bills payable in Paris in France, where an acceptance, to be binding, must be in writing, (although, by our law, it may be verbal,) there can be no doubt, that, unless there was a written acceptance in Paris, no remedy could be had upon any bill drawn in pursuance of the letter of credit, as an accepted bill. But there is as little doubt, upon principles of international law and public justice, that, in such a case, the contract, being made in Massachusetts, and being valid by the laws thereof, would be, and ought to be, held valid in all judicial tribunals throughout the world, and enforced equally in France, in England, and America, as a subsisting contract, the breach of which would entitle the injured party to complete redress for all the damage sustained by him. The case of Carnegie v. Morrison, 2 Metc. [Mass.] 381, is directly in point, upon this very question; and I entirely concur in that decision.

The second question, is one, upon which, until I heard the present argument, I did not suppose that any real doubt could be raised, as to the law, either in England or America.

I cannot but persuade myself, that the doctrine of both countries, as far as this question is concerned, is coincident, notwithstanding the opinions of the learned counsel, which have been brought to the notice of the court upon the present occasion, (and for which, certainly, I feel an unaffected respect and deference), and which assert, that the English doctrine denies all redress, under the circumstances, to the holder of the bills, and confines the whole remedial redress to an action between the drawers and the drawees of the bills, upon the ground, that there is a want of privity between the drawees and the person, who takes the bills, as purchaser, or holder. The case of Marchington v. Vernon, cited in a note to 1 Bos. & P. 101, before Mr. Justice Buller, seems to me fully to support the contrary doctrine.

Assuming, however, that there is a total want of privity between the parties in the present suit, the conclusion, to which these learned jurists have arrived, may be admitted fairly to follow as a result of the doctrine of the common law, although I entertain great doubt, whether, under such circumstances, a court of equity would not, and ought not, to administer complete relief, as a case of constructive fraud upon third persons. But my difficulty is in the assumption, that, in the present case, there is no privity of contract between the plaintiffs and the defendants. It appears to me, that this is an inference not justly deducible from the facts; and I know of no authority in English jurisprudence, which countenances, far less any, which establishes it, under circumstances like the present. On the contrary, I have understood, and always supposed, that, in the commercial world, letters of credit of this character were treated as in the nature of negotiable instruments; and that the party, giving such a letter, held himself out to all persons, who should advance money on bills drawn under the same, and upon the faith thereof, as contracting with them an obligation to accept and pay the bills. And I confess myself totally unable to comprehend, how, upon any other understanding, these instruments could ever possess any general circulation and credit in the commercial world. No man is ever supposed to advance money upon such a letter of credit, upon the mere credit of the party, to whom the letter is given; and I venture to affirm, that no man ever took bills on the faith of such a letter, without a distinct belief, that the drawee was bound to him to accept the bills, when drawn, without any reference to any change of circumstances, which might occur in the intermediate time between the giving of the letter of credit and the drawing of the bills under the same, of which the holder, advancing the money, had no notice. Any other supposition would make the letter of credit no security at all, or, at best, a mere contingent security, and the money would, in effect, be advanced mainly upon the credit of the drawer of the bills, which appears to me to be at war with the whole objects, for which letters of credit are given. Let me state one or two cases to illustrate the doctrine, which, it seems to me, is applicable to letters of this sort. Suppose the present letter of credit had contained an express clause, by which the defendants should directly promise any and all persons, who should advance money and take bills on the faith thereof, that they would accept and pay the bills, so drawn, in their favor; can there be any doubt, that the promise would be available in favor of the persons making such advances, and create a direct privity of contract between them and the person who gave the letter of credit? If there could be no doubt in such a case, then it seems to me, that the circumstances of the present case, and, indeed, of all cases of letters of credit of a similar character, do naturally and necessarily embody an implied promise to the same extent, and, therefore, ought to be governed by the same rule; for there can, in the intendment of the law, be no just distinction between cases of an express promise and cases of an implied promise, applicable to transactions of this sort. Again, suppose, when the plaintiffs were about to advance their money on their bills, with the letter of credit before them, a partner, or authorized agent, of the firm of Wiggin & Co. had stood by, and said, "Take these bills on the faith of this letter of credit, and our house will duly accept and pay them," and, upon the faith of that statement, the money was advanced, and the bill was taken, could there be a doubt, that there would be a privity of contract created directly between the plaintiffs and the defendants, and that they might compel the defendants to accept and pay the bills, or indemnify them for the breach thereof? And yet, stripped of its mere external form, that is the very case before the court. The letter of credit was drawn to be carried abroad, and to be shown to any person or persons, who would advance funds thereon to the drawers, and it imported, that, if any persons, to whom it was shown, should advance the money, and take the bills on the faith thereof, the defendants would accept and pay the bills. Their letter of credit spoke this language to all the world, as expressively, as if they had stood by, and repeated it by their agent.

Take the case of a common letter of guaranty, where the guarantor says, in general terms, in a paper addressed to A. B., the party, for whose benefit it is given, "I hereby guaranty to any person advancing money, or selling goods, to A. B., not exceeding £100, the payment thereof, at the expiration of the credit, which shall be given therefor." Can there be a doubt, that any person, making the advances, or selling the goods, upon the faith of the letter, is entitled to treat the pa-

per as containing a direct and immediate promise to himself to guaranty the payment, notwithstanding it is addressed to A. B.? In the commercial world, as far as I know, no doubt has as yet ever been entertained on this subject; and yet, transactions of this sort are of every day's occurrence, especially where the person, by whom the advance is to be made, is uncertain or unknown. The case of Adams v. Jones, 12 Pet. [37 U. S.] 207, 213, is in point to show, that such a guaranty, in such general terms, will bind the guarantor in favor of any person, who shall trust the party upon the faith and credit of the guaranty. There is no pretence, in such a case, to say, that there is not a sufficient consideration for the promise or obligation; for the consideration need not be immediately for the benefit of the guarantor; but it will be sufficient, if there be a valuable consideration, moving from the guarantee at the request of the guarantor, in favor of a third person, for whom the benefit is designed. It is like the common case, where one man, for a valuable consideration of forbearance, or otherwise, undertakes to pay the debt of another. The question is not of gain to the promisor, but of loss, or detriment, or delay, on the part of the promisee. Lord Mansfield's reasoning, in Pillans v. Van Mierop, 3 Burrows, 1663, treats it as a clear case of a sufficient consideration; that it is a mercantile transaction; and that the very nature of it imports an undertaking by the promisor to the persons taking the bills, to honor them. Lord Mansfield went further in that case, and held, that the agreement to accept amounted to an actual acceptance in favor of the party, upon the ground, that he advanced the money, and drew the bill, upon the faith of the prior negotiations and promise. Mr. Justice Yates, in the same case, said, that "any damage to another, or suspension, or forbearance of a right, is a foundation for an undertaking, and will make it binding, although no actual benefit accrues to the party undertaking." He added: "Now, here, the promise and undertaking of the defendants did occasion a possibility of loss to the plaintiffs." In the case at bar a benefit did, in fact, accrue to Wiggin & Co.; for, in no other way, could they have received the interest and advances intended to be obtained by their grant of the letter of credit. In Pierson v. Dunlop, 2 Cowp. 571, 573, and in Mason v. Hunt, 1 Doug. 297, Lord Mansfield took notice of the true distinction between cases, where a promise enures solely between the parties, and where it enures in favor of a third person also. "It has been truly said, as a general rule, (was his language), that the mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance, unless accompanied with circumstances, which may induce a third person to take the bill by indorsement. But, if there were such circumstances, it may amount to an acceptance, although the answer be contained in a letter to the drawer." The cases of Johnson v. Collings, 1 East, 98, and Clarke v. Cock, 4 East, 56, do not, in any manner, shake the propriety of this doctrine, as to its creating a privity of contract between the parties, whether it amounts to an acceptance, or not; and Mr. Justice Le Blanc, in both cases, expressly recognized Lord Mansfield's doctrine, as containing the true limitations and distinctions, which ought to govern in all cases of this sort. In the case of Johnson v. Collings, as well as in the case of Miln v. Prest, 4 Camp. 393, the promise to accept had not been shown to the party taking the bill, and, therefore, the bill was not taken on the faith thereof. Nor, indeed, had it been even authorized to be shown to the party; which constitutes the striking difference between such a promise and a letter of credit, the letter being, ex vi termini, designed to be shown, if necessary, to obtain the very credit or advances from a third person. Lord Mansfield, indeed, guarded himself on this very point, and said, not, that it always does create an acceptance, but that it may do so. Now, if it would, in any case, create an acceptance, a fortiori it would create a privity of contract, founded upon the promise to accept; for the latter must, in all cases, constitute the foundation of the former. In none of these cases was the point presented exactly under the view, in which it now comes before this court. In neither of them was there a letter of credit designed to circulate, and thus to preserve credit to the bills, which should be drawn. And not one word, in the reasoning of any of these cases, hints at any suggestion, that a letter of credit, in its commercial sense, would not create such a privity, if it was intended to be shown and used to induce any third person to advance money on the bills. If the question were entirely new, I confess that I should not entertain the least doubt, that, according to the known course of mercantile transactions upon letters of credit of this sort, the giver and the receiver intended them to be a circulating medium of credit for the receiver, and that the promise to accept should be an obligatory contract with any and every person who should advance money on the bills on the faith thereof. The language of Lord Mansfield, in Mason v. Hunt, 1 Doug. 297, 299, is exceedingly strong for this purpose: "There is no doubt (said he) that an agreement to accept may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the drawer. If one man, to give credit to another, makes an absolute promise to accept his bill, the drawer, or any other person, may show such promise upon the exchange, to get credit, and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances, which might subsist between the drawer and the acceptor. But an agreement to accept is still but an agreement; and, if it is conditional,

and a third person takes the bill, knowing of the conditions annexed to the agreement, he takes it subject to such conditions." Now, it is impossible to read this language, and not to feel, that, if the case were one of a letter of credit, designed by the parties to be used upon the exchange, it would necessarily create a privity of contract between the party, advancing his money, and the drawee, binding upon the latter. In short, the contract would be a contract, not with the drawer alone, but with any party who should advance the money on the faith of the letter. I have seen no case in England, which shakes, much less which overturns, this doctrine. And, if there were, I should pause a great while, before I could bring my mind to desert the clear judgment of that great judge, Lord Mansfield, never excelled as a judge in the administration of commercial jurisprudence, upon a question of such plain equity and justice, in favor of any other and subsequent adjudication by other minds. I consider a letter of credit, drawn, like the present, for purposes of a general nature, to be equivalent in import and intention to the following language: "Take this letter of credit, show it to any person whatsoever, and I promise any person, who shall, on the faith thereof, advance you money on bills drawn within the scope thereof, that I will accept and pay those bills." I confess myself unable to perceive, upon any grounds of the common law, or of common sense and justice, why such a circulating promise should not be obligatory.

But, be the English doctrine as it may be, the present case must be governed, not by that law, but by the commercial law of America, where the contract was entered into. And it is perfectly clear, at least, in the jurisprudence, which is enforced in the supreme court of the United States, that a letter written within a reasonable time, either before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person, who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding upon the person, who makes the promise. This was expressly so held by the supreme court in Coolidge v. Payson, 2 Wheat. [15 U. S.] 66, 75, and has been fully recognised and established by that court in every subsequent case, which has arisen on the subject, and especially in Schimmelpennich v. Bayard, 1 Pet. [26 U. S.] 284, and Boyce v. Edwards, 4 Pet. [29 U. S.] 111. Now, it is plain, that, if such a promise becomes, as it were, a circulating promise to accept the bill, when drawn, in favor of, and to any party, who shall take the bill upon the faith of such promise, and operates as an acceptance of the bill, it must be, because the promise to accept, in such a case, is a promise by intendment of law made to the party, who takes the bill, and then, at his election, it may be treated as an acceptance, or as a promise to accept. This, therefore, alone, would establish the point of a privity of contract between the party, giving the letter of credit, and the party, advancing the money, and taking the bill on the credit thereof; and it is manifestly founded on a sufficient consideration. Now, I know of no just or reasonable ground, upon which a distinction can be maintained between an implied acceptance, in favor of the person, who makes advances, and takes the bill under such circumstances, and a promise to accept the bill. In each case it enures as a direct contract with the party, founded upon the intent and the object of the letter of credit, or the written promise; and he has, and ought to have, his election, either to treat it as a positive acceptance, or as a promise to accept made directly to him, through the open letter of credit addressed to him, either specially or generally, for that purpose. Such is the doctrine, which, for many years, I have constantly supposed to be well established in the practice of the commercial world, and, therefore, never questioned in courts of justice; and, upon this very doctrine, my judgment proceeded in the recent case of Baring v. Lyman [Case No. 983]. It does not, however, rest upon my single opinion; but it has been fully recognized by the supreme court of the United States. In Townsley v. Sumrall, 2 Pet. [27 U. S.] 170, 181, the court said: "If a person undertake, in consideration, that another will purchase a bill already drawn, or to be thereafter drawn; and, as an inducement to the purchase, to accept it, and the bill is drawn and purchased upon the credit of such promise, for a sufficient consideration; such promise to accept is binding upon the party. It is an original promise to the purchaser, not merely a promise for the debt of another; and, having a sufficient consideration to support it, in reason and justice, as well as in law, it ought to bind him. It is of no consequence, that the direct consideration moves to a third person, as, in this case, to the drawer of the bill; for it moves from the purchaser, and is his inducement for taking the bill. He pays his money upon the faith of it, and is entitled to claim a fulfilment of it. It is not a case falling within the objects or the mischiefs of the statute of frauds. If A says to B, "Pay so much money to C, and I will repay it to you," it is an original, independent promise; and, if the money is paid upon the faith of it, it has been always deemed an obligatory contract, even though it be by parol; because there is an original consideration, moving between the immediate parties to the contract. Damage to the promisee, constitutes as good a consideration as benefit to the promisor. In cases, not absolutely closed by authority, this court has already expressed a strong inclination not to extend the operation of the statute of frauds, so as to embrace original and distinct promises, made by different persons at the same time, upon the

same general consideration. Then, again, as to the consideration, it can make no difference in law, whether the debt for which the bill is taken, is a pre-existing debt, or money then paid for the bill. In each case, there is a substantial credit given by the party to the drawer, upon the bill, and the party parts with his present rights at the instance of the promisee; whose promise is substantially a new and independent one, and not a mere guaranty of the existing promise of the drawer. Under such circumstances, there is no substantial distinction, whether the bill be then in existence, or be drawn afterwards. In each case the object of the promise is, to induce the party to take the bill upon the credit of the promise; and if he does so take it, it binds the promisor. The question, whether a parol promise to accept a non-existing bill, amounts to an acceptance of the bill, when drawn, is quite a different question, and does not arise in this case. If the promise to accept were binding, the plaintiff would be entitled to recover, although it should not be deemed a virtual acceptance." In Boyce v. Edwards, 4 Pet. [29 U. S.] 111, 121, 122, 123, the court held, that if, in the particular case, by reason of the bill to be drawn not being definitely described, in the manner limited by the case of Coolidge v. Payson, 2 Wheat. [15 U. S.] 75, the promise to accept would not operate as an acceptance of the bill in favor of the party receiving it, still, it would operate as a promise to him to accept the bill, when drawn, and thus be equally available for him. The language of the court, upon that occasion, was:—"The rule laid down in Coolidge v. Payson, requires the authority to be pointed to the specific bill or bills, to which it is intended to be applied, in order, that the party, who takes the bill upon the credit of such authority, may not be mistaken in its application." And again: "The distinction between an action on a bill, as an accepted bill, and one founded on a breach of promise to accept, seems not to have been adverted to. But the evidence necessary to support the one or the other, is materially different. To maintain the former, as has been already shown, the promise must be applied to the particular bill alleged in the declaration to have been accepted. In the latter, the evidence may be of a more general character, and the authority to draw may be collected from circumstances, and extended to all bills coming fairly within the scope of the promise. Courts have latterly leaned very much against extending the doctrine of implied acceptances, so as to sustain an action upon the bill. For all practical purposes, in commercial transactions in bills of exchange, such collateral acceptances are extremely inconvenient, and injurious to the credit of the bills; and this has led judges frequently to express their dissatisfaction, that the rule had been carried as far as it has; and their regret, that any other act, than a written acceptance on the bill, had ever been deemed an acceptance. As it respects the rights and the remedy of the immediate parties to the promise to accept, and all others, who may take bills upon the credit of such promise, they are equally secure, and equally attainable by an action for the breach of the promise to accept, as they could be by an action on the bill itself." The case of Adams v. Jones, 12 Pet. [37 U. S.] 207, 213, is equally explicit to show, that a written promise, made to one person, may enure as a promise in favor of another person, who gives credit on the footing of that promise, where the terms of the latter are such as prove, that it was intended to be shown, and to produce that very credit. The case of Carnegie v. Morrison, 2 Metc. [Mass.] 381, 395, 396, is also an authority to the same purpose; and, indeed, it runs on all fours with the present case.

It is unnecessary for me to add, that my own judgment is persuasively governed by these decisions, not merely as authorities, (although that would be a decisive ground), but upon principle, as tending to further and establish commercial confidence, and to give that sanctity, circulation, and faith, to letters of credit, which constitute the very foundations, upon which they were first built, and by which alone they can be sustained in the business of modern commerce. My judgment, therefore, is, that the plaintiff is entitled to recover the amount of the damages sustained by the refusal of the defendants to accept the bill in controversy.

What should those damages be? Should they cover all the money actually paid upon the protested bills by the plaintiffs, including re-exchange, together with interest; or should the re-exchange be excluded? It is clear, that the acceptor is not, ordinarily, bound to any holder to pay re-exchange, upon his refusal to pay the bill; but only to pay the principal and interest. But, here, the drawees (the defendants) have promised to accept and pay the bill upon a sufficient consideration; and I do not perceive any ground why the defendants should not be bound to indemnify the plaintiffs against all losses, including re-exchange, which have been the natural and necessary consequence of their refusal to perform their contract made with the plaintiffs. The defendants are not sued as acceptors; but as special contractors, who have broken their contract; by which breach the plaintiffs have been compelled to pay the very moneys, including re-exchange, which they now seek to recover back. It seems to me, that they are entitled to the full amount paid by them, and interest upon the same from the time when it was paid. That interest should be the interest of the place, where the money was payable by the plaintiffs, and, of course, where they were to be reimbursed. The case of Riggs v. Lindsay, 7 Cranch [11 U. S.] 500, seems to me a clear and satisfactory authority, that the plaintiffs are entitled to a full reimbursement of all the sums paid

by them, including re-exchange. This also appears to have been the opinion of Mr. Justice Bayley, in his work on Bills of Exchange. Bayley, Bills (5th London Ed. 1830) p. 353, c. 9; Id. (Am. Ed.) p. 380. It was also directly affirmed by Lord Camden, in Francis v. Rucker, Amb. 672. Pothier holds, that the acceptor is, in all cases, bound to pay the re-exchange to the holder, in the same manner, as the drawer would be, (Poth. De Change, note 117,) which is carrying the rule beyond what our law seems to justify. Napier v. Schneider, 12 East, 420; Woolsley v. Crawford, 2 Camp. 445. See, also, Story, Bills, §§ 459–463.

For these reasons I am of opinion, that the whole damages and costs, and expenses paid by the plaintiffs, including re-exchange, with interest, are to be included in the judgment for the plaintiffs.

RUSSELL (WILLS v.). See Case No. 17,773.

RUSSELL (WYMAN v.). See Case No. 18,115.

RUSSELL, The JESSIE. See Case No. 7,298.

Case No. 12,166.

RUSSELL & ERWIN MANUF'G CO. v. MALLORY et al.

[10 Blatchf. 140; 5 Fish. Pat. Cas. 632; 2 O. G. 495; Merw. Pat. Inv. 439.] [1]

Circuit Court, D. Connecticut. Sept. 17, 1872.

PATENTS — CONFLICTING CLAIMS — REVERSIBLE LATCH — ABANDONMENT — PUBLIC USE AND SALE.

1. A patent was granted to W., in 1867, (applied for in 1865,) with a claim identical with that contained in a patent granted, in 1864, to M. In a suit in equity, brought by W., against M., for infringing such claim, the answer of M. insisted on the validity of such claim in the patent to M.: *Held*, that M. could not, on the hearing, take the ground that the claim of the patent to W. did not claim patentable subject matter.

2. The claim of the letters patent granted to Rodolphus L. Webb, December 31st, 1867, for "improvements in reversible locks and latches," namely, "The combination of a lock and latch, when the latch bolt and its operative mechanism are arranged in a case or frame independent of the main case, and constructed so that the latch bolt may be reversed, substantially as described, without removing the said independent case from the main case," is not open to the objection that it claims merely the combination of a lock and latch, and so claims merely the aggregation of two things which have no relation to each other, in performing their separate functions, and which are not patentable, as a combination.

[Cited in Russell & Erwin Manuf'g Co. v. P. & F. Corbin Manuf'g Co., Case No. 12,167.]

3. The claim does not claim, as an invention, the combination of a lock with a latch, but claims a reversible latch, constructed as described, to be used in connection with, and enclosed by, the lock case.

4. Mere lapse of time, before an inventor applies for a patent for his invention, does not, per se, constitute an abandonment of the invention to the public.

[Cited in Andrews v. Carman, Case No. 371.]

5. The question of abandonment, whether in regard to the time prior to two years before the application for the patent, or to the time included in such two years, is a question of fact.

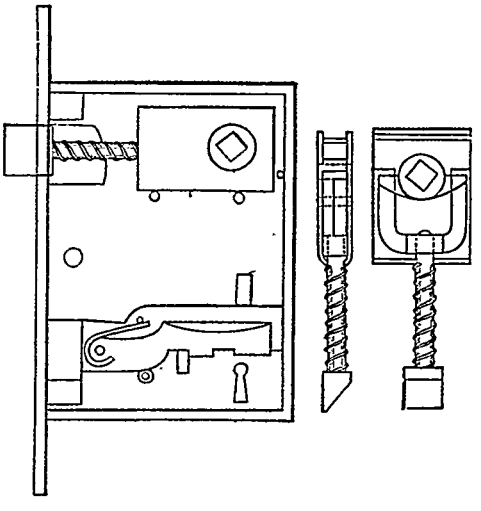
[Cited in Andrews v. Hovey, 124 U. S. 710, 8 Sup. Ct. 681.]

6. An inventor is not required to put his invention into public use before he applies for his patent.

7. Mere public use and sale of an invention, before a patent for it is applied for, does not invalidate the patent, unless the public use and sale were with the consent and allowance of the inventor.

[Cited in Andrews v. Hovey, 124 U. S. 710, 8 Sup. Ct. 681.]

[Final hearing on pleadings and proofs. Suit brought upon letters patent [No. 72,946], for "improvements in reversible locks and latches," granted to Rodolphus L. Webb, December 31, 1867, and assigned to complainants. The invention is illustrated in the accompanying diagram.



[The left-hand figure represents a case containing an ordinary lock mechanism in the lower part, and, in the upper part, the reversible latch shown in the two detached views on the right. This latch is so formed by inclosing the inner end of the latch bar, with the arms and hub in a thin case, as shown, that the case may be placed within the main case of the lock, between the two plates thereof, so as readily to slide a short distance forward or backward. The knob spindle being removed, the whole case may be drawn forward by applying the thumb and finger to the projecting end of the latch until the square portion is clear of the external mortice in the case, when the

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 10 Blatchf. 140, and the statement is from 5 Fish. Pat. Cas. 632. Merw. Pat. Inv. 439, contains only a partial report.]

latch may be turned half round, pushed back, and held in place by inserting the spindle. The latch may be thus adapted to a right or left-hand door.] [2]

C. E. Mitchell and Benjamin F. Thurston, for plaintiffs.

Charles F. Blake and Charles R. Ingersoll, for defendants.

WOODRUFF, Circuit Judge. The bill of complaint herein sets out a patent for "improvements in reversible locks and latches," granted, December 31st, 1867, to Rodolphus L. Webb, and by him assigned to the plaintiffs, May 12th, 1868, and alleges that the defendants have infringed, and are still infringing, that patent, by the manufacture and sale of locks and latches constructed, in substance, according to the invention patented. It prays an injunction and an account of profits.

The answer denies that Webb was the first inventor, and alleges that the defendant Burton Mallory was the first inventor of the said improvement, and that he obtained letters patent therefor June 7th, 1864. It admits that the defendants have made and sold reversible latches constructed in accordance with the said letters patent, and are intending to continue such manufacture, but denies that therein they infringe any rights of the complainants. By an amendment of the answer, the defendants further aver, that, if it shall appear that Webb was the first and original inventor of the reversible latch described in the letters patent issued to him, the said invention was, before his application for letters patent, abandoned, and no steps were taken by him to bring his invention into public use until after the said Burton Mallory had, by his original invention, discovered the said improvement and taken out letters patent therefor, and the defendants had, by their diligence, at large expense and great effort, given to the public the benefit of said invention, by placing the said improved latches on sale in the principal markets of the United States; that said Webb, for many months before his application for the letters patent issued to him, knowingly, and without objection, permitted said Mallory and the defendants to use the said invention, and to make and sell in the various markets of the United States large quantities of latches constructed according to said invention; that the complainants are, by reason thereof, estopped from asserting any right under the said letters patent, and from denying the right of the defendants to use the said invention; and that, by such abandonment, negligence and laches, the said Webb forfeited any right he otherwise might have had to the said letters patent, and the same are invalid and of no effect.

By this answer we are relieved of any necessity to examine the details of the invention, or to compare the two inventions of Webb and Mallory, to ascertain whether, if the patent held by the complainants be a valid patent, the defendants are infringers. The answer admits that they are using the invention for which the letters were granted to Webb, and their defence is an attempted justification of that use. We may, therefore, confine ourselves to the consideration of the justification thus set up by the defendants.

Some account of the improvement which constitutes the invention claimed may be necessary to make certain points urged upon our attention intelligible. Locks and latches were formerly made so permanently constructed and arranged that they could be used upon one edge of a door only. The catch or bolt of the latch being bevelled on one side, a latch that could be applied to a right hand door could not be used on a left hand door. Separate locks and latches must, therefore, be made, and purchasers must, before buying, assure themselves upon which edge or side of their doors the hinges would be placed. In practice this was found inconvenient, and mistakes were made in purchasing, or changes in the course of erecting houses, in the precise arrangement of doors, or in the swing thereof, gave great trouble. It was, therefore, very desirable to have locks and latches so constructed that the latch or bevelled catch could be readily, by a slight change of adjustment, reversed, whereby, whatever lock and latch was purchased, it could, at the option of the purchaser, be applied to the left or to the right hand edge of the door. Later experience also suggested, that, while it was desirable that the latch should be capable of such adjustment or reversal, either before or after the lock was inserted in or attached to the door, it ought not to be so left, when the whole was in complete order for use, that the latch could then be changed or reversed, because this would enable careless or mischievous persons to reverse it, or expose it to reversal by accident.

In general terms, the invention in question consists in enclosing the inner end of the latch, and the arms and hub, by means of which the latch is to be drawn back, in a thin case, so as to preserve their constant due adjustment, and placing that case within the main case of the lock, between the two plates thereof, so as readily to slide, between studs projecting from the surface of the main plate, a short distance forward and backward. In this condition of the parts, the thumb and finger, being applied to the bevelled end of the latch, readily pulls it forward, and, its inner end being round and fitted to its yoke within the small case by a knob or a swivel joint, it is turned around, and so may be adapted either to a right hand or left hand door. Being turned, it is pushed backward to its proper and permanent position. The in-

[2] [From 5 Fish. Pat. Cas. 632.]

sertion of the spindle on the ends of which the door knobs are placed, then holds the inner case with the tumbler or hub and yoke, with the latch also, firmly in place.

1. It is earnestly insisted, that the patent granted to Webb, on which alone the complainants rely, is void, upon facts that are not controverted or are clearly established, namely, that locks were common and latches were common, and locks combined with latches were common, long before the alleged invention of Webb, and that his letters patent purport to be for a combination merely; that, conceding that Webb's improved latch was new, he patented simply the combination of the latch with the lock, which was simply aggregating two things which had distinct and separate operation, each unaffected by the operation, or even the presence, of the other; that, in short, as there was no relation between them in the performance of their several functions, and no reciprocal action, they are not patentable as a combination; and that the complainants' patent is, therefore, void.

It may not be immaterial to observe, that no such defence is intimated in the answer of the defendants. Not only so, the answer itself, in connection with the production of the patent of Mallory, set up in the answer and there insisted upon as valid, impliedly asserts the validity of a patent for the very subject described and claimed to be secured thereby. It is allowing to the defendants very large liberty, to permit them to depart wholly from the ground taken in their answer as a defence, and that, too, when they set up, in their answer, a patent which is liable to the same criticism, and insist upon its validity, notwithstanding it be found that Webb was the first inventor. The claim in the patent to Mallory, set up in the answer, is in these words: "What I do claim as my invention, and new and useful, and desire to secure by letters patent, is the combination of a lock and latch, when the latch-bolt and its operative mechanism are arranged in a case or frame independent of the main case, and constructed so that the latch-bolt may be reversed, substantially as described, without removing the said independent case from the main case." The claim of the patentee Webb, as will be stated presently, is in very nearly the same, if not in the identical, words. The defendants have not, in their answer, thought proper to raise any question of the validity of such a claim. They assert their own title to the invention, and justify their use thereof upon grounds which import the validity of the claim in Mallory's patent. Now, on this hearing, the argument of the counsel reverses and contradicts the defence which the defendants have set up, under their own oath. The defendants are, for all the purposes of this case, bound by their answer. A departure from the defence therein alleged is not permitted in courts of chancery, where the complainant is entitled to call upon the defendant to answer under oath. The answer thus put in must be deemed and held to disclose the true and only defence which the defendants have to the allegations of the bill, and they are thereby concluded. It is with the issues thereby raised that the court has to deal.

This case itself furnishes an illustration of the propriety of the rule. Let it be supposed that the defendants wholly fail to establish, by proofs, any of the defences set up in the answer, but the court should be of opinion, upon the proofs, that the patent to Webb was void upon the grounds now, with great ingenuity and skill, urged by the defendants' counsel, and, for that reason, should decree a dismissal of the bill of complaint. The reasons for the decree, and the arguments urged by counsel, would not appear by the record. The record would indicate, that, upon the issues made by the answer, the defence therein was found and adjudged, when, in truth, the contrary was the fact. The decree would thus purport to establish that Mallory, and not Webb, had the prior right, when the court made no such decision. The record would seem to establish what the defendants claim, namely, that the patentee, Webb, was not the prior inventor, or had, by his laches, lost his right to his patent, in favor of the defendants, who would thus be left to stand before the world holders of Mallory's patent, affirming its validity to secure to them a monopoly, when, in truth, they had, outside of and contrary to what the record discloses, obtained a decision which was fatal to both patents. In short, the decision would be in conflict with the record.

Nevertheless, in view of what was claimed by counsel for the defendants, of the force and effect of certain other decisions of this court, and their supposed influence upon the validity of Webb's patent, we have deemed it proper to consider the point, and to show that (irrespective of the objection that such defence or claim is a departure from, and inconsistent with, the answer) it has no real foundation.

2. The claim in the specification annexed to the patent of Webb, which is thus attacked, reads as follows: "What I claim, therefore, and desire to secure by letters patent, is—The combination of a lock and latch, when the latch-bolt and its operative mechanism are arranged in a case or frame independent of the main case, and constructed so that the latch-bolt may be reversed, substantially as described, without removing the said independent case from the main case."

We are not inclined to depart from what was said in Hailes v. Van Wormer [Case No. 5,904], and Sarven v. Hall [Id. 12,369], on the distinction between a patentable combination and a mere aggregation of old elements having no relation to each other, or any reciprocal or co-operative action to produce the result attained. But, claims should be read in connection with the specification itself, and read in the light gained therefrom; and

it is proper to give such construction to the language employed as expresses the evident intention, if that may be done. It is manifest, from the whole specification and claim, that the inventor here had no idea of claiming a combination of a lock with a latch, as an invention. His specification shows, that the reversible latch, constructed as described, to be used in connection with, and enclosed by, the lock case, was the improvement which he had made. True, as a mere latch, it was immaterial whether the outer case had also within it the lock mechanism or not. Its presence or absence did not affect the operation of the latch, and, equally, the presence or absence of the improved latch did not affect the operation of the lock. Nevertheless, the improved latch was adapted to be used in the case of the lock, and the whole, as an aggregate, is mentioned; and the inventor declares, that, when such a latch as he has described is united with a lock by enclosure within the lock-case, as mentioned, it exhibits his invention. He might, no doubt, have claimed the improved reversible latch enclosed in any outer case. If that latch, in its construction, mode of operation, and arrangement for reversing, was new and useful, it was patentable, and his patent might have been more comprehensive than it now is. His patent is not to be held invalid because he only claims it when used in an outer case, containing also lock mechanism, if, in fact, his improvement was patentable; not even though there is no relation in the operation of the two, and no effect from the combination which either separately would not produce. Nothing in the cases cited forbids an inventor of a new device from taking a patent under a claim narrowed as closely as he sees fit, and, however much narrower than he might have claimed, the patent is valid.

We think, moreover, that the expression, in the claim, "the combination of a lock and latch," is not to be technically construed. The whole specification shows what the improveprovement was, and that the lock mechanism has no effect upon its operation. The terms used mean just what is meant by "a combined lock and latch," or "a united lock and latch," or "a lock and latch," when indicating a single article of manufacture or use. It is that aggregate structure, when it contains within the main case the special arrangement and mechanism which the inventor describes, that he claims as his invention. In a somewhat analogous view, any machine or structure may be claimed, when it contains a new device or devices which are described by the inventor as improvements. The claim is for the whole, as a whole, when and when only it contains the new devices. In a certain sense, the lock and latch have a relation to each other, the same relation that the frame of a machine has to the devices sustained thereby. Such device may be no more patentable in a frame of one description rather than another, but, if the patentee chooses to restrict himself to his new device when used in some special connection, he does no wrong to the public and violates no rule of law.

3. On the question of priority of invention, we cannot think it necessary to extend discussion. It is established, we think, by a very large preponderance of evidence. Indeed, there is little contradiction of the three witnesses who testify positively on the subject, two of whom have no interest in the controversy, and are wholly unimpeached. The contradicting witness is the same on whom the defence of abandonment of the invention almost solely depends, of whose credibility we shall have occasion to observe when treating of that subject. We think that no fair mind, weighing the evidence, can doubt that Webb made the invention in, or prior to, March, 1863, and that in that month it was perfected and embodied in a complete lock and latch fitted for use, or that Webb then deemed it a patentable invention, desired and expected to procure a patent therefor, and consulted Mr. Bliss, solicitor of patents, in order to obtain advice as to what was essential to preserve his right to such patent, exhibiting to him, at the time, his completed invention.

4. The remaining ground of the defence is, that the patentee, although the first inventor, by his neglect and his silence, while the defendant Mallory also perfected and put into use and on sale the same invention, is precluded from asserting his claim and has lost his right to the exclusive use of the invention. This ground of defence is exhibited in three forms: First, that Webb abandoned his invention to the public. Kendall v. Winsor, 21 How. [62 U. S.] 322. This, however, is not very strenuously insisted upon, nor is it very distinctly stated in the answer, doubtless, for the reason, that, if this be established, all the public may use it, and the defendants have no exclusive right under the patent of Mallory. The claim involves this concession, and the defendants would not probably seek an adjudication which establishes that Webb was the original and first inventor, but that his invention had, by his voluntary act, become public property. Consideration of the proofs will, nevertheless, include this point, as well as the next, namely—Second, that Webb voluntarily abandoned the invention as useless; that, although his experiment proceeded so far as, in fact, to produce the device or structure, yet he deemed it of no value, or, at least, so treated it, and, by his conduct, placed it upon the footing of an abandoned experiment; and that, therefore, it in no wise stood in the way of Mallory, who himself made the same invention, procured a patent therefor, and put it into public use and on sale, so that the public derived the benefit of the use of the invention. Thus viewed, the case is supposed to come within the rule held in Gayler v. Wilder, 10 How. [51 U. S.] 477. And third, that the neglect of Webb to apply for a patent, and his silence while Mallory perfected his invention and put it into public use and on sale,

and sold it extensively, ought, in equity, to estop Webb and the complainants, his assignees, from asserting the priority of the invention, and claiming the exclusive right which a valid patent would secure to them.

It appears, by the proofs, that the invention of Webb was complete, and actually embodied in a practical lock and latch, as early as the last week in March, 1863. His application for a patent was made on the 21st of March, 1865. This is the interval, and the only interval, of time within which the conduct of Webb is to be considered with reference to either of the above propositions included in this branch of the defence. The question of abandonment, in either view above suggested, is a question of fact, and to be determined by the evidence. Lapse of time does not, per se, constitute abandonment. It may be a circumstance to be considered. The circumstances of the case, other than mere lapse of time, almost always give complexion to delay, and either excuse it or give it conclusive effect. The statute has made contemporaneous public use, with the consent and allowance of the inventor, a bar, when it exceeds two years. But, in the absence of that, and of any other colorable circumstances, we know of no mere period of delay which ought, per se, to deprive an inventor of his patent.

As it respects abandonment to the public, the argument that such was the intention of the inventor would have been much stronger, if, after perfecting his invention, he had proceeded publicly to make and sell the same, and voluntarily placed it in public use, accessible and available to any who chose to buy and use, for nearly two years before he made any application for a patent. The argument here pressed upon us, that Webb did not intend to secure any exclusive right, or did not esteem the right of any value, or that he abandoned such right to the public, would, in such case, have been impressive; and yet the express terms of the statute secure to the inventor this interval, in which he may, if he please, test the usefulness and the value of his invention, by putting it into use and on sale, without being thereby barred of his patent, and it necessarily follows, that, from the mere lapse of the period mentioned, no inference of abandonment arises.

If the matter be brought to the test of actual design and purpose, either to abandon the invention to the public, or to cast it aside as a useless invention or unsuccessful experiment, the proof seems to us to establish very clearly the contrary. Webb's continuous or repeated declarations, testified to by himself and by the solicitor of patents to whom he applied for advice, his claim to priority of invention when he heard that Mallory was manufacturing a similar lock and latch, his offers to sell his invention to others, indicate, that, in his mind, there was no purpose to forego the right which belonged to him as inventor, nor any conclusion that the invention should be abandoned. The purpose declared by him to the solicitor of patents, when he had first perfected his latch, he never relinquished. It is, no doubt, true, that, although receiving but a moderate salary for the support of himself and family, he could easily have procured means to pay the expense of taking out a patent. His sale of the patent for a second invention would have enabled him to do this, as he is not shown to have been in debt. But, it is plain what his purpose was, in delaying his application. He did not propose to himself engage in business as a manufacturer. He had not means for such an undertaking. The profits of his ingenuity he expected to realize by negotiation with others who were or should become manufacturers. His delay was, therefore, that he might, perchance, find some one to purchase, or might test the utility and value of his invention by submitting it to the appreciation of those who, being engaged in the manufacture and sale of locks, could better judge of its value than he could himself.

We find no reason for concluding that, when, by express enactment, an inventor may have two years of trial in the public markets, putting his invention in use and on sale, and yet be entitled to a patent, he may not, also, have the like period, at least, within which to offer his right as inventor to others, submit the invention to that test of its usefulness and value, and still be entitled to his patent. The lapse of two years is not the test of his right in this respect, nor is the lapse of any specified period conclusive. The law does not declare within what period after the invention a patent must be applied for, or that it must be applied for within any specified time. We do not mean, that an abandonment to the public may not be made, or that an invention may not be given up and abandoned, as a useless or unsuccessful experiment, within less than two years. No particular time is necessary, but the fact must be proved, and the lapse of two years does not establish it. There may be sufficient reasons why a delay of a much greater number of years will not so operate. On the question of abandonment, in either aspect, time and circumstances, the acts and contemporaneous declarations of the party, are all to be considered.

We have here the positive testimony of the inventor. We have his declarations to others. We have his taking advice on the effect of delay. We have his effort to recover his model or original of his invention, and his final sale of his right as inventor. Laying out of view, for the moment, the testimony of a single witness, there is no act or declaration of the inventor, down to the application for the patent, which is not in harmony with, or which does not confirm, the unequivocal testimony, that there was at no time any design or purpose to forego his right as the inventor of the lock and latch in question. Of that witness we observe, that his testimony tends strongly to show that Webb abandoned this invention as a thing of no value, took to

pieces the lock he had constructed in conformity with it, addressed himself to the construction or invention of some other device to accomplish the desired result, satisfied that what he had before done failed to accomplish it in a useful manner, used the parts of his first constructed lock in and toward his further and second invention, left such of the parts as could not be adapted to such second invention to go to waste as rubbish, and thenceforward entertained no idea of using or patenting such first invention, until he learned that Mallory had brought the same invention into use and put it upon sale. This witness is contradicted in all the material parts of this statement, and in the inference sought to be drawn therefrom, by more than three witnesses, none of whom are impeached otherwise than by his contradiction. True, Webb left the newly-invented lock and latch in the shop of Parkers & Whipple, where he was employed when he invented it. He declares that it was so left by oversight or forgetfulness at the time of his removal; and three persons testify to the distinct declarations of the witness above referred to—one of the proprietors of the shop, John A. Parker—that long afterwards he had that lock and latch in his possession, and two of them testify to his refusal to give it up. These declarations were made on several occasions, and, as to two of the persons, (Webb and an officer of the plaintiffs), on their separate personal application to him for the lock, at about the time when a patent was to be applied for. On the question of the time when the lock was invented, he is, in like manner, contradicted by three witnesses, who are clear and distinct in their testimony. We do not think it necessary to indulge in conjecture as to the motive of this witness to misrepresent, or to consider whether it be possible that he has persuaded himself that what he testified was true, or whether by any means he has been led into a mistaken belief as to the facts. It is sufficient, that, upon the testimony in conflict with his statement, we are constrained to say that it would be wholly unsafe and improper to rest any conclusion in this case upon what he testified.

It follows, we think, that the proofs wholly repel any idea of abandonment of this invention by the inventor, in either sense claimed by the defendants, and show, on the contrary, a continuous claim to be the first inventor, a purpose to secure a patent for the invention, and some appreciation of its usefulness and value, though, no doubt, according to the results now shown, that appreciation was greatly inadequate.

Much that has been already said is pertinent to the third claim above stated, to wit, that, by withholding his application for a patent, and by his silence, not putting his invention into actual public use for nearly two years prior to such application, Mallory meanwhile having made the same invention, and put the same on sale, Webb and his assignees are estopped. Permission to put an invention in public use for two years prior to the application, does not make it the duty of the inventor to do so for that or any other period before he applies. Prior to the act of March 3, 1839 (5 Stat. 354, § 7), such public use, with the consent and allowance of the inventor, destroyed his right to a patent. That act relieves the inventor from the danger of such a forfeiture, and that is all. The question of estoppel, now urged, stands, therefore, upon the same footing as if that act had not been passed. Is it, then, true, that an inventor, who makes no secret of his invention, cherishes and declares his purpose to procure a patent therefor, exhibits it to those who, being engaged in manufacturing articles of a similar kind, are competent to judge of its value, in the hope that they may be disposed to purchase, he himself being in no situation, and having no means, to engage in manufacturing—is an inventor, we ask, in these circumstances, estopped to assert a right to the invention, and to claim a patent, because his application is not made until nearly two years have elapsed? Here was no bad faith, no voluntary acquiescence in the manufacture and sale by others. For, the proof shows, that, when he learned that Mallory was making and selling the same lock and latch, he asserted his prior right, and, in a reasonable time thereafter, applied for the patent. The provision of the law of July 4, 1836 (5 Stat. 119, § 6), which made public use and sale no impediment to the granting of a patent, and no defence to an infringer, unless it was by the consent and allowance of the inventor, shows that such facts create no estoppel invalidating his patent when granted. Apart from the question of abandonment, the mere fact that, prior to the application for the patent, some one has obtained knowledge of the invention, and placed the thing invented on sale, whether innocently or fraudulently, does not cut off the prior right. True, the patentee cannot claim damages or profits arising before his patent is granted or applied for; but, he comes to these defendants now, as he would to any party who, in ignorance, in fact, of the existence of any patent, had engaged in the manufacture, and says: "From and after the date of my patent you were bound to take notice of my rights. They were claimed, and my claim was of record in the patent office. Thenceforward, the manufacture of the patented lock and latch was an infringement of my rights. For what you had done before, you are not and cannot be pursued, but then you were bound to refrain from further manufacture." No equity beyond this can be urged in favor of such prior manufacturer; and the circumstance that he was also, in fact, an original inventor, and believed himself to be the first inventor, does not affect the question. He is in no better situation than one who ignorantly and innocently supposed that the invention was open to the public. These considerations lead us

to conclude that the complainants are entitled to the decree prayed for in their bill.

[For another case involving this patent, see Russell & Erwin Manuf'g Co. v. Corbin, Case No. 12,167.]

Case No. 12,167.

RUSSELL & ERWIN MANUF'G CO. v. P. & F. CORBIN MANUF'G CO. et al.

[12 Blatchf. 36; 1 Ban. & A. 159; 7 O. G. 383.] [1]

Circuit Court, D. Connecticut. April 28, 1874.

PATENTS—REVERSIBLE LOCK—CLAIM CONSTRUED.

1. The claim of the letters patent granted to Rodolphus L. Webb, December 31st, 1867, for an "improvement in reversible locks and latches," namely, "the combination of a lock and latch, when the lach-bolt and its operative mechanism are arranged in a case or frame independent of the main case, and constructed so that the latch-bolt may be reversed, substantially as described, without removing the said independent case from the main case," is infringed by the combination of a lock and latch, in which the latch-bolt and its operative mechanism are arranged in a skeleton frame in an outer or lock case, which operates to preserve the proper relations of the yoke and tumbler, while being moved forward and backward, although it does not so operate when the latch and latch mechanism are removed from the outer or lock case.

2. Infringement is not avoided by the fact that, when the patentee's latch-bolt is drawn forward, for the purpose of reversing it, the case or frame moves forward with it in a straight line, and that the defendants' frame, when the latch-bolt is drawn forward, moves forward in a curved line.

3. Nor is infringement avoided by the fact, that the defendant introduces a catch, operated by a spring, to hold in position the latch and its mechanism, after reversal, until the knob-spindle is inserted.

4. The word "independent," in the claim, does not mean that the latch and its mechanism operate without any contributory aid from the main case or adjuncts thereto, but means that the frame containing the latch and its mechanism is separate from, or forms no part of, the main case.

[This was a bill in equity by the Russell & Erwin Manufacturing Company against the P. & F. Corbin Manufacturing Company and Frederick H. North for the infringement of letters patent No. 72,946, granted to R. L. Webb, December 21, 1867.]

Charles E. Mitchell and Benjamin F. Thurston, for plaintiff.

Charles R. Ingersoll and Charles F. Blake, for defendants.

WOODRUFF, Circuit Judge. The bill of complaint herein is filed to restrain the alleged infringement by the defendants, of letters patent for an "improvement in reversible locks and latches," granted, on the 31st of December, 1867, to Rodolphus L. Webb, and assigned by him to the plaintiff on the 12th of May, 1868, and to recover from the defendants the gains and profits arising from such infringement, and for other relief. The answer of the defendants places their defence upon two grounds, viz., that the invention described in the patent is not the invention of Webb, but of one Burton Mallory, and was known and used by him before the said Webb had any knowledge thereof, and was described in letters patent granted to Mallory May 5th, 1863; and that, under any proper construction of the patent to Webb, the defendant corporation has not made use of, or employed, any improvement described or claimed in the said letters patent, or sold any locks which correspond with the construction claimed by the patentee, as described in his claim. They then allege, that the locks which they have made and sold are constructed with the improvements described in letters patent issued to W. T. Munger, March 1st, 1870.

In a suit in this court between the present complainant and the same Burton Mallory referred to in the answer of these defendants, we considered the construction and validity of the claims in the patent granted to Webb, held him to be the first inventor, and adjudged the said Burton Mallory an infringer of the rights of these complainants. Russell & Erwin Manuf'g Co. v. Mallory [Case No. 12,166]. The defendants in this cause have so far acquiesced in that decision that, on the trial of this cause, the only question raised and discussed, or to which proofs on the part of the defendants were addressed, was whether the locks and latches produced, and which, as admitted, the defendant corporation is engaged in manufacturing and selling, do infringe the patent granted to Webb on which this suit is founded. Upon that question we entertain no serious doubt. There is, it is true, a conflict of testimony. The defendants have examined experts, who point out noticeable differences between the latch mechanism made by the defendants and that made by the complainant, but those differences are mainly formal, and, in some respects, verbal only. If, in any feature, there is material change of construction, it is, at most, an addition, modification or improvement on the structure of the patentee, which, nevertheless, embraces its substantial features, and operates by the same substantial means and in substantially the same way. We do not think it necessary to enter very fully into the details of the patented invention, in disposing of this case. It is described with some minuteness, in the opinion of the court in the suit against Burton Mallory, above referred to.

The claim of the patentee is in these words: "What I claim, therefore, and desire to secure by letters patent, is, the combination of a lock and latch, when the latch-bolt and its operative mechanism are arranged in a case or frame independent of the main case, and constructed so that the latch-bolt may be reversed, substantially as described, without removing the said independent case from the

[1] [Reported by Hon. Samuel Blatchford, District Judge; reprinted in 1 Ban. & A. 159, and here republished by permission.]

main case." The description in the preceding specification, and the drawings and model of the patentee, show, that the case or frame in which the latch mechanism is arranged is of thin sheet metal, partially surrounding the mechanism of the latch, to hold the parts in proper relative position when drawn forward for the reversal of the latch-bolt, and while it is being returned to its place. But, the patent cannot be avoided by making that case or frame a skeleton frame operating in substantially the same way. The patentee seems to have anticipated some such attempt to limit the meaning of the word "case," by inserting the words "case or frame," as, for the purposes of his invention, synonymous, as, in their connection and application to this mechanism, we think they are. The defendants use a frame, which operates to preserve the proper relations of the yoke and tumbler, while being moved forward and backward, as does the complainant's "case or frame." It was suggested, that it does not so operate, when the latch and latch mechanism are removed from the outer or lock case, but that, when so removed, the forward end of the bolt is not sustained but falls, and the due adjustment of the mechanism is not preserved; whereas, it is said, the case used by the complainant always preserves the parts in their proper adjustment, whether in or out of the outer or lock case. We apprehend the question of infringement does not depend upon what capacity the several parts of the latch mechanism used by the defendants have or have not, when in no condition for practical use, or outside of the conditions in which the latches of both parties are intended to operate, and in which alone they are, in fact, used. If, therefore, in point of fact, there be any such difference between the two structures, (which, however, the complainant denies,) the question would still be—do the defendants, in making their locks and latches, construct and insert a mechanism and frame, which, in the actual condition and relation to the means of practical use, is like the complainant's patented invention, producing the same result, in substantially the same way, by substantially the same means? If they do, then it is not material that, outside of those conditions, or removed from the outer or lock case, the complainant's latch mechanism and frame has the capacity of holding the parts in due relation, which the defendants' has not. This may show that the defendants' device is not good or not so useful and convenient as the complainant's; but, that is all.

Besides, the patent to Webb is not for the latch with its mechanism and case in a condition not adapted to use. As more fully explained in the former suit, above referred to, it is limited to the structure which contains the latch mechanism within an outer case. It will not avail, therefore, to say, that they do not infringe because, when removed from the outer case, the defendant's devices will not operate in the same manner as the complainant's device will do when thus removed. If the defendants can make their peculiar frame and mechanism of the latch useful outside of any outer case, probably the complainant would not object that, by doing so, the patent was infringed. If the opinion in the former case was correct, the defendants infringe, if their device, constructed and used in the arrangement and connection described in the patent for the aggregate structure, does operate in the same way and produce the same result by substantially the same means. In this view, we think the defendants' frame is not even entitled to be treated as an equivalent. It is, in substance, the same thing as the complainant's case or frame.

Again, there is a difference in the line of motion of the case or frame. When the complainant's latch-bolt is drawn forward, for the purpose of reversing it, the case or frame moves forward with it, in a straight line. By means of a projection in the main case, at a corner or projecting angle of the defendants' frame, the movement of their frame, when the latch-bolt is drawn forward, is in a curved line forward, the frame being made to turn on such projecting angle as a centre of motion. This difference is so obviously an immaterial variation, so far as the question of infringement is concerned, that, although the defendants' expert witnesses gave it some prominence, their counsel expressly declined to claim for it any significance.

So, another difference is stated by the defendants' experts. When the complainant's latch-bolt has been drawn forward reversed and returned to position, but the knob-spindle has not been inserted, it can easily be drawn forward again; it is not held in place until such spindle is inserted. The same is true of the defendants' devices which are claimed to infringe. But, the defendants have superadded another device—a catch operated by a spring, by which, when the latch and its mechanism is returned to its proper position, it is caught and held in position, before the knob-spindle is inserted. This is a merely superadded device. If of any conceivable utility, it may improve the aggregate structure, but it has no effect whatever upon the office, functions or mode of operation of the patented devices, nor does it justify the defendants in appropriating them to their use.

It is further insisted, that, because the complainant's patent and, especially, the claim therein, characterizes the case or frame as "independent" of the main case, and the defendants, in their structure, make the main case useful by inserting studs therein to receive the bearing of the bolt spring, there is, therefore, no infringement. That argument can have no force, unless we should construe the claim as involving, in the aggregate structure, the complete independency of the latch mechanism from any office or function

of the main case. Such is, in substance, the argument. In the first place, the claim does not, in terms or by a just interpretation of its meaning, import that the latch and its mechanism, in the combination in which it is described and patented, operate without any contributory aid from the main case or adjuncts thereto; but, only, that the case or frame is independent of the main case, which means, separate from, or forming no part of, the main case; and this is literally and exactly true of both complainant's and defendants' case or frame. Second, when the claim and specification are read together, it becomes obvious, that the contributory aid of the main case to the successful operation of the latch, in connection with a lock case, as it is patented, is just as essential as in the defendants' device. Studs therein guide the movement of the latch mechanism, the inner side of that case, or a stud therein, (shown in the drawings,) sustain the mechanism against the backward thrust, and against the bearing of the spring before the knob-spindle is inserted, and the latch is sustained by, and slides between, the two surfaces of that outer case. The claim does not, therefore, mean, and could never be understood by one who ever read the specification or saw the model, that the latch and its mechanism operated independently of the main case. All that it imports is, that there was an outer case and a separate inner frame or case, in which the latch mechanism is arranged or held in position. Whether the bearing of the bolt spring was against the case or frame of the latch mechanism, or against a stud or studs in the outer case, is of no materiality to the claim of the patent. The whole operates substantially in the same way, and produces the same result, and by substantially the same means.

A decree must be entered for the complainant, agreeably to the prayer of the bill of complaint, with costs to the complainant.

[For another case involving this patent, see Russell & Erwin Manuf'g Co. v. Mallory, Case No. 12,166.]

Case No. 12,168.

The RUSSIA.

[3 Ben. 471.] [1]

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

COLLISION — NEW YORK HARBOR — VESSEL AT ANCHOR—INEVITABLE ACCIDENT—HARBOR REGULATIONS — JURISDICTION — SUITS BETWEEN FOREIGNERS.

1. A British steamship, coming into the harbor of New York, was swung by the ebb tide, which forms a rip where the tides from the North and East rivers meet, against an Austrian ship, lying at anchor, and sunk her. The ship had come in from sea the day before, and had anchored where she was sunk, and no notice to remove from that anchorage had been given to her by the harbor masters: *Held*, that the court of admiralty was not called upon, by the fact that all parties concerned were foreigners, to decline, from motives of international comity, to exercise jurisdiction in the case.

[Cited in Bernhard v. Creene, Case No. 1,349; The Belgenland, 114 U. S. 367, 5 Sup. Ct. 866; The Topsy, 44 Fed. 636.]

2. The effect of the tide upon the steamer was not an inevitable accident.

3. The ship being anchored in a customary place, and where no state law or city ordinance forbade anchoring, any general regulation of the harbor masters, forbidding her to anchor there, must be held to have been waived in her behalf, by the failure to give her notice to remove.

[Cited in The John Tucker, Case No. 7,431.]

4. The ship having come in from sea in a seaworthy condition, the fact that she was sunk by the blow of the steamship did not establish that she was not "tight and strong."

[5. Cited in Robinson v. Fifteen Thousand Five Hundred and Sixteen Bags of Sugar, 35 Fed. 603, to the point that, when a libellant agrees to accept a certain sum of money in settlement of his demand, that sum becomes his claim, within the meaning of the statute.]

In admiralty.

C. Donohue and T. Scudder, for libellants.

D. D. Lord, for claimants.

BLATCHFORD, District Judge. This is a libel filed by Ambrozio Ralli, the owner of the Austrian ship Figlia Maggiore, against the British steamship Russia, to recover for the damages caused to the Figlia Maggiore and her cargo, by a collision between her and the Russia, which took place in the harbor of New York, off the Battery, on the 25th of May, 1869, about 11 o'clock, a. m. The Figlia Maggiore arrived in port the day previous, from Marseilles, with a valuable cargo, and came to anchor off the Battery, at a place designated by her pilot, and was at anchor at the same place, at the time of the collision. The Russia was coming in from sea, on a voyage from Liverpool, and was bound to her wharf at Jersey City. The libel alleges, that the Figlia Maggiore was anchored from three hundred to four hundred yards distant from the Battery, and at a place usual and customary for vessels to anchor. The tide was ebb, and the weather was clear. The Figlia Maggiore's stern was tailing down towards the direction from which the Russia was approaching. The stem of the Russia struck the port side of the Figlia Maggiore between the main and mizzen rigging, angling somewhat forward, and crushed her in, so that she sank to the bottom in less than ten minutes, with all the property on board of her. The libellant, as carrier of the cargo on board, having possession of it at the time it was sunk, claims to recover in this suit for the damage to it, as well as for the damage to the vessel and her appurtenances, and for loss of freight, if any.

The defence set up in the answer, to show no fault in the navigation of the Russia, is, that, owing to the crowded state of the mid-

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

dle and west side of the North river, the Russia was compelled to go over towards the Battery; that, when she was within a sufficient distance of the Figlia Maggiore, her helm was starboarded, so as to cause her to pass on the port side of the Figlia Maggiore, but that, owing to an eddy which the tide made in that place, she did not mind her helm; that her engines were reversed, and her headway had been nearly stopped, when the collision happened; that, at the place where the accident occurred, the tide makes eddies, which are very irregular in their position, direction, and strength; and that it is impossible to foresee when and in what manner they will affect the course of a vessel getting into them. The case is thus sought to be made, on the part of the Russia, one of inevitable accident; and, to attempt to sustain such a view, testimony was put in, on the part of the Russia, as to the action of the tides from the North and East rivers at their junction. Griffiths, a Sandy Hook pilot, testifies, that the ebb tide begins to run out of the East river about an hour and a half before it begins to run out of the North river; that, at about half tide, or about three hours ebb, which was the state of the tide at the time of the collision, it ordinarily runs out of the East river at the rate of about two knots and a half per hour; that, at that time, it runs out of the North river at the rate of about one knot and a half per hour; that, at that time, the two tides meet on a line drawn from the flag-staff at the Battery to Bedlow's Island, the direction of the line being southwest by south; that, as the tide from the East river runs about west-southwest, and that from the North river runs about south, and against it, a regular bulkhead is formed, and a very large ripple is made; that a vessel, on striking it, is generally slewed around by it to the eastward or the westward, dependent upon how she strikes it; that, at the first of the ebb, the line of the tide-rip is up towards Castle Garden; that, as the North river tide comes down, such line is forced down across the mouth of the East river, until, at half tide, it runs about southwest by south, as before stated; that a vessel striking into that tide-rip will not mind her helm until she gets a length into it; and that the pilots generally try to keep out of such tide-rip. On cross-examination, he testifies, that the rip is easily seen, and that it is risky getting into it. This testimony is confirmed by Van Pelt and Bloodgood, witnesses for the claimants, the former a Sandy Hook pilot, and the latter the master of a steam tug. The latter also says, that if a vessel, having slight way on her, runs heading up the North river, across the mouth of the East river, at the stage of ebb tide referred to, her head will turn to the starboard exactly with the tide from the East river. This testimony condemns the Russia, instead of excusing her. In attempting to enter such a tide-rip, with a vessel at anchor, as the Figlia Maggiore was, on her starboard hand, and near her course, she assumed all the risk of avoiding such vessel. The tide-rip was plainly to be seen, and its course, and character, and action upon a vessel entering it were not fortuitous, or varying, or uncertain, but were, on the evidence, things to be foreseen, and, therefore, to be guarded against. To enter such a tide-rip, was to take, in respect to vessels at anchor ahead, all the risks of so navigating through it as not to collide with such vessels. She entered it at an angle, so that, as the tide from the North river struck her on her port bow, the tide from the East river acted on her starboard side, and the effect was to sheer her head to starboard, although her helm was starboarded, and, with the way she had on, to shoot her, stem on, off to starboard, against the Figlia Maggiore.

There is nothing to show that the Figlia Maggiore was anchored in an improper place. On the evidence, she was anchored in a customary place of anchorage, and in a place not forbidden by any state law or city ordinance. As to any general regulation made by the harbor masters, it is not shown that those charged with the anchorage or management of the Figlia Maggiore were notified of any such regulation, or had been warned not to allow their vessel to remain where she was. As she had taken her anchorage in a place not shown to have been in itself unsafe or improper, as respected the navigation of other vessels, a failure on the part of the proper harbor master to notify her to remove from such anchorage must be regarded as a waiver, in her favor, of at least any general regulation, of which she was not, in fact, notified, which forbade her anchoring at the place where she was anchored.

Of the various other defences set up in the answer, none are made out. Those on board of the Figlia Maggiore did not neglect to take any measures which it is shown they could have taken to prevent or avoid the collision or its consequences. The allegation, in the answer, that the Figlia Maggiore would not have received the damage actually sustained, if she had been tight and strong, is not true in the sense stated, nor is it any defence in that sense. She had just come in, in fair seaworthy condition, from a long voyage; and she was entitled, in law, to have the navigation of the Russia, in respect to her, regulated by some other standard than her capacity to successfully resist, at anchor, a blow from the Russia in motion. Amoskeag Manuf'g Co. v. The John Adams [Case No. 338].

The service on the claimants of the attachment issued against the libellant by the state court after this suit was brought, can in no manner affect this suit in rem against the Russia.

One more point, raised in the answer, remains to be noticed. It is, that, as both of

the vessels are foreign vessels, not owned by citizens of the United States, this court ought not to entertain jurisdiction of the cause of action set forth in the libel. It is not maintained that this court is without jurisdiction of this suit, but it is urged that it ought not to busy itself with deciding a controversy between foreign vessels and foreigners. This case being one of a collision on navigable waters in the harbor of New York, is a civil case of admiralty and maritime jurisdiction; and, therefore, within the cognizance of this court, by virtue of the 9th section of the judiciary act of September 24th, 1789 (1 Stat. 77), the Russia having been attached within the territorial jurisdiction of this court. The Propeller Commerce, 1 Black [66 U. S.] 574; The Belfast, 7 Wall. [74 U. S.] 624, 637–642. The ground urged why this court should not exercise jurisdiction in this case is, that, although it may have power to hear and determine this suit, it will regard the circumstances of the case as rendering it unfit that it should hear and determine it, because the libellant and the claimants are not citizens of the United States and the colliding vessels are both of them foreign vessels. It is supposed that the court ought, from motives of international comity, delicacy and convenience, to decline the suit, and it is maintained that justice does not require this court to interpose in favor of the foreign libellants. Although, on these principles, the court of admiralty forbears, as a general usage, to exercise its jurisdiction over controversies between foreign seamen and ship masters (The Napoleon [Case No. 10,015]), and over suits brought by foreign seamen against masters or owners, being also foreigners, or against foreign vessels (Davis v. Leslie [Id. 3,639]; Bucker v. Klorgeter [Id. 2,083]), yet the principle upon which such court proceeds in determining, in any case, whether to exercise such jurisdiction or not, is to inquire whether the rights of the parties will best be promoted by retaining and disposing of the case or by remitting it to a foreign tribunal (One Hundred and Ninety-Four Shawls [Id. 10,521]). I am not aware that jurisdiction, in a case of collision, has ever been declined by any court of admiralty, either in the United States or in Great Britain, because the two colliding vessels were the property of foreign subjects. In the case of The Johann Friederich, 1 W. Rob. Adm. 35, 37, which was a case in rem prosecuted in the high court of admiralty in England, on a collision on the high seas, between Dover and Dungeness, between a Danish vessel and a Bremen vessel, whereby the Danish vessel, with a cargo on board belonging to British subjects, was sunk and totally lost, Dr. Lushington said: "It has also been said, in the course of the argument, that this court is not desirous of exercising its jurisdiction between foreigners; and, in support of this doctrine, some observations of Lord Stowell, in cases of seamen's wages, have been cited. But it appears to me that the cases cited are distinguishable from the present for the following reason—that all questions of collision are questions communis juris, but, in cases of mariners' wages, whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of the claim must be tried by such law. One of the most important distinctions, therefore, respecting cases where both parties are foreigners, is, whether the case be communis juris or not." Again, he said (page 38): "If these parties must wait until the vessel that has done the injury returned to its own country, their remedy might be altogether lost, for she might never return at all; and, if she did return, there is no part of the world so distant to which they might not be sent for their redress. * * * From these considerations it is perfectly clear, that a refusal to exercise the jurisdiction of the court in these cases would, in effect, amount to a total denial of justice." In conclusion, the judge stated the following to be the grounds on which he exercised jurisdiction in the case: "1st. That all causes of collision are causes communis juris; 2dly. That the vessel, at the time of her arrest, was within admiralty jurisdiction; 3dly. That the collision took place upon the high seas close upon the English coast." He added: "If it had been necessary, I could have cited several authorities in support of the general jurisdiction of the court. But I decide the question on the grounds I have stated, without taking into my consideration the circumstance that was adverted to in argument, that the cargo on board was the property of British subjects. This fact is undoubtedly of considerable importance, inasmuch as I am at a loss to conceive how I could refuse jurisdiction, and send the British owners to a foreign country; and, what an anomaly would occur, if, in a transitory action, I could do justice to one set of owners, and refuse it to another." In the case of The Griefswald, 1 Swab. 430, 435, Dr. Lushington says: "In cases of collision, it has been the practice of this country, and, so far as I know, of the European states and of the United States of America, to allow a party alleging grievance by a collision, to proceed in rem against the ship wherever found."

In the present case, no reasons exist why this court should decline jurisdiction. The case is one of collision. The Russia has been arrested within the jurisdiction of this court. The collision took place in the harbor of New York. Several of the witnesses on both sides belong in New York, and were not on board of either vessel. There is no special question arising under the local laws either of Great Britain or of Austria to be be determined in this case. These consid-

erations, independently of the fact stated on the trial, that some of the cargo of the Figlia Maggiore belonged to citizens of the United States—a fact which is, however, not averred in the libel or shown by proof—induce the court to regard this case as one in which it is eminently proper and conducive to justice that it should exercise the jurisdiction invoked by the libellant.

There must, therefore, be a decree for the libellant, with costs. The reference to ascertain the damages will include damage to the cargo as well as to the vessel, the former being claimed in the libel to be recovered by the libellant, as carrier in possession at the time the damage was done. The Commerce, 1 Black [66 U. S.] 574, 582; The Commander in Chief, 1 Wall. [68 U. S.] 50–52.

[For a hearing on exceptions to the commissioner's report, see Case No. 12,169.]

Case No. 12,169.

The RUSSIA.

[4 Ben. 572.] [1]

District Court, S. D. New York. Feb., 1861.

COLLISION IN PORT—DAMAGES—RAISING VESSEL—FREIGHT—DEMURRAGE.

1. Where a vessel which had arrived at her port of destination, was sunk at her anchorage, with her cargo on board, in a collision with a steamer, for which the latter was held responsible, and, instead of raising the vessel and cargo entire at once, which it appeared could have been done, competent parties having offered to do it for $25,000, the owners of the vessel adopted the method of getting out part of her cargo by divers, before attempting to raise her, in which process more time was consumed than would have been necessary for the raising of the vessel and cargo entire: *Held*, that the damages allowed to the libellant for the expense of raising must be reduced to $25,000.

2. In estimating the damage to the cargo, its value must be taken at the port of destination, less freight and duties.

[Cited in The Aleppo, Case No. 158.]

3. Demurrage could not be allowed for the increased time occupied in raising the vessel, beyond the time which it would have taken to raise her with her cargo entire.

In this case, the Austrian ship Figlia Maggiore, which had arrived in New York harbor from a foreign port, was sunk at her anchorage, in a collision with the Russia, for which the Russia was held responsible. [Case No. 12,168.] Exceptions were filed by the claimants to the report of the commissioner as to the damages.

J. C. Carter and C. Donohue, for libelant.
D. D. Lord, for claimants.

BLATCHFORD, District Judge. The 12th exception is allowed, and the amount awarded on account of the bill of the Atlantic Submarine Wrecking Company, is reduced to $25,000, with interest from July 24th, 1869. The evidence satisfies me that the method adopted of diving out part of the cargo, before any attempt was made to raise vessel and cargo together, entire, was needlessly and even recklessly dilatory and expensive, and was, on the whole, very much more injurious to the cargo itself that was so dived out, than the raising of vessel and cargo together would have been. The evidence is clear, that vessel and cargo could have been raised entire, at once, by competent persons, who would have done so for $25,000, having all the necessary skill and appliances for the purpose. Instead of that, the company which did the work consumed 53 days in the combined operations of first diving out part of the cargo, and then raising together the vessel with the rest of the cargo. The legitimate work of raising the vessel, with the cargo left in her, did not consume more than one-quarter of the 53 days. The evidence shows, that the vessel and her cargo, as one, could have been raised bodily in the same time. Therefore 39 days of the 53 were utterly wasted. The consumption of those 39 days swelled every item of expense charged for wages of men and use of vessels and apparatus. It also left the major part of the cargo that was, in fact, dived out during the 39 days, and which was the most perishable part, to remain under water for a longer time, exposed to damage from water, than if it had been raised with the vessel in 14 days. By the latter course, the whole cargo would have come out of water in 14 days. As it was, but a trifle more than one-third of what cargo was got out during the 39 days came out during 14 days, so that nearly two-thirds of the dived out cargo remained under water longer by the course adopted, than it would have remained if the proper method had been followed. Besides, the cargo dived out was, to a large extent, cargo that was lighter than water, and the taking of it out diminished the buoyancy of the vessel, and increased the labor of lifting her. Moreover, much cargo, it is clear, perished by the breaking open of packages, in the handling of them, by divers, at a great depth under water. This damage would have been saved if the cargo had not been broken out until after the vessel was raised.

The 13th exception is allowed so far as to strike out 39 days from the 202 days allowed for as demurrage.

In regard to exceptions 14 to 28, both inclusive, I understand the commissioner to say, in his report, that, in making up the amounts of the items covered by those exceptions, he has deducted, from the value of the cargo at New York, the freight and duties. The principle of taking the value at New York, less the freight and duties, is correct. But I think, from an examination I have made of some of the items in connection with the evidence, that the commissioner has, in some instances, unintentionally

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omitted to deduct the freight, and the report is sent back for a re-examination of the calculations of amounts, in respect to the items covered by exceptions 14 to 28, both inclusive. I can see no error in the allowance of the item covered by exception 29, either as to principle or computation, but the subject of exception 29, and the subject of exception 30, are so connected, that, inasmuch as there seems, on the evidence of Mr. Schnetzspahn, to be an error in allowing the entire item of $24,864 20, covered by exception 30, without a deduction of freight, and proceeds of sale of madder, and perhaps other deductions, the report is sent back for a revision by the commissioner of his statements of the amounts of the two items covered by exceptions 29 and 30. But no further testimony is to be taken in the case. I have labored under difficulty in regard to the claim of Mr. Schnetzspahn, and other claims in regard to cargo, from not having been furnished with the exhibits put in and referred to in the evidence in respect to them, or with any statement showing how the commissioner arrived at the amounts allowed by him.

The commissioner will make a new report in conformity with the foregoing directions.

Case No. 12,170.

The RUSSIA.

[5 Ben. 84.] [1]

District Court, S. D. New York. April, 1871.

MARSHAL'S COSTS — PAYMENT OF A DECREE IS A SETTLEMENT.

A libel having been filed against a steamer, she was seized under process issued on it, and was discharged from that arrest on a stipulation for value having been given. Subsequently a final decree was rendered against her for $148,700, and that sum was paid into the registry of the court by the claimants, without an execution having been issued or a sale of property having taken place. Thereupon, the marshal by whom the original process was served, but who had, in the meantime, gone out of office, presented to the clerk for taxation a bill for his commissions on the $148,700, under the fee bill of February 26th, 1853 (10 Stat. 161), as on a settlement of the case. The clerk declined to tax the bill, and the marshal appealed: *Held*, that the payment of the money under the decree was a settlement of the claim by the parties, within the language of the fee bill, and that the marshal was entitled to the commission. The case of Bone v. The Norma [Case No. 1,626], criticised.

[Cited in The City of Washington, Case No. 2,772; The Clintonia, 11 Fed. 741; The Scottish Dale, 65 Fed. 811.]

In admiralty.

F. C. Barlow, pro se.

D. D. Lord, for claimants.

BLATCHFORD, District Judge. In this case, after a final decree for the libellant, for the sum of $148,700, that sum was paid into the registry of the court by the claimants, without an execution having been issued, and without a sale of any property having taken place under the decree. The present marshal of the United States for this district was not marshal thereof when the attachment on the filing of the libel was issued. Such attachment was issued to and served by Francis C. Barlow, Esquire, who was at the time marshal of this district. The vessel was almost immediately discharged from seizure and from the custody of Mr. Barlow, as marshal, by having been bonded under a stipulation for value, before decree. On this state of facts, Mr. Barlow presented for taxation to the clerk, as a charge against the claimants, a bill for commissions as due to him on the $148,700, amounting to $746, being one per cent. on the first $500 of the decree, and one-half of one per cent. on the excess over $500, namely, on $148,200. The clerk declined to tax the item, on the ground that, as the vessel had been discharged from the custody of the marshal prior to the entry of the decree, and as the decree had been paid by the claimants, the commissions could not be allowed to Mr. Barlow. From this decision Mr. Barlow has appealed to this court. It is stated that the present marshal, who was marshal when the decree was entered and paid, makes no claim for any commissions on the amount paid thereunder.

The claim of Mr. Barlow is made under the provisions of the fee bill of February 26, 1853 (10 Stat. 161), which provides (section 1) as follows, in respect to "marshal's fees:" "For serving an attachment in rem, or a libel in admiralty, two dollars; and the necessary expenses of keeping boats, vessels or other property attached or libelled in admiralty, not exceeding two dollars and fifty cents per day; and, in case the debt or claim shall be settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per cent. on the first five hundred dollars of the claim or decree, and one-half of one per cent. on the excess over five hundred dollars: provided, that, in case the value of the property shall be less than the claim, then, and in such case, such commission shall be allowed only on the appraised value thereof." The same section contains, also, the following provision, under the head of "Marshal's Fees:" "For sales of vessels or other property, under process in admiralty, or under the order of a court of admiralty, and for receiving and paying the money, for any sum under five hundred dollars, two and one-half per centum; for any larger sum, one and one-quarter per centum upon the excess."

The only case to which I have been referred on this subject is that of Bone v. The Norma [Case No. 1,626]. In that case the claim was settled without a sale of the property libelled, and before any claimant thereof appeared in court. The marshal claimed the commission here insisted on. The court (Mc-

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Caleb, J.), admitted that the language of the act of 1853, in the passage in question, was not free from difficulty, but denied the claim of the marshal, on the ground that to allow it would be to give him a gratuitous compensation for services not actually rendered. It adds: "The law, I think, contemplated the presence of both the parties litigant in court, and the whole progress of the litigation short of the sale under the final decree; or it contemplated the possession of the property by the marshal, and the usual proceedings by advertisement, &c., under an interlocutory order of sale, without the sale itself. It intended to provide an adequate compensation to the marshal for the trouble and responsibility he assumes up to the moment of sale, and to put it out of the power of litigants to deprive him of such compensation for the trouble and responsibility thus assumed, by a compromise or settlement before a sale under a final decree, or a sale under an interlocutory order of court. This, in my judgment, is the only fair and rational interpretation to be given to the provision of the act of congress referred to."

It seems to me that the construction put by Judge McCaleb upon the statute is a strained one. I see no ground for holding that the words "the parties," in respect to a suit in rem, require that there should be a party personally in court as a claimant, aside from the acquiring of jurisdiction by the court, by the service of proper process, or that a party must come into court as a claimant, to litigate, to make him a party settling the debt or claim, within the act. In a suit in rem, the party who settles the debt or claim, without a sale of the property, in order to relieve the property seized, on the stipulation for value, is one of "the parties" within the act, although he files no formal claim to the property. Nor do I see anything in the statute to warrant the view that there must be the whole progress of the litigation short of a sale under a final decree, or possession of the property by the marshal under an order of sale, and steps by him towards a sale, but not followed by a sale. The commission is to be computed on the amount of "the claim or decree," thus making the statute applicable to a settlement either before or after a decree, but without a sale. The words "without a sale" are as applicable to a settlement before decree as to one after, and, in respect to a settlement before a decree, cannot require that there should be the whole progress of the litigation short of a sale. A settlement "without a sale" means a settlement at any time, in the absence of a sale. In case of a sale under process in admiralty, or under the order of a court of admiralty, special compensation by way of commission is given, in the passage before cited from the act. By the clause now under consideration, a fee is given for serving an attachment in rem, or a libel in admiralty, and then the necessary expenses of keeping property attached or libelled in admiralty are provided for, and then a commission to the marshal, that is, to the marshal who attached or libelled the property, is prescribed, in case the debt or claim is settled by the parties without a sale of the property, such commission to be computed on the amount of the claim or decree. In case there is a sale, the commissions therefor, which are at a different rate, go to the marshal to whom the process or order for a sale belongs for execution, and, who makes the sale, and no commission is allowed under the clause relating to a settlement without a sale. It seems to me the language of the statute is too plain for any other construction.

A payment of the amount awarded by a decree is a settlement, within the statute. The commission is allowed, in case of a decree, to be computed on the amount of the decree. Therefore, a settlement cannot be limited merely to an arrangement or compromise before decree.

Nor does the fact that the property is discharged from custody on a stipulation for value make any difference. If the legislature had intended that the commission should be given only when the property continued in the custody of the marshal until the settlement, it would have been easy to so declare. But such a provision would have been easily evaded, by bonding the property, after the trouble of custody had all of it been undergone, and on the very eve of making a settlement.

A case of the collection of the amount of a decree, or stipulation, by execution against the stipulators, would come under another provision of the act of 1853, which gives to a marshal, for serving a writ of execution, mileage, and for making the service, seizing or levying on property, advertising and disposing of the same by sale, set-off, or otherwise, according to law, and receiving and paying over the money, the same fees and poundage as are or shall be allowed for similar services to the state sheriff. Such a collection by execution could not be called a settlement by the parties of the debt or claim without a sale of the property seized on the original attachment, so as to make it possible that a party should be subjected to a double charge, one for the commissions, and one for the fees and poundage.

The decision of the clerk on the taxation must be reversed.

Case No. 12,171.

In re RUST.

[1 N. Y. Leg. Obs. 326.]

District Court, N. D. New York. 1843.

BANKRUPTCY — EXECUTION — ACTUAL LEVY — DECREE—RELATION BACK.

1. The personal property of a bankrupt passes to the assignee in virtue of a decree of bankruptcy, notwithstanding the delivery to the sheriff of an execution against the bankrupt, prior to the filing of the petition.

[Cited in Re Paine, Case No. 10,673.]

[Cited in brief in Edwards v. Entwisle, 2 Mackey, 47.]

2. It seems that an actual levy before petition filed would give to the plaintiff such a lien or priority as is protected by the bankrupt act.

3. The decree of the bankruptcy in compulsory cases, as in cases of voluntary application, operates by relation back to the time of filing the petition, at least.

4. Whether its operation does not also extend to the time of committing the act of bankruptcy, except so far as the doctrine of relation is limited by the first proviso of the second section of the bankrupt act [5 Stat. 440], quære.

[In the matter of Elam Rust, an involuntary bankrupt.]

This case came before the court on the petition of the assignee of the bankrupt.

Mr. Hall, for assignee.

Mr. How, contra.

CONKLING, District Judge. The mere delivery of an execution to the sheriff does not give to the judgment creditor a lien which will prevail over the title acquired by the assignee to the personal effects of the defendant in the execution, under a decree of bankruptcy against him. Such is the established doctrine of the English courts; and there is nothing in the laws of this state, or in the bankrupt act, requiring or warranting a different rule. By the delivery of the execution to the sheriff, the property of the defendant is bound for some purposes; but the title to the property remains in him, and passes to the assignee. Smallcomb v. Cross, 1 Ld. Raym. 252; Cooper v. Chitty, 1 W. Bl. 65, 1 Burrows, 20; Marsh v. Lawrence, 4 Cow. 461. As no levy was made in this case until after the institution of proceedings in bankruptcy, it is unnecessary to decide whether even a levy would have been sufficient to give a lien as against the assignee. I have met with no decision to this effect. A decree of bankruptcy is in the nature of a statute execution for all the creditors, and vests the property of the defendant, ipso facto, in the assignee. Strictly speaking, the title of the defendant is not divested by the seizure under an execution. Still, however, the plaintiff may, in virtue of the levy, acquire such a lien or priority as it was the intention of congress to protect; and as, by the laws of this state, the right thus acquired is superior to that acquired by a subsequent bona fide purchaser for a valuable consideration (Butler v. Maynard, 11 Wend. 548), there seems to be much reason for holding it to be within the saving of the bankrupt act.

For the reason already stated, it is also unnecessary to decide what would have been the effect of a seizure of the goods of the bankrupt on execution, before the filing of the petition on the 7th of August last, but after the day (the 4th of March last) on which the act of bankruptcy was committed. According to the well-known doctrine of the English courts, the adjudication of bankruptcy extends back by relation to the time of the act of bankruptcy, however remote; and avoids all the acts of the bankrupt; the maxim being that a bankrupt can hold no property, and that all his property, from the time of the act of bankruptcy, vests by relation in the assignee. This doctrine prevailed with some limitation until 1825, when, in the consolidated bankrupt act passed in that year, a saving (like that contained in the 2d section of our act) was inserted in favor of persons dealing with the bankrupt in good faith, and without notice of the act of bankruptcy, more than two months before the date, and issuing of the commission. In giving a construction to our act with respect to voluntary applicants, the courts have very properly held that the decree of bankruptcy extends back by relation to the time of filing the petition. This gives to the decree a retroactive operation as extended as the nature of this class of cases admits. With respect to compulsory cases, I am not aware that any decision has been made upon this point. What construction ought to be given to the act in this respect, is a question of great importance. The principle of relation is, in effect, adopted by the 2d section in declaring all future payments, &c., made for the purpose of giving a preference, and in contemplation of bankruptcy, void as against the assignee; and it is also implied and recognized by the proviso in this section relative to dealings with the bankrupt more than two months prior to the filing of the petition. If this latter provision had been in some other part of the act in the form of an independent enactment, instead of following, as it does, the clauses against preferences and frauds, and being in the form of a proviso to it, the inference would have been very strong that the legislature contemplated the application of the doctrine of relation in compulsory cases arising under the act, without any other limitation than that expressed in the proviso. By the order and form of enactment actually adopted the question is undoubtedly to some extent affected. Its satisfactory decision will require an attentive consideration of the policy of the act in connection with these particular provisions. I have assumed in this case that the retroaction of the decree cannot be less extensive in a compulsory than in a voluntary proceeding, and that it must therefore relate back at least to the time of filing the petition by the creditor.

RUST (GOODYEAR v.). See Case No. 5,584.

Case No. 12,172.

In re RUTH.

[1 N. B. R. 154; [1] 7 Am. Law Reg. (N. S.) 157; 6 Int. Rev. Rec. 166; Bankr. Reg. Supp. 33; 6 Phila. 438; 24 Leg. Int. 356; 15 Pittsb. Leg. J. 62.]

District Court, E. D. Pennsylvania. Oct. 26, 1867.

BANKRUPTCY — EXEMPTIONS — UNDER UNITED STATES STATUTE—UNDER STATE STATUTE.

1. Under the present bankrupt law of the United States, and the state exemption laws incorporated with it by its provisions, the exemption of such property, real or personal, of the appraised value of $300, as a bankrupt in Pennsylvania may elect to retain as exempt under the laws of the state, is not included in, but is additional to, the exemption from the operation of the bankrupt law of such necessary and suitable articles, not exceeding in value $500, as with due reference, in their amount, to the bankrupt's family condition and circumstances, may be designated and set apart by the assignee, subject to the court's revision.

[Cited in Re Davis, Case No. 3,621.]

2. But this exception, to the full value of $500, ought not to be allowed in all cases, without discrimination, or measure.

The 14th section of the bankrupt law of March 2d, 1867 (14 Stat. 522, 523), excepts from the operation of the assignment of a bankrupt's estate, his necessary household and kitchen furniture, and such of his other articles and necessaries, not exceeding in value, in any case, $500, as shall be designated and set apart by the assignee, having reference in the amount, to the bankrupt's family condition and circumstances; also his wearing apparel, and that of his wife and children, and his uniform, arms, and equipments, if he is, or has been a soldier in the militia, or in the service of the United States, and such other property as is, or shall be, exempt from attachment or execution by the laws of the United States, and such other property not included in the foregoing exceptions, as is exempted by the laws of the state in which he is domiciled, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864. And it is enacted that the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the court.

The act of congress of May 19, 1828, § 3 (4 Stat. 281), had provided that the proceedings upon executions in the courts of the United States should be the same as were then used in the courts of each state; and had empowered the courts of the United States, by rules of practice, to make such proceedings conformable to any changes thereafter adopted by the legislation of the respective states. Through this act, and subsequent rules of practice adopted as authorized by it, the practice in the federal and state courts, in 1864, was, in general, the same as to the exemption of the property of debtors. The laws of some of the states exempted personal property to an amount exceeding in value $500; and the laws of several states exempted real property to various greater amounts, extending in certain states even to the value of $5,000, if not beyond it. By the laws of other states, exemption was limited to subjects of the value in the whole, of less than $500. The laws of Pennsylvania exempted all wearing apparel of the debtor and his family, and all bibles and schoolbooks in use in the family, and as to the debts contracted since 4th of July, 1849, exempted such other property, real or personal, as he might elect to retain, to the value of $300, to be ascertained upon his request, by the valuation of sworn appraisers summoned by the officer levying the execution. The debtor was allowed to elect to retain to this amount, out of any bank notes, money, stocks, judgments, or other indebtedness to him. According to one of the forms which the judges of the supreme court of the United States have prescribed, under the authority conferred upon them by the 10th section of the bankrupt law, a debtor petitioning for adjudication and relief in bankruptcy must set forth under a distinct head of one of the schedules annexed to his petition, a particular statement of the property claimed as excepted by the provisions of the 14th section of the act from the operation of his future assignment; giving each item and its valuation, and, if any portion is real estate, giving its location, description, and present use. The statement is to be thus made in two divisions, one of them containing the property claimed to be excepted, which may be set apart by the assignee under the 14th section of the act, and the other containing the property claimed to be exempted by state laws. One of the general orders (general order 19) of the supreme court requires the assignee, immediately upon entering upon his duties, to prepare a complete inventory of all the property that comes into his possession, and to make report to the court, within twenty days after receiving the deed of assignment of the articles set off to the bankrupt by him, according to the provisions of the 14th section of the act, with the estimated value of each article; and allows to creditors twenty days from the filing of such report for taking exceptions to the determination of the assignee. There is a form appended (form No. 20) of the schedule of property thus designated and set apart by the assignees to be retained by the bankrupt, requiring specification of it under five heads, namely, Necessary household and kitchen furniture; other articles and necessaries; wearing apparel of bankrupt and his family; equipments, if any, as a soldier; other property exempted by the laws of the United States; property exempted by state laws.

In this case, the bankrupt [David Ruth] had exhibited, in the proper schedule annexed to his petition, and under the proper head, a statement, in the two divisions prescribed, of

[1] [Reprinted from 1 N. B. R. 154, by permission.]

personal property to the value of $500, claimed by him as excepted, which might be set apart by the assignee, and other personal property to the value of $291.75, claimed as exempt by the laws of the state. The assignee set apart for the bankrupt's use personal property to the appraised value of $500, and no more, composed of items included in each of the two divisions of the bankrupt's claim of exceptions and exemption, annexed, as above, to his petition. According to the assignee's inventory, and the estimate of the appraisers, the whole value of the remaining personal estate was $259.55. The real estate was appraised at $2,000. "The bankrupt demands of the assignee that the additional three hundred dollars' worth of property exempted by the laws of Pennsylvania shall be set apart to him." This the register certifies; adding that "the opinion of the court is required for the guidance of the assignee." The bankrupt thus demands, in effect, an exemption to the value, in the whole, of $800.

It was objected that an exemption to this amount should not be allowed in any case. In support of the objection, it was said, in this case and in another one somewhat similar, that the legislation of the United States having assumed $500 in value, and the legislation of the state having assumed $300 in value, to be the greatest proper amount of exemption, a result of the two legislations combined which would extend the exemption to $800, cannot have been intended, because it would be absurd. It was therefore argued that the exemption of $500 under the act of congress must be understood as including that of $300 under the laws of the state, except as to bibles and school-books, which alone were within the proper meaning of the phrase "other property" in the act of congress. Although a debtor might, under the law of the state, elect that real property of the appraised value of $300 should be exempt, yet, when he did so, he made it, according to this argument, a part of the $500 in value exempted. At all events it was contended that the twofold or cumulative exemption could only be allowable in a case in which the subjects of the two divisions were so different that those of the one kind could not be included in those of the other, and consequently, that it should not be allowed in the present case, where the whole exemption was, under both divisions, claimed from personal estate of the same general character.

It was answered that the assumed intention to limit the exemption to $500 in value was not rightly attributable to congress, and that the contrary became apparent on recurrence to the above mentioned exemption laws of some other states, which the act of congress had, in effect, incorporated with its provisions, these laws admitting exemptions to amounts vastly greater than $500; and that even if this had been otherwise, the exemption of $300 under the Pennsylvania laws could not be included in that of $500 under the act of congress, because the subjects were different. The difference asserted was that the subjects of exemption under the state laws were, except as to their valuation, determined absolutely by the debtor's own arbitrary election, whereas, under the act of congress, the subjects of exemption were determinable by a designation which the assignee was to make, upon relative considerations of suitableness, depending upon the debtor's family and condition in life, and his former circumstances, and that this determination was afterwards judicially revisable. It was contended that the subjects were therefore different, and, according to the relative sense of the words "other property" in the act of congress, were independent of, and consequently additional to, one another. According to this argument, besides wearing apparel, bibles, school-books, uniforms, arms, and equipments, and property to the appraised value of $300, arbitrarily designated by the bankrupt himself, the assignee is, with due reference to the bankrupt's family condition and circumstances, to designate such additional property as may not, in these respects, be unsuitable, which cannot exceed, but may reach $500 in value; and thus the whole may amount, in a proper case, to $800, in addition to the wearing apparel and other specifically designated articles. As to the special considerations which ought, under the act of congress, to determine the designation by the assignee, or to determine its extension to such a maximum, nothing was said on either side.

CADWALADER, District Judge. If the exemption laws of all the states had resembled those of Pennsylvania, there would have been great apparent force in the argument against allowing the twofold exemption under the state laws and the act of congress to extend in any case, in the whole, beyond the value of $500. There would, however, have been difficulty in accommodating the argument to the words of the act of congress. Whether this difficulty could have been overcome, it is unnecessary to consider, because, upon recurrence to the exemption laws of other states which are, in effect, incorporated with the act of congress, the argument loses all force, or all applicability. The act of congress must therefore be interpreted with reference to the other motives of legislation.

Proceedings in bankruptcy, where it is involuntary, resemble, in many respects, a general execution for the equal benefit of the creditors. Where bankruptcy is voluntary, the resemblance does not in all respects fail. It is foreign to the purpose of proceedings under such a bankruptcy, that they should operate upon property otherwise exempt from execution, unless it is thus exempt under defective previous laws, which the bankrupt law is, in this respect, intended to improve.

Under the present bankrupt law no such change was intended. On the contrary, the previous uniform system, under state laws of exemption, in the federal and state courts is continued, as it had been established under the act of congress of 1828, and under subsequent rules of the federal courts authorized by this act. In this respect, the bankrupt law merely provides that the state exemption laws, thus previously adopted, shall still apply, so as to exclude their subjects from the operation of the proceedings in bankruptcy. The law further enacts, in effect, that there may, in proper cases, be an additional exemption to be graduated with reference to the number, health, &c., of the bankrupt's family, to his condition in life, socially and otherwise, and to his former and recent, if not present, circumstances. Confusion of the views of the present question has arisen from hastily assuming that it is a question of the absolute unmeasured allowance of an additional exemption to the value of $500. The allowance is conditional, and is measured with reference not merely to value, but also to subjects, and their suitableness to personal requirements. The subjects must be necessaries and other articles which, in character, as well as in amount and value, are suitable to his family condition and circumstances. There may be cases, few perhaps in number, in which, though he may own property of a value considerably exceeding $300, it would sanction a fraud upon his creditors to allow him any part of the excess beyond it, except the specifically designated articles. For example, in a possible case, a debtor who never had owned property to the value of $300 beyond the amount of his debts, might become a bankrupt for the very purpose of depriving creditors of recourse to assets in excess of this value. Such an attempt should never be successful. In ordinary cases, the property excepted should not, however, be of less value than $200, in addition to the subjects of the state exemption laws to the value of $300, and the specifically designated articles. In special cases, the property additionally excepted may be of greater value; and, in some extraordinary cases, may be of the full value of $500, making the whole value, including $300 under the state laws, amount to $800, in addition to that of the wearing apparel and other specifically designated articles.

In the act of congress the articles newly excepted are mentioned first, and those previously exempted by state laws are mentioned lastly. The more natural order of considering the two subjects in Pennsylvania, if not elsewhere, is, perhaps, to invert this arrangement. Thus, the assignee should first consider what exemption is claimed under the laws of the state. As to the subjects of this claim of exemption, his only function is to see to their proper appraisement. In seeing to it, he should proceed as comformably to the laws of the state as may be possible. These subjects of exemption, and the specifically designated articles, having been set apart, a more responsible duty is afterwards to be performed by him in designating the additional articles excepted under the act of congress.

In the present case, I infer that if the bankrupt is not to obtain a further exemption than has been allowed, neither he nor any other party objects to the selection of the articles which he has received. He was mistaken in demanding the additional amount as of absolute right, independently of consideration relative to his family condition and circumstances. On the other hand, the assignee was also mistaken if he supposed the act of congress to preclude him absolutely, under all circumstances, from allowing an exemption beyond the value of $500 in the whole. Whether this bankrupt ought to have received more than has been allowed I have no certain means of deciding from what is now before me. This must be determined by the assignee, whose report, if the bankrupt persists in his claim, will be made hereafter through the register.

RUTHERFORD (FISHER v.). See Case No. 4,823.

Case No. 12,173.

RUTHERFORD v. MOORE.

[1 Cranch, C. C. 388.] [1]

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

SLANDER—ACTIONABLE WORDS—AVERMENTS.

1. Actionable words spoken in the second person, will not support an averment of words spoken in the third person.

[Followed in Birch v. Simms, Case No. 1,427.]

2. The words "He gets his living by thieving," are actionable.

F. S. Key, moved for a new trial because the Court had admitted improper evidence; and in arrest of judgment because the words are not actionable. The words were, "He gets his living by thieving." It must be a specific charge of some crime or misdemeanor liable to punishment. A thief-catcher, an officer of justice, or a judge who gets fees, may be said to get his living by thieving; and he cited Onslow v. Horne, 3 Wils. 186; Holt v. Scholefield, 6 Term R. 691; Dawes v. Bolton, Cro. Eliz. 888; Baker v. Pierce, Ld. Raym. 959; and King v. Aylett, 1 Term R. 70.

Mr. Law, contrâ. The doctrine of mitiori sensu is obsolete; the modern rule is that words shall be taken according to their common understanding and meaning. Beavor v. Hides, 2 Wils. 300.

The errors in arrest of judgment, were overruled. The motion for new trial was on the ground that the court erred in suffering words spoken in the second person, "you," &c., to

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

be given in evidence in support of the allegation that the defendant said "He gets," &c.; and Mr. Key cited Esp. N. P. 521. Mr. Law, contrá, cited Rex v. Pocock, Strange, 1157.

THE COURT granted a new trial on the ground of admitting the improper evidence.

Mr. Law, for plaintiff, moved to amend; which was allowed on payment of the costs of this term, except the jury fee.

[See Case No. 12,174.]

Case No. 12,174.

RUTHERFORD v. MOORE.

[1 Cranch, C. C. 404.] [1]

Circuit Court, District of Columbia. June Term, 1807.

WITNESS—COMPETENCY—HOW SHOWN.

Quære, whether a witness, who has declared his disbelief of a future state of rewards and punishments, is a competent witness. And whether such declarations can be given in evidence to the court, to prevent the witness from being sworn and examined.

Slander. The plaintiff offered J. A. as a witness.

F. S. Key for defendant, objected that the witness had declared his disbelief in a future state of rewards and punishments, and stated that he had witnesses ready to prove such declarations.

CRANCH, Chief Judge, stopped him, and doubted whether that mode of proceeding had ever been adopted in any court; and whether the fact, if proved, did not go rather to the credit than the competency of the witness.

THE COURT asked Mr. Key for authorities. He cited Esp. N. P.; and Peake, Ev. 90; Omychund v. Barker, 1 Atk. 21; 1 Wils. 84; Willes, 538.

THE COURT inclined to think that the only mode of proving the fact of belief has heretofore been by an examination of the witness himself, and that it ought to go rather to the credit. But Mr. Key waived the question as to the competency, and examined his witnesses as to the credibility.

[See Case No. 12,173.]

RUTHERFORD (UNITED STATES v.). See Case No. 16,210.

Ex parte RUTHERGLEN. See Case No. 9,674.

Case No. 12,175.

RUTHERGLEN v. WOLF et al.

Ex parte COHEN.

[1 Hughes, 78.] [2]

Circuit Court, E. D. Virginia. Nov., 1876.

LIS PENDENS — RECORD — ACTION IN FEDERAL COURT.

The purchase of real estate in Virginia while a suit relating to it is pending in a court of the United States is invalid as against the plaintiff in such suit, although the lis pendens be not recorded as required by Code Va. 1873, p. 1166, c. 182, § 5.

[Cited in U. S. v. Humphreys, Case No. 15,422; Shufeldt v. Jenkins, 22 Fed. 370.]

In equity. On the eighth day of November, 1867, Samuel Wolf made a deed, in which his wife joined, conveying a lot of land and house in Petersburg, to Eli Kull, a brother-in-law; the property being alleged to have been worth about $2,000, and the purchase price set forth in the deed being $1,700. Eli Kull was one of the sons of Jacob Kull, and a member of the firm of Jacob Kull & Sons. Shortly after this, Wolf's stock of goods, worth some $6,000, was taken by process of distress issued by the said Jacob Kull & Sons, the principal part of which was disposed of under that process, but a part of the goods remained. On the 4th of January, 1868, Wolf made a trust deed for the benefit of his general creditors, conveying the remnant of his stock of goods and the furniture in his storehouse for that purpose. On the 22d of January, 1868, he filed his petition in bankruptcy in the United States district court for this district, and Andrew Rutherglen was appointed his assignee. On the 11th of February, 1869, the assignee filed his bill in this, the circuit court of the United States, against Kull and others, charging that the deed of November, 1867, and the distraining process afterwards instituted by Kull & Sons, were fraudulent transactions as between the bankrupt and Kull & Sons, and praying that the deed of the house and lot be set aside, and that Kull & Sons be made to account for the goods taken by them under their process of distress. On the 27th of April, 1875, during the pendency of this suit, Eli Kull sold the house and lot in Petersburg to Max Cohen. Cohen, on the 27th of October, 1876, filed his petition in this court, in this suit of The Assignee v. Kull and others, praying that he might be made a party defendant, which was done, and alleging that the said house and lot had been sold to him at public auction, after due advertisement; and publicly purchased by him in good faith and for full value, and without notice, direct or indirect, in any manner whatever, of the pendency of this suit, or of any suit in respect to the house and lot in question, or of any defect in Kull's title to the property; and alleging also, that no memorandum of lis pendens had been recorded by the complainant in this suit so as to affect him with constructive notice thereof. He claimed that, as a purchaser in good faith for full value, without notice, and in the absence of the docketing of a lis pendens as required by the Code of Virginia, he is not bound by the proceedings in this court, and ought to be protected in his title by the court, and prays relief or remedy. The deed of Wolf to Eli Kull was, in due course, pronounced fraudulent, null, and void, and was annulled and released.

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

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

On a hearing of this petition before BOND, Circuit Judge, it was adjudged and decreed, among other things, that Max Cohen being a pendente lite purchaser of the house and lot in the bill mentioned, from Eli Kull acquired no title thereto as against Wolf's assignee in bankruptcy, and that the said Cohen do deliver possession of the same to the said assignee, the plaintiff in this cause.

RUTLAND & B. R. CO. (BOODY v.). See Case No. 1,635.

Case No. 12,176.

RUTLAND & B. R. CO. v. CROCKER.

[4 Blatchf. 179; [1] 29 Vt. 540; 21 Law Rep. 201.]

Circuit Court, D. Vermont. May, 1858.

CORPORATIONS—STOCKHOLDERS—ACTION FOR UNPAID SUBSCRIPTIONS—CONDITIONAL CONTRACT—EVIDENCE.

Where C., who was president of the Taunton Locomotive Company, subscribed to the stock of a railroad company, "payable in cash on the delivery of the last engine of twelve from the Taunton Locomotive Manufactory": *Held*, in an action against C. for the amount of the subscription, that it was competent for C. to put in evidence a contract made by the Taunton Company with the railroad company, on the same date with the subscription, for the delivery of twelve engines, and to show by parol that that was the contract referred to in the subscription, and that all twelve of the engines referred to in it had not been delivered.

This was an action to recover the amount, with interest, of a subscription made by the defendant [William A. Crocker], June 1st, 1847, to the capital stock of the Champlain and Connecticut River Railroad Company, a corporation created by the legislature of Vermont, and the name of which was subsequently changed to that of the plaintiffs in this suit. By the terms of the subscription, the subscribers bound themselves to take the number of shares affixed to their names, and to pay for the same according to assessments to be made from time to time, as provided in the charter, and upon certain conditions particularly specified in the subscription paper. The defendant's subscription was for seventy shares, "payable in cash, on the delivery of the last engine of twelve, from the Taunton Locomotive Manufactory." The shares were one hundred dollars each. At the trial, evidence was given on the part of the plaintiffs, tending to show that the several conditions stated in the subscription paper had been complied with, that the assessments upon the stock had been duly made, and notice given to the defendant, that all the requirements of the charter had been observed, and that the road had been constructed. In respect to the special condition annexed to the subscription of the defendant, the proof was, that the Taunton Locomotive Company had delivered fourteen engines, the last of which was delivered in the latter part of September, 1851, and the twelfth one, the last of February, in the same year; that the engines were new, and were manufactured at that company's establishment; and that a Mr. Fairbanks was the general agent, and the defendant the president, of that company. The defendant, in the course of the trial, gave in evidence a vote of the directors of the plaintiffs, under date of June 4th, 1847, approving of a contract made with the Taunton Locomotive Company for twelve engines, and offered in evidence the contract, dated June 1st, 1847, and, in connection therewith, proposed to call Fairbanks, the agent, to prove that that was the contract for engines referred to in the defendant's subscription, and that the whole number of engines had not been delivered. But the court overruled the evidence, holding, that the subscription was payable upon the delivery of any twelve engines by the Taunton company. There having been a verdict for the plaintiffs, the defendant now moved for a new trial.

David A. Smalley and E. J. Phelps, for plaintiffs.

Benjamin F. Thomas and Milo L. Bennett, for defendant.

NELSON, Circuit Justice. This case ought to have been disposed of at a much earlier date. It was in the hands of the late lamented Judge Prentiss, for examination and decision, at the time of his death, and circumstances, over which I had no control, have since prevented me from giving to it that consideration which its importance required.

After the fullest consideration, I am satisfied that the court erred in excluding the evidence offered by the defendant. The terms of the clause annexed to the subscription import some previous agreement or understanding between the parties, in respect to the engines. The money was to be paid on the delivery of the last engine of twelve from the works of which the defendant was the head. There must have been an agreement for the delivery of twelve engines, and it is fair to conclude that they were to have been delivered at some specified time or times, and, especially, that some time was specified, within which the last was to have been delivered, as the payment of the money depended upon the delivery. If there was no specified time, either in fact, or in contemplation of law, the subscription might have been rendered nugatory at the election of the defendant, and he could have postponed the delivery indefinitely. Again, as the event, to wit, the delivery of the last of the twelve engines, upon which the money was to be paid, depended upon the act of the defendant himself, unless there was some agreement binding him, or his company, to deliver the engines, not only the last one of the twelve, but each and all of them,

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

the subscription would have been a contract wholly upon one side, as no obligation or duty would have existed on the part of the defendant, to deliver the engines, and, therefore, the time of payment might never have happened.

In order to give the subscription any binding operation or effect, against the defendant, it seems to me, that the reference to the twelve engines and the delivery of them must be construed as relating to some contract previously entered into between the parties, providing for the manufacture or procurement of the same, and which, when produced or proved, would explain the intent and meaning of the words. The court was misled, at the moment, on the trial, from a consideration of the difficulty of permitting parol evidence to connect the two instruments, and entertained the view that the rule should be confined to papers explanatory of the transaction, and which, on the face of them, referred to one another. But the rule, thus applied, is manifestly too narrow. The paper is admissible and relevant, if, in point of fact, it is a part of the same transaction. Cornell v. Todd, 2 Denio, 130, 133. This principle is conclusive against the ruling upon the point in question. The evidence offered and rejected was full, not only to make out the contract in respect to the engines, but, also, to show that it constituted a material element in the contract of subscription. The two contracts were of even date, and were made between substantially the same parties, and specified the same number of engines. The price, and the time and terms of delivery of the engines, were agreed upon, and the contract was approved by the directors of the plaintiffs, three days afterwards. I ought to add, that this interpretation seems to be the one given to the clause in the subscription, by the pleader, in the declaration.

There are several other very important questions presented in the case, and which were argued by the counsel, but, as the case must go down for a new trial, I shall leave them for a more full consideration and further argument, as the facts may appear on the second trial.

A new trial is granted, with costs to abide the event.

Case No. 12,177.

RUTLEDGE v. BUCHANAN.

[Brunner, Col. Cas. 237; [1] Cooke, 363.]

Circuit Court, D. Tennessee. 1813.

GRANT—ACTUAL SURVEY—NATURAL OBJECTS.

To establish a grant there must be an actual survey or such a description, with reference to natural objects or other lines capable of identification, as will lead to the place called for.

The plaintiff [Rutledge's lessee] procured a grant for the land in controversy from the state of Tennessee, dated in the year 1808, and proved the defendant was in possession at the time of the service of the declaration in ejectment. The defendant then introduced as evidence a grant to himself for the same land, from the state of North Carolina, of a date long anterior to that relied on by the plaintiff. The defendant's grant called to begin "on a sycamore, running thence," etc. No actual survey was ever made. For the purpose of proving the beginning called for in the grant the defendant offered in evidence an entry made in his name, upon which the grant was founded, calling to begin at a "sycamore marked I. T.—A. B." And further, that before the making of the entry the sycamore tree had been marked with these letters by a company of locators, with a view of calling for it in an entry to be made for the defendant.

Grundy & Trimble, for plaintiff.

Whiteside, Hayes, & Haywood, for defendant.

BY THE COURT. The evidence offered is not admissible. To establish a grant there must be an actual survey, or such a description in the grant itself as will lead to the place called for. In this case there is no actual survey, no marked lines or corners were ever made for the survey; nor is any object called for so distinguishable from other objects as to make it certain what particular spot is to be fixed on as the beginning. A tree may have been marked as the beginning of an entry, and an entry may afterwards have been made calling for the tree so marked; but still, unless the grant in calling to begin at a tree so describes that tree as for it to be certain it was the one intended, evidence of the marking of the tree and making of the entry is not admissible to support the grant. Such a description or reference is not given in this case. And the court is further of opinion that in all cases where there has been no actual survey, the grant cannot be good unless it contains a good description of the land in reference to natural objects, such as watercourses, mountains, etc., or to other lines capable of identification. The call to begin on a tree will not do, unless the tree possesses some peculiar qualities distinguishing it from other trees, which qualities must be described in the grant. Nor is it competent in this case for the defendant to prove the marking of this tree for a location. Marked lines and corners made for a location and not for the survey cannot be given in evidence to support the calls in the grant, unless they are referred to by the certificate of survey.

Taking all the case together the court is decidedly of opinion that the marking of a tree for the beginning of a location is not competent evidence to prove the corner called for in a grant, unless by some expression in the grant it is evident that the tree which it calls for is the one marked for the location.

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

Case No. 12,178.

RUTTER et al. v. The FERRIS.

[17 Leg. Int. 116;[1] 4 Phila. 38.]

District Court, E. D. Pennsylvania. 1860.

SALVAGE—DERELICT VESSEL AND CARGO—VALUE OF VESSEL—REDEMPTION—DEPOSITS.

1. A judicial sale of a vessel is never a fair test of her value.

2. Where she can be restored to a navigable condition, and enabled to resume her voyage with her cargo on board, the award of a fixed sum to the salvors is always preferable to the award of a proportion of the proceeds of a future judicial sale; and the amount of the award should be estimated with a view to the probability of its being raised without an admiralty sale, and in some cases, with regard to the probability of its being raised by way of bottomry or hypothecation. In cases of salvage prompt redemption of the property is encouraged, both in the earlier and ulterior stages of them, in the practice of permitting pecuniary deposits to secure the salvage money.

In admiralty.

This was a libel for salvage. The barque Ferris, a British vessel, left New York with a cargo of naval stores, rosin, tar, &c., on board, upon the 14th Feb'y, 1860, bound for the port of Liverpool. After proceeding about two days upon her voyage, the vessel began to labor heavily, shipping large seas on deck, when the pumps were sounded and five feet of water were found in the hold. The efforts made to free her from the water being ineffectual, she made a signal of distress, and her captain and crew were taken on board by the ship the Forest City, who carried them to New York. On the 17th Feb'y she was found by the vessel of the libellants, the barque Charlotte E. Tay, thus abandoned at sea and derelict. The crew of the Charlotte E. Tay consisted of six men, besides the captain, two officers, the steward, and a cabin boy. The first officer and two of the crew of the Tay were placed on board the Ferris, with orders to bring her, if possible, to the port of Philadelphia. For three days the weather continuing tempestuous, and the sea running high, they labored to keep her afloat; when, on the 20th Feb'y, the wind changing, they made the Delaware breakwater and took four pilots on board, who brought her to this port, which she reached on Thursday, February 23, 1860. The libel averred, and it was not denied in the answer, that had it not been for the assistance thus rendered to her the barque Ferris and her cargo would have been lost; and prayed a decree of such sum of money or proportion of the value of the barque and her cargo to the libellants [Rutter, Newhall & Co.], as compensation for their salvage services, as should be meet and reasonable.

Mr. Kane and G. M. Wharton, for libellants (salvors).

Mr. Riche, G. W. Biddle, and Waln & Cramond, for respondents.

[1] [Reprinted from 17 Leg. Int. 116, by permission.]

CADWALADER, District Judge. In this case, the services were highly meritorious. The property which has been wholly saved, would probably have been wholly lost, if they had not been rendered. Whether, indeed, any particular merit is attributable to the navigator of the Tay is, perhaps, doubtful. But whatever may detract from the value of the services rendered by this vessel, increases the merit of those of her crew who boarded the derelict vessel, and brought her into port. This may, therefore, affect hereafter the distribution of the salvage to be decreed, but should not in the meantime, operate in reduction of its entire amount. If a proportion of the net proceeds of a future judicial sale should be decreed as the compensation for the salvage service, I think that, with a due regard to the policy of encouraging the enterprise and perseverance of nautical salvors, the proportion ought to be one-half. But I do not think this the proper mode of determining the amount. A judicial sale is never a legal test of value. Where it has occurred in consequence of the default of a party who should have protected the property against it, he is liable for the difference between the actual proceeds and the fair market value. This has been adjudged in the circuit court for this district, sitting in equity. A judicial sale under proceedings in admiralty, is peculiarly the reverse of a fair test of value; it is more frequently the means of producing inordinate sacrifice. The subject of sale is often at a place not its proper market. In order to avoid the charges of custody and other accumulating costs, the sale is often ordered before absent parties interested can be represented. In other cases, in consequence of the delay which occurs, the property frequently undergoes deterioration, while these charges and costs accumulate. Afterwards, when the dregs of litigation are sold, they are often sadly sacrificed according even to their deteriorated value. This vessel and her cargo together, according to the market rate of commercial sales and purchases, are now valued at between $18,000 and $19,000. Experience of admiralty sales in all parts of the world attests the probability that the nett future avails of a sale of this property by the marshal might not exceed the half of that amount. That the present case would probably constitute an exception from the general truth of the remark is not safely to be conjectured. But, if it were an ascertained exception, the general remark as to the ordinary effect of awarding one-half of the nett proceeds would not be less applicable.

When a vessel can be restored to a navigable condition, and enabled to resume her voyage with her cargo, the award of a fixed sum is always preferable to that of a proportion. The value of the property saved is, of course, always to be regarded in fixing the sum. The preliminary appraisement may be regarded as determining the approximate

value according to the force of a sale made without undue sacrifice. The proportion of this appraised value decreed in the form of a fixed sum should not be the same as the proportion of proceeds of a future judicial sale. The amount should be estimated with a view to the probability of its being paid without any such sale; and, in some cases, with a view to the probability of its being raised by way of bottomry, or simple hypothecation. An examination of the cases of salvage awarded in fixed sums for boarding and bringing in derelict vessels will show, I think, that the proportions of such sums to the respective amounts of the preliminary appraisements has usually been less than one-half of the proportions awarded as payable out of proceeds of judicial sales. This difference in proportion has not always been attended with any reduction of the amounts received by the salvors.

In administering maritime law under this head, the prompt redemption of the property saved from judicial custody is encouraged in the practice of permitting pecuniary deposits to secure the salvage. This is usually done in the earliest stage of a salvage cause. In the case of a vessel or other property not at the port of its ownership, an extended application of the principle in ulterior stages of the cause, may sometimes promote the interests of commercial navigation. This remark applies particularly when, as in the present case, the vessel and cargo are of distant foreign ownership. Merchants and capitalists at or near the point of refuge, ought always to be encouraged and facilitated in advancing to her master and owners, funds to pay salvage, and enable her to resume her voyage, instead of abiding the doom of an admiralty sale. Justice must, at the same time, be done to the salvors. But they are usually nautical persons, to whom promptness of settlement is often quite as important as the amount receivable. Public policy, rather than their own merit, often determines the amount of their compensation. It ordinarily exceeds greatly the mere value of the service rendered. Public policy has likewise other objects, and among them that of encouraging offers to rescue the property from litigation.

In a foreign port, by which I mean any other than a vessel's home-port, when a sum of money not inadequate as a compensation to salvors is promptly offered, at an early hearing of a salvage cause, and the master or agent of the owner cannot obtain an advance of a greater sum in order to get the vessel afloat and enable her to resume her voyage, the policy which would induce a court of admiralty to adhere very closely to any slightly different rate or amount that might otherwise have been decreed, would be narrow and illiberal. The rejection of such an offer might occur when a larger amount could not be raised. The result might then be a disastrous judicial sale. The party making such an offer becomes, in certain cases, as it were, a second salvor. The rate of a salvage compensation is always, if not arbitrary, more or less uncertain. If the particular circumstances of a case, nicely scanned, would, in the absence of such an offer, have induced a judge to decree a somewhat larger amount, he might little promote the interests of navigation by rigidly refusing to liberate the property saved on payment of the sum offered. In the present case, if no such offer had been made, I would probably have decreed the payment of $4,500, with the expenses which are said to amount to about $850, and costs, to the libellants. By consent, this cause was heard summarily soon after its commencement. The agent of the foreign owners—the master of the vessel assenting—without any knowledge of my views as to the amount—offered at the hearing to pay in cash at once, $5,000, to obtain the liberation of the property saved, without making any further payment in reimbursement of expenses incurred by the salvors, or for costs. This offer was promptly made, in the earliest stage of the litigation in which parties in the situation of those making it could, through the depositions, have been properly apprized of the particular merits of the controversy. The difference between this offer and the decree which I might otherwise have made, is too small to be acted upon. Perhaps the decree for $4,500, and expenses and costs of suit, if made, would be acquiesced in, and the amount at once paid. But I will not speculate upon such a contingency. By so doing in this, or in other cases, I might frustrate the purpose in view. A small addition might, for example, prevent a loan on bottomry from being effected.

Acting upon the general principle above defined, I prefer decreeing that, upon the payment of $5,000 to the salvors, without costs, the vessel and her cargo be liberated. This will leave $4,000 more or less, to the salvors. The amount is much more than an ample compensation for the service performed, and includes, I think, a sufficient addition to fulfil the purposes of public policy. To nautical salvors in general, a decree for such an amount, with immediate payment, would be preferable to a decree of one-half of the net proceeds of the property after a protracted litigation. There is no certainty that the amount might not even exceed one-half of the net ultimate available proceeds.

Decree for $5,000, without costs.

Case No. 12,179.

RUTTER v. MERCHANT.

[1 Cranch, C. C. 36.] [1]

Circuit Court, District of Columbia. July Term, 1801.

COURTS—JURISDICTIONAL AMOUNT.

This court has not jurisdiction of an attachment for a sum less than twenty dollars.

Attachment, on the act of assembly of Virginia, issued by a justice of the peace, returnable to the court of hustings for £5 10s. Virginia currency.

THE COURT decided that this court has not jurisdiction, the amount demanded being under twenty dollars, upon the principle that it was the intention of the act concerning the District of Columbia that magistrates should have exclusive jurisdiction of all personal demands under twenty dollars, although the words of the act do not give such jurisdiction exclusively.

CRANCH, Circuit Judge, contra.

Case No. 12,180.

The R. W. BURROWES.

The BORDENTOWN.

[7 Blatchf. 374.] [2]

Circuit Court, E. D. New York. June 18, 1870.

COLLISION—NARROW STREAM—WHISTLE—SPECIAL CIRCUMSTANCES—TOW.

1. Where a steamer sailing in a narrow stream, on a dark and rainy night, with a heavy barge lashed to her side and projecting beyond her bow, saw, not far above the water, two white lights, and, supposing they were upon two vessels at anchor, proceeded on with undiminished speed, and collided with a vessel in motion that was carrying the lights: *Held*, that the steamer was in fault.

2. Where a steam-tug with seven canal-boats in tow on a hawser, was proceeding in a narrow stream, on a dark and rainy night, and carried red and green lights, which, in the state of the weather, could not be seen at any considerable distance, and saw another steamer approaching at the distance of more than a mile, and did not signal her presence and character by a whistle or by sufficient lights on the canal-boats, and a collision ensued between one of the canal-boats and the other steamer: *Held*, that the steam-tug was in fault.

3. Proof that a vessel has complied with the statute regulations in regard to lights will not necessarily exonerate her from responsibility for a collision. When the special circumstances are such as reasonably to call for extraordinary measures to apprise other vessels of her proximity and character, her omission thereof is culpable negligence.

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

This was a libel in rem, filed in the district court, by the owner of a canal-boat which was in tow of the steam-propeller R. W. Burrowes, against her and the steamboat Bordentown, to recover for injuries sustained by the canal-boat through a collision which took place between such canal-boat and the Bordentown, in the Kills, between Staten Island and New Jersey. The district court decreed against the Bordentown, and dismissed the libel as against the R. W. Burrowes, with costs. [Case unreported.] The libellant and the claimants of the Bordentown appealed to this court.

Erastus C. Benedict, for libellant.

William W. Goodrich, for the R. W. Burrowes.

Welcome R. Beebe, for the Bordentown.

WOODRUFF, Circuit Judge. (1.) I concur generally in the views which governed the decision of the district court in relation to the liability of the steamboat Bordentown, although her fault was by no means gross. The night was very dark, the storm was from the direction ahead of her course, and, of course, her view was greatly obscured. The weather and the obscurity ahead were much worse than when she left Amboy, and her master was desirous of finding shelter and protection. His sincerity in this is proved by the fact that, so soon as he reached Elizabethport, he did lie by until morning. Nevertheless, I cannot wholly acquit the Bordentown of fault. She saw, through the darkness and rain, not far above the water, two white lights. That she supposed they were upon two vessels at anchor was not at all surprising. At the same time, the darkness and uncertainty were such as to call upon her to use the utmost vigilance; and it is testified that the shore on the one or the other side of the narrow channel could be seen. Under such circumstances, she ought to have slackened her speed, on discovering these lights, and approached with such caution that she might be prepared for further discovery and to avoid accident, if her judgment that the lights were on vessels at anchor proved a mistake. Besides this, the circumstance that she had a heavy barge lashed to her port side, and projecting thirty feet beyond her bow, should have admonished her to proceed with greater caution, since she was thereby rendered less manageable, and could turn with less facility to the right or to the left, as exigencies might require.

(2.) But, if degrees of fault were to be ascertained and determined, I should be constrained to say that blame rested much more heavily on the propeller Burrowes. In the very midst of weather such as I have indicated, at midnight, she left her place of safety at Elizabethport, and attempted the passage of a narrow, crooked strait, with seven canal-boats in tow, the forward two tiers being three abreast. I concede that the proof is that the night was not so dark in the direction opposite the wind, that it can be pronounced to have been altogether unsafe for

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

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

her to go. That is not the point of criticism. The circumstances were such that she put any vessel she might meet in great peril of accident, unless she adopted some more precautions to apprise them of her coming, with so unwieldy a fleet, of such length and width.

It is testified that she carried red and green lights. It is, nevertheless, proved, that, in that state of the weather, they could not be seen at any considerable distance. Either they had become dim, or the glasses protecting them were covered with moisture, obscuring them, or, in the dark and rainy night, the atmosphere was so thick as, in a great degree, to hide them from the sight of an approaching vessel. If, in this defect of the red and green lights, she was blameless, she ought to have nevertheless given notice, by lights on her canal-boats in tow, of her character and theirs; and, more than all, when she saw the Bordentown more than a mile distant, she should have promptly signalled her presence and character by her whistle. I am not satisfied, moreover, that she was not too near the eastwardly shore. The proof, I think, shows that the collision was at the middle of the stream; and yet her witness testifies that, after she saw the Bordentown, she had changed her course, and changed her position two or three hundred feet to the westward, and this is in a channel little, if any, wider than nine hundred or one thousand feet. Now, it was her duty, in such a night, and with such a tow, to have kept well off to the west shore; and the importance of this is clearly illustrated by the circumstances under which the libellant's boat was injured. In the effort to make a sheer, when her peril became apparent, the Burrowes turned to the west, and her tow, attached to her by a long hawser, no longer feeling her power, moved on with her full headway, and struck the Bordentown, which had at that time, according to the proof, come to a full stop.

It will not answer to say, that, in all places and under all circumstances, proof that a tugboat has complied with the statute regulations in regard to lights upon herself, shows a full discharge of her duty. The Burrowes may have been at liberty to navigate the Kills on that night and in that state of the weather; but the circumstances called for extraordinary diligence to observe all reasonable precautions, by moving at a moderate speed, by seeing to it that her tow was itself under proper control and management, and by keeping well over to her own side of the stream. Approaching vessels were as much interested, and their protection as truly demanded, that her tows should be under control, as that the tug herself should be; and especially so when, there not being any sufficient number of lights on the canal-boats, an approaching vessel would be, as the Bordentown was, unaware of their presence.

Upon a careful examination of the testimony and a review of the whole subject, I am constrained to say, that there was mutual fault on the part of the Burrowes and the Bordentown, and that each should bear one half of the damages and costs of the libellants, and each bear her own costs.

Let the decree below be modified in conformity with this opinion.

Case No. 12,181.

The R. W. SKILLINGER.

[1 Flip. 436;[1] 6 Am. Law Rec. 352; 2 Cin. Law Bul. 257.]

District Court, S. D. Ohio. June 9, 1875.

MARITIME LIENS—WAIVER—NOTES GIVEN—ASSIGNMENT—EXTINCTION—ADMIRALTY—INTERVENERS.

1. No one can intervene and defend in admiralty in rem, unless it appears by the answer and claim that he has a lien or proprietary interest in the vessel seized.

2. The acceptance of a note by the creditor does not waive the lien, unless it was accepted as payment.

3. The lien does not follow the assignment of the note, nor can the assignee, either in his own, or in the name of the payee, maintain an action to enforce such lien.

4. When the creditor has disposed of his interest in the claim, the lien becomes extinct, as it is strictly personal.

5. If the creditor, as indorser, afterwards pay off the note—this would not revive, or enable him to enforce the lien.

In admiralty.

Cox & Collett, for libellant.

Matthews & Matthews, for defendant.

SWING, District Judge. The libel was originally filed in the name of Cobb, Stribbling & Co., for the use of the First National Bank, of Madison, Indiana. To this libel an answer and claim was filed by W. G. McCoy on behalf of the owner of the steamboat. It nowhere appears in this claim and answer who the owner of said boat is, nor does it appear anywhere in the verification that the claimant on whose behalf the claim is made, is the true and bona fide owner, and that no other person is the owner thereof.

It also appeared in the original libel that the amount claimed was for repairs, and was properly, originally, an admiralty lien, but that same had been assigned by the firm of Cobb, Stribbling & Co., who had made the repairs, to the First National Bank of Madison.

The libellant filed exceptions to the answer and claim, insisting that it did not show that the claimant had any interest in the property nor on whose behalf the claim was filed.

The claimant also filed a motion to dismiss the libel for the reason that the claim, having been assigned, the lien was divested.

Upon argument, the court sustained the

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

exceptions to the answer and claim; and it appearing upon the face of the libel that the claim had been assigned, the court held that the assignment of the claim did not carry with it the lien upon the vessel, and therefore no action in rem could be maintained for the use of the assignee.

The libellant thereupon asked leave to amend the libel, which was granted, and leave was also given the claimant to file an answer and claim to the amended libel when filed. The amended libel was filed in the name of Cobb, Stribbling & Co., leaving out all statement of the assignment of the claim to First National Bank of Madison.

The claimant, W. G. McCoy, filed to the amended libel an amended answer and claim. This amended answer and claim is sworn to by George W. McCoy, agent; in the verification he states that W. G. McCoy is out of the district, and that he believes the facts set forth in the answer are true.

The libellant excepts to the amended answer and claim, and the claimant moves to dismiss the amended libel, but, without disposing of the exceptions and motion, the case was heard upon the evidence. The 26th rule in admiralty provides that "In suits in rem the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom, or on whose behalf the claim is made, is the true and bona fide owner, and that no other person is the owner thereof;" and where the claim is put in by an agent he shall make oath that he is duly authorized thereto by the owner.

In the case of U. S. v. 422 Casks of Wine, 1 Pet. [26 U. S.] 547, Justice Story, in speaking of the objection that the claimants were not the real owners of the wine, says: "In such suits the claimant is an actor and is entitled to come before the court in that character in virtue of his proprietary interest in the thing in controversy."

And in The Revenue Cutter No. 1 [Case No. 11,713], Judge Wilson says: "It is not sufficient to entitle a party to intervene and defend, when it is simply shown that he has an interest in the question litigated. He must have rights in the vessel itself; that is, an ownership, either general or special, in the property, or such a claim as operates directly upon it by way of a lien, statutory or maritime." In Read v. Owen, 9 Port. [Ala.] 180, it is held that a claimant of an interest of a ship, or any other thing, which is the subject of a proceeding in rem must put in his claim on oath averring his interest; and an agent must have his authority before he can put in his claim. The same doctrine seems to be held by Mr. Conkling (2 Adm. 207). In The Lottawana, 20 Wall. [87 U. S.] 222, Justice Clifford says: "Defense may be made to a suit in rem by any person having an interest in the thing seized."

It nowhere appears in the amended answer and claim that the claimant, W. G. McCoy, is the owner of this steamboat; that he has any interest therein or lien thereon, and he can, therefore, have no standing in this court.

The amended libel shows that repairs were made by libellants upon the steamboat, and by the admiralty law they had a lien upon it for the payment thereof.

But the proof in the case shows that the libellants had settled with the then owners of the boat and taken their promissory note therefor, and that subsequently they had assigned the note to the First National Bank of Madison, which had discounted for them and held it at the time of the commencement of the suit.

It is claimed, however, that subsequently the libellants, as indorsers, paid to the bank the amount of said note, and are now the holders thereof. That the taking of a negotiable note, unless received as payment, does not operate as a waiver of the lien is too well settled to need the citation of authorities.

The claim is still retained and may be assigned by the person in whose favor it originally existed, but the lien is personal and can not be assigned. The assignment of the note or other evidence of the claim does not, therefore, carry with it the lien, but the assignee takes it divested of the lien.

Sturtevant v. The George Nicholaus [Case No. 13,578]; Patchin v. The A. D. Patchin [Id. 10,794]; Logan v. The Aeolian [Id. 8,465]; Ruk v. The Freestone [Id. 12,143]; Reppert v. Robinson [Id. 11,703]; Harris v. The Kensington [Id. 6,122]; The Champion [Id. 2,583].

A different doctrine would seem to have been held in The Boston [Id. 1,669], and in The General Jackson [Id. 5,314], but in the former case the assignment was made at the request of the master; and in the latter, the assignment was a collateral security for a debt which was afterward paid by the assignor. So that these cases when properly understood cannot be said to militate against the general doctrine as I have announced it. If, then the transfer of the note to First National Bank of Madison did not carry with it the lien, what was the effect of such transfer upon the lien?

Did it remain in full life in Cobb, Stribbling & Co., or was it extinguished? The lien, as we have said, was personal to Cobb, Stribbling & Co., to secure to them the payment of the debt. When, therefore, they had transferred this debt, and parted with all their interest in it, there was no longer anything remaining in them to which the lien could attach or be an incident. Therefore, ex necessitate, it became extinct.

The fact that they indorsed the note, and as indorsers, were subsequently compelled to pay the note, can make no difference. Their liability as indorsers arose from their contract with the bank, and not with the own-

ers of the boat, and their subsequent payment of the note under it could not bring again into life that which was extinct.

Libel dismissed, each party to pay half the costs.

Case No. 12,182.

In re RYAN et al.

[6 N. B. R. 235.] [1]

District Court, E. D. Michigan. Feb. 21, 1872.

BANKRUPTCY — ASSETS — SALE BY ASSIGNEE —RESALE.

1. An assignee acting under an order of court directing him to sell the goods of a bankrupt for the highest price he could obtain above a certain minimum specified, must comply with the order, and if it is made to appear to the court that he has not obtained the highest price offered, the sale will be set aside and the assignee directed to refund the amount received, and hold the sale open for higher offers until a day specified, when it shall be closed for the highest offer in cash received up to that time.

[Cited in Re Stevenson, 6 Fed. 711.]

2. Costs and attorney's fee of ten dollars ordered to be paid out of the funds belonging to the estate of the bankrupt.

[In the matter of Ryan & Griffin, bankrupts.]

LONGYEAR, District Judge. The assignee had been authorised by an order of the court to sell a stock of boots and shoes belonging to the bankrupts' estate, in bulk and at private sale, for the best price he could obtain, but in no event less than six thousand nine hundred dollars. Martin Brothers and Matthew J. Moynahan were competitors for the stock. Moynahan, on being applied to by the assignee to state the highest price he would pay for the stock, offered seven thousand two hundred and fifty dollars, and stated that that was the highest price he would pay. The assignee then informed Martin Brothers of Moynahan's bid, and that they could not have the stock unless they would make a better offer. They desired time to consider. The assignee gave them time, and agreed with them that if, by a certain hour, they should conclude to pay seven thousand three hundred dollars, they should have the stock. In the mean time, and before any further transactions had taken place between Martin Brothers and the assignee, Moynahan offered the assignee seven thousand five hundred dollars, and tendered five hundred dollars of the amount as earnest money. The assignee, honestly believing that he had the power to make the arrangement he had made with Martin Brothers, and that he was in honor bound to wait till the expiration of the time agreed on, and then to sell to them if they complied with the specified terms, declined to entertain Moynahan's offer, except on condition that Martin Brothers should not accept the terms specified by the time agreed on. Within the time agreed on Martin Brothers accepted the terms and agreed to pay the seven thousand three hundred dollars, and paid to the assignee five hundred dollars of the amount, as earnest money, and the assignee agreed that they should have the goods. Moynahan then paid the five hundred dollars he had tendered as earnest money into court, and application was made to set aside the sale to Martin Brothers, and that the assignee be directed to entertain Moynahan's offer, and a hearing was had.

The assignee in bankruptcy is an officer of the court, and is limited in his transactions in that capacity to the powers and authority conferred upon him by the bankrupt act and the orders of the court. Anything he may do outside, or in conflict with, or in violation of, such powers and authority is, of course, null and void. In this case he was acting under an order of court, authorising and directing him to sell for the highest price he could obtain above a certain minimum specified. By his arrangement with Martin Brothers it was left entirely optional with them whether they would take the goods or not, and of course that arrangement did not amount to a sale, nor even a binding agreement to sell. The assignee's agreement with them to wait till a certain time for them to make up their minds, and then if in case they concluded to purchase at the price named, he would sell the goods to them at all events, and his refusal on account of such agreement to entertain a higher offer actually made in the meantime, were in direct conflict with and in violation of his authority and duty as specified in the order under which he was acting. The following order was made in the premises: "This matter coming on to be heard upon the order for the assignee to show cause upon the petition of Thomas Griffin, one of the said bankrupts, and the same having been heard accordingly, on consideration thereof it is ordered, adjudged and decreed that the sale to Martin Brothers by the assignee of the stock of boots and shoes heretofore authorised by an order of this court to be sold by the assignee, in bulk and at private sale, was unauthorised and in violation of the terms of the said last-mentioned order, in this, to wit: that the sale was so made to said Martin Brothers for the sum of seven thousand three hundred dollars, when a higher offer of seven thousand five hundred dollars had been made, and was then and still is pending, by one Matthew J. Moynahan; and that the said sale to Martin Brothers is therefore void and of no effect, and the same is set aside and altogether held for naught. And it is further ordered, adjudged and decreed that the said assignee be, and he is hereby directed to entertain the said offer of seven thousand five hundred dollars, so made by the said Matthew J. Moynahan, and hold the sale open for higher offers; and that he close the sale at twelve o'clock noon of the twenty-third day of February, eighteen hundred and seventy-two, for the highest offer in cash he shall receive up to that time. And it is further ordered that the assignee pay the

[1] [Reprinted by permission.]

taxable costs of this proceeding, (including an attorney fee of ten dollars, to Lyman Cochrane, Esq.,) out of the funds in his hands belonging to the estate of said bankrupts. And it is further ordered that the assignee return to Martin Brothers any deposit or payment of money they may have made to him on account of said sale."

Case No. 12,183.

In re RYAN.

[2 Sawy. 411;[1] 5 Leg. Gaz. 263.]

District Court, D. Oregon. April 29, 1873.

BANKRUPTCY — TRADER — INSOLVENCY — PREFERENCE—ACT OF BANKRUPTCY—ATTEMPT TO RESCIND.

1. An innkeeper and retail dealer in liquor is a trader, and when he is unable to pay his debts as they become due, in money, he is insolvent, although his property may exceed in value the amount of his debts.

[Cited in Harris v. Hanover Nat. Bank, 15 Fed. 788.]

[Cited in Daniels v. Palmer, 35 Minn. 350, 29 N. W. 164.]

2. An insolvent debtor who prefers one or more of his creditors, necessarily thereby commits an act of bankruptcy.

3. Where it appears that a debtor gave a mortgage upon a large portion of his property, which mortgage purported to be given as security for a debt that in fact never existed, the reasonable conclusion is, that such mortgage was made to hinder and delay, if not to defraud, the creditors of such debtor, and is, therefore, an act of bankruptcy.

4. Where a debtor has committed an act of bankruptcy by giving an unlawful preference, or making a transfer of his property with intent to hinder, delay and defraud his creditors, he cannot discharge himself from his legal liability for such act by a subsequent rescission or undoing thereof.

Petition by F. Opitz and others to have the respondent [Thomas Ryan] adjudged a bankrupt. The cause was heard by the court without a jury, on April 22 and 23, and submitted.

John W. Whalley, for petitioners.

Richard Williams and O. P. Mason, for respondent.

DEADY, District Judge. At the filing of the petition—April 1, 1873, and since 1864—the respondent was engaged in keeping a tavern and bar in the city of Portland, Oregon, called the "Russ House."

The petition alleges that the respondent, being a trader and insolvent, committed acts of bankruptcy as follows: (1) That on January 29, 1873, he made a conveyance and transfer of the chattels in said Russ house to one Catharine Crinnion, with intent to thereby hinder, delay and defraud his creditors; and with the intent to give a preference to said Crinnion; and also with the intent to defeat and delay the operation of the bankrupt act. (2) That on February 12, 1873, he made a payment to Henry Wilmer, and on March 1, thereafter, a payment to —— Hunsaker, with intent thereby to give each of them a preference.

The answer of respondent admits the making of the conveyance and payments, but denies the insolvency, and that either such conveyance or payments were made with the intent alleged.

The evidence proves that at the dates of the alleged acts of bankruptcy, the respondent owed not less than $1,700, and that his assets consisted of the furniture and fixtures of the Russ house, worth in cash probably $1,200; a piece of land on the macadam road worth not to exceed $150, and book accounts for board against forty-six different persons, scattered over the coast, for sums ranging from $239 to $5—amounting in all to $2,954. Some of these accounts are twelve months overdue, one fourth of them are at least six months due, and only $200 or $300 were charged within two months before the commencement of this proceeding. The opinion of the respondent's barkeeper is that $1,500 of these accounts are good—that is, the persons who owe them will pay them when they get money, and he thinks they will have money sooner or later, and some of them before long. This, of course, amounts to nothing; there is really no evidence that a single dollar can be made on these accounts by law, and the strong probability is that they are not worth a cent. For the past nine months the respondent has been falling behind with his creditors, and the probabilities are that good accounts against boarders by the week would have been collected by him as they fell due.

It also appears that for at least six months prior to the filing of the petition, the respondent was unable, and so stated to divers of his creditors, to pay the debts incurred in his business as they became due, in money; and that during that term, for that reason, he procured an extension on $700 or $800 of said debts.

As to whether the respondent's property was sufficient to pay his debts at the date of these transactions, the burden of proof is upon him. Section 41, Bankruptcy Act [of 1867 (14 Stat. 537)]; In re Randall [Case No. 11,551]; In re Silverman [Id. 12,855]. The evidence furnished by the respondent upon this point is not satisfactory, and is altogether insufficient to establish the fact that this property could have been disposed of for cash at $1,700. It must also be borne in mind that the only portion of this property which appears to have had any market value, was the furniture; and to have sold this, or any considerable portion of it, would have broken up respondent's business at once; besides at least $300 worth of it was probably exempt from execution—the respondent being a householder.

But it is immaterial whether his property was sufficient to pay his debts or not. The

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

respondent was an inn-keeper and a retail dealer in liquors, and therefore a trader, and being confessedly unable to pay his debts in money as they became due, in the ordinary course of business, he was insolvent. In Toof v. Martin, 13 Wall. [80 U. S.] 47, the supreme court affirmed the ruling of the court below, which was that, "if the bankrupts" (who were traders) "could not pay their debts in the ordinary course of business, that is, in money, as they fell due, they were insolvent;" and to the same effect have been the decisions of the district courts. Indeed, it would be intolerable if a person in the situation of respondent, who refuses to pay the current bills of his baker, butcher and grocer as they become due, because he has no money to do so with, and at the same time pays and secures other creditors, could prevent the former from having him adjudged a bankrupt upon the doubtful ground that his property was equal in value to his debts, and therefore he was not insolvent.

The payments to Wilmer and Hunsaker are admitted, and the fact being that the respondent was then insolvent, the necessary effect of such payments was to give these creditors a preference, which was an act of bankruptcy. The necessary consequence of his acts the respondent is conclusively presumed to have intended, and therefore the denial in the answer of an intent to give a preference to these parties, is of no effect. In re Sutherland [Case No. 13,638]; In re Silverman [supra].

The conveyance to Crinnion is a mortgage which purports to have been given by respondent to secure the payment of a note of even date therewith, for $3,000 in coin, payable in one year, with interest at the rate of one per centum per month. The property included in it was probably three fourths in value of all the respondent possessed, subject to execution, and consisted of the furniture of the parlor and the sixty-one bedrooms in the Russ house. The instrument gave Crinnion power to take possession in case the note was not paid at maturity or at any time, in case she should "deem herself unsafe," and sell the property at public or private sale for the payment of the debt. The mortgage was filed on January 30, 1873, and on March 19 thereafter, purports to have been assigned by Crinnion, for "a valuable consideration," to one Annie English.

On the trial, Ryan testified that this note and mortgage was a scheme to raise money to pay his debts, but that no money was received upon it except $800 in currency, which was returned to English when she gave up the note, and the transaction was rescinded, because the whole amount of the $3,000 could not be raised. The note was not produced on the trial, and the mortgage still remains on file in the clerk's office unsatisfied and uncanceled. Ryan stated that the note had been lying on the wash-stand in his bedroom from the time it was returned to him, until the day of trial, when it suddenly disappeared, and has not been found, and that the $800 received on the note was paid to and returned by his wife. Under the act (section 41), and upon general principles, the burden of proof is upon the respondent to show this mortgage to have been actually made upon the consideration and for the purposes expressed therein. The facts are peculiarly within his knowledge.

Neither Crinnion nor English are called as witnesses by him, or their absence attempted to be accounted for; while, upon the evidence, their very existence is even doubtful. As the case appears in court, there is no other conclusion reasonable, but that this mortgage was a mere sham and pretence from first to last. In point of fact, it was not true, as therein represented, that respondent owed Crinnion the sum of $3,000 in coin, but only $800 in currency, and it is doubtful whether even that sum was received until after the making of the mortgage, if at all. The assignment to English purports to have been made as late as March 19, and for a "valuable consideration," and although attested by counsel for respondent, no one was called to speak as to the amount or nature of such consideration, or the true character of the transaction. The strong probability is that this transfer is also a sham, and was put upon the instrument with the idea of giving color of good faith to the original transaction. The mortgage was left on file as an unsatisfied one, after, it is now claimed, the transaction was rescinded, apparently for the purpose for which it appears to have been originally made and placed there, to keep off and deceive his creditors; and to this effect was respondent's declaration to the witness Rohr, one of his creditors, as late as February 1. The power to enter and sell at "private sale" whenever the mortgagee might "deem herself unsafe," is a significant and suspicious circumstance, and might at any moment be used by the parties to this contrivance to put the barrier of another apparently innocent ownership between this property and the respondent's creditors.

The intent with which the transfer was made is a question of fact, but if the note and mortgage were fictitious, as it appears they were, then the only reasonable inference from the premises is, that it was done with intent to hinder and delay creditors, if not to defraud them. In re Drummond [Case No. 4,093]; Eefort v. Greeley [Id. 4,260].

It is not an element of this act of bankruptcy that the respondent, at the time of committing it, should have been insolvent. A sale or transfer of property, with intent to hinder, delay or defraud creditors, is an act of bankruptcy, without reference to the solvency of the persons making it. In re Randal [Case No. 11,551].

On the argument, counsel for the respondent seemed to assume, that the inquiry as to his solvency was to be directed to the time

of filing the petition. Insolvency alone is never an act of bankruptcy. In this case, respondent being insolvent on February 12 and March 1, 1873, when he made payments to Wilmer and Hunsaker, he thereby committed an act of bankruptcy. But his even becoming solvent afterward, much less getting further time to pay his debts, would not condone or discharge this act of bankruptcy or prevent him from being adjudged a bankrupt therefor. And so with this mortgage; the question is, did the respondent, at any time within six months before the filing of the petition, make it with the intent alleged, and not did he afterward and before the filing of the petition recant and procure the same to be canceled or rescinded? When an act of bankruptcy has been once committed, the debtor cannot be relieved from the legal consequences thereof, except by lapse of time or an arrangement with the creditors, who have the right to sue on account of it.

I find that the respondent has committed the acts of bankruptcy alleged in the petition, and adjudge him a bankrupt accordingly.

Case No. 12,184.

RYAN v. The CATO.

[Bee, 241.] [1]

District Court, D. South Carolina. July, 1807.

SALVAGE—ADJUDICATION—INDEPENDENT CLAIM.

Petitioner had suffered a claim for salvage to be preferred and decided on, before he made any application for a proportion thereof. Under all the circumstances the court ordered him a compensation out of the proportion of proceeds, reserved for the owners, but remaining in the marshal's hands.

[This was a libel for salvage by Amos Ryan against the ship Cato.]

BEE, District Judge. This case comes before me upon petition for compensation out of the ship Cato and cargo. The petitioner states "that he is master and owner of a fishing smack. That near the Gulf Stream, on or about the —— last, he fell in with the ship Cato, loaded with cotton, &c. That on boarding said ship, she was found without any person on board. That he thereupon took her in tow for two days and two nights, when the weather becoming boisterous, he anchored her in eight fathoms water, nearly in sight of the Charleston lighthouse. That having nobody on board his smack but one negro, he could not leave any person in possession of the ship. That in attempting to let go the ship's anchor, he made exertions by which, for some time, he thought his life endangered, as the blood gushed from his mouth in consequence of a violent strain. That these circumstances compelled him to leave the ship at anchor, and to come up to Charleston, where, as soon as he arrived, he made report of what had been done. That he then hired a vessel and several hands, and proceeded in search of the ship, which, in the heavy gale of that night, had parted from her cable. That, pursuing a direct course, he afterwards found her in possession of Mr. Mackay and others, who would not suffer him to meddle at all with the ship or cargo. That he complained of this conduct, conceiving himself fully entitled to a proportion of salvage for what he had done. That he was at length permitted by said persons to take with him two bales of wet cotton, which he afterwards sold at auction for a trifling sum, by no means adequate to his labour and sufferings, and to the expenses he incurred in endeavouring to preserve the vessel. That without his services as above stated, in towing and anchoring the ship, she must have foundered; or, at any rate, fallen into other hands than those of the persons to whom this court had decreed salvage. That the petitioner was astonished when he heard of such decree, having never been apprized thereof by the publication of any monition, or advertisement of any sale by the marshal; though the salvors well knew the petitioner's claim. That from his ignorance of the proceedings, and the haste with which they were transacted, he never had any opportunity of preferring his suit to this court for what he conceives himself justly and equitably entitled to. He prays, therefore, that he may be allowed to prove the several matters set forth above, and that the court will give him relief," &c.

This is a case differing from any other that has come before me, inasmuch as the claim for salvage had been previously satisfied to the amount of one half of the property saved; this being a vessel derelict. If the petition should be dismissed, the petitioner would have no cause of complaint, since he is alone to be blamed for ignorance of the former proceedings. He should have applied in time, and originated the steps necessary to procure him compensation. It is true that no monition issued; but this was omitted, because the respective agents of the owners and underwriters were before the court, and suggested that a monition was not necessary. The sale of the articles on Edisto Island, instead of their being brought for that purpose to Charleston, was likewise with their consent. The court knew nothing of any other interest.

The petitioner's services cannot be denied, and the strong desire I feel to encourage similar exertions induces me, even at this late hour, to take notice of this petition. It appears that, if the storm had not prevented, this man would have brought the vessel into port, and been entitled to the whole salvage. At any rate, his share would have been larger, if he had come sooner to demand it. As it is, I cannot take back any part of what has been allowed to the other salvors, because they are not at all to blame in the business:

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

and it is contrary to the rule by which I have hitherto been guided in cases of this sort to take from the original owners more than one half of their property, for compensation, under any circumstances. However, as I do not wish that the petitioner should go altogether unrewarded, and as the remaining half of the proceeds of this sale are in the hands of the marshal, I decree that the petitioner receive therefrom the sum of two hundred dollars.

Case No. 12,185.

RYAN v. CENTRAL PAC. R. CO.

[5 Sawy. 260; 6 Reporter, 641.] [1]

Circuit Court, D. California. Sept. 30, 1878.[2]

GRANTS—TO RAILROADS—LANDS IN LIEU OF DEFICIENCY—PARTICULAR LANDS.

1. A grant of the alternate sections of land designated by odd numbers within twenty miles, on each side of the road, was made to aid in the construction of the California and Oregon Railroad, with a provision that if it should be found that there was not sufficient land within the limits indicated not sold, reserved, subject to preemption, etc., then the grantee might select in lieu thereof enough land to make up the deficiency out of the nearest alternate sections designated by odd numbers outside, but within ten miles of the said limit. The road was located through a tract of country lying within the exterior limits of land claimed under a Mexican grant, for which a claim for confirmation was pending in the United States courts at the time the plat of the survey was filed with the secretary of the interior, and the lands withdrawn from public sale, etc. The claim under the Mexican grant was finally rejected, and after such rejection, there being a deficiency, lieu lands were selected outside of the twenty-mile limit on each side, but within the exterior limits before claimed under said rejected grant: *Held*, that the grant attached to the specific alternate sections designated by odd numbers within the forty-mile limit on the filing of the plat of survey of the line with the secretary of the interior, and the withdrawal of the land from sale, etc.

[Cited in Southern Pac. R. Co. v. Dull, 22 Fed. 493; Same v. Orton, 32 Fed. 479; Same v. Wiggs, 43 Fed. 335.]

2. The grant did not attach to any particular land outside said limit to make up a deficiency until said deficiency had been ascertained, and the selection in lieu thereof actually made.

[Cited in U. S. v. Mullan, 10 Fed. 790; Southern Pac. R. Co. v. Wiggs, 43 Fed. 335.]

3. The Mexican grant covering the lands situated within the limits from which such lieu lands were authorized to be selected, having been finally rejected before such deficiency was ascertained and selections in lieu thereof made, the odd sections outside of the forty-mile limit so embraced in the exterior bounds of said rejected grant were subject to selection to supply such deficiency.

4. Newhall v. Sanger, 92 U. S. 761, distinguished.

5. Statute construed, 14 Stat. 239.

On July 25, 1866, congress passed an act granting the alternate sections of public land, not mineral, for a distance of twenty miles on each side of the line of the road, to aid in the construction of a railroad by the California and Oregon Railroad Company (14 Stat. 239). It was also provided, that "when any of said alternate sections, or parts of sections, shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, the lands designated as aforesaid shall be selected by said company in lieu thereof," out of the nearest land within ten miles outside of the lands so granted, etc. The rights of said California and Oregon Railroad Company have become vested in the defendant. The road was located through a tract of land claimed under a Mexican grant to one Manuel Diaz, and at the time of the location proceedings were pending in the courts of the United States for a confirmation of said grant. The said grant was finally rejected as invalid by the supreme court of the United States on March 3, 1873. On October 30, 1874, it was found that there was not sufficient land within the said forty-mile limit subject to the grant to satisfy the said grant; and, thereupon, on said day, the said defendant selected the land in question, and applied for a patent therefor as lieu lands under the provisions of the act, the said land being an alternate odd section, and lying outside and within ten miles of the said forty-mile limit, and being within the exterior limits of said grant claimed to have been made to Diaz. The register and receiver of the Marysville land-office approved said selection December 26, 1874, which approval was affirmed by the secretary of the interior, and a patent in due form was thereupon issued to defendant therefor on March 17, 1875. At the date of said selection said land was public land, said Mexican grant having more than a year and a half before that time been finally rejected, and it was not within any other of the exceptions indicated or implied in the act. Afterwards, on July 14, 1876, the complainant [Michael Ryan], being in all respects qualified, filed an application in due form to be allowed to enter the said land under the homestead act of 1862, paid the proper fees, and received a duplicate receipt therefor from the register and receiver of the land-office of the district. He then filed his bill to restrain the defendant from using its patent, upon the ground that said land was not subject to selection in lieu of the lands specifically granted.

O. P. Evans, for complainant.
J. P. Hoge, for defendant.

SAWYER, Circuit Judge. The land, being at the time of the passing of the act of congress, and the filing of the map of the survey and withdrawal from sale in the office of the secretary of the interior, within the limits of land claimed under a Mexican grant, the only question is, whether it was excluded from

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 6 Reporter, 641, contains only a partial report.]

[2] [Affirmed in 99 U. S. 382.]

lands from which lieu lands could be selected, notwithstanding the fact that the grant had been finally rejected long before the selection was made. It is claimed by complainant that the case is controlled by the decision in Newhall v. Sanger, 92 U. S. 762. I think it clearly not within the rule adopted in that decision. In that case the grant attached to the specific sections within the limits indicated at the time the location of the road became fixed; or, at least, it took effect upon the withdrawal of the lands by the secretary of the interior from pre-emption, private entry and sale, etc. 12 Stat. 492; Newhall v. Sanger, supra. At the time the right of the railroad company attached there was pending a claim for confirmation of a Mexican grant embracing within its exterior boundaries the land in question; and this was held to take the land out of the category of "public lands," as that term was used in the act, and, consequently, that they were not within the terms of the grant at the time the right attached to the odd-numbered sections. This is the ground upon which the decision is rested.

The court says: "There can be no doubt, that by the withdrawal the grant took effect upon such odd-numbered sections of public lands within the specific limits as were not excluded from its operation, and the question arises, whether lands within the boundaries of an alleged Mexican grant which were then (at the time when the grant took effect upon the odd-numbered sections), sub judice, public within the meaning of the act of congress." [Newhall v. Sanger] 92 U. S. 762. In the case now under consideration the grant is specific only to the alternate sections designated by odd numbers within twenty miles on each side of the railroad line; and to these sections only did the grant specifically attach upon filing the map of location and withdrawal from sale, etc., thereon by the secretary of the interior. Such lands as were thus specifically affected by the grant, and were within the exterior limits of a Mexican grant for which a claim was still pending, and such only, are within the decision of Newhall v. Sanger [supra]. Whatever difference of opinion there may have been, and may still be, notwithstanding the decision in that case by a divided court, as to the lands under the conditions of that case, there can be none, I apprehend, on the proposition that the lands in that case would have passed to the railroad company if the Mokelumme grant had been finally rejected before the line of the road had become "definitely fixed." Before that time the grant was a mere float depending wholly upon the future location of the road. The act of congress gave a right to the grantee to annex the grant to land that might be open to appropriation along any line it might select. It required a location of the road to attach the grant to any specific land. And upon the location it attached to all odd sections upon which there was, at that time, no other claim. And the right of location was in the grantee. In this case, the right to select other lands in lieu of the sections specifically designated, which were found to have been previously appropriated, was, also, a pure float within certain limits; and it did not attach to any specific land until it had been finally ascertained that a deficiency existed, and not even then until a selection had been made by the grantee. The right attached to the specific land upon the selection, and not before. And at the time when the deficiency was ascertained and the selection made, and long before that time, the Mexican grant had been finally rejected, and the lands were unincumbered public lands open to selection for homesteads, pre-emptions, or for any lawful purpose without any obstruction whatever. Indeed there is no express exception in this act, as there was in the Central Pacific act, of lands reserved, occupied by homestead settlers, pre-emptions, etc. The exception arises by implication only, from the provision that when any of the alternate sections "shall be found to have been granted, sold, reserved," etc., other lands "designated as aforesaid"—that is to say, "alternate sections," "designated by odd numbers,"—"shall be selected," etc., and this exception by implication only extends by its terms to the twenty-mile limit on each side of the line. But it was, doubtless, not intended that a selection should be made of lands in which some prior existing right had become vested.

Congress manifestly designed the grant to be for the full amount of land indicated; and the only object of any exception at all of the classes mentioned, was to prevent interference with rights existing in others. The exception was not designed to limit the grant, but to avoid disturbing substantial rights already vested and still existing. And that the company might get its full quantity, congress authorized it to make up any deficiency by reason of any prior right that might have attached to any lands specifically designated by selecting other lands outside the designated limits. The intention was to give the full amount of land designated, and the only care of congress was not to interfere with rights already vested and still existing. The right to the lieu lands only attached on the selection, and at that time there was no conflicting interest. All reason for any exception at all had ceased to operate. Any less favorable construction would practically nullify this grant along a large portion of the line, or any other grant in similar terms throughout a large portion of the state. For examples, in very many cases, indeed, almost universally in California, Mexican grants were for a specific quantity of land within exterior boundaries containing a much larger quantity, like the grant in Fremont's Case, 17 How. [58 U. S.] 573, which was for ten leagues within exterior boundaries containing a hundred leagues. So also the grant to Yturbide, the rejection of which was affirmed in 22 How. [63 U. S.] 290, was for four hundred square leagues within exterior bound-

aries embracing the whole state. Had that single grant chanced to have been undisposed of at the time of the location of any of the several roads in California receiving land grants, not one foot of land would have passed to any railroad company in the state under the decision in Newhall v. Sanger. The grant now in question was intended to be substantial, not a mere delusion; and the act should be construed as it was intended to be understood by congress at the time it was passed, and not as it may suit the convenience or interests of parties who come in seeking the advantages resulting from the construction of the road after its completion under the act, by the parties who built it relying upon this grant. Any construction which shall deprive the defendant of the lands which it reasonably had a right to expect under the act of congress, would wrongfully wrest from it, by judicial sanction, a large portion of the consideration which formed the inducement to the undertaking. I can perceive no plausible ground for the view maintained by the complainant, or for extending the principles adopted in Newhall v. Sanger beyond the limits required by the decision. The judgment in that case is binding upon this court, and must be followed as to all lands in the same category. In my judgment the land in question does not fall within the decision; and it was subject to selection, and the title in the railroad company is valid.

The bill must be dismissed. Let a decree be entered accordingly.

[On appeal to the supreme court, the decree of this court was affirmed. 99 U. S. 382.]

RYAN (CUSHMAN v.). See Case No. 3,515.

Case No. 12,186.

RYAN et al. v. GOODWIN et al.

[3 Sumn. 514; 3 Law Rep. 220; 1 Robb, Pat. Cas. 725; Merw. Pat. Inv. 413.] [1]

Circuit Court, D. Massachusetts. May Term, 1839.

PATENTS—COMBINATION—COMPOUNDS—MATCHES—PUBLIC USE—SPECIFICATIONS.

1. It is not necessary to the validity of a patent for a new and useful invention, that any of the ingredients should be new or unused before for the purpose. The true question is, whether the combination of materials by the patentee is substantially new.

[Cited in Ex parte Smith, Case No. 12,966; Re Maule, Id. 9,308; Teese v. Phelps, Id. 13,818; Re Corbin, Id. 3,224; Re Wagner, Id. 17,038; Haffcke v. Clark, 1 C. C. A. 570, 50 Fed. 535.]

2. The public use or sale of an invention, in order to deprive the inventor of his right to a patent, must be a public use or sale by others, with his knowledge and consent, and before his application therefor. A sale or use of it, with such knowledge or consent, in the intermediate time between the application for a patent and a grant thereof, has no such effect.

[Cited in McMillin v. Barclay, Case No. 8,902; Parton v. Prang, Id. 10,784; Jones v. Sewall, Id. 7,495; Kelleher v. Darling, Id. 7,653; Bates v. Coe, 98 U. S. 46.]

3. The court will give a liberal construction to the language of all patents and specifications; and will, in all cases, by taking the whole together, adopt that interpretation of a specification, which will give the fullest effect to the nature and extent of the claim made by the inventor.

[Cited in Brooks v. Fiske, 15 How. (56 U. S.) 223; Turrill v. Michigan, S. & N. I. R. Co., 1 Wall. (68 U. S.) 510; Goodyear v. Providence Rubber Co., Case No. 5,583; Stimpson v. Woodman, 10 Wall. (77 U. S.) 123; Carew v. Boston Elastic Fabric Co., Case No. 2,397; Hamilton v. Ives, Id. 5,982.]

[Cited in Burke v. Partridge, 58 N. H. 351.]

4. The inventor of a new compound, wholly unknown before, is not limited to the use always of the same precise ingredients in making that compound; and if the same purpose can be accomplished by him by the substitution in part of other ingredients in the composition, which have never been so used before, he is at liberty to extend his patent so as to embrace them also. Thus, where an inventor claimed as his invention the combination of phosphorus with chalk, or any other absorbent earth or earthy material, and glue, or any other glutinous substance, using the materials in the proportions substantially as set forth in the specification, in making matches; it was held, that the patent was not void as being too broad and comprehensive.

[Followed in Bryan v. Stevens, Case No. 2,066a.]

Case for an infringement of a patent for "a new and useful improvement in the manufacture of friction matches for the instantaneous production of light." Plea, the general issue; with notice of special matters of defence. At the trial, it appeared, that the patent was obtained by Alonzo D. Phillips, of Springfield, Massachusetts, on the 24th of October, 1836 [No. 68], and had since been assigned to the plaintiffs. The common proofs, that Phillips was the inventor; that it was a useful invention; and that the defendant had used the same, were all offered to the jury. The defence turned upon the following points, which were stated in the special notice: (1) That Phillips was not the original inventor. (2) That the invention was publicly known, and in public use in divers parts of the United States, (specifying the places and persons,) before the supposed invention of the plaintiff. (3) That the invention was in public use, and the sale with the consent and allowance of Phillips in divers parts of the United States, and particularly in Massachusetts, Connecticut, New Hampshire, New York, and Philadelphia, before the application of Phillips for a patent therefor, specifying the names of the persons, who so used and sold the same. (4) That the specification annexed to the patent was vague, ambiguous, and uncertain, and did not describe in a full, clear, and exact manner, and with sufficient certainty, the invention, and the manner of making and compounding the matches; and that the use of chalk, carbonate of lime, or other absorbent earths or

[1] [Reported by Charles Sumner, Esq. Merw. Pat. Inv. 413, contains only a partial report.]

materials, referred to in the specification, was wholly unnecessary and useless, and designed to mislead and deceive the public. (5) That the claim for inventing a mode of putting up the matches was frivolous, and the method not new.

The specification was in the following words: "To All Whom It May Concern: Be it known that I, Alonzo D. Phillips, of Springfield, in the county of Hampden, and state of Massachusetts, have invented certain new and useful improvements in the mode of manufacturing friction matches, for the instantaneous production of light, which improvements consist in a new composition of matter for producing ignition, and in a new mode of putting the matches up for use, by which the danger of ignition from accidental friction, or from other causes, is obviated. And I do hereby declare that the following is a full and exact description thereof. The composition used in preparing the matches usually called loco-foco, and which light by slight friction, is a compound of phosphorus, chlorate of potash, sulphuret of antimony, and gum arabic or glue. That which I use consists simply of phosphorus, chalk, and glue, and in preparing it I use the ingredients in the following manner and proportions. I take one ounce of glue and dissolve it by the aid of water and heat, in the usual manner; to this glue I add four ounces of finely pulverized chalk or Spanish white, stirring it in so as to form a thick paste. I then put in one ounce of phosphorus, keeping the materials at such a degree of heat as will suffice to melt the phosphorus, and incorporate the whole together. Into this composition the matches are dipped, after being previously dipped in sulphur in the usual manner. The composition may be varied in its proportions, but those I have given I consider the best. The ingredients also may be varied; as gum arabic or other gum may be substituted for glue, and other absorbent earths, or materials may be used instead of the carbonate of lime. In order to prevent the danger from accidental ignition, I prepare the pine wood for my matches in the following manner. I cut my pine into thin slabs about the usual thickness of veneers; these I cross-cut into lengths for matches, and by means of gangs of circular saws, cut these comb fashion and lengthwise of the grain of the wood, leaving a portion of one end uncut, holding the strips together like the back of a comb; the number of matches on each slab may be about a dozen. These are then dipped in the sulphur, and afterwards in the above named composition, and put up for sale by laying the slabs upon long slips of paper, cut wide enough to lap over the ends of the matches; the slabs are then doubled up in the paper, much in the manner of papering pins. A slab, when wanted, may be taken out without disturbing the remainder, and the paper effectually removes all danger from friction. What I claim as my invention, is the using of a paste, or composition to ignite by friction, consisting of phosphorus, and earthy material, and a glutinous substance only, without the addition of chlorate of potash or of any highly combustible material, such as sulphuret of antimony in addition to phosphorus. I also claim the mode herein described of putting up the matches in paper, so as to secure them from accidental friction."

S. D. Parker and E. Smith, Jr., for plaintiffs.

Rand & Fiske, for defendants.

STORY, Circuit Justice, in summing up to the jury, said:—The main points of the defence are: (1) That the invention claimed in the letters-patent is not new. (2) That if new, the patentee had suffered his invention to be in public use and on public sale, long before his application for a patent. (3) That the terms of the specification are too vague and indefinite, and the claim too broad to support the patent.

As to the first point, it is mainly a question of fact. It is certainly not necessary, that every ingredient, or, indeed, that any one ingredient used by the patentee in his invention, should be new or unused before for the purpose of making matches. The true question is, whether the combination of materials by the patentee is substantially new. Each of these ingredients may have been in the most extensive and common use, and some of them may have been used for matches, or combined with other materials for other purposes. But if they have never been combined together in the manner stated in the patent, but the combination is new, then, I take it, the invention of the combination is patentable. So far as the evidence goes, it does not appear to me, that any such combination was known, or in use before Phillips's invention. But this is a matter of fact, upon which the jury will judge. The combination is apparently very simple; but the simplicity of an invention, so far from being an objection to it, may constitute its great excellence and value. Indeed, to produce a great result by very simple means, before unknown or unthought of, is not unfrequently the peculiar characteristic of the very highest class of minds.

As to the second point, it is clear by our law, whatever it may be by the law of England, that the public use or sale of an invention, in order to deprive the inventor of his right to a patent, must be a public use or sale by others with his knowledge and consent, before his application therefor. If the use or sale is without such knowledge or consent, or if the use be merely experimental, to ascertain the value or utility, or success of the invention, by putting it in practice, that is not such a use, as will deprive the inventor of his title. Our law (Act 1793, c. 55, §§ 3, 6 [1 Story's Laws, 300; 1 Stat. 318, c. 11]; Act 1836, c. 357, §§ 6, 15 [5 Stat. 119, 123]; Pennock v. Dialogue, 2 Pet. [27 U. S.] 1; The Nathaniel Hooper [Case No. 10,032]) also re-

quires, that the use or sale should not only be with the knowledge and consent, of the inventor, but that it should be before his application for a patent. A sale or use of it with such knowledge or consent, in the intermediate time between the application for a patent and a grant thereof, has no such effect. It furnishes no foundation to presume, that the inventor means to abandon his invention to the public; and does not, because it is not within the words of our act, create any statute disability to assert his right to a patent. It appears from the evidence in the present case, that as early as the 15th of February, 1836, Phillips procured an original specification of his invention to be drawn up, and an application was thereupon made to the proper office for a patent. It does not appear, that any use or sale was allowed to be made by Phillips of his invention until some time afterwards, namely, in March, 1836. The delay in obtaining the patent, which was not granted until October, 1836, was solely owing to certain defects in the original specification, which was returned to the inventor, and afterwards was amended and sent back to the patent office. Now, if this be the real state of the facts, (and of this the jury will judge) it seems clear, that in point of law the second objection falls to the ground; for no use or sale is shown with the knowledge and consent of the inventor, until after he had made an application for a patent.

Then as to the third point. This turns upon the supposed vagueness and ambiguity, and uncertainty of the specification and claim of the invention thereby. The specification, after adverting to the fact, that the loco-foco matches, so called, are a compound of phosphorus, chlorate of potash, sulphuret of antimony, and gum arabic or glue, proceeds to state that the compound which he (Phillips) uses, "consists simply of phosphorus, chalk, and glue;" and he then states the mode of preparing the compound, and the proportions of the ingredients; so that as here stated, the essential difference between his own matches and those called loco-foco, consists in the omission of chlorate of potash and sulphuret of antimony, and in using in lieu thereof chalk. He then goes on to state, that "the proportions of the ingredients may be varied, and that gum arabic, or other gum, may be substituted for glue; and other absorbent earths or materials may be used instead of the carbonate of lime." He afterwards sums up his invention in the following terms. "What I claim as my invention is the using of a paste or composition to ignite by friction, consisting of phosphorus, and (an) earthy material, and a glutinous substance only, without the addition of chlorate of potash, or of any other highly combustible material, such as sulphuret of antimony, in addition to the phosphorus. I also claim the mode herein described of putting up the matches in paper, so as to secure them from accidental friction." Upon this last claim I need not say any thing, as it is not in controversy, as a part of the infringement of the patent, upon the present trial.

Now, I take it to be a clear rule of our law in favor of inventors, and to carry into effect the obvious object of the constitution and laws in granting patents, "to promote the progress of science and useful arts," to give a liberal construction to the language of all patents and specifications, (ut res magis valeat, quam pereat,) so as to protect, and not to destroy the rights of real inventors. If, therefore, there be any ambiguity or uncertainty in any part of the specification; yet, if taking the whole together, the court can perceive the exact nature and extent of the claim made by the inventor, it is bound to adopt that interpretation, and to give it full effect. I confess, that I do not perceive any ground for real doubt in the present specification. The inventor claims as his invention the combination of phosphorus with chalk or any other absorbent earth, or earthy material, and glue, or any other glutinous substance in making matches, using the ingredients in the proportions, substantially as set forth in the specification. Now, the question is, whether such a claim is good, or whether it is void, as being too broad and comprehensive. The argument seems to be, that the inventor has not confined his claim to the use of chalk, but has extended it to the use of any other absorbent earths or earthy materials, which is too general. So, he has not confined it to the use of glue, or even of gum arabic, but has extended it also to any other gum or glutinous substance, which is also too general. Now, it is observable, that the patent act of 1793 (chapter 55) does not limit the inventor to one single mode, or one single set of ingredients, to carry into effect his invention. He may claim as many modes, as he pleases, provided always, that the claim is limited to such as he has invented, and as are substantially new. Indeed, in one section (section 3) the act requires, in the case of a machine, that the inventor shall fully explain the principle, and the several modes, in which he has contemplated the application of that principle or character, by which it may be distinguished from other inventions. The same enactment exists in the patent act of 1836 (chapter 357, § 6). I do not know of any principle of law, which declares, that, if a man makes a new compound, wholly unknown before for a useful and valuable purpose, he is limited to the use of the same precise ingredients in making that compound; and that, if the same purpose can be accomplished by him by the substitution in part of other ingredients in the composition, he is not at liberty to extend his patent so as to embrace them also. It is true, that in such a case he runs the risk of having his patent avoided, if either of the combinations, the original, or the substituted, have been known or used before in the like combination. But, if all the various combinations are equally new, I do not perceive how his

claim can be said to be too broad. It is not more broad than his invention. There is no proof in the present case, that the ingredients enumerated in this specification, whether chalk, or any other absorbent earth, or earthy substance, were ever before combined with phosphorus, and glue, or any other gum or other glutinous substance, to produce a compound for matches. The objection, so far as it here applies, is not, that these gums or earths have been before so combined with phosphorus, but that the inventor extends his claim, so as to include all such combinations. There is no pretence to say, upon the evidence, that the specification was intended to deceive the public, or that it included other earthy materials than chalk, or other glutinous substances than glue, for the very purpose of misleading the public. The party has stated frankly, what he deems the best materials—phosphorus, chalk, and glue, and the proportions and mode of combining them. But, because he says, that there may be substitutes of the same general character, which may serve the same purpose, thereby to exclude other persons from evading his patent, and depriving him of his invention, by using one or more of the substitutes, if the patent had been confined to the combination solely of phosphorus, chalk, and glue, I cannot hold that his claim is too broad, or that it is void. My present impression is, that the objection is not well founded. Suppose the invention had been of a machine, and the inventor had said, I use a wheel in a certain part of the machine for a certain purpose, but the same effect may be produced by a crank, or a lever, or a toggle joint, and therefore I claim those modes also; it would hardly be contended, that such a claim would avoid his patent. I do not know, that it has ever been decided, that, if the claim of an inventor for an invention of a compound states the ingredients truly, which the inventor uses to produce the intended effect, the suggestion, that other ingredients of a kindred nature may be substituted for some part of them, has been held to avoid the patent in toto, so as to make it bad, for what is specifically stated. In the present case it is not necessary to consider that point. My opinion is, that the specification is not, in point of law, void, from its vagueness, or generality, or uncertainty.

The jury found a verdict for the plaintiff. Judgment accordingly.

[For other cases involving this patent, see note to Byam v. Farr, Case No. 2,264.]

Case No. 12,186a.

RYAN et al v. GREEN.

[14 Betts, D. C. MS. 31.]

District Court, S. D. New York. Dec. 11, 1848.

SEAMEN—WAGES—LEAVING SHIP—CONTRACT FOR HOME RUN.

[Upon a contract for the run homeward from a foreign port at a stated gross sum, seamen may leave the ship as soon as she anchors in the harbor of her home port.]

[This was a libel by William Ryan and others against Thomas Green, master of the bark Leverett, for seamen's wages.]

Hiring for run distinguished from hiring for wages. When liability in former ceases, crew not bound to wait owner's decision as to disposition of vessel after arrival. Crew entitled to pay when vessel brought into harbor and secured. Book of Dec. 14, p. 31.

BETTS, District Judge. By stipulation between the proctors, four suits commenced by different seamen are consolidated into one, and the proofs taken are to be applied according to the rights of the respective parties. The controversy turns on a mere punctilio, and it is manifest the suits are defended to defeat the proctor's demand of $3.75 costs on settlement of the demands, rather than any denial of the libellants' rights on the merits. The men were engaged in Havannah in August last to bring the vessel to New York, and were hired at specified prices by the run,—one at $10, two at $12, and one at $15. Two of them also interpose a claim for extra work on board the vessel before the voyage commenced. The barque arrived at quarantine on Wednesday evening, and at 1 p. m. the next day came to the city, and anchored on the Brooklyn side. Either the state of the wind was not favorable, or the owner was not prepared for her to haul into her berth that day; and next morning, at about 8 o'clock, the libellants left her. There is a disagreement in the testimony on the point of their leaving. The men testify that the captain told them they were free of the vessel, and the mate swears the men left without permission, and that the captain forbid them going, as the mate had done the night before. I do not think the result is varied if the evidence of the mate is relied upon as giving the true version of the case. The agreement was for a specific sum, and for a particular and limited service. Neither party was bound under that engagement to anything beyond its express terms. Seamen shipping for a voyage at pro rata wages are bound to the ship until she is in her berth and her cargo is discharged; and the owners and the ship are correspondingly bound to their seamen for a continuance of the pro rata wages during such services. A hiring for a run is a contract quite distinct from that. The mariner is then engaged for no more than to take the vessel to the place of destination, and, like a pilot or other navigator employed for a particular service, his liability to the vessel and hers to him ceases with the termination of that service. The same doctrine was adopted by the court in 1844 (Jackson v. Schuyler), which was a contract by the run to go the voyage in the frigate Kamschatka from New York to Cronstadt [unreported].

It is not intended in this case to consider the effect of a contract for the voyage at a

gross sum of wages. That mode of hiring may properly be attended with all the incidents of ordinary shipping agreements, because it is usually for the round voyage out and home. Jac. Sea Laws, 132, 133. The subject was regulated in France by express provisions of the Marine Code ("Hiring Seamen," art. 1); and the seaman hiring for the voyage was bound to remain with the ship until she was safely moored and wholly unladen. Pothier, Louage des Matr. Nos. 160, 172. Whether the same construction would be placed by our courts on an engagement in a foreign port for a voyage home may well admit of question, unless well ascertained usage applicable to it be shown. But it seems to me that putting the construction of this agreement upon the ordinary and plain import of the language, the run, the term for which the libellants contracted to serve, was the transit only from Havannah to New York. Such was manifestly its acceptation by the master and owner of the vessel, for no claim was set up that the libellants were bound to unload her also for that compensation, and the accommodations for lodging the men on board were taken away immediately on her arrival. The vessel was navigated to the port, and safely anchored. The master says because the proper papers authorizing him to go to the wharf were not obtained, whether she should remain at anchor for a short or long period depended upon the conveniency and election of the owner on his compliance with the regulations of the port as to permits, &c. The crew were under no obligations to await his decision, after it might be made up.

In my judgment, the libellants were entitled to their pay when the vessel was brought into the harbor and secured there, according to the orders of the master. Their engagement had then terminated, and the master and owner had no right to detain them with the ship or withhold the stipulated wages. The mate admits the agreement to pay two of the libellants $5 for extra work on the ship in Havannah before this contract. The owner was twice called upon by the libellants for their pay. He put them off on account of other engagements at the time, and they then placed their claims in the hands of proctors. Written notice was given the master of this by the proctors, and the effort to settle fell through because of the demand of retaining fees by the proctors. Whether the fee charged was right in principle or amount was a matter which could have been submitted to the court on taxation; and in refusing to pay the wages due, and compelling the libellants to collect them by suits, the master and owner were clearly in the wrong, and must accordingly bear the costs thus created by them.

The decree will be that the libellants recover $46.20, the amount of stipulated wages, after deducting hospital money, etc., with the addition of $5 extra, pay agreed to be made at Havannah, and interest from the commencement of the suit, with summary costs to be taxed in one suit.

The proper order for distribution of the amount amongst the libellants, according to their respective rights, will be entered.

Case No. 12,187.

RYAN v. RINGGOLD.

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

Circuit Court, District of Columbia. Dec. Term, 1826.

MILITIA—FINES—ARREST—WHEN LIST TO BE DELIVERED TO MARSHAL.

In order to justify the marshal for arresting a man for a militia fine, it is not necessary that the list of fines should have been delivered to him by the clerk of the court-martial within fifteen days after the session of the appellate court, as required by the fourth section of the militia act for the District of Columbia.

Trespass, assault and battery, and false imprisonment, for arresting the plaintiff for a militia fine.

Mr. Morfit, for plaintiff.

Mr. Lear, for defendant.

THE COURT (nem. con.) was of opinion that it was not necessary, to the justification of the marshal, that the clerk of the court-martial should have delivered to him the list of fines within fifteen days after the session of the appellate court, as required by the fourth section of the militia act for the District of Columbia.

Case No. 12,188.

RYAN v. YOUNG et al.

[9 Biss. 63; 8 Reporter, 229; 11 Chi. Leg. News, 353; 20 Alb. Law J. 79.] [2]

Circuit Court, N. D. Illinois. July, 1879.

REMOVAL OF CAUSES—REAL PARTIES IN INTEREST—REMAND.

Where a suit, commenced in a state court, is removed to the United States circuit court, and it appears to the satisfaction of said circuit court that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the circuit court, it is the duty of the court to dismiss or remand the cause. So where it appears that the real substantial controversy in the suit, is between citizens of the same state, and that the non-resident party upon whose petition the cause was removed has parted with his interest, the federal court will remand the cause to the state court.

[This was a bill in equity by Martin Ryan against James Young and others.]

R. H. Forrester, for complainant.

George H. Leonard and Samuel Ashton, for defendants, citing Dillon, Rem. Causes,

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

[2] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 8 Reporter, 229, and 20 Alb. Law J. 79, contain only partial reports.]

19, 28, 77. That the act of March 3, 1875 [18 Stat. 470], did not repeal the second and third subdivisions of section 639 of the Revised Statutes of the United States: New Jersey Zinc Co. v. Trotter [Case No. 10,167]; Cooke v. Ford [Id. 3,173].

HARLAN, Circuit Justice. This suit was commenced in the circuit court of Cook county, and upon the petition of the defendant, Young, a citizen of Iowa, it was removed to this court for hearing. The complainant, Ryan, and the defendant, Boyd, are both citizens of Illinois, while the defendant insurance company is a corporation created by the laws of Connecticut.

Upon looking into the pleadings and depositions, I find the following facts satisfactorily proven.

1. Lee and wife being indebted to the insurance company in the sum of $3,500, evidenced by Lee's bond for that amount, due January 28, 1872, with interest at 8 per cent., payable semi-annually, executed upon that day to the company, a mortgage upon a house and lot in Chicago, to secure such debt. The mortgage contained numerous conditions and agreements, one of which authorized the mortgagee, its successors or assigns, either in person, or by attorney, to sell and dispose of the mortgaged premises, and all benefit and equity of redemption of the mortgagors, their heirs or assigns, at public auction, in Chicago, after 30 days notice of the time and place of sale, by advertisement in some one of the daily newspapers published in that city. The mortgage dispensed with personal notice to the mortgagors of such sale.

2. Boyd having in some way acquired the interest of Lee in the premises, subject necessarily to the prior claim of the insurance company, in the year 1876, conveyed the same to the complainant, Ryan, for the consideration of $5,500, of which sum Ryan paid him $3,500 in cash, and agreed to convey to Boyd, at the price of $2,000, a lot owned by him in Riverside, the title to which was thereafter to be perfected. At the date of Ryan's purchase, the balance due the insurance company on its mortgage debt was about $2,000. He took the property subject to, and under an agreement to pay, that balance on the Lee debt. The interest due the company was paid by Ryan up to July, 1877, including the installment due in that month. He had made these payments of interest after notice from the company.

3. Ryan swears, and the evidence sustains his statement, that he did not receive notice from the company in reference to the installments of interest due on January, 1878, and July, 1878, and that he had accidentally overlooked them.

4. At the time of Ryan's purchase from Boyd, he gave the latter his note for $2,000, secured by deed of trust to Haines, upon the same property covered by the mortgage to the insurance company. It is admitted that his object in so doing was to secure the performance of his agreement to perfect the title to, and the conveyance to Boyd of, the Riverside lot, which being done, the note for $2,000 and the Haines deed of trust were to be surrendered and cancelled. Prior to July, 1878, Ryan had perfected his title to the Riverside lot, and executed his conveyance therefor, of all which Boyd had due notice; and though, perhaps, he had not, before that date, personally and formally accepted that conveyance as a compliance with Ryan's agreement, it was his duty to have done so. In any event, prior to July, 1878, Ryan was entitled to have the $2,000 note, and the trust deed given to secure it surrendered and cancelled.

5. In July, 1878, or about that time, Boyd made application to the insurance company, through its Chicago agents, to purchase its debt and the mortgage held by it upon the premises in question—the same mortgaged by Lee and wife, and sold by Boyd to Ryan—representing or inducing the company's agents to believe that he owned a second mortgage (the Haines trust deed) upon the property.

It was contrary to the usages of the company to sell their mortgage debts to any except holders of subordinate mortgages. Their rule was to secure foreclosures by judicial proceedings. But believing Boyd to be the owner of the subordinate mortgage, the company sold and assigned to him "without recourse" its debt secured by the Lee mortgage—the assignment, at Boyd's instance, being made in blank.

6. As soon as this assignment was procured, Boyd caused an advertisement of the premises for sale at public auction, under the terms of the Lee mortgage, the sale to take place in August, 1878. The advertisement was made in the name of the insurance company, but without its direction or procurement. The sale occurred at the time advertised, and was conducted by Boyd's attorney, in the name of the company. The property was struck off to some one whose name is not disclosed, and who was unknown to the crier, but who represented himself as bidding for James Young, who was not himself present, and who was also unknown to the crier. The amount bid was the balance due on the Lee bond, of which Boyd was the owner. Boyd then caused the insurance company to convey the property to Young, and shortly thereafter, by quit-claim deed, dated August 17, 1878, Young conveyed to Boyd. The former, so far as the record shows, neither paid nor received anything upon his purchase, and received nothing upon his conveyance to Boyd. Of the advertisement and sale, Ryan had no notice until after the sale occurred.

It is not to be doubted, under the evidence, that throughout the whole transaction, Young was the mere agent and representative of

Boyd, and had no real interest in the property.

Ryan claims that all the proceedings through which Boyd acquired title were fraudulent and void. He seeks to redeem the property, and to that end, asks that an account be taken of the amount due upon the original mortgage debt to the insurance company. Upon that amount being ascertained, he asks that he be allowed to pay the same; that the conveyance under which Boyd claims be set aside; that his title to the property be confirmed and quieted, and for all other proper relief. Upon these facts, it is evident that there is no real, substantial controversy in this case between Ryan and Young, or between Ryan and the insurance company.

It is practically of no concern to Young or the insurance company what decree is entered as between Ryan and Boyd. Young passed the legal title to Boyd by a quit-claim deed, and the insurance company assigned its mortgage debt without recourse. Neither Young nor the insurance company is an indispensable party to the relief asked. The vital question in the case is, whether Ryan can enforce his claim to redeem the land as against Boyd, the holder of the legal title, upon paying the amount due on the Lee mortgage debt at the time of its transfer by assignment in blank, to Boyd. The only real, substantial controversy in the case is between Ryan and Boyd, both of whom are citizens of Illinois. Of such a controversy this court cannot take cognizance. The case comes within section 5 of the act of March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes." That section declares "that if in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require," etc. My duty, obviously, is to proceed no further in this cause but to remand it to the state court for final hearing.

It is proper to state that upon the face of the original bill there was apparently a controversy in the suit between Ryan and Young, which, perhaps, entitled the latter to claim a removal. But before Young presented his petition for removal, indeed, before the commencement of this suit, he had executed, and there was upon record, a quit-claim deed from him to Boyd. That fact was not, however, disclosed by his petition. Had it been disclosed, the state court would have seen that there was no substantial controversy between Young and Ryan, and that the real issue was between Ryan and Boyd. Now, that it appears upon the whole case that the real substantial controversy in the suit is between citizens of Illinois, and that there is no such controversy between citizens of different states, our duty is to send the cause back to the state court for a determination of the issues between the real parties in interest.

The court expresses no opinion as to what are the rights of the parties upon the merits. Complainant's counsel may draw the necessary order, giving his client costs incurred in this court.

RYAN, The ANN. See Case No. 428.

Case No. 12,189.

RYBERG et al. v. SNELL.

[2 Wash. C. C. 294.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

BILL OF LADING — TITLE TRANSFERRED BY ASSIGNMENT—BILL OF EXCHANGE—CONSIDERATION—POSSESSION.

1. E. consigned a cargo to the plaintiffs, to whom he was indebted; and, before or on the sailing of the vessel for Copenhagen, the bills of lading for the same were assigned by him to Gardner & Co., who sent the defendant, as their agent, to communicate the same. The cargo was sold by the plaintiffs, and merchandize shipped to Gardner & Co. in return, and the defendant drew the bill upon which this suit was instituted, in favour of the plaintiffs, on Gardner & Co., for a balance claimed by them, being the debt due to them by E.; which bill Gardner & Co. refused to pay. In an action by the payee against the drawer, the consideration of the bill may be inquired into.

2. The endorsement of a bill of lading transfers all the legal right in the property to the assignee, and the consignee cannot claim his debt out of the property shipped to him, unless it was actually in his possession before the assignment of the bill of lading.

3. Where a consignment had been made by a debtor to his creditor, the transfer of the bill of lading might not take the property from the creditor.

4. The possession of the consignee, after the assignment of the bill of lading, was the possession of Gardner & Co., and therefore the plaintiffs could have no lien on the goods consigned to them for the debt of E.

[Cited in Donath v. Broomhead, 7 Pa. St. 302.]

This was an action on a bill of exchange, drawn by the defendant on Gardner & Co. in favour of the plaintiffs, which was duly protested, and notice given.

The defendant made out the following case: One Echart, on the 10th of May, 1806,

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

shipped on board the Mary, a cargo consigned to the plaintiffs, merchants at Copenhagen, for account and at the risk of the shipper. At this time, Echart was indebted to the plaintiffs. On the 26th of May, about the time of the sailing of the vessel, or shortly after, Echart, for a valuable consideration, assigned over the bill of lading to Gardner & Co., the drawees, who immediately despatched the defendant to Copenhagen in another vessel, to apprize the plaintiffs of their right to the cargo. The cargo was sold, and the plaintiffs shipped sundry goods to Gardner & Co. in return, which, together with the debt due to them from Echart, made a balance due from Gardner & Co., for which Snell, as his agent, drew the bill on which the suit is brought. If the item of charge against Echart had been omitted, the balance would have been in favour of Gardner & Co. This account, from the heading of it, shows that the plaintiffs knew of the transfer of the cargo to Gardner & Co.

Mr. Hallowell, for plaintiffs, contended, that the bill of lading vested such a title in the consignee, to the amount at least of his debt against Echart; that Echart could not have stopped the goods in transitu, and which right he could not divest by an assignment of the bill of lading. Of course, the bill was given for a just consideration.

WASHINGTON, Circuit Justice (PETERS, District Judge, absent), stopped Hopkinson, who was to have argued for the defendant, and observed, that the case was too plain to justify the delay of a further discussion. The principles which must govern the case are so clear, that there cannot be two opinions respecting them. The suit is brought by the payee against the drawer; and consequently, the consideration for which the bill was drawn, may be inquired into. If Echart's debt was not properly chargeable to Gardner & Co., then the bill was drawn without consideration; because, striking out that item, the balance was in favour of Gardner & Co. The legal result of all this would be, that the plaintiffs cannot recover. The endorsement of a bill of lading, transfers the legal right in the property to the assignee, and therefore all the right of Echart in this cargo passed to Gardner & Co., on the 26th of May, by the assignment made on that day. Had the cargo got into the actual possession of the plaintiffs before the assignment, they would have had a right, in virtue of their lien, to satisfy their debt against Echart, out of the proceeds. But this lien can never arise, until such actual possession is obtained; and at the time it attaches, the property must belong to the principal, and it continues no longer than the actual possession continues. This was not a consignment by a debtor to his creditor, for the purpose of discharging a debt; but from a principal to his factor, for account, and at the risk of the principal. The possession of the plaintiffs was the possession of Gardner & Co., who had acquired a legal title to the property, long before the goods arrived; and of course they could have no lien, on account of a debt due from Echart. The bill, then, is drawn without consideration, and your verdict should be for the defendant.

The plaintiffs suffered a nonsuit.

[For a motion to take off the nonsuit ordered as above, see Case No. 12,190.]

Case No. 12,190.

RYBERG et al. v. SNELL.

[2 Wash. C .C. 403.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1809.

BILL OF LADING — ASSIGNMENT — TITLE TRANSFERRED—FACTORS—LIEN FOR BALANCE.

1. If goods be sold and shipped, upon the account and at the risk of the vendee, the bill of lading making the goods deliverable to him, or being assigned to him, transfers the legal title in the goods, to the perfection of which, nothing is wanted but actual possession. Until this be obtained, the vendor retains an equitable right to countermand the delivery of the goods, if the consideration has not been paid, and the consignee has in the mean time failed.

2. If the factor should dispose of goods, bona fide, which have been consigned to him, although the goods had not come into his hands, but the bill of lading has been actually transferred to the vendee, the right of the principal is defeated. But before the authority to sell has been exercised, the owner may countermand the consignment, or sell the goods while in transitu.

[Cited in Valle v. Cerre, 36 Mo. 589.]

3. To constitute a lien by a factor for his balance, possession of the goods by him, and a right in the principal to the property on which the lien is to operate, are necessary.

[Cited in brief in Elliott v. Bradley, 23 Vt. 220.]

This was a motion to take off the nonsuit ordered at the trial. Ryberg v. Snell [Case No. 12,189].

Hallowell & Rawle, for plaintiffs.

Mr. Hopkinson, for defendant.

WASHINGTON, Circuit Justice. The stress of the argument by the plaintiff's counsel, on this motion, is, that a bill of lading conveys to the consignee a legal title to the property; that a factor, being such consignee, and a creditor of the consignor, for the balance of a former account, has equal equity with a person who, bona fide, and for valuable consideration, becomes a purchaser of the property from the consignor, even before possession is acquired by the factor, and is therefore entitled to hold it until his debt is satisfied.

The whole error of this argument, consists in the generality of the first proposition. It

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

is true, that if goods be sold and shipped upon account and at the risk of the vendee, the bill of lading making the goods deliverable to him, or being assigned to him, transfers the legal title in the goods, to the perfection of which, nothing is wanted but actual possession. Until this be obtained, the vendor retains an equitable right to countermand the delivery, if the consideration has not been paid, and the consignee has in the mean time failed. The legal title, in this case, vests in the consignee in virtue of the contract of sale; and the bill of lading, endorsed, is evidence of that contract. But, if goods be consigned generally to a factor, at the risk and for the account of the principal, the bill of lading conveys no more than an authority to the factor to demand and receive possession of the property from the master; and if the factor should dispose of it, bona fide, and for a valuable consideration, even before actual delivery, by a transfer of the bill of lading, it is equivalent to a sale by the principal; and the right of the principal, or of one claiming under him, is defeated. But if this authority to sell has not been exercised, it is competent to the consignor to vary the destination of the goods, as he pleases and when he pleases; or to sell them whilst they are in transitu, or afterwards, if he think proper to do so. What should prevent him? The factor is his servant in respect to these goods; he has no title to them; and his possession is the possession of his principal. But it is said, that the factor has a lien on the goods, to the amount of the balance due him from the consignor. This would be very true, if the consignor had not parted with his interest in the goods before they came into the possession of the consignee. But, to constitute a lien, two things must concur,—possession by the factor, and a right in the principal to the property upon which the lien is to operate. The goods must come into the actual possession of the factor, the property of the principal; and therefore, if before such possession, the principal has divested himself of all right and title to the goods, the lien never can attach. The proposition contended for by the plaintiffs' counsel, can only be true where the consignment to the factor is founded upon some contract, which vests in him a legal title to the property; as if made for the use of a third person, or of the factor himself, in consideration of advances made, or engagements entered into, on the faith of the consignment, or the like.

A question has been raised upon the argument of this motion which was not thought of at the trial, viz. that Snell, the drawer, was authorized by Gardner & Co. to receive from the plaintiffs the proceeds of this cargo, and to state and settle all accounts with them relating to the same, with the usual power to compromise, &c.; in consequence of which, it is contended, that although the debt due by Echart to the plaintiffs, might not be properly chargeable to Gardner & Co., still, their attorney having admitted the charge, they are bound. This argument again is founded upon a mistake, as to the powers of the defendant, which certainly did not authorize him to draw upon his constituents for a debt due from Echart & Co. or by any act of his, to bind them in any manner to pay a debt for which they were not legally responsible.

RYCRAFT (UNITED STATES v.). See Case No. 16,211.

RYDER (BARNES v.). See Case No. 1,020.

RYER (ROBERTS v.). See Case No. 11,913.

RYERSON (ALLEN v.). See Case No. 235.

Case No. 12,191.

RYNAUD v. The RICHARD COBDEN.

[N. Y. Daily Times, Feb. 15, 1863.]

District Court, D. Connecticut. Feb. 10, 1863.

CARRIERS—CONTRACT TO RECEIVE—ADMIRALTY—ACTION IN REM.

This was a libel filed to recover the damages caused by the refusal to receive on board the vessel certain hogsheads of tobacco, which the libelants alleged the agents of the vessel had agreed to receive on board and carry as freight.

Kaufman, Frank & Wilcoxson, for libellants. Beebe, Dean & Donohue, for claimants.

SHIPMAN, District Judge. This libel must be dismissed. It is now well settled that in order to subject a vessel, through process in rem, for loss of goods agreed to be carried on freight, the goods must have been delivered and received on board. Dill v. The Bertram [Case No. 3,910]. The goods in this case were not so delivered and received on board, and no liability for their loss is thrown on the vessel. Whether there is a personal liability resting upon those in charge of the vessel in consequence of any failure of duty on their part need not be determined. That question is not before the court. Libel dismissed, with costs.

S.

Case No. 12,192.

SABBICH v. PRINCE.

[Cited in Baxter v. Leland, Case No. 1,124. Nowhere reported; opinion not now accessible.]

Case No. 12,193.

In re SABIN.

[9 N. B. R. (1874) 383.] [1]

District Court, E. D. Michigan.

BANKRUPTCY—SECURED CLAIM—LEAVE TO FORECLOSE—REASONS ASSIGNED—HOW PETITION VERIFIED.

1. In order to entitle a mortgagee to apply to the court for leave to foreclose his mortgage in another court, he must prove his debt in the bankruptcy court as a secured claim. The petition must allege this fact, the date and amount of the debt proved; the mortgaged property must be fully described, and it must be stated what other encumbrances there are upon the property, and, if there are any, they must be fully described. It must state the actual value of the mortgaged property; if the value is greater than the encumbrances it must be made to appear that the rights of the petitioner cannot be fully protected by a sale by the assignee under the bankruptcy proceedings.

2. The petition must be signed and duly verified by the same officers and in the same manner as oaths in other cases to be used in the courts of the United States. When administered by a notary public the signature and notarial seal of the notary constitute a sufficient authentication.

[This was a petition by Philo R. Sabin for leave to foreclose his mortgage in another court.]

LONGYEAR, District Judge. The petition falls far short of stating a case upon which the court can act, and the same cannot therefore be entertained. Petitions of this kind are frequently presented, and they are mostly in like manner defective, evincing a want of knowledge, on the part of practitioners in this court, of the requisites necessary in such cases, and of the grounds upon which the court will entertain application to relinquish the administration of mortgaged assets in its custody, under its own supervision and proceedings. I therefore avail myself of the present opportunity to lay down the general principles applicable in such cases:

In order to entitle a mortgagee to apply to the court for leave to foreclose his mortgage in another court, he must prove his debt in the bankruptcy court as a secured debt, as provided by the bankruptcy act. Phelps v. Sellick [Case No. 11,079], and cases there cited. The petition must allege this fact, and also the date of the proof and the amount of the debt as proved. The mortgage and the property covered by it must be fully described in the petition; and it must be stated whether there are other and what encumbrances upon such property, with a full description of such other encumbrances, if any. It must be made to appear that the estate has no ultimate interest in the mortgaged property; and to this end the petition must state the actual value of the mortgaged property, in order that the court may be informed whether there is or is not a surplus of value over the encumbrances. Phelps v. Sellick, supra.

In case the value of the property is greater than the encumbrances, it must be made to appear that the rights of the petitioner cannot be fully protected by a sale of the property by the assignee under the bankruptcy proceedings, either subject to the encumbrances, or free of the same, and the debt or debts paid out of the proceeds; and to this end the petition must state the facts from which such conclusion is claimed to follow. The petition must be signed and duly verified. The oath must be administered by the same officers and in the same manner as oaths in other cases to be used in the courts of the United States. When administered by a notary public the signature and notarial seal of the notary constitute a sufficient authentication. Act Cong. Sept. 16, 1850 (9 Stat. 458). When not accompanied by such seal the signature and official character of the notary must be authenticated in the usual manner.

Upon the presentation of a petition containing the foregoing requisites, the same will be entertained, and an order will be made requiring the assignee to show cause why the same should not be allowed; and thereupon such proceedings will be had and order made as the court shall deem best for the interests of all concerned. In cases where the mortgaged property shall have been legally conveyed by the bankrupt before the commencement of the bankruptcy proceedings, so that no right, claim or interest therein has passed to or is set up by the assignee in virtue of the bankruptcy proceedings, no application to the bankruptcy court for leave to foreclose is necessary.

In this instance the petition omits most of the foregoing requisites. It cannot, therefore, be entertained, and the clerk will return the same to the petitioner or his solicitor, together with a copy of this opinion.

[For subsequent proceedings in this litigation, see Cases Nos. 12,194 and 12,195.]

[1] [Reprinted by permission.]

Case No. 12,194.

In re SABIN.

[12 N. B. R. 142; 1 N. Y. Wkly. Dig. 101.] [1]

District Court, E. D. Michigan. 1875.

BANKRUPTCY—INCOMPLETE LIEN—STATE STATUTE.

A lien, authorized by a statute, on compliance with certain provisions concerning record and notice, is not complete until the statutory requisites are complied with; and if these are postponed until after the filing of a petition in bankruptcy, on which an adjudication follows, no lien will exist.

[For prior proceedings in this litigation, see Case No. 12,193.]

By HOVEY K. CLARKE, Register:

The register certifies—that on the 16th day of June, 1874, Johnson & Hunt tendered a deposition of Benjamin G. Johnson, one of the firm, as proof of debt due to them against the above named bankrupt's estate, and which they claimed was secured, by virtue of the statutes of the state of Michigan, by a mechanic's lien upon certain described premises belonging to said estate. The act under which the lien is claimed, after specifying the parties who may "have a lien," and the subjects to which and the conditions upon which it shall apply, declares (new compilation, section 6790) "such lien shall not attach, unless the said contractor or some one on his behalf shall make and file with the register of deeds of the county in which the lands shall lie a certificate containing a copy of the contract," etc., directing the particulars which the certificate must show, the manner of verification and recording it, to which is added a proviso "that no lien created by virtue of this act shall be binding upon the owner, part-owner, or lessee, until he shall have been notified of the filing of such lien with the register of deeds."

The proceedings under which the adjudication in bankruptcy in this case was had were commenced on the 20th day of October, 1873, at which time, as I understand the effect of the bankrupt act [of 1867 (14 Stat. 517)], and the ruling of this court, the title of the bankrupt to the premises on which the lien is claimed had passed to the assignee in bankruptcy. The proceedings to "attach" the lien under the statutes of Michigan were not commenced until the 23d day of October.

I am not referred to any fact, nor to any principle of law, which will subject the title acquired by the assignee to the lien claimed by the creditors in this case, and having declined to file the proof as a secured claim, I am requested by the claimants to certify the questions arising into court for determination by the district judge. I send herewith the proof of debt offered by the claimants.

LONGYEAR, District Judge. The foregoing conclusions and action of the register are approved.

[For subsequent proceedings in this litigation, see Case No. 12,195.]

[1] [Reprinted from 12 N. B. R. 142, by permission. 1 N. Y. Wkly. Dig. 101, contains only a partial report.]

Case No. 12,195.

In re SABIN.

[18 N. B. R. 151; 10 Chi. Leg. News, 364; 3 Cin. Law Bul. 625.] [1]

District Court, E. D. Michigan. 1878.

BANKRUPTCY — FUND IN HANDS OF ASSIGNEE — JURISDICTION—RESIDENCE—ADVERSE CLAIMS.

1. The district court has jurisdiction of a controversy as to the ownership of a fund in the hands or under the control of the assignee in bankruptcy, without regard to the residence of the parties in interest.

[Cited in Winter v. Swinburne, 8 Fed. 51.]

2. Where it appears that a suit to determine adverse claims as to the ownership of a fund in the hands of the bankrupt court is pending, the court will detain such fund until the rights of the parties thereto have been determined in such suit.

On the petition of James Armstrong and others, for the surrender to them of a dividend check, payable to their order. The petition set forth that petitioners were residents of the state of New York, and trustees of Edward W. Bancroft, for the benefit of his creditors, under an assignment bearing date December 29th, 1873; that on the ninth day of April, 1875, Scott, Lathrop and Hermance, predecessors of the petitioners, as trustees of the estate of the said Bancroft, proved a claim against the estate of the said bankrupt, in the sum of sixty-six thousand nine hundred and ninety-five dollars and ninety-eight cents, and that the same was allowed by the register, and placed upon the list of debts; that on the twenty-first day of May, 1875, a dividend was declared in the sum of five thousand eight hundred and twenty dollars and seventy cents, and a check therefor, payable to the order of said Scott, Lathrop and Hermance, as such trustees, was drawn by the assignee, countersigned by the register, and should have been delivered to them; that the assignee refuses to deliver said check to the petitioners, and improperly and wrongfully withholds the same, notwithstanding the request of petitioners to deliver it to them; that neither Scott, Lathrop, nor Hermance, nor the petitioners, have ever received this check, or the money represented thereby, but have forbidden the American National Bank from paying the same without their indorsement; that they have been subrogated to all the rights of the former trustees by an order made by the register, and are entitled to the said check and money represented thereby, and prayed that the said check may be declared

[1] [Reprinted from 18 N. B. R. 151, by permission. 3 Cin. Law Bul. 625, contains only a partial report.]

null and void, and a new check be issued by the assignee to the petitioners.

The answer of the assignee alleged the filing of a bill in equity by Thomas Cochran and William Barbour, as complainants, against Scott, Lathrop and Hermance and Bancroft, the petitioners, and the assignee as defendants. That said bill sets forth the filing of the proof of debt, February 9, 1874, by said Bancroft, against the estate of said Philo R. Sabin, for a claim of one hundred and seventy-two thousand three hundred and two dollars and seven cents. That on February 11, 1874, there was filed proof of another debt by Bancroft, in the sum of seventy-two thousand sixty-two dollars and fifty-eight cents, which last claim was derived by Bancroft by an assignment to him of the same from Peake, Opdyke & Co., of New York. That on November 28, 1873, in consideration of twenty-five thousand dollars paid him by Charles H. and George C. Scofield, Bancroft assigned to them any and all dividends which might be declared by the assignee, upon any claims which he had against the estate of said Sabin, or which might become payable to him by said assignee. That by said assignment, the amount which Scofield & Co. were to receive hereunder, was limited to twenty-five thousand dollars. That owing to defects in the first proof of debt filed by Bancroft, in failing to give proper credits for certain securities received by him, the said proof of debt was withdrawn, by order of the court, and leave granted to file an amended proof, and in accordance with such permission, Scofield & Co. caused a proof of debt to be perfected in the name of Scott, Lathrop and Hermance, trustees of Bancroft, for the seventy-five thousand seven hundred and fifty-two dollars which Scofield & Co. caused to be filed on April 9, 1875, in place of the one first above mentioned. That after the commencement of proceedings in bankruptcy, Bancroft became embarrassed and made a general assignment to Scott, Lathrop and Hermance; but inasmuch as the assignment to Scofield & Co. of Bancroft's claims against the estate was not an assignment of the demands themselves, but only of the right to receive dividends to a certain amount, Scofield & Co. could not formally make proof of the debt in their own name, but were obliged to have the same made in the name of the party having the legal title thereto; wherefore they did, at their own cost and charges, procure the above named amended proof to be filed. That in certain litigation over said claims, and the proof and allowance thereof, Scofield & Co. also paid out counsel fees, etc. That on June 1, 1875, a dividend was declared, and by means of a power of attorney executed by Bancroft prior to his assignment, Scofield & Co. received the dividend then payable on said claim derived from Peake, Opdyke & Co.; but as to the amount claimed for them by the trustees of Bancroft, the assignee drew a check for a dividend, payable to the order of said trustees, and delivered the same to the attorney of Scofield & Co., which was forwarded to them, and has been in their hands until their assignment to Cochran, McLean & Co., and in the latter's hands since that time. That the dividends on the claims have not paid thirteen thousand dollars, the amount remaining due. That afterwards the trustees resigned, and the petitioners in this matter were appointed in their place, and both sets of trustees have refused to indorse said check. That Scofield & Co. assigned their right to the same to Cochran, McLean & Co., who have since dissolved, and Cochran & Barbour have succeeded to their rights. That the bill prays that the dividend may be decreed to belong to the complainants. That neither Bancroft nor his trustees have any right to the dividends, except such as may be declared in excess of the twenty-five thousand dollars, and that Cochran & Barbour alone have the right to collect the same.

The assignee further alleges that the bill proceeds to pray for relief, and for a decree adjudging the dividend to the complainants, and that the check may be indorsed and delivered to them. He also avers generally his belief that the allegations of the bill are true, and that the complainants are entitled to the check; that in obedience to the order of the bankrupt court, made May 28, 1875, he delivered to Don M. Dickinson, Esq., representing Cochran, McLean & Co., a check for the amount of the dividend. He further avers that he is advised that the petitioners have entered their appearance in the chancery suit above mentioned, and that in delivering the check to said Dickinson, he acted in entire good faith, and in accordance with what he supposed and believed to be the truth upon the facts made known to him; that said chancery suit is now pending and undetermined, and an effort, as he is advised, will be had thereunder for a plenary hearing of the entire subject-matter, and that a more satisfactory determination can be had than in a summary proceeding of this character. That he believes the petitioners have no interest in the check aforesaid, or in the dividends which they represent.

[For prior proceedings in this litigation, see Cases Nos. 12,193 and 12,194.]

Henry M. Duffield, for petitioners.
Don M. Dickinson, contra.

BROWN, District Judge. This is a conflict between rival claimants to a fund still practically in the hands, or under the control of the assignee of Sabin, the petitioners being the trustees of Bancroft under a general assignment for the benefit of creditors, and the respondents, standing in the position of the assignee of such claim to the amount of twenty-five thousand dollars, by a special assign-

ment made before the general assignment to petitioners. This, in brief, is the relative position of these parties, and the question is whether the court will order the dividend paid over to the trustees of Bancroft under the general assignment, as holding the legal title thereto, or will detain it until the right of Cochran & Barbour to the same can be determined in the chancery suit, commenced by them against the assignee and the petitioners. This, of course, involves incidentally the jurisdiction of the district court, in equity, of a bill filed by citizens of New York, as complainants, against the assignee of Sabin and the petitioners, who are also citizens of New York, as defendants.

Whenever a contest arises with regard to the ownership of a fund in court, the practice of the English court of chancery is to make what is termed a "stop order" to detain the fund in favor of assignees or creditors, or other persons entitled thereto, as against any party to the suit, and, in case the right to the same is in dispute, to make such order operative until a bill can be filed to settle the right to the same. The practice is thus stated by Mr. Daniell (3 Daniell, Ch. Prac. 1797): "Any person, although not a party to the cause or proceeding in which the fund in court is standing, who has become entitled to any such fund, or to any share thereof, or to any lien or charge thereon, may apply to that branch of the court to which the cause or proceeding is attached, for an order to prevent the fund in question being paid out or otherwise dealt with, without notice to the applicant." Instances of such applications are not infrequent in the reports. Hobson v. Shearwood, 8 Beav. 486; Williams v. Symonds, 9 Beav. 523; Thorndike v. Hunt, 3 De Gex & J. 563; Wells v. Gibbs, 22 Beav. 204; Bethune v. Kennedy, 3 Beav. 462.

The case of Feistel v. King's College, 11 Beav. 254, bears a strong resemblance to the one under consideration. Feistel becoming entitled, by assignment, to a certain claim, filed a bill, obtained a fund in court and a decree for payment. Before payment to him under the decree, the assignees of one Lyon Samuel, a bankrupt, came into court and claimed that a part of the fund equitably belonged to the bankrupt, by an agreement made in 1844, and asked for an account to be taken. It was contended "that strangers to the cause had no right to intervene. That this was an attempt to alter the decree by petition, and that a stop order was not usually granted after the rights had been declared by decree." But the chancellor observed: "I quite agree that the decree cannot be altered upon petition, but here there is no attempt whatever to find fault with the decree. The case is simply this: there is a decree for payment to A B, who has assessed, or holds it in trust for C D. C D says: 'Do not part with the fund until I have an opportunity of taking proceedings to establish my right.' I think that a court has authority to do this, and has frequently exercised it." It was ordered that the fund be not paid out, and that applicant file a bill to enforce his demand within ten days. In Stuart v. Cockerell, L. R. 8 Eq. 607, the question arose between assignees in bankruptcy and an assignee of a dividend in court. The court entertained the application of the assignee of the dividend. See, also, In re Brown's Trust, L. R. 5 Eq. 88; Lister v. Tidd, L. R. 4 Eq. 462. In Thorndike v. Hunt, 3 De Gex & J. 563, Head Justice Turner held that the application to the court should be by a bill, when parties claim adversely. I see no reason to doubt that Cochran and Barbour have pursued the proper practice, in this regard, and that a stop order should be made, provided the court has jurisdiction of the bill filed by them against the assignee and petitioners.

Aside from the question of citizenship, I find no difficulty in supporting the jurisdiction of the district court in this case. By section 4972 the jurisdiction of the district courts as courts of bankruptcy extends—3d. To the ascertainment and liquidation of liens, and other specific claims upon the assets of the bankrupt. 4th. "To the adjustment of the various priorities and conflicting interests of all parties." 5th. "To the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties, and due distribution of the assets among all the creditors." 6th. "To all acts, matters and things to be done under, and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy."

More comprehensive language could scarcely be used to confer upon the district courts jurisdiction of all controversies of whatsoever name and nature, connected with the winding up and distribution of the estate of bankrupts. McLean v. Lafayette Bank [Case No. 8,885]. It is true the jurisdiction under this section is usually exercised in a summary manner; but I know of no objection to proceeding in any case by plenary suit, particularly where there are parties making adverse claims to any portion of the bankrupt's estate.

It is admitted that if this were an original suit, this court would not have jurisdiction, by reason of the parties in interest being citizens of the same state. The bill can only be supported upon the theory that it is auxiliary to the proceedings in the bankrupt court, and that cognizance of the case is necessary to prevent a failure of justice. I find no case directly in point, though there are a large number holding the general principle that when the new suit naturally grows out of, and is connected with the former one, jurisdiction may be entertained regardless of citizenship. For instance, if a judgment at law be recovered in the circuit court, the defendant may file a bill to enjoin the judgment against the representative of the original plaintiff, though he be a citizen of the same state as the defendant. Dunn v. Clarke, 8 Pet.

[33 U. S.] 1; Dunlap v. Stetson [Case No. 4,164]; St. Luke's Hospital v. Barclay [Id. 12,241]. So a creditor's bill, a cross-bill, and a bill of review, are simply continuations of the original suit, and may be sustained between citizens of the same state. Hatch v. Dorr [Id. 6,206]; Whyte v. Gibbes, 20 How. [61 U. S.] 541; Railroad Co. v. M'Chamberlain, 6 Wall. [73 U. S.] 748. In Freeman v. Howe [24 How. (65 U. S.) 450], a state court attempted to replevy from the marshal property seized by him upon a writ of attachment. The proceeding was held to be unauthorized, and the supreme court remarked by way of dictum, that the plaintiff in replevin might have obtained relief in a federal court, even if both parties were citizens of the same state. Such jurisdiction was actually exercised by the circuit court of Massachusetts, in Gibbs v. Usher [Case No. 5,387], when a bill was filed to restrain the use of the process of the court by the marshal, in a manner contrary to law. In Minnesota Co. v. St. Paul Co., 2 Wall. [69 U. S.] 609, it is said that when a bill in equity is necessary to have a construction of the orders, decrees, and acts made or done by a federal court, the bill is properly filed in such federal court, as distinguished from any state court, and it may be entertained in such federal court, even though the parties who are interested in having the construction made, would not, from want of proper citizenship, be entitled to proceed by original bill of any kind in a court of the United States.

If the property be in the hands of the receiver of the circuit court "nothing can be plainer than any litigation for its possession must take place in that court, without regard to the citizenship of the parties." The dictum in the case of Freeman v. Howe was subsequently quoted with approval in Buck v. Colbath, 3 Wall. [70 U. S.] 334. That a judgment of this court may be stayed, or impeached for fraud, by a bill in equity filed for that purpose, regardless of citizenship, was also declared in O'Brien Co. v. Brown [Case No. 10,399], and in St. Luke's Hospital v. Barclay [supra]. In Givin v. Bradlove, 2 How. [43 U. S.] 29, the marshal failed to pay over to a judgment creditor the money collected upon an execution. It was held, Mr. Justice Daniel dissenting, that the marshal might be proceeded against by the creditor, notwithstanding both parties were citizens of Mississippi. In Jones v. Andrews, 10 Wall. [17 U. S.] 327, a leading case, it was held, that a bill for an injunction to restrain proceedings in garnishment against the plaintiff's property, which proceedings had been instituted in the circuit court, and also praying the benefit of set-offs against the garnishing creditor's demand, was not an original suit, but a defensive and supplemental suit, in which the jurisdiction of the court did not depend upon the citizenship of the party, but upon the cognizance of the original case. In First Nat. Bank of Alexandria v. Turnbull, 16 Wall. [83 U. S.] 190, the sheriff of a state court had levied an execution upon property claimed to belong to citizens of other states; an issue was made in the state court to determine the title of the property, and before trial the plaintiffs in such issue removed the cause to the circuit court of the United States. The supreme court held the action to be merely auxiliary to the original action, and therefore not properly removed. See, also, Davis v. Gray, Id. 203; Sutherland v. Lake Superior Ship Canal & R. Co. [Case No. 13,643]. In Kellogg v. Russell [Id. 7,666], the marshal, acting as messenger of the district court in bankruptcy, seized certain property supposed to belong to the bankrupt, and transferred it to the assignee. A suit was brought in the state court against the marshal for such seizure, by the party who claimed the property. It was held that the marshal and the assignee might bring suit in the circuit court against the claimant and the bankrupt to set aside the transfer as fraudulent, notwithstanding the fact that the property was in possession of the assignee at the time the suit was brought, and that an injunction could be issued to restrain the further prosecution of the suit in the state court.

The principle underlying these cases is thus admirably stated by Judge MacDonald, of the district court of Indiana, in Conwell v. Whitewater Valley Canal Co. [Case No. 3,148]: "In a cause over which a national court has acquired jurisdiction solely by reason of the citizenship of the parties, if the rights and interests of third persons should become complicated with the litigation, either as to the original judgment, or any property in the custody of the court, or any abuse or misapplication of its process, and if no state court has power to guard and determine those rights and interests without a conflict of authority with the national court, the latter court will, from the necessity of the case, and to prevent a failure of justice, give such third persons a hearing, irrespective of their citizenship, so far as to protect their rights and interests relating to such judgment or property, and as to correct any abuse or misapplication of its process, and no further."

I cannot see that the case of Paine v. Caldwell [Case No. 10,674] has any bearing upon the one under consideration. In that case it was held that an assignee in bankruptcy, appointed by the district court of Maine, had no power to bring an action in that court against a citizen of Massachusetts, to recover a fraudulent preference obtained by him in the supreme court of Maine, which was paid within four months preceding the commencement of bankrupt proceedings. Service of the subpœna was made on the attorneys who acted for the defendant in obtaining this judgment, and it was argued that the respondent, having resorted to and availed himself of the courts of Maine to obtain this fraudulent judgment, continued subject to the authority of the courts of that state, including the district court in bankruptcy, and could not withdraw from the state with the fruits of his

judgment, without remaining amenable to the courts in any ulterior proceedings arising from his original suit; but as the defendant had never become a party to the bankruptcy proceedings, the court denied its jurisdiction. There can be no doubt of the correctness of this opinion.

So in Christmas v. Russell, 14 Wall. [81 U. S.] 69, the bill was dismissed on the ground that it was an original proceeding, and therefore not cognizable in the federal court. See, also, Markson v. Heany [Case No. 9,098]. The case under consideration grows directly out of a dispute as to the ownership of a fund in the hands of the bankrupt court. The defendants, the original trustees of Mr. Bancroft, having proved their debts, remain subject to the jurisdiction of this court without regard to their place of residence. In re Kyler [Id. 7,956]; Phelps v. Sellick [Id. 11,079]; Watson v. Citizens' Sav. Bank [Id. 17,279]. I am not bound to anticipate that the subpœna may not be served upon them; indeed it strikes me now as a proper case for substituted service on their attorneys. I regard the suit as auxiliary to the original proceedings in bankruptcy, and that the court has jurisdiction of the case.

The claim that the complainants in this bill have a complete and adequate remedy at law was touched upon at the argument of this motion, but I prefer to consider it when formally raised upon demurrer to the bill. As at present advised, I am unwilling to say that a suit at law in a court of another state is as complete a remedy as the detention of the fund here. Boyce v. Grundy, 3 Pet. [28 U. S.] 210; Watson v. Sutherland, 5 Wall. [72 U. S.] 74; Bunce v. Gallagher [Case No. 2,133]; U. S. v. Meyers [Id. 15,844]; Hunt v. Danforth [Id. 6,887].

The petition must be denied.

SABIN (CHASE v.). See Case No. 2,627.

Case No. 12,196.

SABIN v. CONNOR.

[Nowhere reported; opinion not now accessible.]

Case No. 12,197.

SABIN v. CONNOR.[1]

District Court, D. Nevada. March 30, 1871.

MECHANIC'S LIEN—NEVADA ACT—CONSTRUCTION—REPEAL—BANKRUPTCY—RIGHTS OF ASSIGNEE.

[1. It is the performance of the labor, and not the filing of the account and description, which gives the miner a lien under Act Nev. 1867 (St. 1867, p. 48), which provides that "all miners or other persons performing labor * * * shall have a lien upon said lode," and that the provisions of the mechanic's lien law of 1861 (St. 1861, p. 35), "respecting the mode of recording, securing and enforcing mechanics' liens, shall apply" thereto.]

[Cited in Re Hope Min. Co., Case No. 6,681.]

[2. A mechanic's lien exists from the time the labor is begun, under the Nevada mechanic's lien law of 1861, making the lien thereby given preferred from the time the work is commenced, and providing that every person wishing to avail himself of the benefits of the act shall within 60 days after the completion of the building, etc., file his account, etc.]

[3. An assignee in bankruptcy takes the realty of the bankrupt charged with a mechanic's lien theretofore arising for labor performed, and the same may thereafter be enforced by the filing of the account, etc., as provided by law.]

[4. An act (Nevada Mechanic's Lien Law 1871; Laws 1871, p. 123) re-enacting in substance prior laws (Acts 1861–67) with some modifications, and repealing those laws in direct terms, where it is plain that it was never intended to destroy rights acquired under the old laws, but simply to consolidate and extend them, will be considered as continuing such laws.]

[5. A law in existence at the time labor was performed, giving a right to a lien therefor, and an action to enforce the same, is a part of the contract; and the repeal of the law cannot affect the right to the lien or an action for its enforcement.]

[Cited in Re Hope Min. Co., Case No. 6,681.]

[This was a bill in equity by A. B. Sabin, assignee in bankruptcy of the Hope Mining Company, against Charles Connor.]

HILLYER, District Judge. The bill is filed to have the lien of the defendant, a miner, declared null and void. Defendant demurs to the bill for want of equity. The facts are, briefly, that the defendant worked in the mine of the bankrupt, the Hope Mining Company, from about March 31, 1870, to February 10, 1871. Creditors' petition against the bankrupt was filed February 11, 1871; adjudication, March 2d, and assignment, March 3d. The defendant filed his notice of lien, account, and description of the property sought to be charged with the lien, on the 1st day of March. On the 4th day of March, the legislature passed a mechanic's lien law, and repealed, without any saving of rights acquired before that time, all former laws. The questions raised upon the demurrer are: First. That filing the notice, account, and description are necessary to create the lien, and, this having been done after the commencement of the bankruptcy proceeding, the lien cannot avail. Second. That the act of March 4th, by repealing the law under which this lien (if any) accrued, without any saving clause, has destroyed all remedy for the enforcement thereof.

On the first point the argument for the plaintiff is that the lien is created by filing the account and description required, and not by performing the labor; that the laborer has no lien until the account is filed, and not having done this prior to the commencement of proceedings in bankruptcy, to which the title of the assignee relates, no lien can be charged on the bankrupt's estate after such commencement of proceedings. Section 1 of the act supplementary to the mechanic's lien law of 1861 (St. 1867, p. 48) provides: "All miners or other persons performing labor to the amount of twenty dollars or upwards, * * *

[1] [Not previously reported.]

for the owner * * * of any lode of gold or silver bearing quartz, * * * he or they shall have a lien upon said lode," etc. Section 2 provides that "all the provisions of the mechanic's lien law of 1861, respecting the mode of recording, securing and enforcing mechanics' liens, shall apply hereto." It seems plain from this language that it is the performance of the labor that gives or raises the lien in favor of the laborer, and for the mode of recording, securing and enforcing this lien already in existence, the provisions of another law are adopted.

Referring now to the lien law of 1861 (St. 1861, p. 35), section 2 declares that every person wishing to avail himself of the benefits of the act (that is, of the lien) shall within sixty days after the completion of the building, etc., file his account and a description of the property to be charged with such lien. Section 4 makes the lien a preferred one over every lien or incumbrance which shall have attached to the property subsequent to the time at which the work was commenced. Section 6 provides that no such lien shall bind the property longer than six months after filing the same; and section 7, that such liens may be enforced by suit in any court of competent jurisdiction. Now, it seems clear to my mind that the lien exists from the time the labor is begun, and that filing the account and description and bringing suit within the time prescribed are only the mode by which the laborer may avail himself of such lien.

Judge Blatchford, in Re Dey [Case No. 3,870], under the law of New Jersey, held that performing the labor did not create the lien. A careful reading of that law as quoted by the learned judge will show that there is a material difference between the language of that law and our own. The first section of the New Jersey law declares the debt shall be a lien, but the 12th section provides that no debt shall be a lien unless a claim is filed as provided in the act. The statute of New Jersey is not at hand, and it may well be that Judge Blatchford found enough, taking the whole law together to carry him to the conclusion that the legislature of the state did not intend a lien should exist until the claim was filed. On the other hand, the supreme court of Massachusetts, under the law of that state (not varying substantially from our own) as to creating the lien, held that the statute created the lien as soon as the labor is performed, and that the certificate necessary to keep the lien alive might be filed after the bankruptcy proceedings have been commenced. Clifton v. Foster [103 Mass. 233]. The Massachusetts law declared that, unless the certificate was filed within thirty days, the lien should be "dissolved." Our law says the party shall file the account, etc., in sixty days, if he wishes to avail himself of the lien. Both statutes create a lien when the labor is performed, but in one case it is dissolved, and in the other unavailable, unless the certificate is filed within the time prescribed. In California, under a law from which our own is copied, it has been held that the lien attached from the time of the delivery of the material (Tibbetts v. Moore, 23 Cal. 208), and that the lien is deemed to have accrued at the commencement of the work (McCrea v. Craig, Id. 522). The defendant, then, had a lien on the property described when the bankruptcy proceedings were commenced, and the assignee took the estate charged with this equity. The filing of the account and description was necessary to preserve his lien, and this cannot be considered as any unlawful interference with the rights of the assignee, or the authority of this court. Clifton v. Foster, supra.

Upon the second point: The act of March 4, 1871, re-enacts in substance the laws of 1861 and 1867, with some modifications, and it also repeals those laws in direct terms. It is plain that the legislature never intended to destroy rights acquired under the old laws, but simply to consolidate all the laws upon the subject of mechanics' liens, and to extend it to some objects not before included. Unless, therefore, the repealment have an effect contrary to this intention, by reason of the unqualified terms of the repealing statute, it will be entirely consonant with justice to carry out the evident intention. In a case in point the supreme court of the United States said: "The new act took effect upon the repeal of the old, and may more properly be said to be substituted in the place of and to continue in force, with modifications, the provisions of the original act, rather than to have abrogated and annulled them." Steamship Co. v. Joliffe, 2 Wall. [69 U. S.] 450. The legislature of Massachusetts in adopting the Revised Statutes, repealed all former laws; and, speaking of the effect of this repeal, the supreme court of that state said: "There was no moment in which the repealing act stood in force without being replaced by the corresponding provisions of the Revised Statutes, and the practical effect is a continuance, and not an abrogation, of the old law." Wright v. Oakley, 5 Metc. [Mass.] 400. The law of 1871, which went into effect the instant the law of 1861 was repealed, provides that suits upon the liens may be brought in any court of competent jurisdiction. This, upon the authorities cited, may fairly be considered as a continuance of the law of 1861, which contained precisely the same language. The lien holder has a remedy preserved to him still by the new law, and the case stands very differently than it would if the law of 1861 had been repealed without the enactment of a substitute therefor.

But, if the repeal could have the effect contended for by the plaintiff, it would, in my judgment, "impair the obligation" of the defendant's contract. The law in existence at the time the defendant performed his labor was a part of his contract. After the labor was done, he had, by virtue of that law, a lien for the amount due him, and before the repeal everything required of him had been

done, and nothing remained except an action to enforce the lien. "When a right has arisen upon a contract or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it or an action for its enforcement." [Steamship Co. v. Joliffe], 2 Wall. [69 U. S.] 450. "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made. These are necessarily referred to in all contracts, and forming a part of them, as the measure of the obligation to perform them by the one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning. When it becomes consummated, the law defines the right, compels one party to perform the thing contracted for, and gives the other the right to enforce the performance by the remedies then in force." McCracken v. Hayward, 2 How. [43 U. S.] 608. "Whatever belongs merely to the remedy may be altered, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself." Bronson v. Kenzie, 1 How. [42 U. S.] 311. "Whenever the legislature so far alter the remedy as to impede, destroy, change, or render the right scarcely worth pursuing, they necessarily impair the obligation of the contract." Smith v. Morse, 2 Cal. 524. "If the legislature can deprive a creditor of the right to reach property, —a right which existed at the time of the contract,—it is evident that nothing will remain of the obligation of the contract but an empty name." Quackenbush v. Danks, 1 Denio, 128. Nothing would be left to this defendant but an empty name if the legislature can take away by repeal the only remedy, it is claimed, he has to enforce his lien.

I consider that the defendant has a valid lien upon the property described, and that it can be enforced in this court. The demurrer is sustained, and the bill dismissed, with costs.

SABINE (AETNA INS. CO. v.). See Case No. 97.

SABINE, The (NOTT v.). See Case No. 10,366.

Case No. 12,198.

The SABIONCELLO.

[7 Ben. 357.] [1]

District Court, S. D. New York. June, 1874.

BILL OF LADING—DAMAGE TO CARGO—SEA PERILS—NEGLIGENT STOWAGE.

1. A ship, bound from Leith to New York, took on board coal, coal oil, railroad iron, and bales of paper stock. She gave for the paper stock a bill of lading, acknowledging the receipt of the bales in good condition, and excepting perils of the sea. She met with heavy weather on the voyage, and pumped oil, and, on the discharge of her cargo, some of the casks of oil were found to be empty, from leaks caused by the pressure on and breakage of the casks. The paper stock was found to be stained with oil and coal dust; and the consignees filed a libel against the ship to recover the damage: *Held*, that, the damage being shown to have occurred on board the vessel, from oil and coal forming part of the cargo, the burden lay on the ship to show that it arose from a peril excepted in the bill of lading.

[Cited in The Pharos, 9 Fed. 914; The Giglio v. The Britannia, 31 Fed. 432.]

2. Although the shippers of the paper stock knew that oil was to be taken by the vessel, they did not assume all risk of damage to it from the oil.

3. In view of the peculiar character of the coal oil, and the liability of injury to the paper stock, if the casks should leak, the ship was bound to use especial care in stowing the paper stock and the oil, with reference to each other;

[Cited in Mainwaring v. The Carrie Delap, 1 Fed. 879; The T. A. Goddard, 12 Fed. 177; The Maggie M., 30 Fed. 693; Hills v. Mackill, 36 Fed. 704; The Glamorganshire, 50 Fed. 840.]

4. Such care was not taken, and there was, therefore, negligence, for which the vessel was liable.

In admiralty.

John E. Parsons, for libellants.

Welcome R. Beebe, for claimants.

BLATCHFORD, District Judge. This is a suit for damage to bales of paper stock, consisting of shavings of paper, old books and pamphlets, and newspapers, brought by the ship Sabioncello, from Leith, Scotland, to New York, under a bill of lading acknowledging the receipt of the goods in good order and condition, and excepting the perils of the sea and the dangers of navigation. The bales were covered with bagging. The cargo consisted of 1,324 barrels of coal oil, 110 tons of coal, 150 tons of old railroad iron, and these bales of paper stock, 158 in number, covered by the said bill of lading. The libel alleges damage to the bales of paper stock, arising from their having been improperly stowed among, or under, or near the barrels of oil, and that, through want of proper care, the vessel permitted the paper stock to become stained by oil and coal dust, whereby it was damaged.

It is shown, that a large number of the bales of paper stock, when they came out of the vessel, at New York, were stained and saturated, in spots extending some distance inward, with the oil, which, in some instances, was wet and fresh, and that some of the bales were stained with coal dust. The evidence is satisfactory to show that the oil stains were made on board of the vessel. The bill of lading acknowledges the external good order of the bales, and there is no reliable evidence to show that any of the stains of oil or of coal dust were made before the bales of paper stock were put on

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

board of the vessel. The question, therefore, arises, whether the damage happened by the perils excepted in the bill of lading. The damage to the goods being shown to have occurred on board of the vessel, from oil and coal forming part of the cargo, the burden lies on the vessel to show that the damage arose from the peril excepted in the bill of lading. Clark v. Barnwell, 12 How. [53 U. S.] 272, 280. Accordingly, the answer sets up, that the vessel, on her voyage, encountered gales of wind and heavy seas, and was much strained, and her seams were opened, and she took in water; and that, owing to these causes, her cargo shifted, and her bulkheads were thrown down, and that the stains of oil on the bales of paper stock arose from the exceptions contained in the bill of lading, exempting the vessel from liability growing out of the dangers of the seas and the accidents of navigation. It is shown that the vessel, during the voyage, encountered three gales, and was on her beam ends more than once, and leaked some about her upper works during the gales; that, when the weather was rough, they pumped a great deal of oil; that, when the cargo came to be discharged, three of the oil casks were found to be entirely empty, and the most part of another one was out, and a good many were partly empty, and, after those which were partly empty were filled up, there were seventeen empty oil casks left; and that this escape of oil resulted from pressure on and breakage of the casks. But, even assuming that the evidence shows that the winds and the waves caused the oil casks to break, and the oil to escape, so that it reached and stained the bales of paper stock, it is competent for the libellants to show that such damage might have been avoided by the exercise of reasonable skill and attention on the part of the vessel. The libellants, in undertaking to show that, must establish negligence affirmatively. In considering that question, however, regard must be had to the character of the cargo. The vessel being up as a general ship, the libellants may not be at liberty to say that it was negligence to carry oil in the same vessel with paper stock; but yet the proposition set forth in the answer, that, as the shippers of the paper stock knew that oil was to be taken by the vessel, such shippers assumed all risk of damage to the paper stock from the oil, is not a sound one. The true rule is, that the peculiar character of the coal oil, its pungent odor, its volatile character, the damage certain to result to other cargo from contact with it, the liability of the casks containing it to break by pressure, from the working of the vessel, and let out the oil, demanded especial care in stowing the paper stock and the oil, with reference to each other. On the evidence, I find that such proper care was not exercised. The certificate of the surveyors at Leith, introduced in evidence by the claimants, certifying as to the manner in which the cargo was stowed at Leith, sets forth that the casks of oil were stowed in both ends of the ship. The ship had but one deck, but had cross beams in the hold, on which a second deck could be laid. The certificate states, that, in the forward end of the ship, the oil was stowed up to the cross beams, and that, above such oil, to the deck, bales of paper stock were stowed; that, in the after end of the ship, the oil was stowed up to the deck, with a platform on the cross beams, to prevent undue pressure; that part of the coal was stowed in the bottom amidships, with iron on top, and bales of paper stock on top of the iron, to the cross beams, and two tiers of iron above the cross beams, and these covered with boards and mats, and filled up with coal in the main hatchway. It is very clear from this, that, while some of the bales of paper stock were above the cross beams forward, others were under the cross beams amidships; and that there was oil under the cross beams, fore and aft, and oil above the cross beams aft. It is denied by the officers and crew of the vessel, in the face of this certificate, and in contradiction of evidence on the part of the libellants as to the stowage, as seen on the arrival of the vessel at New York, that there was any paper stock stowed below the cross beams. Wherever the paper stock and the oil were stowed, the former was stowed in too close proximity to the latter; and, even though the winds and the waves caused the oil casks to be broken, and the oil to be set free, so that it reached the bales of paper stock, yet the probability that such perils would occur required, in view of the nature of the oil and of the paper stock, that more care should have been used in stowing the paper stock, in reference to the oil, than was bestowed. Muddle v. Stride, 9 Car. & P. 380. There was, therefore, negligence, for which the vessel is liable. Let a decree be entered for the libellants, with a reference.

[For a hearing on exceptions to the commissioner's report, see Case No. 12,199.]

Case No. 12,199.

The SABIONCELLO.

[8 Ben. 90.] [1]

District Court, S. D. New York. April, 1875.

CARRIERS — DAMAGES — EXCEPTIONS TO REPORT — MARKET VALUE — EXPERTS.

1. Where goods were damaged on a ship by bad stowage, for which the ship was held liable: *Held*, that the amount of damage was properly arrived at by ascertaining the difference between the market value of the goods in their damaged state, and what would have been their market value if they had been sound.

[Cited in Morrison v. I. & V. Florio Steamship Co., 36 Fed. 572.]

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

2. The fact, that the owner of the goods, who was a paper manufacturer, sold the damaged goods, which were paper stock, at auction, and bought them in, and manufactured them into paper, and sold the paper at the same price at which he sold paper made from undamaged stock, did not change the rule.

[Cited in Morrison v. I. & V. Florio Steamship Co., 36 Fed. 572.]

3. The mere fact of the sale of the goods at auction, without proof of the price they brought, was no ground for disregarding the evidence of experts as to their value.

This case came up on exceptions to the commissioner's report of damages. The libel was filed to recover damages alleged to have been sustained by some paper stock shipped on the Sabioncello and consigned to the libellants, by reason of bad stowage. The case is reported in [Case No. 12,198]. On the reference the libellants called experts, who testified as to the market value of the stock in its damaged state and what it would have been worth if sound. It appeared that the libellants sold the damaged stock at public auction (for what price did not appear), bought it in themselves and manufactured it into paper, and sold the paper for the same price as paper manufactured from sound stock.

The commissioner reported that he found due the libellants as follows:

"The injury and damage to 117 bales of paper stock by reason of the oil staining and soaking into the same (in some bales more than others) is the difference between the sound value and the damaged value of the said 117 bales:

Sound value was.....	$4,953 69
Damaged value was.....	2,352 32
Leaving the damage sustained....	$2.601 37

"Proctors for claimants claim that no damage was sustained by libellants, because they purchased the 117 bales as damaged paper stock at auction, and used the same in manufacturing paper at their factory, and the evidence does not show that the product manufactured was sold for less than the usual price for the product manufactured from sound paper stock. The commissioner does not adopt this rule of damages; but holds that the market value of the 117 bales as damaged, deducted from the sound value, is the proper measure of damages."

To this report the claimants filed exceptions as follows: 1. The commissioner erred in finding that the libellants had sustained any damages. 2. The commissioner erred in not finding specially in his report upon what basis he placed his estimate of damages. 3. If the commissioner in fact based his report upon the estimate of the experts sworn, he erred, as he should not have taken those estimates as the basis of his report. 4. The testimony disclosing the fact that the goods were sold at public auction and purchased by the libellants, the price paid by them would afford a better basis as to damage, and the commissioner should have required that to be shown. 5. The evidence in the case having disclosed that there were two causes of damage—viz., bad stowage and the perils of the sea,—the commissioner erred in not finding specially by his report, how much damage was sustained from the one cause and how much from the other. 6. The uncontradicted evidence showing that the merchandise was manufactured by the libellants without any loss, the commissioner erred in not reporting that the libellants had sustained no damage. 7. The commissioner erred in making by his report a general finding for a gross amount, without giving the rules upon which it was based, and should have made his report special, upon the evidence offered.

Man & Parsons, for libellants.

Beebe, Wilcox & Hobbs, for claimants.

BLATCHFORD, District Judge. Exception 1 is overruled. Exception 2 is overruled, because the commissioner does find specially in his report upon what basis he places his estimate of damages, and states therein that the basis is the difference between the sound value and the damaged value of the 117 bales. Exception 3 is overruled, on the ground that, if the claimants desired some other basis than the estimate of the experts sworn, to be taken, they should have introduced evidence to establish such basis. Exception 4 is overruled, on the ground that it was open to the claimants to show the price paid by the libellants at auction for the damaged bales, the claimants having brought out, on cross-examination of the witness Sturges, the fact that the libellants bought the damaged bales at the auction, and the fact that the libellants' books contained an account of the sale, and not having pursued the inquiry further. Exception 5 is overruled, on the ground that the reference was to compute the amount of the damages sustained by the libellants as set forth in the libel, and the damages set forth in the libel are damages to the paper stock by its being stained by oil and coal dust in consequence of its having been badly stowed by the ship. Exception 6 is overruled, on the ground that the evidence does not show what the exception states. Exception 7 is overruled, on the ground that the report is not a general finding for a gross amount, and does give the rules on which it is based.

Case No. 12,200.

In re SACCHI.

[10 Blatchf. 29;[1] 4 Chi. Leg. News, 289; 6 N. B. R. 497; 43 How. Pr. 252.]

Circuit Court, E. D. New York. June 4, 1872.

BANKRUPTCY — MORTGAGE — FORECLOSURE — IN WHAT COURT—ASSIGNEE—COSTS.

1. In general, a mortgagee, holding a mortgage on real estate of a bankrupt, should not be

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

permitted to foreclose such mortgage in a state court.

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

2. The courts of the United States have ample power to protect all the rights of the mortgagee.

3. If necessary to secure the equitable rights of a mortgagee, the court in bankruptcy, as a court of equity, may have the rents separated from the general estate of the bankrupt, to be specially applied on the mortgage.

4. The mortgagee, if the validity of the mortgage is not denied, may invoke the summary power of the court, to sell the mortgaged premises; or, if such validity be denied, he may himself proceed, by bill, in the district or circuit court of the United States.

[Cited in Sutherland v. Lake Superior Ship Canal, Railroad & Iron Co., Case No. 13,643.]

5. Circumstances stated, in which proceedings on the mortgage, in the state court, may be allowed.

6. What commissions will not be allowed to an outgoing assignee in bankruptcy.

[In review of the action of the district court of the United States for the Eastern district of New York.

[In the matter of Ernest Sacchi, a bankrupt.]

Andrew C. Morris, for petitioner.

Tracy, Catlin & Van Cott, for assignee.

WOODRUFF, Circuit Judge. The present is an extraordinary appeal to the circuit court. The petitioner for the review of the decision of the district court seeks to remove the assignee in bankruptcy, on the ground of bad faith and mismanagement in his trust, and applies to this court to reverse the order denying his application, in the face of the express decision and opinion of the register in bankruptcy, and of the district judge,—In re Sacchi [Case No. 12,201],—upon the proofs herein, that the assignee would have been derelict in his duty if he had not done substantially what he did. Had it been possible for the assignee to obtain these opinions in advance, upon these same proofs, counsel would hardly have presumed to say that the assignee was guilty of official misconduct calling for his removal, because he acted in accordance with those opinions; and yet this court is asked to condemn him, as guilty of official misconduct, for doing what both the register and the district judge approve. As both of those officers had all the proofs before them which are before me, the claim, on this appeal, that those proofs show wilful misconduct, comes very little short of an attack upon the integrity of the tribunals by whom the proofs were deemed to justify the assignee. Certainly, I ought not to impute wilful misconduct and bad faith to the assignee, because he drew, from the circumstances before him, the conclusions which the register and the district judge approve.

The question here is, not whether, in fact, there was illegality in the mortgages, the foreclosure of which the assignee resisted, but whether such resistance was fraudulent, malicious or from unjust motive, and not in good faith, for the benefit of the general creditors. However I might conclude, that, upon the whole case, the mortgages were valid, that the holders had a right to an early foreclosure, and that delay, while the rents, if any, passed into the hands of the assignee, operated prejudicially to the holders of the mortgages, this would come far short of holding, that, under circumstances which, under the advice of counsel, were deemed suspicious—circumstances which the register and the district judge have declared suspicious—the assignee was guilty of misconduct calling for his removal, because he acted on the suspicion and sought to bring the inqury into the proper court for investigation.

But it is not true, that, had the mortgagees seen fit to assert their rights in the mode which was most appropriate, any injustice would have been done to them, nor would unnecessary delay have been permitted to occur, to their prejudice. The purpose and design of the bankrupt law is, to bring the property of the bankrupt into the bankrupt court for administration; and that court is furnished with all needful power to liquidate and settle all liens thereon; and, where there are adverse claims, which it is not appropriate or proper to litigate by summary inquiry and order, provision is made, by giving jurisdiction to the district court concurrently with the circuit court, for that purpose. It is true, that state courts have jurisdiction to entertain bills for the foreclosure of mortgages upon the real estate of a bankrupt, and may, no doubt, properly exercise that jurisdiction, if no objection is made. Special circumstances may sometimes exist, in which there is no reason for objection by the assignee, as, for example, where the mortgaged premises are, confessedly, of less value than the mortgage debt,—In re Iron Mountain Co. [Case No. 7,065]; and, where a foreclosure is pending, and the proceedings are nearly completed at the time the proceedings in bankruptcy are commenced, it may sometimes be convenient and economical to suffer the validity of the mortgage, and the amount due, to be settled in the state court; and, even then, whether to permit a sale by the decree of the state court, or not, will be in the discretion of the court in bankruptcy. In general, mortgagees should not be permitted to pursue the estate of the bankrupt in the state court, but should come to the tribunal which, under the federal laws, is charged with its administration. No injustice can result from this. If there be doubt whether the mortgaged premises are an adequate security for the payment of the debt and interest (when finally adjudged due upon a valid mortgage), the court will recognize the prior lien of the mortgage upon the land, and the equitable right of the mort-

gagee to have the rents separated from the general estate of the bankrupt, by a receivership or otherwise, and not permit them to be applied to the payment of other debts, or even to the expenses of the assignee, or his fees; and on the obvious ground that he is only entitled to the interest which the bankrupt has in the premises. Nor will any delay be permitted without just reference to the interests of all who are concerned, the mortgagee as well as other creditors. Nor do I think it doubtful, that, where no just cause for questioning the validity of the mortgage exists, the court in bankruptcy would entertain the summary petition of a mortgagee for the sale of the mortgaged premises, and direct the assignee to make the sale, either free of all liens, or subject to the mortgage, as might be deemed judicious. Nor, if the assignee disputed the validity of the mortgage, is it doubtful, that, under the jurisdiction declared in the second section of the bankrupt law, the mortgagee may proceed by bill, in either the district or circuit court. It is, therefore, an error, to insist that the mortgagee, if not permitted to proceed in the state court, is remediless, or that he must await the pleasure of the assignee, and suffer him to collect the rents and income of the mortgaged premises, leaving the interest unpaid.

I can see, I think, that it was either misapprehension on this subject, or a disregard of these views, that led the mortgagees in this case into the state court after the bankruptcy, and after the appointment of the assignee, and that the resistance to any withdrawal of the administration from the bankruptcy court, the proper tribunal, has resulted in bitter personal feeling, in great and unnecessary delay, and in large expenses and possible loss, which might have been easily avoided.

It further appears, that, pending the controversy, the petitioner for the review has become the sole creditor of the bankrupt, (other than two prior mortgagees of the premises in question,) and that no property of the bankrupt has come to the assignee, except the mortgaged premises. The bankrupt united in the petition for the substitution of an assignee to be named by the petitioner, as such sole creditor. The assignee, by his counsel, on the argument of this review, declared his entire assent to such change. There is, therefore, no reason why the prayer of the petitioner, to that extent, should not be granted, the present assignee being allowed, out of any moneys collected, his just and reasonable disbursements, and his commissions upon the moneys received and paid or to be paid. But, it would not be just or reasonable to allow him, as was suggested on the argument, commissions based upon the speculative idea, that, possibly, if continued in office, and permitted, for the mere purpose of earning commissions, to litigate the validity of the mortgages, against the will of all who are interested in that question, he might establish their invalidity. The bankrupt law was not enacted for the purpose of enabling assignees to earn fees by unnecessary litigation, when no interest of the parties to be affected thereby requires it, and when, on the contrary, every beneficial interest involved forbids it.

Had it, therefore, appeared, that, upon the conceded fact, that there are no general creditors but the petitioner, and, therefore, no interest is to be served by further contest respecting the mortgages, (the bankrupt himself uniting in the petition,) the district court had refused to substitute such other assignee, there might have been reason for asking this court to review the decision. But it appears, by the opinion of the district judge, that the petitioner declined to take such substitution unless it proceeded upon other grounds; and this was conceded on the argument in this court. This, however, does not appear by the order which was made and which is under review. It ought, I think, to have been made a part of the order, lest there should stand on the record an adjudication that the petitioner was not entitled, upon conceded facts, to have any part of the relief sought. The mere fact that the petitioner, under the advice of his counsel, thought himself entitled to a removal of the assignee on the other ground, ought, probably, not to deprive him of the opportunity to bring the matter to a close without further litigation.

Let an order be made, that the assignee convey the estate of the bankrupt to such assignee as the petitioner and the bankrupt may name, or, if they do not agree, to refer it to Register Winslow to receive the nomination of the petitioner, and, if he approve such nomination, then to the assignee so approved, but reserving to the present assignee all moneys collected by him, until his just allowance for his expenses and for his commissions thereon shall be settled in such manner as the district court may direct.

Case No. 12,201.

In re SACCHI.

[6 N. B. R 398;[1] 43 How. Pr. 250.]

District Court, E. D. New York. March 27, 1872.

BANKRUPTCY—REMOVAL OF ASSIGNEE—CAUSES ALLEGED.

A petition was filed against an assignee in bankruptcy to have him removed for the reason that he attacked two mortgages upon the bankrupt's property without sufficient cause, and that he delayed a sale of the property for the purpose of obtaining the rents in order to spend them in litigation. *Held*, that the assignee was fully justified in his attack upon the mortgages, and that there was no evidence to show that he ever collected any rents, or how

[1] [Reprinted from 6 N. B. R. 398, by permission.]

much he has spent in litigation. Petition dismissed, with costs to be paid out of the fund.

[In the matter of Ernest Sacchi, a bankrupt.]

A. C. Morris, for petitioner.
Tracy, Catlin & Van Coot, for assignees.

BENEDICT, District Judge. This case comes before the court upon a petition for the removal of an assignee, chosen by the creditors of the bankrupt. The petition is filed by Gustavus A. Sacchi, who, since the adjudication of bankruptcy, has become the sole creditor by a purchase of all the debts. If the petitioner had sought an order for the substitution of an assignee of his own choosing, in place of the one originally chosen by the creditors, upon the ground that he had become the sole creditor, I should have felt disposed to grant the order; but such an order is declined, and the retention of the present assignee made dependent upon the decision of the court on the charges of misconduct made against him in the petition.

The complaint against the assignee is that, without sufficient cause, he attacked two mortgages upon the bankrupt's property, known as the "Brooklyn market;" one of fifteen thousand dollars, held by Henry Mill; the other for thirty thousand dollars, held by the petitioner, and that he has delayed a sale of the property for the purpose of obtaining the rents in order to spend them in litigation. I have examined with some care the circumstance under which the assignee interposed a defense to the mortgages in question, and stopped the foreclosure proceedings taken in the state court to procure a sale of the property in question, and I find nothing to support a charge of misconduct against the assignee—but, on the contrary, much to justify his attack upon the mortgages. I am confirmed in this opinion by the fact that none of the creditors, except the petitioner, appear to have complained of the action of the assignee; that Mill, whose mortgage of fifteen thousand dollars was attacked for usury, does not appear here to complain, and that when the mortgage of thirty thousand dollars, held by the petitioner, who is the father of the bankrupt, was attacked, he bought up all the creditors interested to push the attack, at a loss of four thousand dollars, as he says. In view of all the circumstances, I am inclined to think that it would have been good ground for an application for the removal of the assignee if he had omitted to attack the mortgages. Nor is the method adopted by him, in his endeavor to release this property from the mortgages, open to criticism. The charge that he delayed the action of the mortgagees, in order to collect rents to spend in litigation, is wholly unsupported by the evidence. The proofs do not show that he ever collected any rents, or how much he has spent in litigation. The assignee admits that he has paid or is become liable for fees in the defense of the suits brought to foreclose the mortgages referred to, but no amount is stated or proved, and, so far as the evidence shows, there is no fact which will warrant the inference that the defense of the suits was interposed for any other reason except to protect the property from what he supposed to be illegal demands. It is true that the assignee might have applied sooner than he did for an order directing the sale of the property, but when he did apply the petitioner opposed, and, moreover, it is by no means clear that the property could, with due regard to the interest of the creditors, be sold earlier than even the present time. If the petitioner desired for his own interest to realize upon his mortgage, proper proceedings on his part in this court would have given him relief. Markson v. Heaney [Case No. 9,098]. The petitioner failed to apply to this, and took proceedings in the state tribunal, thus compelling the assignee to resort to injunctions in order to stop his proceedings there, and save the property for distribution among the creditors in this court, where its distribution properly belongs.

The prayer of the petitioner is therefore denied, with costs of the proceedings to be paid out of the fund.

[For a review of this case in the circuit court, see Case No. 12,200.]

SACHS (WEBB v.). See Case No. 17,325.

Case No. 12,202.

SACKET v. McDONNELL et al.

WHITE v. SAME.

[8 Biss. 394.] [1]

Circuit Court, N. D. Illinois. Jan., 1879.

ADVERSE POSSESSION — LIMITATIONS — SQUATTER CLAIMS—LOST AND UNRECORDED DEED.

1. In order to acquire a valid title to land by virtue of the statute of limitations, there must have been an open, adverse, and continuous possession for twenty years, under a claim of title to the property.

2. A squatter on land cannot avail himself of his occupancy, unless he has denied or impugned the title of the real owner. Mere permissive occupancy will not suffice.

3. If proven by parol, the evidence must be clear and convincing.

Two actions of ejectment [by George B. Sacket against Patrick McDonnell and others, and by M. M. White against the same defendants], to recover two pieces of land in N. W. ¼, N. W. ¼, section 36, township 39 north, range 13 east of third principal meridian, in Cook county, Illinois.

Herbert, Quick & Miller, Josiah H. Bissell, and Frank H. Collier, for plaintiffs.

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

Wm. C. Goudy and H. M. Shepard, for defendants.

BLODGETT, District Judge (charging jury). The plaintiffs have each shown a chain of conveyances from the United States to themselves respectively, showing title in fee simple in themselves to the parcels of land they claim. This will entitle plaintiffs to a verdict at your hands unless defendants have made out a better title under the law and the facts in the case. The defense is based upon the following section of the Illinois statute of limitations: "No person shall commence an action for the recovery of lands, nor make an entry thereon, unless within twenty years after the right to bring such action or make such entry first accrued, or within twenty years after he or those from, by, or under whom he claims, have been seized or possessed of the premises, except as hereinafter provided." Rev. St. Ill. c. 83, § 1.

To sustain this defense the defendants must show that they or their father under whom they claim, entered into possession under a claim of title adverse to that of the plaintiffs, or of those under whom they claim; that is, there must have been in some form an assertion on the part of the elder McDonnell, when he took possession, that he claimed title to this property as against all other titles. Kerr v. Hitt, 75 Ill. 51; McClellan v. Kellogg, 17 Ill. 498; Jackson v. Berner, 48 Ill. 203.

The statute of limitations invoked in this case does not give a person title who merely enters upon another man's land, and remains there twenty years, unless he claims a right of entry by virtue of his own title so as to give the owner an opportunity of trying titles with him. Thus, if a mere squatter, as they are popularly termed, (that is, a person who enters without color of right) enters upon your land, claiming no title as against you, but simply moves on to the land on the assumption that you have no immediate use for it and without impugning your title, and you acquiesce in his remaining there,—do not drive him off or sue him in ejectment or trespass,—he gets no title as against you by such permissive occupation. To allow one thus to become the owner of another man's land, would be an abuse of good nature and punish a charitable man, and would be a most unjust requital for the kindness the occupant received at the hands of the owner, and while the law favors statutes of repose which end litigation and strife by lapse of time, yet a party asserting a title like this set up by the defendants must by his proof bring himself clearly within the provisions of the law on which he relies. Record titles deduced by a connected chain of conveyances directly from the government, should not be set aside, except upon clear and satisfactory evidence.

* * * * * * * * * *

Defendants have introduced evidence tending to show that McDonnell had in his possession during some part of the time he occupied the land a deed from one Burke conveying the land in question along with other lands to McDonnell. This deed is not produced and the undisputed evidence is that it was not recorded. The rule is that when a deed has been destroyed or lost without the fault of the party who seeks to use it in evidence, parol evidence of its contents may be given. The defendant's testimony tends to show that there was such a deed in existence, and that after due search it cannot be found, and evidence has been given tending to show its contents. This deed was not recorded and the circumstance that an intelligent man who had a deed for a tract of land so valuable as this grew to be long before McDonnell died, and yet did not record it, may be considered as tending to raise a doubt as to whether the paper these young people saw in their father's possession was really a deed of the title to this land. While, as I have said, the law allows parol evidence of the contents of a lost or destroyed deed, the testimony should be of a very clear and convincing nature in order to justify a jury in acting upon it, and setting aside a valid record title upon such proof. The deed, if you are satisfied there was one, and that it conveyed the land in question is to be considered for two purposes: First—As a title adverse or hostile to the title claimed by plaintiff. For this purpose it was not necessary that the deed should have been recorded, if you are satisfied from the proof, that McDonnell when he entered, claimed title as against all others by virtue of this deed. Second—If the deed in question conveyed eighty acres or more of land, including this land in controversy, and McDonnell took possession of and occupied a part of the tract conveyed by the deed, claiming title to the whole, such occupation would be a good possession of the whole. But you must be satisfied that the deed actually purported to convey the fee of the land in controversy, and that in occupying a part, McDonnell claimed the whole. Burke himself may have had only a squatter's title. He may have made some improvements and conveyed to McDonnell simply his improvements for a few dollars, without pretending to convey anything but his squatter rights.

If, then, you are not satisfied from the proof that McDonnell entered upon this property claiming an adverse or hostile title to the plaintiff and had continued in the open and adverse possession for twenty years before the commencement of this suit, defying, as it were, the plaintiff's title and right to the property, then plaintiff will be entitled to recover, because the burden of proof is thrown on the defendants to make out their title as against the title of plaintiff. While, if you believe from the proof that defendants' father did enter upon the property, asserting a hostile title to plaintiff and continued his

possession twenty years before this suit, defendants must have a verdict at your hands. If the proof satisfies you that McDonnell entered as a mere squatter, intending to stay only so long as the lawful owner should permit, then plaintiff should have a verdict.

Verdict and judgment for plaintiff.

Case No. 12,203.

SACKETT v. DAVIS et al.

[3 McLean, 101.] [1]

Circuit Court, D. Michigan. Oct. Term, 1842.

NOTES—ACTION BY BEARER—ACT OF CONGRESS.

1. On a note payable to Thompson or bearer, suit may be brought in the name of the bearer.
2. He is not an assignee, and need not aver in the declaration the citizenship of Thompson.
3. Such a note is not within the act of congress, in regard to assigned instruments.

[This was an action at law by Sackett against Davis and Whitwood.]

Douglass & Walker, for plaintiff.

McLEAN, Circuit Judge. This action was brought upon four promissory notes, described as payable to William P. Thompson, or bearer. The declaration alleges the citizenship of the parties to the suit; but the citizenship of Thompson is not averred, and on this ground a question of jurisdiction is raised.

If the plaintiff had sued as assignee, this objection would be fatal, as it would be necessary to show that suit might have been brought in this court by the assignor, at the time of the assignment. But the plaintiff does not sue as assignee, but as holder of the notes. The defendant promised to pay to Thompson, or bearer. Now the promise is to pay to either, and either may bring the action in his own name. The property in the note passes by delivery. And in such a case nothing more need be shown by the person who sues, than that he is the holder of the notes, or the bearer. The case is not within the provision of the act of congress in relation to the assignment of notes, &c.

The ground taken is not sustainable. Judgment for the plaintiff.

SACKETT (MERRITT v.). See Case No. 9,484.

Case No. 12,204.

SACKETT'S HARBOR BANK v. BARRY et al.

[1 Bond, 154.] [2]

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

COURTS — ACT OF CONGRESS — RESIDENCE OF DEFENDANT—NOMINAL OR REAL PARTY TO SUIT.

Under section 9 of the act of congress of February 10, 1855 [10 Stat. 606], "to divide the state of Ohio into two judicial districts," which provides "that suits, not of a local nature, shall be brought in the court of the district where the defendant resides; but if there be more than one defendant, and they reside in different districts, the plaintiff may sue in either:' *Held*, that a defendant is one who is a real, and not merely a nominal party to the suit, and who has either directly or indirectly an interest adverse to the claim of the plaintiff, and may be in some way affected by the judgment or decree to be entered.

In equity.

H. Stanbery and Corwine & Hayes, for complainants.

Tilden & Curwen, for defendants.

OPINION OF THE COURT. This is a bill in chancery prosecuted in the names of the Sackett's Harbor Bank, a banking institution located at Buffalo, in the state of New York, and Jesse C. Dunn and others, citizens of said state, against Ebenezer F. Osborn and several other persons averred to be citizens of the state of Ohio. The complainants allege that they are stockholders in the Union Bank of Sandusky city, and sue in that character. They charge, in their bill, that a part of the defendants were directors and officers of said Union Bank; and that, in violation of their duty as such, and in fraud of the rights of the stockholders, at a time when the bank was profitably engaged in its business, they assigned all its effects in payment of its debts; thereby putting an end to the practical exercise of its franchises and functions as a bank, and greatly lessening the value of its stock. The prayer of the bill is for an account, and for a decree for the effects of the bank, so far as there are any; and also for damages and compensation for the wrongful assignment.

The defendants, Osborn, Freeland T. Barry, Sadler, Hubbard, Witherell, Johnson, and Bill, have filed a plea to the jurisdiction of this court, averring: (1) That Theodore Torrey, named as a defendant in the bill, was a citizen of Missouri, at the commencement of this suit, and still resides there; and that process has not been served on him. (2) That the said Osborn, Barry, and the other defendants above named, are citizens of the state of Ohio, and residents of the Northern district of said state, within which district they were severally served with process in this case. (3) That the only parties, defendants in this suit, who are residents and citizens of the Southern district of Ohio, are Ezekiel S. Haines, administrator of E. H. Haines, Samuel Marfield, and W. W. Bierce. who are stockholders in said Union Bank of Sandusky, and have no interest in the subject-matter of this suit, except as such stockholders; that their interests are identical with those of the complainants, and that this suit is brought for their benefit as well as for the complainants; and that no relief is sought from the said last-named defendants, who are merely colorable parties to this suit,

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

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

and made defendants for the purpose of giving jurisdiction to this court.

A general demurrer has been filed to this plea; and, on this demurrer, the only question requiring the consideration of the court is, whether, upon the case, as presented, this court has jurisdiction. In the decision of this question, the court will not regard with nice scrutiny the mode of its presentation. Mere technical exceptions to the manner in which the facts are pleaded will not avail, when it appears the court can not rightfully exercise jurisdiction in the case. This being ascertained, it is the plain duty of the court at once to dismiss the bill.

The demurrer admits the facts set forth in the plea. These facts, as applicable to the question under consideration, are that the three defendants above named, as residents and citizens of the Southern district of Ohio, are sued as stockholders in the Union Bank of Sandusky, and have precisely the same, and a common interest, with the complainants.

In the argument of the demurrer, several authorities were cited, applicable to the general question of the jurisdiction of the courts of the United States, in relation to the proper parties to give jurisdiction to those courts. No case was referred to involving the precise question now before the court. Its decision depends on the construction to be given to section 9 of the act of congress of February 10, 1855, "to divide the state of Ohio into two judicial districts." This section provides "that suits not of a local nature shall be brought in the court of the district where the defendant resides: but if there be more than one defendant, and they reside in different districts, the plaintiffs may sue in either."

It is insisted by the complainant's counsel, that this provision gives them the option of suing in either district, as a part of those named as defendants reside in the Southern district; and this presents the question who is a defendant within the meaning of the section of the statute before quoted? Having reference to the organization of the federal courts, and the grounds on which jurisdiction is conferred, so far as relates to the parties to a suit, there would seem to be no difficulty in finding an answer to the question. A defendant is one who is a real and not merely a nominal party to the suit, and who has, either directly or indirectly, an interest adverse to the claim of the plaintiff, and may be in some way affected by the judgment or decree to be entered.

Applying this test, it is clear the three defendants residing in the Southern district are not necessary or proper parties. The suit is brought by stockholders in the Union Bank of Sandusky, charging malfeasance and fraud in the directors and officers of that institution, and seeking, among other things, to make them individually liable for the injury alleged to have been sustained by the stockholders by their wrongful acts. There is no allegation that the stockholders residing in this district, or, indeed, any of the stockholders, have had any participation in these acts. Nothing is averred against them; nor does the bill ask for any decree against them; and it is beyond all controversy that their interests are identical with those of the complainants, and that upon a hearing on the merits, the bill, as to them, would be dismissed.

The conclusion, therefore, is obvious and irresistible, that the three persons residing in the Southern district are made parties in this suit for the mere purpose of conferring jurisdiction on this court.

I have no hesitancy, therefore, in deciding that the demurrer to the plea must be overruled. It would be little less than an act of usurpation in this court to exercise the jurisdiction claimed for it in this case; and the complainants must, therefore, be remitted to the court for the Northern district for the assertion of their rights. This will be attended with no injury to them, while it will greatly promote the convenience of the real defendants, by enabling them to contest the claim of the complainants in the district in which they reside, and in the vicinity of the place where the transactions in controversy have occurred.

The demurrer to the plea to the jurisdiction of the court is overruled.

SACKS (MANN v.). See Case No. 9,035.

SA-COO-DA-COT (UNITED STATES v.). See Case No. 16,212.

Case No. 12,205.

SACRIDER v. BROWN.

[3 McLean, 481.] [1]

Circuit Court, D. Michigan. Oct. Term, 1844.

NOTES—DEMAND—PROTEST—NOTARY'S CLERK.

1. The clerk of a notary, strictly, is not authorised to present a bill for payment.

[Cited in Browning v. Andrews, Case No. 2,040.]

2. In London and Liverpool, under a long established usage, the clerk makes a demand.

3. The protest must be made by the notary. If his name be used by the clerk, it is improper and cannot make the protest valid.

[Cited in Com. Bank of K. v. Barksdale, 36 Mo. 572.]

At law.

Mr. Hand, for plaintiff.

Mr. Collens, for defendant.

McLEAN, Circuit Judge. This action is brought against the defendant as an indorser of a foreign bill of exchange; and the only question raised in the case is, whether the

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

demand of payment and protest for non payment were legally made. The demand and protest were made by the clerk of the notary, using the name of the notary, but without his knowledge or direction.

In the case of Leftley v. Mills, 4 Term R. 175, Justice Buller said: "The next and the material part is the making of the demand; the party making the demand must have authority to receive the money. * * * It is material, too, to consider by whom the demand was made in this case; I am not satisfied that it was a proper demand, for it was only made by the banker's clerk. The demand of a foreign bill must be made by a notary public; to whom credit is given because he is a public officer."

Mr. Chitty, in his treatise on Bills (page 333), states the above and adds: "But the number of bills requiring presentment is frequently so great as to render a presentment by the notary himself impossible, and the constant practice is, for the clerk to make the presentment." "In case there be not any public notary at the place where the bill is dishonored, it is expressly provided by 9 & 10 Wms. III., c. 17, § 1, as to inland bills, that they may be protested for non payment by any substantial person at that place, in the presence of two or more witnesses." The statement by Mr. Chitty that a demand of payment must be made by a notary and not by his clerk, caused a correspondence between him and the association of notaries for Liverpool, which afterwards included the notaries of London. From this it appeared that it had long been the practice in London and Liverpool, for the clerks of notaries to present bills for acceptance or payment. While Mr. Chitty admitted the practice, he still adhered to his original statement, and in page 465, when considering whether the clerk of a notary can, under the above statute, make the demand of payment, he says it is doubtful, though such is the practice. Again, Mr. Chitty says (page 477): "The established custom of merchants requires, that a formal demand of payment shall be made within the business hours of the last day of grace, by a notary, being a known public officer of experience, and sworn to do his duty," &c. In a case in New York it has lately been decided that a notary's clerk cannot present a bill for payment, but that the presentment must be made by the notary. 3 Hill, 53; 4 Hill, 129.

Now if it were admitted that a notary's clerk may make a demand of payment, yet it is very clear that the clerk cannot make the protest. This must be done by the officer who acts under oath, and to whose official acts duly certified the law gives verity. The use of the name of the notary, without his consent or knowledge, was a gross impropriety and can add nothing to the protest. It was void when made, and time has not given it validity. We think the protest for non payment is not established by the evidence. Judgment for the defendants.

Case No. 12,206.

SADDLER et al. v. HUDSON et al.

[2 Curt. 6.] [1]

Circuit Court, D. Maine. Sept. Term, 1854.

COURTS—JURISDICTION—RESIDENCE.

This court has not jurisdiction to render a judgment in a patent cause, against a defendant not a resident in the district, and on whom no personal service of the writ has been made, and who has not appeared in the action, though an attachment was made of his property.

[Cited in Anderson v. Shaffer, 10 Fed. 267; Boston Electric Co. v. Electric Gaslighting Co., 23 Fed. 839; U. S. v. American Bell Telephone Co., 29 Fed. 44; Treadwell v. Seymour, 41 Fed. 581.]

[This was an action at law by Lincoln Saddler and others against Charles H. Hudson and others. Heard on motion to dismiss.]

F. O. J. Smith, for plaintiffs.

Shepley & Dana, contra.

CURTIS, Circuit Justice. This is a motion to dismiss an action at law for want of jurisdiction. It is an action on the case founded on letters patent. The defendants are described in the writ, as "citizens of the United States, and transacting business in the city of Portland, within said district of Maine." The marshal returns on the writ, that he has attached property of the defendants, and "I have summoned the within named defendants to appear at court, by giving to Stephen Berry, agent of said defendants, a summons in hand, the said defendants both residing out of the district of Maine." The question is whether this court has jurisdiction over the defendants, who are not inhabitants of this district, nor found therein, and upon whom personal service of the process has not been made.

This question was considered by the supreme court, in the case of Toland v. Sprague, 12 Pet. [37 U. S.] 329. It was there held, by a majority of the judges, that a process of foreign attachment, by which the property of a defendant was attached, by virtue of the state laws adopted by the process acts of 1789 (1 Stat. 93), and 1792 (1 Stat. 275), could not give the circuit court jurisdiction over a person not an inhabitant, and not found within the district. There is no sound distinction between a direct attachment and a foreign attachment. The rule announced by the court in that case, and repeated in Levy v. Fitzpatric, 15 Pet. [40 U. S.] 171, is that process of attachment against the property of a nonresident defendant, cannot issue from a circuit court, except as part of, or together with process to be served on his person; and that no judgment can be rendered against a nonresident defendant, who has not been personally served with process, unless he has entered an appearance. In Picquet v. Swan [Case No. 11,134], Mr. Justice Story had previously

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

held the same views, and this law has been followed since in numerous cases. The case of Allen v. Blunt [Id. 215], affords a strong illustration of the strictness with which the rule has been applied; that also was a suit on a letters patent.

The case must be dismissed for want of jurisdiction.

Case No. 12,207.

SADLER et al. v. MAXWELL.

[3 Blatchf. 134.] [1]

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

CUSTOMS DUTIES—PROTEST—REQUISITES.

1. Requisites of a protest against the imposition of duties, stated.

[See Bangs v. Maxwell, Case No. 841.]

2. The principles ruled in Goddard v. Maxwell [Case No. 5,492], as to protests, affirmed.

This was an action against [Hugh Maxwell] the collector of the port of New York, to recover back an excess of duties. The invoice, dated London, April 16th, 1851, was of one case of silk-worm gut, at 4s. per 1,000, amounting, with charges, to £83. 2s. 4d. The appraisers added £81. 15s. 11d. to the invoice prices, to make them equal to the market value in London. The plaintiffs [Joseph Sadler and others] demanded a reappraisement, and the merchant appraisers valued the goods at £399. The collector adopted the latter appraisement, and levied $714 duties, together with $10 appraisers' fees. The case turned upon the sufficiency of the protest, which was a printed one, the same in form as that in Goddard v. Maxwell [Case No. 5,492], with a written clause inserted, but no more definite and specific than the one employed in that case.

BETTS, District Judge. Upon the face of the papers, the appraisals are extraordinary and deserving of explanation, if one can be legally demanded. The official appraisers added 100 per cent. to the invoice, and the merchant appraisers 400 per cent., and there is no evidence in the case affording reasonable ground for either valuation. But the court can only dispose of the matter upon the objections taken to the legal sufficiency of the protest, the protest being the foundation of the plaintiffs' right to avoid the appraisal and recover back the excess of duties levied.

Upon the principles ruled in Goddard v. Maxwell [Case No. 5,492], the importer was bound to state, in his protest, in plain and direct terms, his objections to the additions made to his invoice; and it was not enough for him to use general expressions, which may include the objections he wishes to raise. The collecter is not only to be put on his guard by explicit notice, but, as this court has repeatedly decided, the notice must be so specific as to advise him exactly what the error is, to enable him to correct it, if he deems it proper to do so. The court cannot regard objections to the proceedings of the collector made on the argument, however logically deduced from the averments in the protest, when the protest failed to lay them before the collector in terms unmistakably clear and precise.

There is no undue rigor in strictly enforcing the statutory requirements in respect to protests, because the importer always knows what is the ground of his complaint. and is, therefore, in a condition to make the collector understand it as completely as he does himself; and a public officer ought to be protected, in his official acts, against being made liable to serious losses personally, through the intentional or accidental reserves or ambiguities of protests.

Judgment for defendant.

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

Case No. 12,208.

SADLER v. MORE.

[1 Cranch, C. C. 212.] [1]

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

WITNESS — ATTACHMENT FOR FEES — WHEN ALLOWED.

A witness cannot have an attachment for his fees until he has proved his attendance, obtained an order of court that the party should pay him, and produced evidence of the service of the order, and of the party's refusal to obey it.

Matthew Dulaney, a witness summoned by the defendant, applied for an attachment against him for not paying his fees for attending.

THE COURT were of opinion, that he must first prove his attendance, and get an order of court and serve it upon the defendant, and produce affidavit to that effect, and of the defendant's refusal to pay.

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

Case No. 12,209.

SADLIER et al. v. FALLEN et al.

[2 Curt. 190.] [2]

Circuit Court, D. Rhode Island. Nov., 1854.

IMPRISONMENT FOR DEBT — DISCHARGE BY STATE COURT—INSOLVENT LAWS.

1. A debtor, committed under mesne process, issuing out of this court, cannot be lawfully discharged by an order of a state court, made under an insolvent law of the state.

2. Whether this court could act under such insolvent law and discharge him, quære.

[This was an action at law by Dennis L. Sadlier and others against Lawrence Fallen and others.]

Mr. Jenckes, for plaintiffs.

Mr. Curry, contra.

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

CURTIS, Circuit Justice. This is an action of debt upon a bond for the prison limits. From the declaration and the third plea, which is demurred to, the following facts appear. At the November term, 1853, of this court, the plaintiffs recovered a judgment against Fallen. Before execution issued, his bail surrendered him; and he being in close jail, the defendants gave the bond declared on, in order that Fallen might have the benefit of the jail limits. The condition of the bond, as it appears upon oyer had, was in substance, that if Fallen, then a prisoner in jail at the suit of the plaintiff, should thenceforth continue a true prisoner within the limits of the prison, until he should be lawfully discharged, without committing any escape, then the bond was to be void. On the tenth day of December, 1853, up to which time he continued a true prisoner, Fallen filed his petition in the supreme court of Rhode Island, for the benefit of the insolvent law of that state; and that court ordered Fallen to be liberated from imprisonment under this process, on giving bond to return to jail agreeably to the provisions of that insolvent law. Fallen gave a bond, in compliance with that order of the supreme court, and thereupon the jailer discharged him from this imprisonment.

The insolvent law of Rhode Island, entitled, "An act for the relief of insolvent debtors" (Dig. 1844, p. 210), by its twenty-second section, provides, that one petitioning for the benefit of that law who shall be detained in jail upon a committal, or surrendered by his bail, shall be discharged from jail upon the presentation of his petition, and giving a bond with sureties to return to jail within ten days after the rising of the court at which the petition shall be finally disposed of, unless the petitioner shall receive his certificate of discharge.

The question is, whether this law of the state, and the action of the state court under it, were operative upon the mesne process issuing out of this court, under which Fallen was imprisoned. It is not argued that this law could operate proprio vigore, so as to discharge the defendant from imprisonment under process issuing from a court of the United States; but that congress, by the act of February 28, 1839 (5 Stat. 321), has adopted this law of the state, and made it applicable to this case. That act is in the following words,—"No person shall be imprisoned for debt in any state, on process issuing out of courts of the United States, where, by the laws of such state, imprisonment for debt has been abolished; and where, by the laws of the state imprisonment for debt shall be allowed under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the courts of the United States, and the same proceedings shall be had therein as are adopted in the courts of such state."

I find it impracticable to distinguish between the case at bar and the decision of the supreme court of the United States in Duncan v. Darst, 1 How. [42 U. S.] 301. In that case the debtor had been committed to jail on a ca. sa., and applied to a state judge and gave bond, pursuant to a law of the state, to appear at the next court of common pleas, and there take the benefit of the state insolvent law, and to surrender himself to jail if he failed to comply with all things necessary for his discharge. The law of Pennsylvania in that case was, in substance, the same as the law of Rhode Island in this case. Yet it was held that though the discharge from jail would have been lawful, if the debtor had been in under state process, it was not a lawful discharge from imprisonment under process of a court of the United States. That congress had not adopted, either by the process act of 1792 (1 Stat. 275), or of 1828 (4 Stat. 278), any state laws regulating process, which can be executed only by the state courts; and that so far as a state law is adopted, and does regulate or affect the process of the courts of the United States, it must take effect upon that process, through the action of the courts of the United States themselves, modifying their own process, or controlling its operation, so as to render it conformable to the laws of the state, and not by the action of state courts or judges upon that process, or upon its operation.

Now it is true this case arose before the act of 1839 was passed; but the process act of 1828 was quite as broad in its effects as the act of 1839, which is now in question; and the principles settled by the court in reference to the former, are entirely applicable to the latter statute. Indeed, the language of the act of 1839, points so clearly to the same intention, found by the court to have been entertained by congress in enacting the act of 1828, that it may properly be said to be a legislative declaration of the correctness of the principles of that decision. For its concluding words are, "and the same proceedings shall be had therein, as are adopted in the courts of such state." It is clear, therefore, that under this act, whatever was to be done to assimilate the effect of process out of the courts of the United States, to the effect of process out of the state courts, was to be done in and by the courts of the United States, acting on their own process, by changing its requirements, or controlling its effects upon motion, and not by orders or decrees of state courts operating thereon.

Nor is this inconsistent with the decisions of the supreme court of the United States in Beers v. Haughton, 9 Pet. [34 U. S.] 329; U. S. v. Knight, 14 Pet. [39 U. S.] 301. For though in those cases effect was given to the state laws, discharging from, and regulating imprisonment for debt, yet effect was not given to an order or decree of a state court operating upon, and controlling process out of the courts of the United States, as is attempted in this case. Here Fallen was im-

prisoned under mesne process issuing out of this court. He was released from that imprisonment by an order of the supreme court of Rhode Island. My opinion is, that congress has not made that order capable of controlling the precept of this court.

If Fallen had so far complied with the state law as to be entitled to go at large from all restraint, by surrender by his bail under state process, upon giving a bond with condition, it may be that on application to this court, it would have been our duty to grant him the same indulgence in respect to his imprisonment, under similar proceedings of this court. If this law of Rhode Island existed when the act of 1839 was passed, and was adopted thereby, it might be found practicable thus to give effect to it. Vide McCracken v. Hayward, 2 How. [43 U. S.] 608; Catherwood v. Gapete [Case No. 2,513]. But I do not express any opinion upon either of these points, because they do not exist in the case.

The result is, that the order of the state court did not justify the departure of Fallen from the prison limits, and the third plea is therefore bad on demurrer.

[See Case No. 12,210.]

Case No. 12,210.

SADLIER v. FALLEN.

[2 Curt. 579.] [1]

Circuit Court, D. Rhode Island. June, 1856.

COURTS—FEDERAL JURISDICTION — NON-RESIDENT —INHABITANT.

Though a circuit court of the United States would have jurisdiction over a suit against an inhabitant of the district, if personal service were made on him by leaving a copy of the writ at his last and usual place of abode, and under the same process a direct or foreign attachment was made, yet if no personal service whatever was made, there is no jurisdiction, in the case of an inhabitant, any more than of a non-resident.

[Cited in Perkins v. Hendryx, 40 Fed. 657; Crocker Nat. Bank v. Pagenstecher, 44 Fed. 706.]

[This was an action by Dennis L. Sadlier and others against Lawrence Fallen and others. See Case No. 12,209.]

CURTIS, Circuit Justice. This is a motion to dismiss for want of jurisdiction. The suit was commenced by a writ of capias and attachment, in the form prescribed by the statute law of Rhode Island. This writ empowers and requires the officer to arrest the body of the defendant, and for want of the body, to attach his goods and chattels. The statute also provides, that when any person shall reside, or be absent out of this state, or shall conceal himself therein, so that his body cannot be arrested, the personal estate of such absent or concealed person lodged or lying in the hands of his attorney, agent, factor, trustee, or debtor, shall be liable to be attached in the manner therein pointed out. A copy of the writ is to be served on the garnishee, and he is permitted to defend the suit. No provision is made for any personal service on the defendant; but if he shall not return into the state before the return day of the writ, the action is to be continued until the next term, and the defendant may answer to the action six days before such next term. If it appears that no effectual attachment has been made, the action is to be dismissed, and the person defending the suit is to recover his costs. Pub. Laws, p. 110, §§ 1, 3, 21, 25. In this case, the defendant is described in the writ as a citizen of the state of Rhode Island, and as of the city of Providence, in that state. The officer has returned that he could not find the body, and for want thereof, in obedience to the direction of the plaintiff, he had laid an attachment on his goods in the hands of Thomas Durfee. On this motion it must be taken to be true, that the defendant is a resident of Rhode Island, but either temporarily absent from or concealed in the state, at the time of the service of the writ. And the question is, whether the court has jurisdiction under the eleventh section of the judiciary act (2 Stat. 78). If the law of Rhode Island had made provision for notice to the defendant, in addition to the service of a copy of the writ on the garnishee, as is done in case of a direct attachment by the third section of this act, I should not find any difficulty in sustaining the jurisdiction. Because the defendant being an inhabitant of the state, is within the express words of the eleventh section of the judiciary act of 1789, and as to the particular mode of giving him notice, the court is referred, by the process act of 1792 (1 Stat. 276, § 2), to the law of the state. But no personal service whatever on the defendant, by any mode, is provided by the law of the state. Still, as the defendant was an inhabitant of the state, and either concealed therein, or only temporarily absent therefrom, its tribunals have jurisdiction over his person, ratione domicilii; and if the law of the state deems it sufficient notice to him to make it his duty to appear, to serve a copy of the writ upon any person with whom he has deposited goods or chattels, proceedings founded thereon, would, perhaps, be consistent with the principles of public law, and valid in other states. In Douglas v. Forrest, 4 Bing. 686, and Becquet v. MacCarthy, 2 Barn. & Adol. 951, the courts of common pleas and king's bench went even further than this. And though Lord Brougham says, in Don v. Lippmann, 5 Clark & F. 21, that the last-mentioned case has been supposed to go to the verge of the law, yet there is nothing in his judgment inconsistent with the exercise of jurisdiction over an inhabitant temporarily absent, provided notice be given to him as required by the law of the country having legislative authority over him. But I do not feel called on to come to any decided opinion concern-

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

ing the validity of these proceedings, tested by the rules of public law; because I am constrained, by the opinion of a majority of the supreme court, in Toland v. Sprague, 12 Pet. [37 U. S.] 330, to declare, that as no process against the person of the defendant was served, this court cannot render a judgment. See, also, Levy v. Fitzpatric, 15 Pet. [40 U. S.] 171. It is true, the precise question did not necessarily arise in that case, and four judges declined to express an opinion thereon. But sitting here at the circuit, I do not feel at liberty to disregard the deliberate opinion of a majority of the court, upon a point of jurisdiction, which is certainly attended with considerable difficulty. And I yield to it with less reluctance, because in this particular case, I understand there are proceedings in a state court which will doubtless secure the rights of the plaintiff; and, for the future, provision can be made by a rule, which the court has power to make under the section of the process act already cited, so far modifying the proceedings by foreign attachment, as to require a copy of the writ and of the officer's return of the attachment thereon, to be served on the defendant by leaving the same at his last and usual place of abode within the state. In my opinion the court, upon such process, so served, would have jurisdiction over an inhabitant of the state concealed or temporarily absent, provided some effectual attachment was made of his property. If no such attachment should be made, the proceeding would not be in conformity with the law. The suit must be dismissed for want of jurisdiction.

Case No. 12,211.

In re SAFE DEPOSIT & SAVINGS INST.

[7 N. B. R. 392.] [1]

District Court, N. D. New York. Oct. 12, 1872.

BANKRUPTCY — DENIAL OF ALLEGATIONS OF PETITIONING CREDITORS — EVIDENCE — POWER OF CONGRESS TO PASS BANKRUPT LAW — CONFLICT WITH STATE LAWS — PRIOR PROCEEDINGS IN STATE COURT.

1. When all the allegations of the petitioning creditors' petition are denied by the answer and amended answer, with the exception of the allegation of insolvency, which is admitted by the respondent, as shown by its inability to meet the legal demands of its creditors (depositors) an order of adjudication of bankruptcy will not be made until the acts of bankruptcy alleged, or one of them, shall be sustained by evidence taken upon the issue made by the petition and amended answer.

[Cited in Re Findlay, Case No. 4,789; Re Hathorn, Id. 6,214.]

2. The plenary and paramount power of congress to establish uniform laws on the subject of bankruptcies throughout the United States, is given in express terms by the constitution of the United States. It is therefore very clear that when congress has exercised the power thus conferred, their action must necessarily control or limit the exercise of the power of the United States over the same subject matter; and that whenever any state legislation, or any action of the state courts comes practically into actual conflict with the proper execution of the laws of congress, constitutionally passed under such grant of power, state legislation and the jurisdiction and action of the state courts must yield to the paramount authority of the national government. In re Bininger [Case No. 1,420]; also, In re Merchants' Ins. Co. [Id. 9,441]; In re Independent Ins. Co. [Cases Nos. 7,017 and 7,018].

[Cited in Re Dole, Case No. 3,965.]

3. Objection to the exercise of jurisdiction by bankruptcy court founded upon the prior proceedings in the state court against the corporation and its property, and the consequent taking of possession of all the alleged bankrupt's estate under such proceedings before the petition in this case was filed, and under which proceedings it is insisted that the state court has now the exclusive right to administer the estate of the alleged bankrupt, overruled.

HALL, District Judge. This is an application for an adjudication in bankruptcy against the above named corporation. The original petition was abandoned by the creditor who obtained and served the order to show cause against an adjudication; but other creditors appeared and prosecuted such petition, under section forty-two of the bankrupt act [of 1867 (14 Stat. 537)]. The respondent appeared and filed an answer; and the question of adjudication was very elaborately and ably argued upon the petition and answer.

The alleged act of bankruptcy, secondly charged in the original petition, is the only one relied upon by the learned counsel of the petitioners; it being conceded that the other act of bankruptcy charged is sufficiently denied. Whether the answer, by its express admissions and its failure to deny facts properly charged in the petition, sufficiently establishes the act of bankruptcy relied upon and entitles the petitioners to an adjudication, is the question now to be determined.

The petition charges, in substance, that the respondent, within six calendar months before the filing of the petition, and on or about the twelfth day of September eighteen hundred and seventy-two, being bankrupt and insolvent, or in contemplation of bankruptcy and insolvency, did procure and suffer its property to be taken on legal process, to wit, an order and proceedings in an action commenced and prosecuted in the supreme court of the state of New York, by and in the name of one Benjamin Allen, against the said corporation, while said Allen was one of its directors or trustees, acting in collusion with said corporation; that its said property was so taken on such legal process by Frank Hiscock and Timothy Parker, who were, in and by such order and proceedings in such action, appointed receivers of all the property and effects of the said corporation; that they as such receivers on and by virtue of such order and proceedings in said action had taken the said property into their possession; and that said corporation did consent to the same, and did thereby, by its officers, attorney and counsel, procure and suffer its said property to be so

[1] [Reprinted by permission.]

taken on such legal process by the said Frank Hiscock and Timothy Parker, as such receivers, at the city of Syracuse, and at the city of Utica, within this district, with the intent by such disposition of its said property to defeat or delay the operation of the bankrupt act.

A printed circular was pasted to the petition, and, by an express statement in the body of such petition, it was made a part thereof; but it was not alleged that such circular was issued or sanctioned by the respondent corporation. This circular purported to be signed by Levi Blakeslee, (who verified the amended answer in this case on the seventh inst., and stated in his affidavit of verification that he was then and since February, eighteen hundred and seventy-one, had been the cashier of said respondent corporation, at Utica, and as such had charge of its business and affairs there); by Patrick Lynch, (who also verified such amended answer on the same day and stated in his affidavit of verification that he had been the cashier and manager of the corporation respondent since April, eighteen hundred and seventy-one, at Syracuse, and as such had charge of the business of such corporation at Syracuse, and was still such cashier); by Benjamin Allen, and eleven others. The circular was dated September twelfth, eighteen hundred and seventy-two, and was addressed "to the depositors of the People's Safe Deposit and Savings Institution," and then proceeded as follows: "This institution has been unable to procure currency to meet all calls thus far by depositors, and receivers have been appointed by the court, of the property of the bank. Such an appointment was an absolute necessity, and, under the circumstances, we believe for the best interest of the depositors, and will avoid a sacrifice of securities." It then names the receivers; declares that the parties signing the circular have the fullest confidence in such receivers; that they have given complete security, &c., &c. There is, however, no allegation in the petition or admission in the answer that the persons whose names are affixed to the circular were the trustees or managers of the corporation, or that it was issued by the authority of the corporation or any of its officers or agents.

The amended answer of the respondent first "denies," (positively and not on information and belief) "that within six calendar months next preceding the date of the said petition, or ever, the said People's Safe Deposit and Savings Institution of the state of New York did commit an act or acts of bankruptcy within the meaning of the bankrupt act;" and since the forms of pleading sanctioned by the New York court of procedure have been prescribed by congress for use in the courts of the United States in this district, this general denial, standing alone, would probably put the petitioners to the proof of every fact charged which was necessary to constitute an act of bankruptcy. It is therefore necessary that the express admissions or other statements of the respondent's answer should be carefully considered, as they alone can be relied on to establish the acts of bankruptcy charged. It is true that upon the argument certain facts were assumed by both parties to be conceded or established, but no admission or concession was put in such form that it could be returned as the basis of judicial action if the decision of this court should be brought before the circuit court for review.

Looking, then, to the answer alone and giving its substance only, and only so much of it as is material to the question under discussion, it may be properly said that it also contains a further and more specific, but equally positive, denial of the particular act of bankruptcy relied upon in the argument. The third article of the answer fully denies that act of bankruptcy in direct and positive terms, in language very closely following the language of the allegations of the petition; and were it not for the subsequent admissions in the answer it might well be supposed that the existence of nearly all of the material facts alleged as together constituting such act of bankruptcy were severally and separately so denied. Nevertheless, the subsequent admissions in the answer, even when inconsistent with such denials, may be properly taken as conclusive against the respondent; and to such admissions our attention will be directed.

The corporate existence of the respondent, the exercise of its franchises in receiving deposits, making loans and investments upon bonds and other securities, in short the carrying on of business as a savings bank, with a very wide range in its transactions, is admitted; and it is then stated, in substance, that about the first day of September, eighteen hundred and seventy-two, and for some days thereafter false and malicious circulars were distributed to many of their depositors; that in consequence thereof a panic was created and a run on said savings bank was commenced and depositors in large numbers, continued from day to day to call for the amount of their deposits; that the corporation continued to pay their depositors at Utica until such payments had substantially exhausted the current funds on hand in that city, and, as the corporation could not raise current funds sufficient to pay off the depositors as they called for payment, without sacrificing the assets and securities owned by the corporation, it refused, at Utica, any further payment to its depositors; but continued at its office in Syracuse to pay off to its depositors their deposits, as they called for the same, until enjoined and restrained by the court as hereinafter mentioned; that the corporation, being unable to pay its depositors on demand without sacrificing its securities, on or about the eleventh day of September, eighteen hundred and seventy-two, an action was duly commenced in the supreme court of the state of New York, &c.; (substantially as set forth and for the purposes stated by the petition against the respondent;) that on the twelfth

of September, eighteen hundred and seventy-two, the injunction order and order appointing Hiscock & Parker receivers were made by the said supreme court; that they gave bonds as such receivers, and immediately and on that day, took possession of all the property, assets and effects of the said corporation, and were still in possession thereof. In short, the answer admits the most material allegations of the petition in respect to this act of bankruptcy except the allegation that the proceedings, and the taking of the property of the corporation, were procured or suffered by the corporation, or instituted, carried on and done in collusion with the corporation or its officers, and the allegation that the said proceedings and taking of property were procured or suffered by the corporation with intent to defeat the operation of the bankrupt act.

The proceedings in the suit in the supreme court are not fully set out in the petition, or in the answer; and the substance of all the material admissions in regard to such proceedings has, it is believed, been already stated. There is nothing in the answer to show that the corporation assented to the proceedings, or had any power to resist the appointment of the receivers at the time of their appointment or to resist their taking possession of the property of the corporation. Indeed, so far as this court is judicially informed, the order for the injunction and the order appointing the receivers may have been made before the actual service of process upon the corporation, and without the knowledge of or any notice to any officer of the respondent; and the petition against the corporation in these bankruptcy proceedings was filed within four days after the granting of such orders, and, for aught that appears, before any motion could have been made in opposition to the continuance or confirmation of such proceedings. So far as any act or omission of the corporation formed the grounds of such proceedings, there is, it is believed, an entire absence of any admission or statement favorable to the petitioners, with the single exception of the alleged and admitted insolvency of the corporation, as shown by its inability to meet the legal demands of its depositors; and therefore upon the whole case as now presented, it is not deemed proper to make an order of adjudication until the acts of bankruptcy alleged, or one of them, shall be sustained by evidence taken upon the issues made by the petition and amended answer.

It was strongly insisted upon the argument that no adjudication against the respondent could be made in this court, because the proceedings in the state court were commenced before any act of bankruptcy had been committed, and, therefore, before any proceedings could have been taken in this court under the bankrupt act; that the state court had thereby first obtained jurisdiction, and that under such circumstances the taking of the respondent's property under the orders of that court could not be an act of bankruptcy, nor could this court under proceedings in bankruptcy afterwards obtain jurisdiction of the person and property of the corporation and upon an adjudication in bankruptcy deprive the state court of its previously acquired and properly exercised jurisdiction, or take from the receivers or officers of the state court the property of the corporation and distribute it as provided for in the bankrupt act. In answer to this objection it was insisted that the insolvent laws of the states were superseded or suspended by the bankrupt act; that the proceedings in the state court were under an insolvent law of the state, and could not prevent or interfere with the proper execution of the bankrupt act.

It cannot be necessary to discuss, at length, the questions thus presented. The plenary and paramount power of congress to establish uniform laws on the subject of bankruptcies throughout the United States, is given in express terms by the constitution of the United States. It is therefore very clear that when congress has exercised the power thus conferred their action must necessarily control or limit the exercise of the power of the states over the same subject matter; and that whenever any state legislation, or any action of the state courts, comes practically into actual conflict with the proper execution of the laws of congress, constitutionally passed under such grant of power, state legislation and the jurisdiction and action of the state courts must yield to the paramount authority of the national government. This being so it is unnecessary in this case to decide that the insolvent laws of the states were superseded ipso facto by the bankrupt act. In respect to the particular act of bankruptcy relied on in this case, and the very able and elaborate argument of the respondent's counsel founded upon the allegation of state jurisdiction properly and previously acquired, it is not deemed necessary to do more than to refer to the clear and conclusive reasoning of the learned circuit judge who decided the Case of Bininger [Case No. 1,420]; but the cases referred to in Bump, Bankr. (5th Ed.) 520–522, show that the doctrines of that case have been generally, if not uniformly, recognized by the bankruptcy courts. In re Merchants' Ins. Co. [Case No. 9,441]; In re Independent Ins. Co. [Cases Nos. 7,017 and 7,018].

The motion for an adjudication upon, or notwithstanding, the respondent's answer is denied, and the objection to the exercise of jurisdiction by this court, founded upon the prior proceedings in the state court against the corporation and its property, and the consequent taking of possession of all the alleged bankrupt's estate under such proceedings, before the petition in this case was filed, and under which proceedings it is insisted that the state court has now the exclusive right to administer the estate of the alleged bankrupt, is overruled; and it is referred to C. Carskaddan, Esq., register in bankruptcy,

to take such testimony and proofs as may within the next two weeks be offered by either party, (on a proper notice of at least three days to the other,) upon the issues raised by such petitions and answer, with directions within five days after the expiration of such time or the closing of said proofs to report the same to this court. And this cause will be continued for the purpose of a hearing on said proofs and report to the eighth day of November next, at ten o'clock, a. m., at the United States court room in this city, if that shall be a court day, and if not until the next court day thereafter; and either party may then bring on said matter for argument upon such report and upon the question of adjudication or any other question then arising herein without further notice or order.

Case No. 12,212.

Ex parte SAFFORD et al.

In re DOWNING.

[2 Lowell; 563;[1] 15 N. B. R. 564; 15 Alb. Law J. 328; 24 Pittsb. Leg. J. 159.]

District Court, D. Massachusetts. April, 1877.

STATUTE OF FRAUDS — TITLE PASSED — ACTION AGAINST BUYER.

Leather was bought on a credit of sixty days, by parol, and the goods were weighed in the presence of the buyer, and the damaged hides rejected, and the shrinkage agreed on. They were then placed by themselves in the sellers' warehouse, marked with the buyer's name, and he was to send for them when he pleased. He made an arrangement with the sellers concerning the insurance of the goods. This course of dealing was usual between the parties. *Held*, the goods had been accepted and received by the buyer within the statute of frauds of Massachusetts, and the goods having been destroyed by fire in the sellers' warehouse, the sellers could prove for their price against the assets of the buyer in bankruptcy.

[J. O.] Safford & Co. offered for proof against the estate of [T.] Downing the price of certain lots of leather bought by him of them at sundry times under parol contracts. Some of the leather had not been taken away from the petitioners' store at the time of the great fire in Boston, on the night of Nov. 9–10, 1872. As to these lots, the question was whether they had been accepted and received by the bankrupt, within the statute of frauds of Massachusetts (Gen. St. c. 106, § 5). The parties had dealt together for a long time. The habit of Downing was to come to the warehouse of the petitioners nearly every day, and to buy entire "tannages," as the lots from a single tannery are called, on a credit of sixty days. The leather was always weighed in his presence; the damaged hides were thrown out, and shrinkage agreed on, and his leather was piled up by itself, and marked with his name; and he sent for it when he pleased. Some time before the fire Downing asked one of the petitioners whether the leather was insured, and was told that they had a general insurance, which was more than enough to cover any probable loss, and that he should have the benefit of any surplus, after they were indemnified on their own stock. He testified that he made this inquiry because he considered the leather to be his.

B. J. Hayes, for creditors.
B. Dean, for assignee.

LOWELL, District Judge. The single question in this case is whether the goods had been accepted and received by Downing, within the meaning of the statute of frauds. They had been weighed in his presence, and the precise hides agreed on, and the shrinkage ascertained. At his request, though whether in his presence or not is not quite clear, they had been set apart from all other goods, and marked with his name; and he was to take them when he pleased to send his carrier for them. No delivery could be more complete, unless they had come into his personal possession; and I do not understand it to be denied that, at common law, the property would have passed. Undoubtedly the decisions upon the statute have introduced some refinements not easily reconciled with common sense, by which the property in goods is held to have passed and not to have passed at the same time; and they are said to have been delivered by the buyer before they are received by the seller. I have no intention of departing from those decisions; but this case steers wide of them.

The latest authorities make the distinction between accepting goods and receiving them to be this: Goods may be constructively delivered, as to a carrier or warehouseman, and yet not accepted, if, for instance, they were ordered by word of mouth, or bought by sample; and the carrier or warehouseman is not, as such, without special appointment, the agent of the buyer to ascertain that the goods conform to the order or to the sample; and, therefore, in such a case, the goods may be received and yet not accepted. It was formerly said that the goods must be received, and an opportunity be given to examine them, before they could be accepted; but in a very elaborate opinion of the queen's bench this doctrine was denied to be sound, and a defendant was held bound who had exercised acts of ownership over the goods, though he had not precluded himself from objecting that they did not conform to the contract; or, in other words, there might be an acceptance to satisfy the statute, and let in proof of the contract, which yet would not be an acceptance under the contract itself, when proved. Morton v. Tibbett, 15 Q. B. 428. In Cusack v. Robinson, 1 Best & S. 299, Blackburn, J., says, "Acceptance may be before receipt;"

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

and it was there decided that specific goods, agreed on and afterwards sent to a warehouse named by the vendee, had been both accepted and received by him. Whether the courts of Massachusetts would assent to the full extent of the law laid down in Morton v. Tibbett, ubi supra, I do not know; but I take it to be clear that, by the law of this state, and of the United States generally, as well as of England, if specific goods are fully agreed on and bought, and afterwards sent to a warehouseman or carrier designated by the vendee, the statute is satisfied. Ullman v. Barnard, 7 Gray, 554; Cross v. O'Donnell, 44 N. Y. 661; Howes v. Ball, 7 Barn. & C. 481; Dodsley v. Varley, 12 Adol. & E. 632.

There is no doubt that the vendor may himself be the warehouseman or bailee. This was decided in the leading case of Elmore v. Stone, 1 Taunt. 458. I have seen it stated that this case has been overruled; but that is a mistake. It was fully approved by Shaw, C. J., who states the exact case, though he does not cite it by name, in Arnold v. Delano, 4 Cush. 40. It was cited and followed in Beaumont v. Brengeri, 5 C. B. 301, and Marvin v. Wallis, 6 El. & Bl. 726, and its doctrine reaffirmed in Cusack v. Robinson, ubi supra. See Benj. Sales (2d Am. Ed.) 136. It has often been decided that there can be no sufficient receipt by the vendee, so long as the vendor holds as vendor, and insists on his lien for the price. The reason is given by Abbott, C. J., in an early case, that if the vendee had actually received the goods, it would necessarily follow that he could maintain trover for them, and the vendor would be left to his action for the price. Baldey v. Parker, 2 Barn. & C. 37. In this case there is no doubt that the vendor's lien was gone; for the vendee usually removed the goods within the sixty days for which credit was given, and had an undoubted right so to do.

If the decision were to turn merely on the conditional contract of insurance made by the vendee, that would be sufficient evidence to warrant a jury in finding a receipt of the goods. The cases are many where a sale, or a mere offer to sell, or a request by the vendee to the vendor to sell on his account, and various other acts of ownership, have been held sufficient for that purpose, though the goods remained in the actual possession of the vendor, or of a middleman. Chaplin v. Rogers, 1 East, 192; Blenkinsop v. Clayton, 7 Taunt. 597; Marvin v. Wallis, 6 El. & Bl. 726; Castle v. Sworder, 6 Hurl. & N. 828.

It may be said that a resale would be a fraud on the vendor, if the goods are not the property of the vendee, and that for this reason the latter is estopped; but the true reason is, that such an act is of itself evidence of acceptance and receipt; and a contract of insurance is fully as significant in this respect.

It was argued that, in a certain sense, the lien of the vendor was not gone, because, if the vendee had become insolvent, it might have revived under the decision in Arnold v. Delano, 4 Cush. 33, and similar cases; and it was added that, so long as the right of stoppage in transitu was not lost, there could be no receipt by the vendee. The law is so given in Story, Sales, § 276; but there are many decisions to the contrary of that statement, and none in its favor that I have seen. In Bushel v. Wheeler, 15 Q. B. 442, note, Coleridge, J., said of the right to stop in transitu, "That is a bad test: there might be stoppage in transitu, though there had been a note in writing." Lord Denman, C. J., made a similar remark in delivering the opinion of the court; and the decision covers the point. So are Cross v. O'Donnell, 44 N. Y. 661; Castle v. Sworder, 6 Hurl. & N. 828; and in point of principle the following cases, as well as those above cited, in which delivery of accepted goods to a carrier were held to have been received by the vendee within the statute, though in most of them the right of stoppage might have been exercised if the vendee had become insolvent: Dodsley v. Varley, 12 Adol. & E. 632; Howes v. Ball, 7 Barn. & C. 484; Pinkham v. Mattox, 53 N. H. 600. The revival of the vendor's lien in case of insolvency is an equitable doctrine very difficult to explain at common law; but it arises only upon bankruptcy or insolvency, and does not then revest the property.

Lastly, it is said that certain late cases in Massachusetts are opposed to the plaintiff's argument: Knight v. Mann, 118 Mass. 143; s. c., 120 Mass. 219; Safford v. McDonough, Id. 290. But they are not like this case. In the former, the goods were not taken out and weighed in the presence of the buyer; and he had done no act of acceptance except to authorize them to be set apart, and to say that he would send for them. The court said that he had still the right of examination and rejection, which it is clear that the bankrupt in this case had not. In the latter case, the plaintiffs were holding the goods as unpaid vendors, and had refused to deliver them excepting for cash or a satisfactory note. This case is more like Ross v. Welch, 11 Gray, 235, where the defendant bought growing cabbages, and received constructive delivery of them on the ground. It is true a few were actually delivered; but that fact is not noticed in the judgment of the court, who say, "An agreement to sell an article ready to be delivered and taken away, though still standing in the soil, unrevoked, is sufficient delivery to give effect to the sale between the parties."

It is not necessary to go so far in this case; because the hides were delivered in an unequivocal manner, and put by themselves, and insured for the buyer, though it happened, through most unforeseen circumstances, that the insurance was inadequate. With all the refinements to which I have before alluded, I know of no case, either in

England or the United States, in which such circumstances have not been considered evidence for the jury to find both acceptance and receipt to satisfy the statute; and, as a juryman, I have no hesitation in saying that they were so accepted and received, because this was the undoubted intent and understanding of both parties. Debt admitted to proof.

Case No. 12,213.

SAFFORD et al. v. BURGESS.

[16 N. B. R. 402.] [1]

Circuit Court, D. Vermont. Oct. 2, 1877.

BANKRUPTCY — TITLE OF ASSIGNEE — STATUTE OF FRAUDS.

1. The assignee takes the property of the bankrupt as an attaching creditor would take it, subject to all legal claims upon it.

2. The bankrupt made a contract with S. & Co. to manufacture hides into leather for them, the hides to be purchased with the proceeds of drafts upon S. & Co.; the drafts were discounted at a bank, and the proceeds thereof placed to the credit of the bankrupt in his general account; the hides purchased were paid for by checks upon such account; *Held*, that the hides were purchased for S. & Co. and became their property; that it is not necessary that the agent should pay out the identical bank-notes he receives from his principal.

3. Where some of the hides were purchased with the proceeds of drafts which S. & Co. refused to accept, their title to such hides is not affected by such fact, but they become debtors to the estate or to the bank advancing the money.

4. The title to the leather, when completed, passes under the arrangement for the purchase of the hides.

[Appeal from the district court of the United States for the district of Vermont.

[This was a proceeding by James O. Safford & Co. against John J. Burgess, assignee of R. S. Read.]

Before HUNT, Circuit Justice, and WHEELER, District Judge.

HUNT, Circuit Justice. The findings of fact by Judge Shipman, and his conclusions of law in this case, are so satisfactory in their general character as to require little to be said in relation to them. The agreement under which the hides were tanned was a common one, and vested the title to the property purchased in Safford & Co. The assignee takes the property of the bankrupt, as an attaching creditor would take it, that is, subject to all legal claims upon it. The case is not that of a bona fide purchaser, whose rights are in many cases superior to those of any ordinary creditor.

Two suggestions are made by the appellants, which should be considered.

1. The money obtained from Safford & Co. by Read was not identically paid to the persons from whom he purchased skins. He obtained funds from Safford & Co., from time to time, by his drafts upon them, which drafts were discounted by a bank and the proceeds placed to the credit of Read. His account at this bank was a general one. All moneys from every source coming to the bank on his account were placed to his credit, and his checks for the purchase of skins not only, but for any other purpose, were charged against him. The appellant then orally argues that, upon this state of facts, the skins were not purchased with the funds of Safford & Co., and that therefore the case is not within the many authorities cited, which hold that "the person for whom and with whose funds property is purchased becomes the owner of it, although the purchase is made by an agent in his own name and without disclosing his principal." Ridout v. Burton, 27 Vt. 383; Hall v. Williams, Id. 405. This argument is not sound. The cases cited show that the title vests in the principal when the agent advances his own funds, provided the purchase is made under and in execution of the authority. It is not necessary that the agent should pay out the identical bank-notes he received from his principal. If Read had received from Safford & Co. five one hundred dollar bills, and on making a purchase had paid in whole or in part other bank-bills which he had in his pocket-book, the question would have been not as to the identity of the currency, but was the act in execution of the authority given. Any considerable business must be done by the means of bank-checks. No man now carries large amounts on his person to pay for purchases made, and the fact that Read's payments were made by or by means of bank-checks, upon a fund made up of all his credits, will not make him any less the disburser of Safford's funds in the purchases actually made on their account. The evidence is conclusive that all the property in question was purchased for and applied in the performance of the contract with Safford & Co.

2. It is insisted also by the appellant that a portion of the skins were purchased by Read with the proceeds of drafts on Safford & Co., which that firm refused to accept. As to these it is claimed that no title vested in Safford & Co. It is far from certain that the statement of facts here made is sustained by the evidence. The sum of four thousand five hundred dollars was paid by Safford & Co., and it is difficult to find the evidence that a larger amount was invested in the purchase of skins under the contract. But if the fact be assumed, does it place the assignee in any better position? If two hundred and twenty-five dollars were thus expended in the purchase, as is insisted, it was an expenditure under and in performance of the contract, and it may well be argued that Safford & Co. are debtors to the estate to that amount. It may well be argued also, either that Safford & Co. are indebted to the bank advancing this money, upon a promise to accept the drafts, to be

[1] [Reprinted by permission.]

implied from the circumstances, or if not, that the bank can claim an equitable lien upon the property thus purchased with their funds. But the assignee does not represent this claim. It is a specific claim to be asserted by the specific party in whom it is vested, and not in one who is a general representative of the bankrupt, or of the bankrupt and his creditors. Whenever the bank with whose funds the property was alleged to have been purchased shall make the claim, it will be proper that all the facts connected with it, and the equities upon both sides, be presented and considered. It cannot be done upon this record or upon the facts before us, and does not aid the title of the assignee to the leather in question.

3. It is argued further that the title to the leather, when completed, does not pass under the arrangement for the purchase of skins. That if one takes timber to a carriage-maker, saying that he wishes it to be built into a carriage, retaining the title in himself, and the carriage-maker adds the iron, the leather, and the paint to the timber, thereby completing a carriage, that this does not give the title to the carriage to the owner of the timber delivered. When that case shall be presented, it will be in time to decide it. The one before us is not identical or similar to it. The substance, the body, and identity of the skins is that of the leather. Its tendency to decay is arrested; it is hardened, and enlarged, but remains the same substance. A better analogy would be that of logs converted into planed lumber, steamed lumber, or lumber impregnated with chemical substances for its preservation. See the Vermont cases, supra; Marsh v. Titus, Thomp. & C. 29. See, also, Silsbury v. McCoon, 3 N. Y. (3 Comst.) 379, and the learned argument of Mr. Nicholas Hill. The rule there established is this: If a chattel wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs to the original owner, even as against a bona fide purchaser. When it is converted into a thing of a different species, as wheat into bread, olives into oil, grapes into wine, corn into whiskey, or wool into garments, it may be reclaimed by the owner except as against an innocent purchaser.

The decree must be affirmed.

Case No. 12,214.

SAGE v. TAUSZKY.

[6 Cent. Law J. 7;[1] 24 Int. Rev. Rec. 12; 2 Cin. Law Bul. 330.]

Circuit Court, S. D. Ohio. Dec., 1877.

FEDERAL COURTS—FOLLOWING STATE PRACTICE—DEPOSITION.

The act of congress of June, 1872 (Rev. St. § 914 [17 Stat. 197]), which requires that the practice, pleadings, forms, and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts of the United States, shall conform, as nearly as may be, to the practice, pleadings, forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, has no application to the manner of taking depositions to be used in the federal courts. The requirements which must be followed in taking depositions to be used as evidence in the federal courts are prescribed by sections 863–865, Rev. St., which have not been repealed by section 914.

[Quoted in brief in Re Hawkins, 13 Sup. Ct. 515.]

The case came on to be heard on motion of counsel for plaintiff, to suppress the depositions of Oppenheimer et al., taken on behalf of defendant in Chicago, Ill. The grounds of the motion were as follows: 1st. The notice to take said depositions does not state the names of the witnesses whose depositions were to be taken thereunder. 2d. It does not state any reason for taking the deposition of any witness. 3d. The officer who took said deposition does not in his certificate state any reason for taking the deposition of any witness. 4th. The deposition of said Oppenheimer was not taken on the day named in said notice. 5th. It nowhere appears that said Oppenheimer was not, and is not, now, a resident of Cincinnati, or does not live within a hundred miles thereof.

Wilby & Wald, for the motion.

E. G. Hewitt, contra.

SWING, District Judge. These depositions were taken in Chicago, more than one hundred miles from the place of trial, in conformity with the Ohio practice. The notice was that, on Monday, the 27th day of August, 1877, the defendant would take the depositions of sundry witnesses, etc. The deposition shows that on that day a witness, who knew nothing of the case, was called, and this was repeated for four days, until on the fifth day the material witness was called. There was no cross-examination, and no counsel for plaintiff was present when the examination was had. The question arising here involves the construction of sections 863–865 and 914 of the Revised Statutes of the United States. It is admitted that the depositions are not taken in conformity with the requirements of the federal statutes on that subject, and are in conformity with the law of Ohio. If we are to be governed by sections 863–865, the depositions must be suppressed; if we are to be governed by section 914 alone, it is claimed the motion must be overruled. Prior to the act of June 1st, 1872, the laws of congress regulating the taking of depositions, (sections 863–865), provided that the testimony of any witness might be taken in any civil cause depending in a district or circuit court, by deposition de bene esse, when the witness lives at a greater distance from the place of trial than one hundred

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miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial before the time of trial, or when he is ancient or infirm. They also designated the officers before whom the depositions might be taken. They further provided that reasonable notice must first be given in writing by the party, or his attorney, proposing to take such deposition, to the opposite party, or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. They provided also for the manner in which the witness should be sworn, and how his testimony should be reduced to writing. They further provided that every deposition taken under said provisions should be retained by the magistrate taking the same, until he delivered it with his own hands into the court for which it was taken, or it should, together with a certificate of the reasons of taking it, and of the notice, if any, given to the adverse party, be by him sealed up and directed to said court, and remain under his seal until opened in court. Such were the express requirements by the acts of congress, in regard to the taking of depositions, when the act of June, 1872 (Rev. St. U. S. section 914), was passed, which, it was claimed, modifies or repeals such provisions. The act of June, 1872, provides, "that the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes in the circuit and district courts, shall conform as nearly as may be to the practice, pleadings and forms and modes of procedure, existing at the time in like causes in the courts of record of the state, within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

It is a settled rule of law, that a more ancient statute will not be repealed by a more modern one, unless the latter expressly negatives the former, or unless the provisions of the two statutes are manifestly repugnant. It will be observed that this latter act does not in terms repeal the former acts upon this subject, nor does it in terms provide when, or the mode in which, a deposition shall be taken. It is only, therefore, by the construction which shall be given to the general terms, "practice, pleading and forms and modes of proceeding" that we are to determine, whether, when and how a deposition may be taken, as provided for by this latter statute. The supreme court of the United States, in Nudd v. Burrows, 91 U. S. 426, held that these terms did not include the manner in which the judge, in the trial of a cause, should instruct the jury, or what papers should go to the jury, and the decision was reaffirmed in Railroad Co. v. Horst, 93 U. S. 291. In the recent case of Beardsley v. Littell [Case No. 1,185], decided in the United States circuit court, Southern district of New York, by Judges Johnson and Blatchford, it is said by the court: "It may well be doubted whether there is anything in this act which applies to the subject of the evidence of witnesses, either as to its character, competency or the mode of taking it." And in our own administration of the law we have always held that it did not embrace the mode of examination of witnesses upon the stand, and have ruled in accordance with the doctrine of Railroad Co. v. Stimpson, 14 Pet. [39 U. S.] 461, and Houghton v. Jones, 1 Wall. [68 U. S.] 702, that the cross-examination of a witness must be confined to the facts and circumstances stated in his direct examination, which is in direct opposition to the doctrine of the supreme court of this state, as announced in Legg v. Drake, 1 Ohio St. 286.

But suppose it be conceded that the provisions of the act of June 1st, 1872, by any construction, could be made to embrace the taking of depositions, and that by implication it repealed the former laws upon that question. Yet, after the passage of this act, congress, in 1873, revised and re-enacted the laws of the United States, and in section 5596 of the revised statutes it is provided what acts shall be in force on and after December 1st, 1873. This section provides, in terms, that all prior acts, "any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof." Section 5595, says: "The foregoing seventy-three titles embrace the statutes of the United States, general and permanent in their nature, in force on the first day of December, 1873." Sections 863-865, then, are still in force; they are reenacted by this act, if they had been previously repealed; and we have sections 863-865, and 914, all in force on the same subject, if section 914 applies to the manner of taking testimony. We have a statute which does not state, in terms, that all depositions shall be taken according to the state law, but which conforms the pleading, practice, and modes and forms of proceeding to that of the state: and another statute prescribing, in terms, the mode of taking depositions. Now, if section 914, standing alone, would apply to that, yet it must be construed as if sections 863-865 followed immediately after it, and it read, "except that depositions shall be taken in the manner following."

If this be not so, two provisions of law, enacted at the same time, one, the former act of congress re-enacted, providing specifically and definitely the mode of taking depositions, the other, the state law upon the subject, entirely different in its provisions, and which it is claimed by general terms, is made the law of the United States. Under such circumstances, we think the question clearly within the reason of the rule announced by Justice Bradley, in Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, that "the laws of the state are only to be regarded as rules of decision in the courts of the United States

where the constitution, treaties, or statutes of the United States have not otherwise provided. When the latter speak, they are controlling; that is to say, on all subjects on which it is competent for them to speak. There can be no doubt that it is competent for congress to declare the rules of evidence which shall prevail in the courts of the United States, not affecting rights of property, and where congress has declared the rule, the state law is silent."

It is hardly necessary for me to refer to authorities upon the question as to the necessity of a strict conformity with the provisions of the statute in the taking of depositions; the reports are full of them. The latest utterance of the supreme court recognizing it is in the case of Shutte v. Thompson, 15 Wall. [81 U. S.] 159, though in that case it was held, and I think very properly, that the defendant had by his acts waived his right of exception.

The first reason assigned for suppressing the depositions in this case is, that the notice does not state the names of the witnesses whose depositions were to be taken, as required by the statute. But it was presented to the plaintiff's attorneys, and they indorsed their acceptance on it, and by so doing, I think, gave the opposite party the right to rely on the sufficiency of the notice, and this exception is waived. The second ground is, that the notice assigns no reason for taking the deposition. That is not required by the statute; so there is no foundation for their objection. Fourth, the deposition was not taken on the day named in the notice, and fifth, it nowhere appears that the witness was not, and is not now a resident of Cincinnati, etc. It is not necessary that it should appear in the deposition or the certificate that the party is not now a resident of Cincinnati; that might be made to appear on the trial of the cause. The deposition was not taken on the day named in the notice, and witnesses who testified simply that they knew nothing of the case were examined for four days to keep the notice alive until the real witness should appear. I have had occasion to remark before, that that was a practice not to be encouraged, but it is a general practice with the profession, and it is not for that alone that this deposition should be suppressed. The third ground of the motion is, that the officer who took the deposition does not in his certificate assign any reason for taking it, and that, I think, is fatal to the deposition. If the party had been present, and had cross-examined the witnesses, as in the case in 15 Wallace, and had been present at the time the certificate was made, it would have been within his power to suggest any change or alteration in the certificate; and if he had failed to do so, I should have held that, under that case, he had waived all his right to objections and exceptions. But the party was not present, and he was not really bound to attend four or five days continuously, while witnesses were being called who knew nothing of the case, and he had no knowledge as to who the witness was whose deposition was really sought. I think, therefore, that this deposition must be suppressed. I have been referred to rule eight of this court, passed in 1855, which provides: "It having been the usage of this court to receive depositions taken on notice under the statute of the state, such usage is not abrogated by the rules adopted by this court." It has been the practice, since I have been on the bench, to receive depositions taken on notice under the statute of the state, and such will continue to be the usage of this court. If the party accept such a notice as this without objections, attend the taking of the depositions and cross-examine the witness and make no objections to the form of certificate at the time, he will be held to have waived his right of objection, and the depositions will be received.

Case No. 12,215.

SAGE v. WYNKOOP.

[16 N. B. R. 363.] [1]

Circuit Court, N. D. New York. Oct. 24, 1877.[2]

BANKRUPTCY—TRADER—PROCURING PROPERTY TO BE TAKEN ON EXECUTION—CREDITOR—PRINCIPAL AND AGENT—LEVY.

1. An insolvent debtor, who was a trader, gave to a creditor new notes, payable on demand, signed by himself alone, to take up others of the same amount, secured by the signature and indorsement of other responsible parties, and purchased goods of persons who were ignorant of his insolvency, in order that such goods might be taken on execution on judgments recovered on such notes. *Held*, that he thereby procured, or at least suffered his property to be seized on execution within the meaning of section 5128 of the Revised Statutes, if seizure there was.

2. Where the agent of the creditor had reasonable cause at the time to believe the debtor was insolvent, and knew that the transaction was in fraud of the bankrupt law [of 1867 (14 Stat. 517)], it is the same as if the creditor had himself taken part therein, with the same cause to believe and the same knowledge.

[Cited in Re Jacobs, Case No. 7,159.]

3. A levy which has been relinquished before the filing of a petition in bankruptcy creates no lien upon the property as against the assignee.

This was a bill filed to compel the payment of two judgments recovered by the complainant [Gardner A. Sage, Jr.] against one John H. Fowler out of a certain fund deposited with the clerk in accordance with a special order of the district court. The bill sets forth the recovery by the complainant, in the supreme court of the state of New York, of two judgments against said John H. Fowler, one for four thousand and fifty-two dollars and twenty-eight cents, on the 19th day of May, 1875, and the other for one thousand and twenty-three dollars and thirty-five cents on the 2d day of June,

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[2] [Affirmed in 104 U. S. 319.]

1875; the issue of executions thereupon and the levy by the sheriff of Onondaga county by virtue thereof upon a stock of goods in the city of Syracuse, belonging to said John H. Fowler; that on the 4th day of June, 1875, said John H. Fowler filed a petition in voluntary bankruptcy, and subsequently was adjudged a bankrupt thereupon, and Jonathan G. Wynkoop was appointed assignee; that on the 17th day of August, 1875, an order was made by the district court authorizing the assignee to sell the stock of goods which had been levied upon by the sheriff and directing him to deposit with the clerk the sum of five thousand two hundred dollars, to which, under the provisions of said order, the liens of the sheriff and the complainant attached with the same force as before the making of the order they had attached to the stock of goods; that shortly thereafter the assignee sold the goods and deposited with the clerk the amount required by said order. The relief demanded was that said judgments, with interest, sheriff's fees, and costs, be decreed to be paid out of said fund so deposited. The assignee alone answered, and, after admitting substantially the allegations contained in the bill, alleged that said John H. Fowler was insolvent for more than four months before he was adjudged a bankrupt, and that during that period the complainant held four notes of a thousand dollars each, made by one Combes and indorsed by said Fowler and his wife, and which respectively matured March 18th and 31st, April 21st and May 8th, 1875; that at the same time the complainant held a note for one thousand dollars made by said John H. Fowler, without an indorser, maturing April 13th, 1875; that on the 28th of April, 1875, said John H. Fowler retired said notes by giving five new notes for one thousand dollars each, payable on demand, signed by himself and unindorsed, dated respectively as of the dates when the notes of said first series became due; that upon the same day actions were commenced upon four of those notes, and subsequently upon the fifth, which resulted in said two judgments of the complainant; that this was done to cast the burden of paying said notes from responsible parties upon said John H. Fowler, in contemplation of his soon becoming bankrupt; that said judgments were recovered by collusion and with intent to give the complainant preference, and that the filing of the petition in bankruptcy was delayed by said John H. Fowler in order that the preference should be perfected. Evidence was given which tended to sustain and also to disprove the allegations in the answer.

Irving G. Vann, for complainant.
George N. Kennedy, for defendant.

WHEELER, District Judge. This cause has been heard on bill, answer, replication, proofs, motion of defendant to suppress evidence, and argument of counsel. The evidence sought to be suppressed, although most of it is in the nature of hearsay, as the motives of those communicating are in question, shows parts of the transaction involved, and for that purpose seems to be admissible. The motion is therefore overruled.

From the pleadings and proof it satisfactorily appears that the bankrupt, of whom the defendant is assignee, was insolvent and known to be so by himself and by the agent and attorney of the orator having entire control of this business for the orator. That the bankrupt, who was a trader, by giving new notes signed by himself alone to the attorney of the orator to take up other notes of the same amount, secured by the signature and indorsement of other responsible parties toward whom they were both friendly, on which to be sued, and by procuring goods on credit of parties to whom his insolvency was unknown, in addition to his stock, that they might be taken on execution for this debt, procured, or at least suffered, his property to be seized on execution, if seizure there was, to give relief to those liable for the debt and interested to have it satisfied by him or out of his means. And that the agent and attorney of the orator had good reason to know that the new notes were given, and took them, and caused suit to be commenced upon them, for the like purpose of saving the other parties, or some of them for whom he was interested, harmless, without detriment to his client and principal or to himself, and caused the proceedings to be carried forward, knowing that if the plan should be successful other creditors would probably suffer. This was done by the bankrupt, being insolvent, with a view to give a preference to a person or persons under a liability for him, and done by the agent of the orator having reasonable cause to believe the bankrupt was insolvent, and knowing that it was in fraud of the provisions of the bankrupt law, which is the same as if done by the orator himself, with the same cause to believe and with the same knowledge, and brings the case within both the letter and spirit of section 5128, Rev. St. as amended by sections 10 and 11 of the act of June 23, 1874 [18 Stat. 180]. The orator having brought this suit to reach the avails of property of the bankrupt levied on by virtue of executions on judgments in these suits so brought, is not, on these findings, entitled to any decree in his favor.

There is another ground, not urged in argument, however, on which it would seem that the defendant is entitled to a decree in his favor, at least so far as the first and larger judgment and execution are concerned. It is alleged in the bill, fol. 15, that the sheriff, by virtue of that execution, levied on the stock of goods of the bankrupt, and fols. 25 and 26, that he kept and retained possession of it. The levy, whatever it was, is admitted in the answer, fol. 108, and as proved

before the master, fols. 635-6; but there is no admission or proof about keeping or retaining possession under the levy except the testimony of the deputy-sheriff who served the other execution, fols. 639-47, which shows that possession, if taken, was not kept, nor resumed under that execution until the night of June 3, 1875, and that it was vacant so far as the officer serving that execution, or any officer acting under it was concerned from before 11 o'clock until night of that day, during which time, at 2 o'clock p. m., the petition in bankruptcy of the bankrupt was filed. From the whole it seems most probable that there was a formal levy, as it is called, by going into the store on the 31st of May, but no seizure until the night of the 3d of June. However that was it is clear that any seizure that had been made had been relinquished, and after relinquishment it was the same as if it had never been made. Bradley v. Wyndham, 1 Wils. 44; 2 Term R. 596; Storm v. Woods, 11 Johns. 110, Fitch v. Rogers, 7 Vt. 403; Kellogg v. Griffin, 17 Johns. 274; Heard v. Fairbanks, 5 Metc. [Mass.] 111, 2 Add. Torts, § 907.

In this view neither the sheriff nor the orator had, at the time the petition in bankruptcy was filed, any greater right to the goods of the bankrupt than so far as they were bound by the common law by the teste of the writ of execution, left in force by the statute after delivery of the writ to the sheriff. The common law so bound the goods of the debtor that the sheriff might seize them in the hands of a purchaser from the debtor unless bought in market overt, but vested no property in them in the sheriff without seizure. Smallcomb v. Cross, 1 Ld. Raym. 251; Payne v. Drewe, 4 East, 523; Edwards v. Harben, 2 Term R. 587; Beals v. Guernsey, 8 Johns. 446; Bliss v. Ball, 9 Johns. 132; Westervelt v. Pinckney, 14 Wend. 123. The whole property in the goods remained in the debtor and passed by the assignment to the assignee. Rev. St. U. S. § 5044. This is in accordance with the rule under the English bankrupt acts. Bayly v. Bunning, 1 Lev. 173; Philips v. Thompson, 3 Lev. 69, 191; Mont. Liens, 83; Smallcomb v. Cross, 1 Ld. Raym. 251; Cole v. Davies, Id. 724.

The right of the sheriff to seize the goods is quite similar to that of the landlord under the statute of Illinois to seize the goods of his tenant for rent, which is held not to vest any right in the goods against an assignee in bankruptcy. Morgan v. Campbell, 22 Wall. [89 U. S.] 381. And it seems to have been on the ground that there was an actual seizure that the right of a landlord to hold the property of his tenant against the assignee has been upheld. Marshall v. Knox, 16 Wall. [83 U. S.] 551. It is not at all clear that the sheriff serving the other execution took and maintained any possession of the goods before the night of June 3d, and, if showing that he did would maintain the orator's bill, it is quite doubtful on the evidence whether it would be made out. But whether it would be or not, he fails here on the other point.

Let a decree be entered that the bill be dismissed with costs.

[On appeal to the supreme court, the decree of this court was affirmed. 104 U. S. 319.]

Case No. 12,216.

SAGEMAN v. The BRANDYWINE.

[Newb. 5.] [1]

District Court, D. Michigan. 1852.

SEAMEN—WHO ARE—FEMALE COOK—WAGES.

A female employed as cook on board of a vessel is a mariner, and is entitled to sue in the admiralty for her wages.

In admiralty.

J. S. Newberry, for libelant.

Mr. Eldred, for respondent.

WILKINS, District Judge. This was a libel for seaman's wages promoted by Emily Sageman, the cook of the vessel. To entitle one to sue as a mariner, the services rendered must pertain to the business of navigation, and be such as are necessary, or tend to preserve the vessel, or take care of those navigating the vessel. A cook on board of a vessel has been held to be a mariner. It matters not whether the cook is a male or female. The libel must be sustained. And it is referred to the clerk to ascertain the amount due to the libelant.

SAGINAW VALLEY & ST. L. R. CO. (MACDONALD v.). See Case No. 8,766.

Case No. 12,217.

SAGORY v. WISSMAN.

[2 Ben. 240; 1 Am. Law T. Rep. U. S. Cts 41.] [2]

District Court, S. D. New York. March, 1868.

FOREIGN CONSUL—JURISDICTION OF STATE COURT—BILL AND CROSS-BILL—STRICT FORECLOSURE—EFFECT OF REPLYING TO A BAD PLEA.

1. Where a suit at common law was brought against the defendant, a foreign consul, the declaration being in debt, on a bond for $40,000 executed by the defendant to the plaintiff, September 30th, 1851; and the defendant's plea set up that the bond was secured by a mortgage on lands in Virginia, conditioned that, if the bond were not paid, the plaintiff might enter into the lands and sell them, and retain his debt out of the proceeds, and that, on the 6th of April, 1858, after the debt became due, the plaintiff did enter on the lands, they exceeding in value the amount of the debt, to sell and dispose of them, and that he might have sold and disposed of them, and paid his debt, but, instead

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

[2] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 1 Am. Law T. Rep. U. S. Cts. 41, contains only a partial report.]

of so doing, he had remained in possession, whereby the debt was paid and satisfied; and the plaintiff replied to the plea, setting up that the defendant, on the 4th of July, 1855, filed a bill in chancery in a state court in Virginia against the Buckingham Gold Company, alleging that he, as owner of the lands subject to the mortgage, had contracted to sell the lands to them, and they had taken possession, but had not paid the price, and praying a sale of the lands by decree of the court, and afterward filed a supplemental bill against the plaintiff, praying that he might be made a party, and that afterward, in June, 1857, after default in the payment of the mortgage, the plaintiff filed a bill, in the nature of a cross-bill in chancery, in the same court, against the defendant and others, for the purpose of selling the premises to pay the debt, and the defendant appeared and answered the bill, and afterward the bills came on to be heard together, and the court made a decree of sale, under which the lands were sold to the plaintiff, leaving a deficiency of $18,399, and that the plaintiff's entry into the land was under that sale, and not otherwise; and the defendant rejoined, (1) that the court in Virginia had no jurisdiction of the cause, inasmuch as the defendant was a foreign consul; and (2) that the plaintiff's bill in that court was not a cross-bill; and the plaintiff demurred to the rejoinder: *Held*, that the courts of a state have no jurisdiction of suits against foreign consuls, but have jurisdiction of suits brought by them.

2. The court of Virginia had jurisdiction of the suit brought by the defendant; but the suit brought there by the plaintiff was not a part of the defendant's suit, but was an original suit, and, therefore, not within the jurisdiction of that court.

3. The first rejoinder was, therefore, good.

4. The second rejoinder was bad, it averring that the bill of the plaintiff was not a cross-bill, whereas the replication averred that the bill was in the nature of a cross-bill.

5. A strict foreclosure of a mortgage is a payment of the debt, but the entry alleged in the defendant's plea was not a strict foreclosure, but an entry to sell and pay the plaintiff's debt; and such an entry was no defence to the bond.

6. The defendant's plea was, therefore, bad; and although the plaintiff had replied to it, the defect was not cured thereby, and the plaintiff was, therefore, entitled to judgment.

This case came up on a demurrer by the plaintiff [Charles Sagory] to each one of two several rejoinders by the defendant [J. Fritz Wissman, administrator of Frederick Wissman] to a replication by the plaintiff to a plea by the defendant to the first count of the plaintiff's declaration. The suit was brought against Frederick Wissman in his lifetime, and the pleadings were framed prior to his death. The declaration was in debt, for $40,000. The first count set forth, that the defendant was the consul of the free city of Frankfort-on-the-Main, for New York, and it was founded on a bond executed by the defendant to the plaintiff, September 30th, 1851, for $40,000. The plea set forth, that the bond sued on was secured by a mortgage of even date, executed by the defendant to the plaintiff, upon certain lands in Buckingham county, in the state of Virginia, conditioned that, if the debt were not paid when due, the plaintiff might enter into and take possession of the lands, and sell them, and retain his debt out of the avails, with costs and expenses, paying the overplus, if any, to the defendant; that, on the 6th of April, 1858, after the debt became due, the plaintiff entered into and took possession, in his own right, of the lands, they exceeding in value the amount of the debt, to sell and dispose of the same, and which he might have sold and disposed of, and, out of the avails, have paid the debt and the costs and expenses, but that, instead of doing so, he had ever since remained, and still remained, in possession thereof, and claimed to be the absolute owner thereof, and as such had ever since received, and still did receive, the rents and profits thereof, whereby the debt was paid and satisfied. The plea concluded with a verification. The replication, after craving oyer of the mortgage mentioned in the plea, set forth, that the defendant, on the 4th of July, 1855, filed a bill in chancery, in the circuit court of the county of Buckingham, in the state of Virginia, sitting as a court of chancery, a court of general jurisdiction, against the Buckingham Gold Company, a corporation, alleging that the defendant, as owner of the lands subject to the mortgage, had contracted with said company for the sale of the lands to them, and that the company had gone into possession of the lands, but had made default in paying for them, and praying that the lands might be sold under the decree of said court; that afterward, and on the 18th of September, 1856, the defendant filed in the same court a supplemental bill against the plaintiff, setting forth the said mortgage, and that the whole of its principal and a large amount of interest on it were due, and praying that the plaintiff might be made a party to said suit; that the plaintiff filed his answer to said original and supplemental bills, and afterward and on the 3d of June, 1857, after default in the payment of the mortgage, filed a bill in chancery in the nature of a cross-bill, in said court, against the defendant and others, for the purpose of selling the mortgaged premises, unless the defendant should redeem them, and of applying the proceeds toward the debt due to him by the defendant; that the defendant appeared and answered the bill, and admitted its allegations; that, on the 16th of September, 1857, the original and supplemental bills of the defendant, and the cross-bill of the plaintiff, came on to be heard together by the court, and it was decreed, that, unless the defendant should pay to the plaintiff, within sixty days from that date, $24,800, with interest at the rate of six per cent. per annum on $20,000, part thereof, from September 30th, 1856, till paid, the defendant should be foreclosed from redeeming, and the premises should be sold at auction, and the plaintiff might become the purchaser; that, on the 24th of December, 1857, the premises were duly sold at auction, under the mortgage and the decree, for $9,100, to the plaintiff, leaving a deficiency

due to the plaintiff, on the mortgage, of $18,399.75, with interest from December 24th, 1857; that the premises were duly conveyed to the plaintiff under the decree; and that the plaintiff entered into possession of the premises by virtue of said sale, and not otherwise. The replication concluded with a verification.

The first rejoinder set forth, that, before, and at the time of, the commencement of the suits by and against the defendant, mentioned in the replication, and before and at the time of the commencement of the suit against him in which the decree was rendered, and at the time the decree was rendered, the court in Virginia was a state court, and the defendant was consul, in New York, of the free city of Frankfort-on-the-Main, duly accredited, and the state court had no jurisdiction of the cause, but such jurisdiction belonged exclusively to courts established under the constitution and laws of the United States. This first rejoinder concluded with a verification. To this first rejoinder the plaintiff demurred, setting forth, in his demurrer, various causes of demurrer. Only one of them was presented for consideration on the argument, namely, whether, as the defendant was a foreign consul, the state court of Virginia had jurisdiction of the suits mentioned in the rejoinder. The ground taken by the plaintiff was, that, as the defendant brought a suit in the state court, and made the plaintiff a party to it, as the holder of the mortgage on the premises in question, and as the plaintiff then filed a bill in the same court, in the nature of a cross-bill, against the defendant and others, for the purpose of selling the premises, and of applying the proceeds towards the satisfaction of the debt, and as the suits brought by both parties were heard together, and the decree that was made was made in both of the suits, the state court had jurisdiction to make the decree; that the privilege of a consul to be exempt from the exercise of jurisdiction over him by a state court, extended only to an adverse suit against him, and did not extend to a suit instituted by himself; that the suit brought by the plaintiff was not an original suit; and that the jurisdiction acquired by the state court over the parties, by the institution of the suit brought by the defendant, covered the cross litigation instituted by the plaintiff, although, if the bill filed by the plaintiff had been an original bill, the court would have had no jurisdiction of it, as against the defendant.

W. M. Evarts, for plaintiff.
S. P. Nash, for defendant.

BLATCHFORD, District Judge. It is unquestionable that, under section 9 of the judiciary act of September 24th, 1789 (1 Stat. 76), the courts of the states have no jurisdiction of a suit against a foreign consul. Davis v. Packard, 7 Pet. [32 U. S.] 276. There is no objection, however, to the bringing of a suit by a consul in a state court. Although, by the constitution (article 3, § 2), the judicial power of the United States extends to all cases affecting consuls, yet congress has not seen proper to make the jurisdiction of suits brought by consuls exclusive in the courts of the United States. The state court of Virginia had, therefore, undoubted jurisdiction of the suit brought by the defendant. But it had no jurisdiction of the suit brought by the plaintiff, if that suit was an original suit. The plaintiff claims that that suit was not an original suit, but was a cross-suit, and was a part of the suit brought by the defendant, and that, therefore, the court had jurisdiction to make the decree in it.

I think that it appears, by the replication, that the suit brought by the plaintiff, in the state court, was an original suit. The replication does not state that the bill filed by the plaintiff was a cross-bill, but states that it was a bill in the nature of a cross-bill. The replication does not show why the plaintiff was made a party to the suit brought by the defendant, or what relief, if any, was prayed, in that suit, against the plaintiff. It merely states, that a supplemental bill was filed by the defendant, setting forth the execution and delivery of the mortgage, and that the whole of the principal and a large amount of interest was due thereon, and praying that the plaintiff might be made a party to the suit. It is apparent, that, on a bill of this character, no decree could have been made against the defendant, foreclosing his equity of redemption in the mortgaged premises. The bill filed by the plaintiff is stated, in the replication, to have been filed for the purpose of selling the mortgaged premises, in case they were not redeemed by the defendant, and of applying the proceeds toward the debt due to the plaintiff. The prayer of the original bill filed by the defendant is stated, in the replication, to have been merely that the premises should be sold. That the bill filed by the plaintiff was a bill to foreclose the equity of redemption of the defendant in the mortgaged premises, is shown by the averment, in the replication, that the decree made by the court was, that, unless the defendant should, by a certain day, pay to the plaintiff a sum certain, the defendant should be barred from all equity of redemption in the mortgaged premises, and they should be sold at auction. It is quite clear, I think, that the bill filed by the plaintiff was not a cross-bill, but was an original bill for relief. Story, Eq. Pl. § 400, note 4. Therefore, if the defendant was, at the time, a foreign consul, the court had no jurisdiction of the suit, and no jurisdiction to make the decree in question, so far as that decree barred the defendant's equity of redemption. As the replication states the decree, it barred such equity, unless the defendant should pay to the plaintiff a certain sum by a certain day, and, when such equity should be barred, then the premises should be sold.

It is under a deed made to the plaintiff on a purchase made by him of the premises, on a sale made of them under those circumstances, that, as the replication avers, he entered into the premises.

The demurrer to the first rejoinder is, therefore, overruled.

The second rejoinder is one which sets forth that the bill filed by the plaintiff in the state court was not a cross-bill. This rejoinder concludes to the country. To this second rejoinder the plaintiff demurs, and assigns, as one cause of demurrer, that the rejoinder ought not to have concluded to the country, and does not put in issue any matter of fact alleged in the replication. This is true. The replication avers that the bill filed by the plaintiff was in the nature of a cross-bill. The rejoinder avers that it was not a cross-bill.

The demurrer to the second rejoinder is, therefore, allowed.

The plaintiff insists, however, that, although both of the rejoinders may be good, the plea in question is bad; and that, as the defendant committed the first fault, by pleading the plea out of which the rejoinders grew, judgment must be rendered against the defendant on both of the demurrers. I think it very clear that the plea is bad. It avers that the mortgage contained a condition that, if the debt were not paid, the plaintiff might enter into the lands and sell them, and pay his debt out of the proceeds; that, after the debt became due, he entered into and took possession, in his own right, of the lands, they exceeding in value the amount of the debt, to sell and dispose of the same, but that, instead of doing so, he had continued in possession, claiming to be the absolute owner, and receiving the rents; and that thereby the debt is paid. A foreclosure of a mortgage on land, without a sale of the land, that is, what is called a strict foreclosure, is an extinguishment of the debt, provided the premises are of sufficient value to pay the debt. But this doctrine only applies to a case of strict foreclosure. It does not apply to a case where the mortgagee, instead of entering into possession of the premises by way of strict foreclosure, either on a decree of strict foreclosure, or by virtue of a power in the mortgage to that effect, enters for the purpose of sale. On a strict foreclosure, the mortgagee must credit the value of the premises on the debt, if they are of no greater value than the amount of the debt, but, if they are of greater value than the amount of the debt, the mortgagee is under no obligation to refund the overplus to the mortgagor. On a sale under a decree of foreclosure and sale, the debt is extinguished only up to the amount produced by the sale, and the balance may be recovered on the bond, the surplus, if any there be, on the sale, belonging to the mortgagor. These principles are fully settled in Spencer v. Harford, 4 Wend. 381, and Morgan v. Plumb, 9 Wend. 287. Although the plea in this case avers that the value of the premises was greater than the amount of the debt, yet it does not show that the mortgagee took possession of the premises by way of strict foreclosure, either under a decree or under the mortgage. It sets up no decree of any kind, but merely an entry by the plaintiff under the mortgage. It avers, that the power in the mortgage was, that the plaintiff might, on default in the payment of the debt, enter into and take possession of the lands, and sell them, and retain the debt out of the avails, paying the overplus, if any, to the defendant; and that, after the debt became due, the plaintiff entered into and took possession, in his own right, of the lands, to sell them, and that he might have sold them, and have paid the debt from the proceeds, because the lands exceeded in value the amount of the debt, but that, instead of selling them, he has remained in possession, claiming to be the owner of them, and receiving the rents and profits. The plea sets up nothing which shows that the defendant's equity of redemption in the lands is in any way barred, or foreclosed, or affected. He could, for aught that is shown by the plea, file a bill to redeem the mortgage. If the plaintiff should, in defence, set up the facts which are averred in this plea, those facts would be no defence to the bill. They are, therefore, no defence to this suit. The plaintiff has a right, notwithstanding the facts set up in the plea, and although he may have entered into and retained possession of the lands, under the circumstances and for the purpose set forth in the plea, to pursue any concurrent remedy which he has, to recover the debt from the defendant, subject, of course, to the right of the defendant to redeem the mortgage, and to compel the plaintiff to sell the lands and apply the proceeds on the debt. The defendant has no right to complain. He could have paid his debt. He gave to the plaintiff the right to enter for security, subject to the obligation to sell. He can enforce that obligation. But he cannot claim, as he does in this plea, that such entry paid the debt, because the lands were of more value than the debt. The plea is, therefore, bad in substance, and, it being so, the plaintiff did not cure the defect by replying to the plea, and there must be judgment for the plaintiff. Wyman v. Mitchell, 1 Cow. 316, 322; Griswold v. National Ins. Co., 3 Cow. 96, 119.

Case No. 12,218.

The SAILOR PRINCE.

[1 Ben. 234.] [1]

District Court, S. D. New York. June 13, 1867.

ADMIRALTY — JURISDICTION — SEAMEN'S WAGES — STATE ATTACHMENT—LIEN ON FREIGHT MONEY FOR WAGES.

1. A libel was filed by seamen to recover wages against a ship and freight money. The marshal made return to the process, that he

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had not attached the vessel, but had attached the freight money in the hands of parties who held it. Prior to the service of the process, suit had been commenced in a state court against the owners of the vessel, in which warrants of attachment had been issued, under which the state sheriff had seized the vessel. He held her under those attachments when the marshal came to seize her. He had also served copies of the warrants upon the parties who held the freight money, with notice that he attached it. On this state of facts, the parties submitted to this court the question, whether there had been a valid attachment of the freight by the marshal, so as to give this court jurisdiction to hear and determine the libel. *Held*, that seamen have a paramount lien for their wages upon the freight money of the voyage, and that such lien is to be administered by a court of admiralty by the service of its attachment upon the freight money, in the hands of the parties where it is found.

[Cited in The Olivia A. Carrigan, 7 Fed. 510, 511; Moran v. Sturges, 154 U. S. 267, 14 Sup. Ct. 1026.]

2. As against a lien of this character, the principle established by the supreme court of the United States, in the case of Taylor v. Carryl, 20 How. [61 U. S.] 483, ought not to be extended.

[Cited in The Caroline, Case No. 2,419.]

3. The application of the principle of that case to an attachment issuing from a state court against a vessel, would only work delay in the enforcement of a sailor's lien for wages upon her, but the application of it to an attachment against freight money would work the entire destruction of the lien.

[Cited in The Caroline, Case No. 2,419; The Vigilancia, 63 Fed. 734.]

4. The possession of the freight money by the sheriff, constructive or otherwise was not such as the possession of the vessel in Taylor v. Carryl, or such as prevented the marshal from levying his process upon it, so as to give this court jurisdiction of it in rem. The jurisdiction of this court is therefore sustained.

The libel in this case was filed by John P. Murray, and fourteen other seamen, against the British ship Sailor Prince, and the freight money earned by her on a voyage from Manilla to New York, to recover their wages. The amount claimed to be due for the wages was about $5,000, and was for the service of the seamen on board of the vessel, on the voyage on which the freight money was earned. On the filing of the libel a monition was issued, March 1st, 1867, against the vessel and the freight money. The marshal made return to that monition that he had not attached the vessel, but had served a copy of the monition personally on Kirkland & Von Sachs, and had attached $7,100 in gold, freight money. To a subsequent alias monition issued against the vessel alone, the marshal made a return of "not found." Prior to the service of the monition by the marshal on Kirkland & Von Sachs, the claimants, Charles Lanier and J. G. Richardson, had severally commenced actions in the supreme court of the state of New York, against the Barned's Banking Company, Limited, an English corporation, in which actions, warrants of attachment had been issued to the sheriff of the city and county of New York, and service thereof made by him by attaching the vessel, which was still in his hands under the attachment, and by serving upon Kirkland & Von Sachs copies of the warrants of attachment, with notices that the freight money due the vessel was attached as the property of the Barned's Banking Company, Limited, in accordance with the provisions of the Code of New York in that behalf. After the service of the monition on Kirkland & Von Sachs, the freight money, by the consent of all the parties and for the greater security of the fund, and that it might be earning interest, was paid over by Kirkland & Von Sachs to Messrs. Evarts, Southmayd & Choate, attorneys for the master and the consignees of the vessel, upon the agreement that the rights of all the parties to the suit, in and to the fund, should remain unimpaired and in all respects the same as if the money had remained in the hands of Kirkland & Van Sachs, the fund to be invested in government securities. After the freight money was so paid to Messrs. Evarts, Southmayd & Choate, the warrants of attachment were served on them by the sheriff, and afterward the monition in this suit was served on them by the marshal. The actions in the state court were still pending. The foregoing facts were agreed upon by the counsel for the respective parties, or appeared in the papers on file in the case, and a stipulation was entered into, submitting to the court the question whether there had been a valid attachment of the freight moneys by the marshal, so as to give this court jurisdiction to hear and determine the libel. If the court should be of opinion that there had been, the several claimants were to have such time to answer to the merits as the court should order.

W. G. Choate, for libellants.
G. De F. Lord, for claimant.

BLATCHFORD, District Judge. The lien of a seaman for his wages is, in the admiralty, prior and paramount to all other claims on the subject of the lien, and is to be first paid out of it or its proceeds. The freight money earned by the vessel on the voyage on which the seaman served is subject to such paramount lien, and is the natural fund out of which the wages are to be paid; and this lien is to be administered by the court of admiralty by the service of its attachment upon the freight money in the hands of the parties where such money is found. Drinkwater v. The Spartan [Case No. 4,085]; Sheppard v. Taylor, 5 Pet. [30 U. S.] 675, 711. The paramount lien, then, in this case being clear, and the court having taken the usual means to enforce that lien, and the marshal having returned that he has attached the freight money, it would seem that there could be no legal impediment to the exercise of its jurisdiction.

But it is urged by the claimants that this court cannot, in view of the decision made by the supreme court of the United States, in

the case of Taylor v. Carryl, 20 How. [61 U. S.] 583, assume jurisdiction of this case, or draw to itself the power, now and in this suit, of applying this freight money to the payment of the wages of these seamen. If I regarded that case as necessarily covering in its decision the principle involved in the present case, I should of course feel myself bound to follow it. But as I do not so regard it, I proceed to state my reasons for holding that, notwithstanding that case, the court has jurisdiction of the present case. The case of Taylor v. Carryl was decided by five judges against four, after three arguments of it before the court. That case was one where a vessel, while under seizure by a sheriff under process from a state court, was libelled in the admiralty by seamen on board of her for their wages. The decision of the supreme court in that case, as explained by Mr. Justice Nelson, in delivering the unanimous opinion of the same court in Freeman v. Howe, 24 How. [65 U. S.] 450, was, that the vessel seized by the sheriff under the process from the state court, and while in the custody of that officer, could not be seized or taken from him by the process of the district court of the United States. Again he says (page 455), that the majority of the court were of opinion that the question as to whether the state or the federal authority should for the time prevail, depended on the question which jurisdiction had first attached, by the seizure and custody of the property under its process. Subsequently, in Buck v. Colbath, 3 Wall. [70 U. S.] 334, 342, Mr. Justice Miller, in delivering the unanimous opinion of the supreme court in that case, says that the principle of the case of Taylor v. Carryl [supra] was, that as between the two courts, where the property had been seized by an officer of the one court, by virtue of its process, such possession could not for the time being be interfered with by the other court. And Mr. Justice Miller in that case (page 342) goes on to say, that whenever the litigation in the court where the property has first been seized is ended, or the possession of such court or its officer is discharged, then other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not.

Now, in my view, the principle decided in the case of Taylor v. Carryl ought not to be extended as against a lien of the character of that sought to be enforced by the libellants in this case. It is at best a rule of comity. It is a relinquishment by a court of admiralty—the only court which, under the constitution and laws of the United States, has jurisdiction over the lien of seamen for their wages, or is authorized to enforce such lien—of its clear jurisdiction, in favor of a state court, which cannot enforce or displace such lien, and has no jurisdiction over it, giving to the state court the right, for the time being, to obstruct and interfere with the lien and with the remedy of the seamen. That principle or rule of comity is, according to Taylor v. Carryl, to be sustained, in regard to a vessel which has been seized by and is in the lawful custody of the sheriff under process from the state court, so long as it is in such custody, the federal court being at liberty, when the litigation in the state court is ended, or when the possession of the sheriff is discharged, to take possession of the vessel and enforce against it admiralty liens. The lien of a seaman against the vessel for his wages will remain unaffected by any action of the state court in regard to the vessel. If the state court, in the suit in which it issued the process on which the vessel was seized and is held in custody, sells the vessel, the purchaser will take his title to her subject to the lien of the seaman for his wages, and the moment she passes out of the custody of the sheriff, the seaman can enforce his lien, by serving process on her on a libel in the admiralty. Now, this rule of comity, thus regarded and limited and administered, may, perhaps, in ordinary cases, work no other mischief than to cause unnecessary and harsh delay in the enforcement of their rights by a class of men whose paramount and superior claims are recognized in the codes of law of all commercial countries. The state court can seize and sell only the interest of the owner in the vessel over and beyond the amount of the liens of the seamen, and can convey no absolute right of property in the whole vessel to a purchaser. Legally, the lien remains, to be enforced the moment the hand of the state officer is withdrawn from the vessel. And the vessel, in theory at least, remains in specie, so as to be subjected to process for the enforcement of such lien. But, if the principle be extended so far as to permit the state court, as against the lien of the seamen in this case on the freight money of this vessel for their wages, to appropriate that money to the payment of the inferior claims of the creditors who have attached it by the process of the state court, the lien of the seamen on such money for their wages is gone, extinguished, put out of existence, in the face of an admiralty court, by the act of a court of common law. The court of admiralty is to abnegate functions which are conferred upon it by the constitution and laws, and to refuse to enforce a clearly admitted paramount admiralty lien, which no other court can enforce or directly destroy or supersede, because a state officer has, under process from a state court, attached a sum of money which is the subject of such lien, and is to permit the state court to apply that money to the payment of an inferior claim not founded on a lien, and thus indirectly destroy the lien practically and to all intents and purposes. I cannot believe that any such doctrine flows from the decision in Taylor v. Carryl, or will be sustained by the

supreme court of the United States. So believing, I sustain the jurisdiction of this court in this case.

In speaking of process of the state court I refer solely to lawful process. When the question arises as to a state process which is void, it will remain to be disposed of upon considerations which may be peculiar to such a case.

I have preferred to maintain the jurisdiction of this court upon the point on which I have placed it in regard to the distinction between this case and that of Taylor v. Carryl, as being a broad and not a technical ground, and one comporting with the high prerogatives of a court of admiralty. I therefore do not enlarge upon another point of distinction which might, perhaps, be taken between the two cases, founded upon the fact that the sheriff in this case is not in possession of the freight money and does not appear ever to have been in possession of it, although he served his warrants of attachment upon the parties who held it, with a notice that it was attached as the property of the defendant in the warrants. The manner of attaching the money by the sheriff was, indeed, so far as the question of actual possession of the money is concerned, of as high a character as the manner of attaching it by the marshal in this case. Yet it by no means necessarily follows that the possession of the money by the sheriff, of whatever character it may be, constructive or otherwise, either absolutely under the state law of New York, or relatively when compared with the character of the possession of the money by the marshal in this case, is such a possession as was the actual possession of the vessel by the state sheriff in Taylor v. Carryl, or such a possession as requires this court, under a rule of comity, to refrain from interfering with it, or prevents the marshal from levying his process upon it so as to give this court jurisdiction of it in rem.

The view I have taken of this case proceeds upon the ground that the sheriff claims by his process to have attached the whole freight money. If he claims to have attached only the interest of the defendant in his attachments in what remains of the money over and above the amount of the paramount and prior maritime liens upon it, then, of course, there can be no difficulty about the jurisdiction of this court, or about the attachment by the marshal, and the way is clear, even within the broadest application of the case of Taylor v. Carryl, for this court to ascertain the amount due to the seamen for their wages and pay it out of the freight money, leaving to the sheriff, under his attachments, just what he in fact attached, namely, the residuum beyond the amount of the paramount maritime liens.

An order will be entered in conformity with this decision and giving the claimants one week to answer the libel.

[See Case No. 12,219.]

Case No. 12,219.

The SAILOR PRINCE.

[1 Ben. 461.] [1]

District Court, S. D. New York. Oct., 1867.

MARSHALLING OF ASSETS — SEAMEN'S WAGES — MORTGAGEE—JURISDICTION—VESSEL AND FREIGHT.

1. Seamen filed a libel for wages against a ship and her freight, and had a decree against them. The vessel was sold and her proceeds brought into the registry. The freight money was also attached, but was not brought into the registry, and the libellants applied to have their decree paid out of the proceeds of the ship. Their application was contested by one Patrick, who had filed a libel against the proceeds of the vessel, to which he claimed to be entitled, because he had purchased at sheriff's sale the interest of a foreign corporation which had held mortgages on the vessel which, as Patrick claimed, had become forfeited (thus making the corporation's title to the vessel absolute) at the time of the commencement of the suit, and the issuing of the attachment in pursuance of which the sheriff's sale of the vessel had taken place. Patrick claimed that the decree for seamen's wages should be satisfied out of the freight instead of out of the proceeds of the vessel. An answer to Patrick's libel had been interposed by other claimants, who alleged that all the interest of the foreign corporation in the mortgages on the vessel had passed to them, before the commencement of the suit in which the attachment was issued. *Held*, that the principle, that, where one creditor has two funds to resort to, while another creditor has a security on only one of such funds, the court will compel the former to resort to the other fund, if that is necessary for the satisfaction of both claims, is sometimes applied in the admiralty, but that it was not applicable to this case.

[Cited in The Edith, Case No. 4,282; The Orient, Id. 10,569; The Olivia A. Carrigan, 7 Fed. 511; The Hudson, 15 Fed. 170.]

2. The admiralty has no jurisdiction to enforce the claim of a mortgagee of a vessel.

[Cited in Rodd v. Heartt, 21 Wall. (88 U. S.) 608; The Grand Republic, 10 Fed. 399.]

3. Patrick stood before the court only as having the rights of mortgagee, and his libel, being a libel by a mortgagee against the proceeds of the vessel, could not be maintained.

4. That libel might, however, be treated as a petition.

5. The court had no authority to adjudicate upon Patrick's title to the mortgages, which was contested by the other claimants.

6. Even in disposing of claims against proceeds in the registry, this court refuses to consider a claim that is contested.

7. Patrick's claim could not be set up to defeat or delay the claim of the seamen, and of the master and other persons interested, to be paid out of the proceeds.

8. The allegation, that, prior to the attachment of the vessel, the mortgagee had taken possession of her, could not affect the question, because such taking possession was for the benefit of the real owner of the mortgages, and the question who was such real owner was the question in dispute between Patrick and the other claimants.

9. The decree in favor of the seamen and the master must be satisfied out of the general fund in court, leaving the question whether that payment should be charged against the proceeds of

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

the vessel or the freight, to be determined on the final hearing on Patrick's libel.

[Cited in The Amos D. Carver, 35 Fed. 669.]

This was a contest between different parties having claims upon a fund in court. The amount in the registry of the court arising from a sale of the vessel was $8,869.58. The libellants had a decree for seamen's wages amounting to $4,978.70, which was against the vessel and her freight. Other parties had claims against the vessel for wharfage, ballast, master's wages, consignees' disbursements, &c., &c., amounting in all to $5,287. The libellants, Murray and others, now applied to the court for an order that the decree in their favor be paid out of the proceeds of the ship. When the libel was filed, process was issued against the vessel and her freight. The process was not then executed on the vessel, because she was in the actual custody of the sheriff of the city and county of New York, under process issued to him from a state court of the state of New York. But the marshal returned that he had attached $7,100 in gold, being freight money in the hands of Kirkland and Von Sachs. After the attachment of the freight by the marshal, the gold attached was, by arrangement, placed in the hands of Messrs. Evarts, Southmayd & Choate, and sold and invested in government securities. The marshal did not take possession of the freight money. Prior to the attachment of it by the marshal, it had been attached by the sheriff under the process so issued to him, and it was claimed to be held under such process of the sheriff at the time the marshal attached it. [Case No. 12,218.] On these facts this court held that there had been a valid attachment of the freight money in this suit, and that this court, therefore, had jurisdiction of this action. This decision was made on the 13th of June, 1867. On the 19th of July the vessel herself, she having been released from custody by the sheriff, was attached by the marshal on further process issued in this suit. The decree in favor of the libellants, Murray and others, was made on the 12th of September. The freight money was not in the registry of the court, but was still in the hands of Messrs. Evarts, Southmayd & Choate.

The application of Murray and others was opposed by William Patrick, who filed a libel in this court on the 11th of September, praying process against the proceeds of the vessel in the registry. The claim set up by Patrick was stated thus in his libel. Charles Lanier, on the 26th of September, 1866, brought a suit in the supreme court of New York against the Barned's Banking Company, an English corporation, and obtained an attachment against it for $50,000, to the sheriff of the city and county of New York. The sheriff on the same day attached the Sailor Prince under the attachment. On the 10th of July, 1867, Lanier obtained a judgment in his suit, and took out an execution, on which the sheriff, on the 18th of July, sold the vessel to Patrick for $100, which Patrick paid, receiving from the sheriff a bill of sale of the vessel. Patrick's libel averred that the Barned's Banking Company were, on the 26th of November, 1866, the legal owners of the vessel, by virtue of two mortgages made by Dixon and Wynne, her owners, one in February, 1865, and one in September, 1865, and both owned by the company; that both of the mortgages had become forfeited, and the title of the company to the vessel had become absolute, before the 26th of November, 1866, by the failure of Dixon and Wynne to pay the mortgages; that Patrick, by becoming such purchaser, was the owner of the vessel, and was entitled to all the proceeds of the vessel, after the payment of all just claims against her which were prior liens to his; that, under the libels of Murray and others, process had been levied on both vessel and freight; that all of the wages and disbursements claimed by Murray and others and by Sadler, the master, were earned during the voyage of the vessel from Manilla to New York, next previous to her being seized by the sheriff; that the freight for her cargo from Manilla to New York was $16,738.32; that the sheriff levied on the freight money under the Lanier attachment, and afterward the marshal levied on it under the process in this suit; that the freight money was afterward, by consent, paid over to Evarts, Southmayd & Choate, who held it subject to all the rights of the sheriff and the marshal, and of all parties interested in it; that this court had held that the attachment of the freight money by the marshal was valid, and that the freight money was under the control and subject to the order and disposition of the court; that the amount of the wages of the seamen and the wages and disbursements of the master were, by law, liens on the freight, as well as on the proceeds of the ship, while Patrick was entitled to only the proceeds of the ship; and that right and justice required that this court should order the amount of the claims of the seamen and master to be paid exclusively out of the freight, without resorting to the proceeds of the ship in court, and that a sufficient amount of the freight should be ordered to be paid into court for that purpose, and that all the proceeds of the vessel in the registry, after deducting such claims as might be prior liens on such proceeds exclusively, should be paid over to Patrick.

The firm of Smith, Simpson & Co., of London, answered the libel of Patrick, and claimed that, by transactions between themselves and the Barned's Banking Company, all the interest of that company in the two mortgages on the vessel passed, prior to November 26th, 1866, to Smith, Simpson & Co.; also, that the rights of Patrick in the vessel and her proceeds were subordinate to those of Smith, Simpson & Co.

W. G. Choate, for Murray and others.

G. DeF. Lord, for Patrick.

C. F. Southmayd, for Smith, Simpson & Co.

BLATCHFORD, District Judge. The principle invoked on the part of Patrick, and under which the court is asked to deny the application of the seamen to be paid out of the proceeds of the vessel, is, that, where one claimant has two funds to resort to, while another creditor has a security on one of such funds only, the court will compel the former to resort to the other fund, if such a step is necessary for the satisfaction of both claims; and that, whenever the election of a party having two funds will disappoint the claimant having the single fund, the court will control that election, and will compel the one to resort to that fund which the other cannot reach, and by these means will protect the claimant on the single fund. Coote, Adm. 122, 123. This principle is a sound one, as a general principle of law, and is applied in courts of admiralty to a certain extent, and in cases to which it is properly applicable. But in none of the cases cited, and relied on, on the part of Patrick, has the principle been applied to a case like the present one. The cases of The Trident, 1 W. Rob. Adm. 29; The La Constancia, 4 Notes of Cas. 285; The Mary Ann, 9 Jur. 95, and The Dowthorpe, 2 Notes of Cas. 264,—were all of them cases in which the question arose in regard to bottomry bonds. In The Trident, the question was between two bottomry bonds; in The La Constancia, between two bottomry bonds and claims for seamen's wages, pilotage, and towage; in The Mary Ann, between a bottomry bond and a claim for seamen's wages; and in The Dowthorpe, between a bottomry bond and claims for pilotage, towage, and seamen's wages. Now, the jurisdiction of the admiralty in cases of bottomry bonds is unquestioned. It arrests the vessel and condemns and sells her at the suit of the holder of the bond. But the admiralty has no such jurisdiction at the suit of the mortgagee of a vessel. It never takes jurisdiction of such a mortgage to enforce its payment, nor will it try, by a possessory action, the title to, or the right of possession of, a vessel under a mortgage. This is the settled doctrine of the courts of the United States. Bogart v. The John Jay, 17 How. [58 U. S.] 399. An enlarged cognizance of mortgages of vessels was given to the admiralty court in England by the statute of 3 & 4 Vict. c. 65, but no similar law has been passed by congress. Patrick does not stand before this court with any higher claim than that of a mortgagee. He claims to represent, and stand in the place of, the Barned's Banking Company, as owners of the mortgages on the vessel, and to have all their rights. As mortgagee, he could not have brought his libel against the vessel. And, although it is true that the admiralty can, where proceeds are rightfully in its custody, entertain supplemental suits by parties in interest, to ascertain to whom the proceeds rightfully belong, and deliver them over to the parties who establish the lawful ownership thereof. (Andrews v. Wall, 3 How. [44 U. S.] 573), yet it was decided by the supreme court, in the case of Schuchardt v. The Angelique, 19 How. [60 U. S.] 239, that, where a mortgage existed upon the moiety of a vessel, which was afterward libelled, condemned and sold by process in admiralty, and the proceeds were brought into the registry of the court, the mortgagee could not file a libel against a moiety of those proceeds. The libel of Patrick is such a libel, and, therefore, cannot be maintained. His claim is before the court only on his libel, and his objection to the application of the seamen is founded solely on his libel. That would, therefore, be a sufficient answer to his objection in the form in which it is now made. But, as was intimated by the supreme court in the case of Schuchardt v. The Angelique [supra], a mortgagee of a vessel can, when its proceeds are brought into the registry, after a sale, apply to the court by petition, claiming an interest in the fund. It is proper, therefore, to consider the claim of Patrick, as mortgagee, to have the seamen thrown upon the freight for their payment, on the assumption that Patrick is before the court in a proper way.

I find no authority for the course of practice urged on the part of Patrick. On the contrary, in the case of The Fortitude, 2 Notes of Cas. 515, Dr. Lushington, the same judge who had previously decided the case of The Dowthorpe, refused, either in the exercise of the ordinary jurisdiction of the court, or in virtue of the enlarged power given to the court by the statute of 3 & 4 Vict. c. 65, to entertain a suit, brought by the mortgagee of a share in a vessel, against the vessel and her freight, the vessel being under arrest for wages, and the aid of the court being asked to arrest the freight. The court placed its want of jurisdiction on the ground that the mortgagee could not have an original action against the freight, and that the court could not adjudicate upon the title to the freight, which was disputed by the owner of the share that was not mortgaged. The court also says (page 523), that, in the case of The Dowthorpe, it was induced to go the full length of the authority it had. Now, in the present case, the court is asked to adjudicate upon the title to these mortgages. They are claimed by Patrick, and also by Smith, Simpson & Co. The suit by Patrick, on the issues raised by the answer of Smith, Simpson & Co., resolves itself into a contest as to the ownership of the mortgages. It is not a question of title to the vessel, for, under the process of the state court, nothing was or could be attached or sold but the right, title and interest of the state court debtor in the vessel. The suit in the state court was not one in rem against the vessel, and, under the sale at which Patrick bought, he could acquire no better title to the vessel than Lanier's debtor possessed, and it was that title, and not the vessel itself, which he bought.

The Moses Taylor, 4 Wall. [71 U. S.] 427. If, therefore, the Barned's Banking Company had no interest in the mortgages, and thus no interest in the vessel, Patrick has no standing in court. That he has, for that reason, no standing in court, is asserted by Smith, Simpson & Co., who claim that they had acquired all the interest of the company in the mortgages. The adjudication of a question of this kind is peculiarly the province of a court of equity, and is not within the usual functions of a court of admiralty. In the case of The Saracen, 6 Moore, P. C. 74, Lord Langdale says: "With respect to the equitable jurisdiction of the court of admiralty, it is true that, in the decision of cases properly within the jurisdiction of the court of admiralty, equitable considerations ought to have their weight, but it does not thence follow that the court of admiralty has jurisdiction to do all that courts of equity may do, in suits instituted by persons suing either for themselves, or on behalf of themselves and others, for the administration of assets, or the distribution of a common fund in which several persons are interested, or upon which they have claims. No instance of the exercise of any such jurisdiction has been cited, and, in the absence of any authority, it does not appear to us that there is any such jurisdiction." And, even under the power of the court to dispose of proceeds in the registry, the court, in its discretion, refuses to consider a claim that is contested. Leland v. The Medora [Case No. 8,237]; The Maitland, 2 Hagg. Adm. 253. The principle on which the court acts in disposing of proceeds in court, is not to assume the jurisdiction of a court of chancery, to compel parties to submit to a marshalling of assets, in the usual acceptation of that authority. The Rodney [Case No. 11,993]. I think, therefore, that I should be departing from the settled course of practice in admiralty, if I should allow the claim set up by Patrick to be interposed to delay or control in any way the payment of the seamen and the master and the other parties interested, out of the proceeds of the vessel in the registry. Seamen are peculiarly wards of the court, and their claims, and the other admiralty claims against the vessel or her freight, ought to be adjusted and paid without reference to the contest between these rival claimants to the mortgages on the vessel. They will be so adjusted on a hearing of all parties concerned, other than Patrick, and Smith, Simpson & Co.

After the above decision was rendered, an application was made on behalf of Patrick for leave to amend his libel, which was granted to him, and on this amended libel he renewed his application.

BLATCHFORD, District Judge. The only averment contained in the amendment is, that the mortgagee, whose interest Patrick claims to have acquired and to represent, through a sale of it by the sheriff in the state court, on an attachment issued against such mortgagee, had, prior to the issuing of the attachment, assumed the possession, management, and control of the vessel, and had paid the wages of the seamen employed in her, and that, by reason of those facts, and the other facts stated in the libel, Patrick became, and, at the time of such libel, was, the legal owner of the vessel, and was entitled to her possession, and was lawfully in possession of her, and is entitled to all her proceeds. The only new fact averred, that was not in the libel when the case was before the court on the former occasion, is, that the mortgagee was a mortgagee in possession, exercising acts of control and ownership over the vessel. The original libel averred that the mortgages had become forfeited, and the title of the mortgagee to the vessel had become absolute, before the issuing of the attachment by the state court, and that thereby the mortgagee became the legal owner of the vessel, and that Patrick represented the title of the mortgagee.

The difficulty in the case on the part of Patrick is, that the taking possession of the vessel by the mortgagee does not vary the question, so far as the controversy is concerned of which this court is asked to take cognizance. Although the mortgagee did take possession, and although, as between him and the mortgagor, that act may, in connection with the non-payment of the mortgages when due, and their consequent forfeiture, have been sufficient to divest the mortgagor of what title he had, and vest it in the mortgagee, yet, if, at the time of so taking possession, the mortgagee did not own the mortgages, but had previously passed away all interest in them to Smith, Simpson & Co., such taking possession either amounted to nothing so far as the mortgagee was concerned, or else it inured to the benefit of the real owner of the mortgages. The right of the mortgagee to take possession in his own right, or except as representing the real owner of the mortgages, being contested here by Smith, Simpson & Co., the contest here is still one between Patrick, claiming that the interest in the mortgages remained in the mortgagee, who then took possession, and is now represented by Patrick, and Smith, Simpson & Co., who claim that the interest in the mortgages did not remain in the mortgagee, but had been transferred to them. The contest here, therefore, remains what it was before the libel was amended—merely a contest as to the ownership of the mortgages. The court cannot reach any decision on the libel without adjudicating as to the title to the mortgages. The mere act of taking possession by the mortgagee could not destroy the claim of Smith, Simpson & Co. to the mortgages, if they had previously acquired the interest of the mortgagee in the mortgages, as is

claimed by them in their answer to Patrick's libel.

I am, therefore, of opinion that the libel of Patrick, even as amended, cannot be allowed to be interposed to control the payment of the seamen, for the reasons set forth in my former opinion.

So far as the seamen, wards of the court, and the master, whose claims are peculiarly admiralty claims, and are claims against both ship and freight, are concerned, Patrick is not entitled to compel them to become parties to a marshalling of assets, and to wait for the payment of the amounts decreed to them, until it can be determined whether as against Patrick they ought not to be paid exclusively out of the freight. They must be paid, and paid at once, out of any funds of which the court has control, on which they have a lien, without regard to Patrick's claim. But this can be done without doing injustice to Patrick. The decision of the court on the questions raised by the libel of Patrick has been made on motion, and not on the formal decision of the suit brought by him, on a final or plenary hearing. If this court is wrong in its views, and disposes finally now, on motion, of the fund in which Patrick claims an interest, he will perhaps be cut off from the opportunity of correcting by appeal any error that may have been committed by this court. But if, while the seamen and master are paid, and paid promptly out of the money which the court has at its disposal to pay them, that is, out of the proceeds of the vessel and the freight indiscriminately, on both of which their claims are liens, and against both of which they have decrees, the question as to whether, as regards Patrick and his claim, the claims of the seamen and master shall be charged against the vessel exclusively, or the freight exclusively, or both, and, if both, in what proportions against each, can be left open to be decided on the hearing of the libel filed by Patrick. This will do substantial justice to all parties, and an order for payment will be made accordingly.

Case No. 12,220.

The SAILOR'S BRIDE.

[Brown, Adm. 68;[1] 17 Leg. Int. 245.]

Circuit Court, D. Michigan. Dec., 1859.

SALVAGE — QUANTUM MERUIT — JURISDICTION OF CLAIMS AGAINST FOREIGNERS.

1. Salvage being the compensation allowed to persons by whose assistance a ship or cargo is saved from impending peril, if the property is not benefited by the exertions of the salvors, they can claim no compensation as salvage.

2. But if an effort be made in good faith, with means believed to be adequate, the salvor may recover something in the nature of a quantum meruit, though his efforts are unsuccessful.

[Distinguished in The Brabo, 33 Fed. 885.]

3. Though a court of admiralty is not bound to take jurisdiction of controversies growing out of contracts between foreigners having a domicile in this country, it may lawfully exercise it, and ought to do so, where justice requires it.

4. It has jurisdiction in a case of salvage rendered by an American tug to a British vessel in Canadian waters.

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

This was a case of salvage in which the libellant alleged that Evans, being the owner of the steamtug Fields, a vessel duly enrolled and licensed at Detroit, and used in navigating the lakes and rivers connected therewith, in descending the St. Clair rapids, discovered the schooner Sailor's Bride aground near the Canadian shore, and being informed that she was desirous of being hauled off, after some delay, procured a hawser strong enough, as was supposed, to draw the vessel from the place where she was aground, but the cable, not being of sufficient strength, parted; another, being procured, was obliged to be cut to preserve the tug from damage. In making this fruitless attempt, the tug was engaged six hours, and the libellant alleged that the usual charge for such service was at the rate of ten dollars an hour. In the answer it was averred that a special contract was made with the master of the tug that unless the schooner was drawn off, no compensation was to be charged.

W. A. Moore and Mr. Blockmore, for libellant.

Alfred Russell and Mr. Walker, for claimant.

McLEAN, Circuit Justice. The schooner Sailor's Bride was a Canadian vessel, and was aground in the St. Clair rapids, near the Canadian shore. The tug, as appears, had been regularly enrolled and licensed at Detroit, the home port of the vessel, and was used in navigating the waters of Michigan and the adjoining states. But it seems, also, to have been used in towing boats over the St. Clair rapids, or into Detroit and other ports. On the present occasion it was performing the duties of a tug in attempting to relieve the Sailor's Bride. This was a temporary duty, involving no right of navigation between two or more states, and therefore, was not within the rule of navigation as prescribed in the cases cited. Allen v. Newberry, 21 How. [62 U. S.] 244; McGuire v. Card, Id. 248; Jackson v. Magnolia, 20 How. [61 U. S.] 296. A tug engaged in towing vessels into port is, for the time being, connected with the vessel towed, and partakes of its character. The same may be said of a towage over the St. Clair rapids or any place of difficulty. And the only question which arises is, whether an American vessel so employed may do an office of kindness to a ves-

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

sel of a foreign country, as alleged to have been done or attempted to be done in this case. To hold that this may not be done would be a strange perversion of those laws of commercial intercourse which characterize the civilized nations of the world.

A salvage service is defined to be the compensation allowed to other persons by whose assistance a ship or its loading may be saved from impending peril. This service must be within the admiralty jurisdiction, and may be rendered spontaneously or by request. And it is admitted that salvage is a compensation for actual services rendered. But as, in this case, the vessel remained aground, and the owner was in no respect benefited by the efforts of the master of the tug, no compensation can be claimed on that ground.

Considering the extent of our commercial intercourse with other nations, and the numbers of foreign vessels which annually visit our ports, it becomes important to inquire to what extent foreigners, transiently here, are entitled to seek redress on the instance side of the American admiralty. Mr. Justice Story was of opinion that, with reference to what may be deemed the public law of Europe, a proceeding in rem might well be sustained by our courts where the property of a foreigner was within our jurisdiction. Nor was he able to perceive how the exercise of such a judicial authority clashes with any principles of public policy. On the contrary, he thought the refusal might well be deemed a disregard of national comity, inasmuch as it would be withholding from a party the only effectual means of obtaining relief. The jurisdiction of the admiralty in matters of contract depends not on the character of the parties, but on that of the contract, whether maritime or not; when, therefore, its jurisdiction once attaches to the subject-matter, it will exercise it conformably with the law of nations, or with the lex loci contractus, as the case may require. The result, therefore, of the American authorities seems to be that, though the admiralty courts of this country are not bound to take jurisdiction of controversies growing out of maritime contracts between foreigners having a domicile in this country, as they are between parties citizens or residents here, yet that they may lawfully exercise it, and ought to do so, in obedience to the demands of justice.

Two depositions on the part of the claimant have been taken, those of Peter Duas and Jas. Bogue, and it is objected that they were taken without notice. This is unfortunate for the claimant, as both of these witnesses say that compensation was not to be made to the master of the tug if the Sailor's Bride should not be drawn off. But as no notice was given of taking the depositions, they are necessarily excluded from the jury. The other deposition, that of Henry P. Odell, states that the claimant requested the master of the tug to pull off his vessel, which he attempted to do, but failed. But no facts were stated by this witness showing any special contract made by the parties, and, although in the answer it is alleged no compensation was to be paid if the Sailor's Bride should not be removed, the depositions proving the fact have been suppressed.

The case stands upon the statement of one witness as to the contract to haul off the vessel. If this be placed upon the footing of salvage, as the effort to remove the vessel was ineffectual, and no benefit resulted to the claimant, no compensation can be paid on that ground. As the evidence does not show any agreement to pay a specific sum to relieve the vessel in jeopardy, and as a claim for salvage cannot be maintained, it can only rest on a quantum meruit. And at this point we have to meet the objection that although the effort was made it was fruitless, no benefit being done to the claimant. Under such circumstances, can the libellant recover? No stipulation was entered into that no compensation should be paid unless the vessel should be pulled off. The effort was made in good faith, and with means that were believed to be adequate. Six hours were laboriously employed to remove the vessel, and no want of skill was charged against the master of the tug; one cable was broken, and another was cut, in trying to accomplish the object. Under the circumstances, while I am inclined to think the master of the tug is entitled to some compensation, I do not think he is entitled to the same pay as if he had been successful. He was disappointed in his own efforts, and so was the claimant. Upon the whole, I will abate one-half of the amount allowed to the libellant, and affirm the residue of the decree with costs.

Decree varied.

SAINE (SWOPE v.). See Case No. 13,705.

ST. ANDER, The. See Case No. 2,568.

ST. CLAIR (RIGGS v.). See Case No. 11,829.

ST. CLAIR COUNTY (LYELL v.). See Case No. 8,621.

ST. CLAIR COUNTY (NICOLAY v.). See Case No. 10,257.

STE. GENEVIEVE (WELCH v.). See Case No. 17,372.

Case No. 12,221.

The ST. GEORGE.

[Blatchf. Pr. Cas. 551.] [1]

District Court, S. D. New York. Oct. 14, 1863.

PRIZE—ATTEMPT TO VIOLATE BLOCKADE.

Vessel and cargo condemned for an attempt to violate the blockade.

In admiralty.

BETTS, District Judge. The above vessel and cargo were captured at sea, April 22,

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

1863, off New Inlet, North Carolina, by the United States ship-of-war Mount Vernon, and were sent to this port for adjudication. A libel was filed against the prize, demanding its condemnation and forfeiture April 29, 1863, and a monition and attachment were the same day duly served thereon, which were returned on the 19th of May thereafter. Thereupon, on due and regular proceedings before the court, the default of the prize was proclaimed and decreed, no person intervening or appearing therefor. It appears, from the certificate of the vessel's registry, that she was a British vessel, owned at the port of Hamilton, Bermuda, November 10, 1853, by John Jay Bowne, of that place. The shipping articles show that the crew engaged, in April, 1863, for a voyage from St. George's in the Bermudas, to Baltimore, and thence back to the West Indies, and to St. George's. The certificate of clearance from the same port cleared the vessel, with 800 bags of salt and a cargo of general merchandise, for Baltimore, April 10, 1863. The master of the vessel and the agent of the owner testified, on examination in preparatorio, that they knew that Wilmington was in a state of blockade; that they knew of the state of war; that the vessel was boarded by a United States war vessel, April 22d, and warned off the coast; and that the warning was indorsed by the boarding officer of the vessel's papers. The first mate testifies that, after leaving Bermuda, the master suggested to him to run the blockade, and that the prize was steered for the coast of North Carolina, to do so. No evidence is given disproving these facts.

The case is one of a clear intention and attempt to violate the blockade, and a decree of condemnation and forfeiture of the vessel and cargo must be entered.

Case No. 12,222.

In re ST. HELEN MILL CO.

[3 Sawy. 88;[1] 10 N. B. R. 414; 8 West. Jur. 597.]

District Court, D. Oregon. Aug., 1874.

Circuit Court, D. Oregon. Aug. 19, 1875.

CORPORATIONS — MORTGAGE — CORPORATE SEAL — STOCKHOLDERS' MEETING — NOTICE — BANKRUPTCY — ASSIGNEE.

1. A corporation cannot execute a deed otherwise than under its seal.

2. A lien by way of mortgage can only be created by a deed under seal.

3. An assignee represents the rights of the creditors and each of them, as well as the bankrupt, and may therefore maintain or defend proceedings in regard to the property of the latter, which, on grounds of public policy or otherwise, he would not be allowed to.

4. A corporation cannot make a deed unless the directors, or a majority of them, meet together as a board, and so determine; and the only evidence of such meeting and action is the "record" required to be kept by the secretary.

[Cited in Corbett v. Woodward, Case No. 3,223.]

5. A stockholders' meeting has no authority to elect a president and secretary of the corporation.

6. Meeting of stockholders without notice is invalid.

[Cited in Doernbecher v. Columbia City Lumber Co. (Or.) 28 Pac. 900.]

In bankruptcy.

Joseph Simon and John W. Whalley, for assignee.

William Strong, for creditor.

DEADY, District Judge. On February 21, 1874, the St. Helen Mill Co., a corporation duly organized under the laws of this state, with a board of five directors, and doing business at St. Helen, was duly adjudged a bankrupt, and thereafter H. S. Allen was appointed assignee of its estate.

On March 27, 1874, S. A. Miles made proof of a debt against the estate of the bankrupt of $3,714.28, arising upon the promissory note of the corporation, made under its corporate seal to the order of said Miles, on January 7, 1873, for the sum of $3,239.38, payable one day after date, with interest at the rate of one per centum per month, with security—the security being, as claimed, a mortgage executed by said corporation upon certain lots in the town of St. Helen.

To this proof of debt with security, the assignee made objection: (1) That said pretended mortgage was not executed or acknowledged by the bankrupt. (2) That said pretended mortgage was not executed by the authority of said bankrupt.

The answer to the objections is irrelevant and immaterial.

The facts of the case, as found by the register, are substantially as follows: A few days after the making of the note—which was given in settlement of a previous indebtedness—the creditor asked the directors of the incorporation, or some of them, for security, at the same time giving them to understand that if the debt was secured he would not sue upon it at the following April term of court. The result was, that after some informal conversation between the four persons then acting as directors of the corporation, it was concluded between them that the security should be given, and thereupon an instrument purporting to be a mortgage by the St. Helen Mill Company of certain lots in St. Helen, belonging to it, was executed to the creditor, as follows: "In witness whereof, the said party of the first part has hereunto set their hands and seals the day and year first above written. St. Helen Mill Co. Wm. Pickering, Secretary. (L. S.) James Dart, President. (L. S.)"

Said Dart and Pickering being two of the directors aforesaid, and acting president and secretary of the corporation; and on the same day said Dart and Pickering acknowledged

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

said instrument "to be their free act and deed," before the county clerk of Columbia county.

At the date of signing this instrument, and for some years previous, said corporation had a corporate seal, and never had adopted or used any other seal upon that or any other occasion, and that said corporate seal was not affixed to said instrument aforesaid; nor did said directors, at any formal meeting, ever consider or authorize the execution of said instrument, or the giving of any security to said Miles whatever.

The capital stock of said corporation consisted of 500 shares, and at the annual meeting of stockholders for the election of directors thereof, on January 6, 1873, there was only 406 shares of said stock represented; and no notice of said meeting was given.

Upon this state of facts the question arises: Is this instrument the deed of the corporation? for if it is not its deed, it is not a mortgage, and is therefore no security for the debt in question. It was an established principle of the common law, that corporations aggregate could only act under their common seal. 1 Bl. Comm. 475; Kinzie v. Trustees of Town of Chicago, 3 Ill. 188. In this country the rule has been much modified, but I know of no case which goes so far as to hold that a corporation can execute a deed otherwise than under its corporate seal. The exceptions to the common law rule are confined to cases of simple contracts, or contracts not under seal. A conveyance of real property by a corporation must be under its corporate seal. Richardson v. Scott R. Co., 22 Cal. 156.

In Angell and Ames on Corporations (section 295) it is said: "To bind a corporation by a specialty it is necessary that its corporate seal should be affixed to the instrument. * * * The corporate seal is the only organ by which a body politic can oblige itself by deed; and though its agents affix their private seals to a contract binding upon it, yet these not being seals, as regards the corporation, it is in such case bound only by simple contract."

In Eagle Woolen Mills Co. v. Monteith, 2 Or. 285, the supreme court held "that the deed of a corporation must be sealed with the corporate seal."

Indeed, counsel for the creditor practically admits that this instrument is not the deed of the corporation, and therefore not a legal mortgage, but insists that it is an equitable one, and therefore entitled to be recognized and enforced in a court of bankruptcy as a security in favor of a creditor.

Where a deed or agreement of sale, absolute upon its face, was intended by the parties as a mortgage or security only, equity will treat it and give effect to it, as such. Such an instrument is sometimes called an equitable mortgage, because equity treats it as a mortgage. 1 Washb. Real Prop. 502, 504, 507.

But in this case, the instrument which the court is asked to treat as a mortgage is in no sense the deed of the bankrupt. "It is impossible to create a lien by way of mortgage, by any instrument which is not a deed under seal. An instrument not thus executed would not be a mortgage, though it might be a contract for a mortgage." 1 Washb. Real Prop. 504. But if it be admitted that this instrument as between the parties to it, would be enforced in a court of equity as an agreement for a mortgage, still it does not follow that such effect can be given to it in this proceeding or in any proceeding between the parties now before the court.

"An agreement to mortgage an estate as a security for a debt, though regarded in some cases as an equitable mortgage, can have no validity against third persons who acquire legal interest in or liens upon the property. * * * Equity may, in some instances, reform an instrument, but it cannot make one." 1 Washb. Real Prop. 514.

Now, since the date of this instrument the property mentioned therein has passed to the assignee. Upon the assignment he took the property in trust for the creditors, to apply the same upon their several claims as they then existed, with or without security. The assignee not only succeeds to the rights and liabilities of the bankrupt, but he also represents the rights of the creditors and each of them; and as such representative, may maintain or defend proceedings in regard to the property of the bankrupt, which, on grounds of public policy or otherwise, the latter would not be allowed to. Carr v. Hilton [Case No. 2,436]; Brock v. Terrel [Id. 1,914]; In re Wynne [Id. 18,117]; Allen v. Massey [Id. 231].

But this instrument is not even the contract of the corporation, and therefore equity would not treat it as an agreement for a mortgage. Upon the facts, it is plain that the corporation not only did not give the creditor a mortgage, but it never agreed to do so. The corporation act provides that "the powers vested in the corporation are exercised by the directors." Code Or. 661. But to act, they or a majority of them must meet together as a board, and that fact, together with their conclusion, must appear from the "record of the official business" of the corporation, which section 9 of the corporation act requires to be kept by the secretary. Gashwiler v. Willis, 33 Cal. 16; The California [Case No. 2,313]; D'Arcy v. Tamar, K. H. & C. Ry. Co., L. R. 2 Exch. 158.

In this case, the record not only fails to show that at any meeting of the directors it was resolved or voted to give the creditor a mortgage or security for his debt, but the testimony of the directors who signed this instrument, affirmatively proves that it was only signed by them in pursuance of an informal understanding among the majority of the directors, and that the subject never came before the directors as a board, or was

acted upon by them at any meeting of the same.

Besides, the directors who signed this instrument as "Pres." and "Sec." were never duly chosen. It appears from the record that the stockholders present at the annual meeting in 1873, after the election of directors, proceeded to elect a president and secretary of the corporation. This was an unauthorized act and void. A stockholders' meeting has no power to elect a president or secretary. The authority to do this is vested in the directors "at the first meeting" after their election and qualification. Code Or. 661; Gashwiler v. Willis, supra. Indeed, the stockholders' meeting at which these directors were elected was illegal, being held without notice, and less than the whole amount of stock represented.

The objections to the proof of debt, with security, are sustained at the costs of the creditor.

Affirmed on petition for review in the circuit court, August 19, 1875.

FIELD, Circuit Justice. Since the demurrer to the petition in this case was argued, I have carefully read the opinion of the district judge upon the questions presented, and I concur fully in its reasoning and conclusions. It presents with clearness and precision the law as to the necessity of a corporation attaching its seal to an instrument to render it operative as its deed; and holds, in accordance with the uniform current of the authorities, that the power to execute a mortgage by its officers can only be conferred by vote of the directors meeting together and acting as a board; and that the only evidence of such vote is to be found in the official record of the corporation. Upon these points I could add nothing to the opinion.

ST. JAMES, The (ROBERTS v.). See Case No. 11,914.

Case No. 12,223.

The ST. JOHN.

[2 Ben. 192.] [1]

District Court, S. D. New York. March, 1868.[2]

COLLISION—IN THE HUDSON RIVER—WHISTLES—LOOKOUT.

1. Where a steamboat coming down the Hudson river from Albany, on rounding Magazine Point, saw the lights of a towboat below, which was going up on the east side of the river, and the pilot of the steamboat blew two whistles, whereupon the towboat answered with two whistles and starboarded her wheel, expecting that the steamboat would pass to the eastward of her, but the latter struck a barge on the port side of the towboat, the collision occurring about the middle of the river, and the steamboat having no lookout forward outside of the pilot house: *Held*, that the towboat was right, on hearing the two whistles of the steamboat, in starboarding her helm, and was not in fault.

2. The pilot of the steamboat misjudged the position of the towboat, supposing she was on the west shore, instead of on the east shore, and such mistake was the cause of the collision.

3. The steamboat was also in fault in not having a proper lookout.

In admiralty.

Beebe, Dean & Donohue and C. Swan, for libellant.

Charles Jones, for claimants.

BLATCHFORD, District Judge. This is a libel filed by Abraham E. Hasbrouck, owner of the barge Ulster County, for a collision which took place on the Hudson river, near West Point, about 3 o'clock in the morning of the 20th of November, 1864, between the steamboat St. John and the barge. The St. John was on a trip from Albany to New York, having left Albany about eight o'clock on the previous evening, and run to the place of collision, a distance of about one hundred miles, in seven hours, at a speed of over fourteen miles an hour. The Ulster County was in tow of a propeller called the Pluto, and was lashed to the port side of the propeller, there being another barge lashed to the starboard side of the propeller, and a canal boat in tow astern of the latter barge. The Pluto and her tows had left New York, bound to New Paltz, in Ulster county, opposite Poughkeepsie, about five o'clock on the previous afternoon, and had run to the place of collision, a distance of about fifty miles; in ten hours, at a speed of about five miles an hour. The night was light, the weather was clear, the tide was about half flood, and there was scarcely any wind. The propeller, with her tows, went up on the east side of the channel of the river, in the usual and proper course for such vessels, until she reached a point nearly opposite West Point, but a little below it. The river runs from Albany southward, and, just above West Point, it turns abruptly to the eastward, around a point called Magazine Point, and, after running in an easterly direction for a short distance, it turns abruptly to the southward around West Point. Magazine Point being on the left bank of the river and West Point on the right bank. The pilot in charge of the Pluto was on the lookout for the St. John, her regular time for leaving Albany being known. The Pluto was going very slowly, being close shut off. As the St. John came down and turned around Magazine Point, and headed to the eastward, the pilot of the Pluto saw her. If the Pluto had kept on the course she was then on, the St. John would have passed to the westward of her and her tows, and there would have been no collision, for the Pluto was well to the east side of the river; and,

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

[2] [Modified in Case No. 12,224. Decree of circuit court affirmed by supreme court in 154 U. S. 586, 14 Sup. Ct. 1170.]

although the usual course of the St. John was to take rather a wide sweep around West Point, because she was a large boat, in order to get a proper turn and not collide with small vessels along the western shore below West Point, yet she would usually go down in the middle of the river after she had got her turn around West Point. The pilot of the St. John, as soon as she came around Magazine Point and headed to the eastward, saw the light of the Pluto, and sounded two whistles for the Pluto to keep to the left. The pilot of the Pluto immediately replied by two whistles, and starboarded his helm, and got his head to north-northwest, running to the left, and expecting that the St. John would pass to the eastward of him, as indicated by her two whistles. But the St. John came on, and her stem struck the Ulster County on her port bow and sunk her. The force of the blow was such as to part all the lashings which fastened the barge to the tug, and, although the St. John had slowed and stopped her engine, and reversed it, before she struck the barge, yet she had on sufficient headway, with the enormous bulk of a steamer over four hundred feet long, which had been running at a speed of nearly fifteen miles an hour but a short interval before, to cut into the barge a distance of some ten feet. It is claimed, on the part of the St. John, that no answering whistles from the Pluto were heard on board of the St. John, and that, in consequence, after slowing, she blew two whistles a second time, and, getting no response to them, stopped her engine and reversed it. But the evidence is satisfactory that the Pluto did answer promptly by two whistles, and did starboard her helm, and it does not appear that the St. John took any different course after she blew her first two whistles from what she would have taken if she had heard a response to them, or that her movements or courses were at all influenced by her failure to hear a response from the Pluto. The St. John kept on without reference to where the Pluto was or the course she was taking, and ran into her. It is very clear, on the evidence, how and why the collision happened. When the pilot of the St. John sighted the light of the Pluto across the land of West Point, he entirely mistook her position. He admits that he thought she was over to the west shore. So believing, he signaled to her to keep toward the west shore, and that the St. John would go to the eastward of her. The Pluto obeyed, and headed accordingly, and had got over to the middle of the river, in her progress from the easterly side of it toward the westward, when the collision occurred. All the testimony agrees that the collision happened at nearly the middle of the river, and the witnesses from the St. John admit that they found the Pluto further to the eastward than they supposed she would be. It is manifest that the sole cause of the collision was the mistaking by the St. John of the position of the Pluto and her tows, and the mistaken signal which the St. John gave for the Pluto to keep to the westward, which signal, in the position the Pluto was in, was properly answered by the starboarding of her helm. The St. John was wholly in fault, and the Pluto and the Ulster County were free from fault. The Pluto, as soon as a collision appeared inevitable, slowed and stopped, and used all proper means to avoid it.

The St. John had no proper lookout. The only persons on the lookout on board of her were those in the pilot house, and they mistook the position of the Pluto. It has been again and again decided that the pilot house is not a proper station for a lookout, and this case adds another forcible illustration of the propriety of the well-established rule. If a proper, experienced, and competent lookout had been stationed on the bow of the St. John, engaged in that duty alone, with his attention not distracted by other duties, the presumption is that he would have correctly discerned the position of the Pluto, and that the collision would not have occurred.

There must be a decree condemning the St. John in damages, with a reference to a commissioner, to ascertain and report them.

[On appeal to the circuit court, the decree of this court was modified. Case No. 12,224. An appeal was then taken to the supreme court, where the decree of the circuit court was affirmed. 154 U. S. 586, 14 Sup. Ct. 1170.]

Case No. 12,224.

The ST. JOHN.

[7 Blatchf. 220.] [1]

Circuit Court, S. D. New York. April 23, 1870.[2]

COLLISION — ON RIVER — LOOKOUT — DAMAGES — SUIT BY CARRIER—PLEADING—AMENDMENT.

1. Where a steamboat was going down the Hudson river, and another steamboat was going up that river with a barge in tow on her port side, and a collision occurred between the former vessel and the barge, in consequence of the attempt of the former vessel to pass on the starboard side of the latter vessel, the latter vessel being near the shore that was on her starboard side: *Held*, that the former vessel was in fault.

[Cited in The B. B. Saunders, 19 Fed. 122; The Garden City, Id. 532; The Cement Rock, 38 Fed. 765.]

2. Steamboats meeting on the Hudson river must pass to the right, unless there be some substantial reason why that cannot be done.

3. The necessity of a lookout on the bow of a large steamboat, enforced.

4. A steamboat which gives a signal to another vessel for a departure from the ordinary rule

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

[2] [Modifying Case No. 10,223. Decree of circuit court affirmed by supreme court in 154 U. S. 586, 14 Sup. Ct. 1170.]

of navigation, must take the hazard of the consequences of making such departure herself, whether she hears a response to such signal or not.

[Cited in The Milwaukee, Case No. 9,626; The B. B. Saunders, 25 Fed. 731; The John King, 1 C. C. A. 319, 49 Fed. 472; The Florence, 68 Fed. 942.]

5. An amendment of the libel as to the amount of damages claimed, in a suit on a collision, allowed, to remove a formal difficulty in the way of a just award.

6. A carrier can maintain an action, in admiralty, for damage done to goods in his care.

7. The amount actually paid for the hire of another vessel to replace one damaged by a collision, is more satisfactory evidence of the proper amount of demurrage to be allowed for the loss of the use of the damaged vessel while being repaired, than the mere opinions of witnesses giving a higher estimate of the value of such use.

[Cited in Petty v. Merrill, Case No. 11,050.]

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

[This was a libel for damages resulting from a collision. There was a decree in the district court condemning the St. John, with a reference to a commissioner to ascertain the amount. Case No. 12,223. From that decree the present appeal was taken.]

Welcome R. Beebe and Charles Donohue, for libellant.

Charles Jones, for claimants.

WOODRUFF, Circuit Judge. There is very great difficulty in determining, from the evidence, the precise manner in which the collision in question herein was caused. The steamboat St. John, at about three o'clock, a. m., on the 20th of November, 1864, was on her voyage from Albany to New York, on the Hudson river. The steamboat Pluto, having the barge of the libellant in tow and lashed to her port side, was on her voyage up the river from New York to New Paltz in Ulster county. The night was clear and the moon about "half size." At some point in the river very near to West Point—either at the Point, or a little above or a little below—the bow or stem of the St. John struck the port side of the barge and the injury was sustained which is the subject of investigation.

There are some facts either not disputed or so far established, that I think a safe and just conclusion is attainable. At Magazine Point, a short distance above West Point, the river, in its downward course, turns abruptly eastward, and then, at West Point, abruptly southward, describing, in the two curves, the central portion of the letter S. The Pluto was proceeding up the river, having the barge in question and two others in tow, and was near the eastwardly shore of the river, about one quarter of a mile below West Point, when she saw the St. John coming down, the St. John then being at or not far below Magazine Point, and about one quarter of a mile above West Point. The St. John, having turned Magazine Point, saw the Pluto below West Point, and her pilot and his assistants took her to be, as she was in fact, a steamboat with barges in tow. The pilot of the St. John, from his elevated position in the pilot-house, saw the stern-light of the Pluto, as he says, over the Point, before he could see her hull or lower lights, and judged that she was in the westwardly part of the river, or, as he expresses it, "I thought she was best to the west shore." He thereupon determined to pass to the left, or on the starboard side of the Pluto. The testimony pretty clearly establishes, (so far as the opinions of the witnesses, formed on such a subject at such a time, aided by their knowledge of the course of the river and the shores, and, hence, the distance in a right line at which persons on approaching vessels can there see each other,) that the two steamboats were then nearly a half of a mile apart. Believing the Pluto to be towards the west shore of the river, and concluding to pass to the eastward of her, the pilot of the St. John signalled that intention to the Pluto by two whistles, and, with the helm of the St. John hard-a-starboard, bore towards the east side of the river. At what precise moment he starboarded the helm is not very material. He must have put his helm a-starboard to make the necessary turn at Magazine Point, and he and his three assistants at the wheel all testify that, after that manœuvre, the helm was not changed before the collision. He heard no response to his signal, and, shortly after, he repeated it, by again blowing two whistles, and yet heard no response, and, having, as I am satisfied, already given the order to slow, as he came around Magazine Point, he rang to stop and then to back, but, notwithstanding, as the pilot and his witnesses say, he had gotten some rear-way on the St. John, her bow struck the port side of the barge, and broke into her, so that she soon sank.

On the barge, the whistles were heard, and the pilot of the barge testifies, that he answered by two whistles, to signify his assent to pass to the west or on the starboard side of the St. John, and put his helm to starboard, to aid in that movement; but it is obvious that, either because the Pluto was moving slowly, or because she was hindered by her tows, she had made but little progress westward when the collision took place. The witnesses generally agree that the point of collision was about the centre of the river. My own judgment, upon all the proofs, is, that it was eastwardly of the centre; else, the barge could not have been struck on her port bow, if any reliance is to be placed on the testimony of the witnesses for the claimants, that the wheel of the St. John was not changed after it was hove to starboard. This fact, that she was so struck, is, in my mind, an important one, in corroboration of those witnesses; for, if the St. John had been turned to the westward, to go around West Point, before the collision, she must, if she collided at all with the barge, have struck her on

her starboard and not on her port side. And, to my mind, it shows, also, that the place of actual collision was above the place where the St. John would port her helm to take her course down the river, and that the collision occurred while she was endeavoring to pass to the east of the Pluto and her tows, but before the pilot of the St. John comprehended the result of his mistake as to their position.

The collision was, therefore, due to the attempt of the St. John to pass to the eastward, or on the starboard side, of the Pluto and her tows. It is true, that the witnesses for the claimants say that the course of the St. John was according to the usual course of steamboats of her size coming down the river, and that it is desirable to go far to the east before taking a course down the river opposite West Point. No doubt, there is greater convenience in doing so; but it is not proved that there is any difficulty in heaving the helm to port in season to keep in the middle, or westerly of the middle, of the river off that point.

The rule of navigation requires that steamboats meeting shall pass to the right unless there be some substantial reason why that cannot be done. The Pluto, with her tows, was in her proper position, and it was the duty of the St. John to avoid her. If, by her two whistles, she invited a departure from the rule, she took the risk, both of her own whistles being heard, and, in turn, of hearing the response, if a response was made. She had no right to dictate to the other boat a departure from the ordinary rule of navigation; and the hazard of the consequences of giving such a signal, whether she heard a response or not, rested upon her, if she persisted in her endeavor to pass on the starboard side of the other.

The mistake of the pilot of the St. John was, necessarily, of a two fold character. From his position, looking in a straight line across the end of West Point, his belief that the light of the Pluto was to the west of the centre of the river, involved, also, the idea, that she was further north, that is, nearer the Point, than she was. Had his supposition been correct, there would have been ample room for him to continue to swing around toward the east and then take up his course on the east side down the river. But, the Pluto being on such east side when seen, she was unable to get out of the way of this movement. The St. John should have ported her helm, or, at least, have steadied it, earlier, and the accident would not have happened.

On the Pluto nothing was done or omitted of which the St. John can complain. She had a perfect right to keep her course; and the St. John cannot complain that, in assent to her invitation to sheer to the west, the Pluto attempted to do so. It was not the fault of the Pluto, if her whistles were not heard by the St. John.

The claimants, while they insist that the question of the sufficiency of the lookout can have no bearing on the liability of the St. John, because the proof shows that the pilot and his assistants in the pilot-house did, in fact, see the Pluto as soon as it was possible to see her beyond West Point, and sooner, from their elevated position, than a lookout on the bows could have seen her, nevertheless claim that the Pluto was in fault in not having had a sufficient lookout. In the first place, the pilot of the Pluto had placed a man at the wheel, and was himself forward on the lookout, and saw the St. John as soon as she came around Magazine Point. He was not only on the lookout, but was looking for the St. John herself, as he knew that she was, in due course, at or near that Point. I think the Pluto not in fault in that respect. In the second place, I am not satisfied that a lookout on the bow of so long a boat as the St. John would not have been so far forward of the pilot-house as to see the Pluto sooner than the pilot did, nor that, when he saw her, he would not have more accurately judged respecting her position and saved the St. John from the collision.

The proofs are not such as to warrant a reversal of the decree of the district court charging the St. John with the consequences of the collision. The case of The Johnson, 9 Wall. [76 U. S.] 146, is instructive and sustains the views above expressed, as well in regard to the duty of the St. John to go to the right and pass on the port side of the Pluto, as, also, to the risk she assumed in blowing her whistles as an invitation to a departure from the usual rule. If it were true that the navigation of the river is so difficult, and the St. John so long, that she cannot govern herself by those principles in passing through the turns in the river, then she should have slowed much earlier, and have come around Magazine Point with such moderation that she could pick her way without endangering other vessels which are themselves without fault; and no desire to keep up her speed or not to lose time in making the turns, nor any mere convenience in turning, furnishes any excuse for not doing so.

In regard to the exceptions to the report of the commissioner and the objection to the allowance of an amendment of the libel in respect to the claim for damages, I have examined these questions, and, without extended discussion, it must suffice to say: (1.) The court undoubtedly had power to allow an amendment, in its discretion, going not to the introduction of a new cause of action, but only to the removal of a formal difficulty in the way of a just award. (2.) The right of a carrier to maintain an action for damage done to goods in his care, and for the safe and sound delivery of which he is responsible, cannot be questioned. He has such right even at common law, on strict principles. Here, if the claimants deemed

themselves entitled to insist that the owners not yet satisfied for their loss should be made parties, they should have sought such relief earlier. On appeal, no such objection will be entertained. Even the master of a vessel is permitted, in admiralty, to proceed for a collision. (3.) The other objections are, I think, without just foundation, except the one to the allowance of fifty dollars per day for the demurrage or loss of the use of the barge for the residue of the season. It appears, by the testimony of the libellant, that he actually hired another barge, for the residue of the season, for one thousand dollars; and he does not show that the service of that barge was not as useful to him as that of the barge which was injured. This is more satisfactory evidence of the extent of the libellant's loss than the opinions of the other witnesses.

I am not fully satisfied with the allowance of twelve hundred dollars for depreciation,—The Isaac Newton [Case No. 7,091]; but I cannot say that the proofs do not justify the report of the commissioner in that respect.

The sum of five hundred dollars must be deducted from the decree, and, as to the residue, it should be affirmed, without costs of appeal.

[On appeal to the supreme court, the decree of this court was affirmed. 154 U. S. 586, 14 Sup. Ct. 1170.]

Case No. 12,225.

The ST. JOHN.

[2 Spr. 266.] [1]

District Court, D. Massachusetts. Feb., 1864.

PRIZE—PARTICIPATION—SIGNAL DISTANCE.

In admiralty.

R. H. Dana, Jr., U. S. Atty., for all the vessels.

SPRAGUE, District Judge. This steamer was captured at about eight o'clock in the morning of the 18th April last, by the United States steamer Stettin, under the command of Acting Master Beers, at Bull's Bay, in an attempt to break blockade. The vessel and cargo have been condemned, and the question is upon the distribution of proceeds.

The flag-ship New Ironsides and the Powhattan, Housatonic, Paul Jones, Flag, Lodona, and America, of the blockading squadron off Charleston, claim to share in the proceeds. The principal ground of their claim, viz., co-operation in the common enterprise of blockading, without regard to being within signal distance, has been disallowed by this court, upon full consideration, in the case of The Cherokee [Case No. 2,640], and re-affirmed in the more recent case of The Aries [Id. 529]. The only actual captor in the present case was the Stettin, and no vessels can participate with her in the proceeds, unless they were within signal distance.

The capture took place in the daytime, so that no question arises as to the seeing of rockets, lanterns, or Coston lights. The nearest vessel was the Flag. No one states her distance at less than twelve or fourteen miles. Captain Strong, her commander, admits that he could not see the Stettin, still less make out signals from her by flags, if she had used any, and that he was not within signal distance, unless the being able to hear guns of certain calibre at that distance would make him so. Now, the Stettin, in the chase, fired as many as eight guns, the largest she had on board; yet none of them were heard by the Flag. Without undertaking to decide that a system of exchanging communications by guns cannot be established, of such a character as to entitle all vessels within its reach to share in a prize with the actual captors, it is enough to repeat what I decided in the case of The Aries [supra], that the orders respecting guns and rockets in force in the squadron off Charleston do not amount to such a system; and to add that, in this case, the Flag was not near enough to hear such guns as the Stettin had, in the then state of the wind and weather.

The claim of the Flag to participate in proceeds must be disallowed. The claims of the other vessels of the squadron fall with it, as they were still farther off than the Flag. The decree will divide the net proceeds between the United States and the steamer Stettin.

[1] [Reported by Hon. Richard H. Dana, Jr., and here reprinted by permission.]

Case No. 12,226.

ST. JOHN v. ERIE RY. CO.

[10 Blatchf. 271.] [1]

Circuit Court, S. D. New York. Dec. 19, 1872.[2]

RAILROAD COMPANIES—PREFERRED STOCK—MORTGAGES—RIGHTS OF STOCKHOLDERS.

1. A certificate for shares of stock in a railroad corporation declared that such stock should be entitled to preferred dividends, out of the net earnings, not to exceed a specified rate, after payment of mortgage interest in full. After the certificate was issued, the corporation borrowed money and issued bonds therefor bearing interest, and also took leases, on rent, of connecting railroads: *Held*, that the holder of the certificate was not entitled to be paid a dividend, before payment of the interest on such bonds, or of such rent.

[Cited in Nickals v. New York, L. E. & W. R. Co., 15 Fed. 579; New York, L. E. & W. R. Co. v. Nickals, 119 U. S. 308, 7 Sup. Ct. 215.]

[Cited in brief in Chaffee v. Rutland R. Co., 55 Vt. 123.]

2. The meaning of the words, "net earnings," defined.

[Cited in Mobile & O. R. Co. v. Tennessee, 153 U. S. 497, 14 Sup. Ct. 972.]

[Cited in Hazeltine v. Belfast & M. H. L. R. Co., 79 Me. 411, 10 Atl. 331; People v.

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

[2] [Affirmed in 22 Wall. (89 U. S.) 136.]

San Francisco Sav. Union, 72 Cal. 203, 13 Pac. 500.]

[This was a bill in equity by Thomas St. John against the Erie Railway Company to obtain a judgment as to the rights of the stockholders, and to protect them against the alleged wrongful acts of the company.]

Dorman B. Eaton, for plaintiff.
William W. McFarland, for defendants.

BLATCHFORD, District Judge. The plaintiff is the holder of certificates for shares of stock in the Erie Railway Company, which certificates declare him to be entitled to so many shares "in the preferred capital stock" of the company. Each certificate contains these words: "Said stock shall be entitled to preferred dividends, out of the net earnings, if earned in the current year, but not otherwise, not to exceed seven per cent. per annum, payable semi-annually, after payment of mortgage interest of said company in full." This preferred capital stock was issued in pursuance of the terms of a contract entered into, October 22d, 1859, between the shareholders and the creditors of a prior corporation, known as the New York and Erie Railroad Company. That company had, at the time, failed to pay at maturity certain of the coupons on bonds issued by it and secured by mortgages, and certain of its unsecured debts. Proceedings had been commenced against it, by certain of its mortgage creditors, to enforce the mortgage trust, and a receiver of the property covered by the latest two of the mortgages, (there being five,) had been appointed. The shareholders, the bondholders under all of the mortgages, and the unsecured creditors, then entered into the contract referred to. It contemplated and provided for the formation of a new company, in which such shareholders in the former company should become shareholders, by exchange, to the same extent. It appointed two trustees, who were to purchase the mortgaged property, on a foreclosure sale, for account of the parties to the contract, and obtain possession of the property, displacing the receiver, and then receive its net earnings, and apply them to pay (1) certain floating debt of the old company, not exceeding $320,000 of principal; (2) certain expenditures on the Long Dock property, estimated at $500,000; (3) the "delayed mortgage coupons, in the order of their priority." The mortgages were to continue as mortgages, under the new company. This left to be provided for, the holders of unsecured bonds. By the contract, they agreed to exchange their bonds for preferred stock, equal in amount to the amount of the bonds, and of the overdue coupons, and of the coupons for two years in advance. The contract also provides, that "such preferred stock is to be entitled to preferred dividends out of the net earning, (if earned in the current year, but not otherwise,) not to exceed 7 per cent. in any one year, payable semi-annually, after payment of mortgage interest and delayed coupons in full;" that the trustees might retain, from "said net earnings," a compensation for their services; and that, in case of a foreclosure, the trustees might assess a contribution to complete the purchase, the amount of such contribution "to be a charge upon the net earnings of the road, to be repaid before the payment of dividends upon the preferred stock, or to be funded, as the board of directors shall determine."

On the 4th of April, 1860, an act was passed by the legislature of New York [Laws 1860, p. 253], providing for the organization of the new company, by the name of the Erie Railway Company, after the sale on the foreclosure, and for the preservation of the mortgage liens. It also provided, that the capital stock of the new company should not exceed the amount of the capital stock of the old company, and of its debt unsecured by mortgage, and that the unsecured and judgment creditors of the old company might receive for their debts preferred stock of the new company.

On the 2d of April, 1861, an act was passed by the legislature of New York [Laws 1861, p. 213], reciting, that the trustees under the contract had purchased the property of the old company, under a decree for the foreclosure of the fifth mortgage, subject to the several mortgages thereon, and providing for the creation of the new corporation. It also provided, that the common capital stock of the new company should not exceed the outstanding capital stock of the old company; that the preferred capital stock of the new company should be equal to the amount of the total unsecured and judgment debt of the old company; that such preferred stock should "be entitled to preferred dividends out of the net earnings of said road, if earned in the current year, but not otherwise, not to exceed seven per cent. in any one year, payable semi-annually, after payment of mortgage interest and delayed coupons in full;" and that the holders thereof might "vote personally or by proxy, at all meetings of the corporation, in the same manner as the holders of common stock, but not otherwise."

On the 30th of April, 1861, the articles of association of the new corporation were entered into, reciting at length the said contract, stating that the preferred capital stock of the new corporation was to be equal to the amount of the total unsecured and judgment debts of the old company, recognizing the liability of the trustees to deliver preferred stock, and ratifying their acts in purchasing the property, and in executing their trust.

The delayed coupons were all of them paid, and the trust was discharged. Preferred stock, to the amount of $8,536,910, was issued by December 31st, 1868. The defendants regularly paid dividends on the prefer-

red stock, until that due for the year 1868, which one they did not pay.

The practical question involved in this case is, whether the holders of the preferred stock are entitled to a seven per cent. dividend annually, before interest is paid by the defendants on one million of pounds of sterling bonds issued by them in 1865, after the preferred stock was created, and before rent is paid by the defendants on any leases taken by them since January 1st, 1862, of roads which they operate in connection with their own.

The earnings of the defendants for the year ending December 31st, 1868, after deducting the ordinary operating expenses, the interest paid on mortgages existing January 1st, 1862, and the rents of roads leased prior to January 1st, 1862, were sufficient to pay a dividend to some amount on said preferred stock. If no interest had been paid by the defendants on said sterling bonds, and no rent for roads, leases of which were taken after January 1st, 1862, such earnings were sufficient to pay a dividend to some amount on said preferred stock. The sterling bonds referred to are unsecured by mortgage, and bear interest at six per cent. per annum, in gold coin. They were issued for money borrowed by the defendants at various times after the issuing of said preferred stock, which money it was necessary for them to borrow to equip and repair their road, and which money was expended for those purposes. The bonds are in the hands of holders for value in good faith. During the year 1868, the defendants necessarily paid interest on said bonds to the amount of $388,494.65. During the same year, the defendants paid $362,995.35, as the rent, for that year, of roads the leases of which were taken by it after January 1st, 1862.

The prayer of the bill is, that the court will ascertain and adjudge the meaning of the words "net earnings," and to what roads, property, and franchises they relate, and the rights and priorities of the preferred stockholders, and the construction of said contract, statutes, and certificates of stock, and the duty of the defendants in regard to keeping accounts of earnings, and to paying the same, and the order and priority of their payment, and that the defendants be enjoined from applying any portion of their net earnings, after payment of the interest on said mortgage bonds, to any other purpose than the payment of a dividend on said preferred stock.

It is contended, on the part of the plaintiff, that, as the unsecured bondholders to whom the preferred stock was issued, stood, when the contract was made, next in order, as creditors, to the holders of the mortgage bonds, they became entitled to occupy the same relative position as holders of preferred stock, and to receive their dividends on such stock, out of the earnings, before the payment of interest on obligations incurred after the issuing of such stock, and of rents of roads the leases of which were taken after the issuing of such stock; that the words, "after payment of mortgage interest and delayed coupons in full," do not mean, merely, "before any dividend is paid on the common capital stock," but mean, "next after payment of mortgage interest and delayed coupons in full;" that this construction is sensible, because of the prior position of the preferred stockholders as holders of unsecured bonds entitled to be paid interest next after the payment of mortgage interest; that they did not waive, but preserved, their position, as entitled to such interest, and only modified their right in regard to the repayment of the principal of their debts; that the provision in the contract, that the contributions by assessment should be repaid out of the net earnings, before the payment of dividends on the preferred stock, shows that it was not intended that anything should be interposed before the payment of such dividends, except what was specially expressed; that the preferred stock is only a new form of security for the debts in exchange for which it was issued, holding the same place, and entitled to be paid the same interest, as such debts were entitled to when the exchange was made, subject to the proviso as to the earning of the interest in the current year; that the holders of the preferred stock are not subject to the contengencies of new loans and new leases and extended enterprises; that, while the contract contains no limitation on the power of the defendants to take new leases, or to issue interest-bearing securities, it contains a limitation on their power of disposing of their net earnings, of which all persons making such leases, or lending money on such securities, had notice; that the shares of preferred stock are, in fact, perpetual bonds, with no right to the repayment of the principal, but with a specified preferential right in regard to interest; that the fact that it is called "stock," and that it is declared to be entitled to "dividends," and that its holders have an equal right to vote with the holders of the common stock, cannot destroy the rights which appertain to it by the terms of the contract; that separate accounts should be kept of the losses and profits of the several leased roads; and that there must be devoted to the payment of dividends on the preferred stock, the earnings of the line, as it existed when the stock was issued, less the expenses of operating such line, including rents for any part of it, and less the interest on the mortgage debt.

I do not think that a fair and reasonable construction of the contract, with which the language of the statutes, and of the certificates of stock, is in harmony, sustains the views urged on the part of the plaintiff. The words are not, "next after payment of mortgage interest." They are, "after payment of mortgage interest." The contract, in its fifth article, provides that the holders

of the unsecured bonds agree to exchange them for "preferred stock," "to be entitled to preferred dividends out of the net earnings." The only way, mentioned in the contract, in which the stock was to be "preferred stock," was, that it was to be entitled to "preferred dividends." What was that word "preferred" to mean? "Preferred" over what? Were the dividends to be "preferred" over, and to be paid before, the mortgage interest on the five mortgages, so as to become, in fact, by the agreement of the holders of the mortgage bonds, who were parties to the contract, a virtual mortgage on the net earnings, to the extent of such dividends, prior to the lien of the five mortgages? But for some expression of intention, in the contract, on that subject, the mere word "preferred" might be construed so to mean. It otherwise might mean, not merely "preferred," as respected the holders of common stock, but "preferred" as respected the securities held by all other parties to the contract. Therefore, something must be inserted to exclude such an inference, and to secure to the holders of mortgage bonds a priority as to the payment of their delayed coupons, and of their future interest. Such priority was, accordingly, secured, by adding the words, "after payment of mortgage interest and delayed coupons in full." There is nothing to show that the words have any other effect, or were intended to have any other effect. An intention that they should have such effect, which is a reasonable effect, is inferable from the fact that they clearly have such effect, and it is unreasonable to infer any other intention, when that intention is a sufficient reason for inserting them. Without them, there is nothing to give the mortgage interest a priority over the "preferred dividends." In this view, it is impossible to see in them anything except the expression of a priority in favor of the mortgage interest over the "preferred dividends," and impossible to see in them any expression of a priority in favor of the "preferred dividends" over anything.

So, also, in regard to the provision for the repayment of the contributions. It had been before declared that the mortgage interest should have priority over the "preferred dividends." It was now desired to declare that the repayment of the contributions should have priority over the "preferred dividends;" and it was so declared. But, here again, there is nothing declaring a priority of the "preferred dividends" over anything.

The priority of the "preferred dividends" over anything depends wholly on the meaning of the word "preferred." Now, what is it that is entitled to "preferred dividends?" It is "preferred stock." But, such stock is not declared to be anything more than stock entitled to "preferred dividends." In that sense only, is its character as "preferred stock" defined by the contract. What it is entitled to is "dividends," and only "dividends," and they are of a defined and special character. It is entitled to nothing else. It has no privilege or priority, by reason of being "preferred stock," except in reference to stock that is not so preferred, that is, common stock. In reference to such common stock, the preferred stock is entitled to its specified preferential dividends, and it is not entitled to anything else in reference to anything.

The former holders of the unsecured bonds of the old company, by taking the preferred stock in exchange for their bonds, abandoned their position as creditors, and became merely stockholders in the new company, as against then existing, and all future, creditors of the new company. They acquired the same right to vote as the holders of common stock. In the absence of any expressed intention to the contrary, it would be very unreasonable to suppose that the general power of the defendants to take leases of roads, and pay the rents on them, and to borrow money, and issue bonds therefor, and pay the interest on such bonds, would have been subordinated by the legislature, or by themselves, to the rights of any class of their stockholders, and equally unreasonable to suppose that the claims of creditors would have been postponed to those of stockholders. When to this is added the consideration, that short roads leased, though unprofitable as to their immediate traffic, may increase largely the profits of a long main line which they feed, and that moneys borrowed and expended in renewing and repairing what was the main line when the preferred stock was issued, may go largely to create any net earnings there may be, not only is the impracticability of the views urged on the part of the plaintiff such as to make it most unlikely that anything was done in accordance with such views, but the injustice of postponing the claims of the lenders of such moneys, to be paid their interest out of such net earnings, to the rights of stockholders to dividends therefrom, is too manifest to need remark.

Moreover, the views urged on the part of the plaintiff, if sound, must be carried to their legitimate conclusions. The money has been borrowed on the sterling bonds. Their holders are creditors. If the company should become bankrupt, are the claims of those creditors to be repaid their principal, to be postponed to the claims of the preferred stockholders, in respect to the capital of their shares? Why not, if there is to be such postponement as between interest to the creditors and dividends on the preferred stock? The stock is, in the contract, declared to be "preferred stock" as well as to be entitled to "preferred dividends." The statute and the certificates call it "preferred capital stock." If "preferred stock," why should it not have preference over the principal of subsequently created debts, if dividends on it are to precede the payment of interest on such debts? Yet, such a claim would probably never be

advanced, and certainly would not be admitted.

The statement in the contract, the statute, and the certificates, that the "preferred dividends" are to be paid out of the "net earnings," sheds no light, one way or the other, for a solution of the question. The mortgage interest and the delayed coupons are also to be paid out of the net earnings. Net earnings are, properly, the gross receipts, less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains, that is, out of the net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders, to go towards dividends, which, in that way, are paid out of the net earnings. That this is the meaning of the expression "net earnings," in the contract, is shown by the fact, that the contract states that the trustees are to receive the net earnings, and out of them pay the floating debt, and the delayed coupons, and by the further fact, that the contract, the statute, and the certificates state that the mortgage interest is to be paid out of the net earnings, by stating that the preferred dividends are to be paid out of the net earnings, "after payment," (that is, out of the net earnings,) "of mortgage interest."

It results, from these considerations, that the bill must be dismissed, with costs.

[On appeal to the supreme court, the decree of this court was affirmed. 22 Wall. (89 U. S.) 136.]

ST. JOHN v. MISSOURI, K. & T. RY. CO. See Cases Nos. 10,767 and 10,768.

ST. JOHN (PLANTERS' BANK v.). See Case No. 11,208.

Case No. 12,227.

ST. JOHN v. PRENTISS.

[See Case No. 2,194.]

Case No. 12,228.

ST. JOHN v. SOUTHERN EXP. CO.

[1 Woods, 612; [1] 10 Am. Law Reg. (N. S.) 777.]

Circuit Court, S. D. Alabama. April Term, 1871.

CARRIERS — LIABILITY FOR LOSS — CONNECTING LINES — CUSTOM — EXPRESS CONTRACT — RULES OF COMPANY—RECOVERY.

1. The reception by an express company of a package for transportation to a point beyond its route, and the receipt of the entire compensation for the transportation to that point, is sufficient to make out a prima facie case of contract to carry and deliver the package to that point.

2. To avoid liability in such case, the company must show a specific contract to carry only to its own terminus, or a settled and uniform rule not to assume liability beyond that point, which rule must be brought home to the consignor, either by express notice, or by a notoriety so general that he may be fairly presumed to have had notice.

3. Plaintiff delivered a package addressed to a consignee in New York, to defendant, an express company in Mobile, paid the freight for the entire distance and took a receipt, stating that "this company is to forward the same to its agent, nearest or most convenient to destination only, and then to deliver the same to other parties, they to complete the transportation; such delivery to terminate all liability of the company for such package." The company's route extended only to Lynchburg, but it had an arrangement with the Adams Express Company to transport such packages to any point on the latter's route, and receive a pro rata share of the freight: *Held*, that the Adams Express Company was the agent of defendant, within the terms of the receipt, and defendant was liable for failure to deliver in New York.

4. If an express company has a settled and uniform rule that money packages must be sealed and indorsed in a certain way, and such rule is brought home to the knowledge of the consignor, who neglects or intentionally omits to comply with it, and the company in ignorance of the special value of the package, takes ordinary care of it only, the company will not be liable for the loss.

5. If, however, the money is stolen by an agent of the company, and the company recovers the money from the thief, it will be liable for the amount so recovered, upon a count for money had and received, notwithstanding the violation of its rules by the consignor.

The evidence tended to prove this state of facts: After the close of the late War of the Rebellion, the postal service between the Northern and Southern states was considered unreliable, and the defendant, the Southern Express Company, having an office in Mobile, was largely employed in the conveyance of letters. These were required to be put up in stamped postal envelops, and the uniform charge on all letters, not containing money, for their conveyance for all distances within the United States was twenty-five cents. When the superscription did not indicate that the letter contained money, it was sent, on reaching its destination, to the post office for delivery. But when the superscription indicated that the letter contained money, it was delivered to the person to whom addressed and his receipt taken. The charge for the transmission of a money letter was four dollars per thousand dollars inclosed, and the rules of the company required the amount inclosed to be stated on the envelop, and that the envelop should be sealed in a prescribed way. The defendant's route extended only to Lynchburg, but it had an arrangement with Adams Express Company to transport packages to any point on the latter's route, and receive a pro rata share of the freight, and it was the practice of the defendant company to deliver to the Adams Company at Lynchburg, packages under this agreement. An attempt was made to bring home to the plaintiff a knowledge of these rules and practices of the company, and on the part of the plaintiff to show that the rules of the com-

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

pany had been relaxed in his favor by the agent of the company at Mobile. On the 26th of May, 1866, the plaintiff inclosed six bank bills for one thousand dollars each, in an ordinary stamped postal envelop, and having indorsed upon it the word "important," addressed it to J. B. Alexander & Co., New York City; he delivered the same to the agent of the defendant at Mobile, for transmission, according to the direction; paid twenty-five cents therefor, and took a receipt stating that "this company is to forward the same to its agent nearest or most convenient to destination only, and then to deliver the same to other parties, they to complete the transportation, such delivery to terminate all liability of this company for such packages." There was no indorsement upon the envelop and nothing in the manner in which it was sealed to indicate that the package contained money. On the 3d of June following, the plaintiff, under precisely the same circumstances, delivered another package to defendant for transmission to New York, also addressed to J. B. Alexander & Co., and containing five thousand dollars. These two packages safely reached the office of the Adams Express Company in New York, and appearing to be ordinary letters of no intrinsic value, were handed to the messenger usually employed for that purpose to deposit in the New York post office for delivery. The packages were stolen by the messenger and neither of them nor their contents ever were delivered to Alexander & Co., or the plaintiff. There was some evidence tending to show that the Adams Express Company had recovered a part of the money contained in the packages from the messenger who stole it.

Robert H. Smith and Thos. H. Herndon, for plaintiff.

Wm. G. Jones and John P. Southworth, for defendant.

WOODS, Circuit Judge (charging jury). The plaintiff claims that the defendant, being a common carrier on the 26th day of May, 1866, undertook and agreed with plaintiff for a valuable consideration, to transport from Mobile, Alabama, and to deliver to J. B. Alexander & Co., in the city of New York, a sealed package, which the plaintiff on that day delivered to the agent of defendant in Mobile, containing six thousand dollars, the property of the plaintiff. That by and through the negligence and carelessness and improper conduct of the defendant and its servants, said package and its contents were wholly lost to the plaintiff.

Plaintiff further avers that on the 3d day of June, 1866, the defendant, as such common carrier, undertook and agreed with plaintiff for a valuable consideration to transport from Mobile, Alabama, and to deliver to J. B. Alexander & Co., in New York City, another sealed package which the plaintiff on that day delivered to the agents of defendant in Mobile, containing five thousand dollars, the property of the plaintiff, and that by the negligence, carelessness and improper conduct of the defendant and its servants, said last named package and its contents were also wholly lost to the plaintiff. He therefore seeks to recover of the defendant the amount of money contained in said packages, with interest. He has also included in his declaration counts for money had and received, and upon an account stated. The defendant pleads the general issue, with leave to give in evidence any matter that might be specially pleaded.

This action is brought against the defendant as a common carrier. The undertaking of a common carrier is to deliver the goods entrusted to him against all events, unless prevented by the act of God, or the public enemy, except where his liability is limited by contract. Before the plaintiff can recover, he must establish his case by proof substantially as he has stated it. Your first inquiry will therefore be, Did the plaintiff deliver the packages containing money, or either of them, to the defendant, to be carried to New York and delivered as alleged, and did the defendant, for a valuable consideration, undertake and agree to convey them to New York City and deliver them to J. B. Alexander & Co., as the plaintiff avers, and has the defendant failed so to deliver them? On the question of the delivery of the packages to the agent of the defendant in Mobile, and the failure of the defendant to deliver them to J. B. Alexander & Co., in New York, I presume you will have little trouble. I do not understand the defendant to controvert these facts. They must be proven, however, to your satisfaction. But the defendant alleges that its lines of business reach only as far north as Lynchburg, Virginia, on the route to New York City; that this fact was known to plaintiff, and that its agreement was not to convey the packages to New York, but to convey them to Lynchburg, Virginia, and then safely to deliver them to Adams Express Company; that it did so transport and safely deliver the packages, and that it is therefore not liable to plaintiff for any loss which occurred after such delivery to the Adams Express Company.

You are to decide from the facts in the case, and controlled by the rules of law as I shall give them to you, what the contract of the defendant with the plaintiff was. I instruct you that the reception by an express company of a package for transportation, directed to a point beyond the route of the express company, and the receipt by such company of the entire compensation for the transmission and delivery of the package to the point to which it is directed, makes out a prima facie case of a contract to carry and deliver the package according to the superscription, and will bind the company unless a different contract is shown, or a settled and uniform rule established by the company not to be bound

beyond its own line, which rule is brought home to the consignor, either by express notice or by a notoriety so general that he may fairly be presumed to have had notice. If you find the fact to be that the defendant received the packages of the plaintiff directed to J. B. Alexander & Co., New York, for transmission, and received the pay for the entire route from Mobile to New York, then I instruct that prima facie, the plaintiff has shown a contract on the part of defendant to carry the packages to New York and deliver them according to the direction, and that the Adams Express Company and its servants were the agents of defendant to complete said transmission and delivery. This proof would, however, only make a prima facie case, and the defendant may rebut it by other proof.

It was competent for the defendant to contract that it was to be bound for the safe transmission of the packages over its own lines only, and if it has satisfied you by proof that it did so contract, then it cannot be held liable for the default of the Adams or any other company which undertook to complete the conveyance of the packages. I believe it is not claimed that defendant made any such contract expressly with the plaintiff, but it is insisted that such contract may be fairly implied from the form of receipt given by the defendant for money packages, and that such receipts must, from their general use by the company, have been familiar to the plaintiff. The defendant says that its receipts for money packages contained a provision in these words: "That this company is to forward the same to its agent nearest or most convenient to destination only, and then to deliver the same to other parties, they to complete the transportation, such delivery to terminate all liability of this company for such packages."

You will first determine from the proof whether the contents of this receipt were brought home to the knowledge of plaintiff. If you find they were, then I say to you that the true construction of this provision is that the defendant undertakes to deliver packages at any point upon its own routes, or upon the routes of any other company with which it has an arrangement to receive, convey and deliver packages, for a pro rata share of the compensation paid by the shipper; but when the terminus of its own route or the route of such a connecting company is reached, and the package is to go to a point beyond, then the defendant is only bound to deliver the same to other parties to complete the transportation, and on such delivery, its liability ceases. I instruct you, that if you find from the proof that there was an understanding between the defendant and the Adams Express Company by which the latter agreed to receive from the former at the end of its route all packages for transmission over the routes of the Adams Express Company, and to deliver them according to the superscription at any point on the routes of the Adams Express Company, and received a pro rata share of the money paid the defendant for the transportation of the package, then the Adams Express Company was the agent of the defendant, referred to in the language of the receipt, and if the Adams Express Company had an agency or office in New York, it would have been the duty of this defendant under that receipt to carry the package to New York, either by itself, or its agent the Adams Express Company, and then deliver it according to its superscription. You are not, however, to confine your consideration upon this point to the terms of this receipt exclusively. You may examine the way bills and other blank forms of the defendant to ascertain what its contract was, and you may take into consideration any statements you may find to have been made to plaintiff by the superintendent or other agent of the defendant, in reference to the transmission of these or other packages, or any special contract or understanding made by defendant's agent with plaintiff.

If you shall find under these instructions that the defendant only contracted to carry the packages of the plaintiff over its own routes, and then to deliver them to another company for transmission to its destination, and that it has performed this contract, then that is an end of the case against the defendant, so far as its liability as a common carrier is concerned. If, however, you find that the defendant undertook to convey the packages to New York, and then deliver them to the persons to whom they were addressed, you will then proceed to consider another branch of the defense. This is, that the rule of the defendant was that packages containing money should be sealed in a certain way; that the amount of the contents should be indorsed upon the package, and a certain rate of compensation for carriage, in proportion to the amount of money conveyed, should be paid; that the plaintiff, well knowing this rule, placed the money which he alleges was lost in an envelop not sealed according to the rules, nor containing a statement indorsed upon the envelop of the amount of the contents, and that he only paid the rate charged by the defendant for the transmission of an ordinary letter containing no inclosure of value, and that by reason of this default on the part of the plaintiff, the packages were entrusted to an agent of the Adams Express Company in New York, who was only employed to deliver ordinary letters, and not valuable packages, and were thereby lost.

Upon this branch of the defense, I instruct you, that the rules of the company, in order to have any influence upon the decision of the case, must have been known to the plaintiff, and these rules must have been settled and uniform. If these rules were not by the proof brought home to the notice of the plaintiff, or if the defendant was in the habit of departing from them, and allowing exceptions to be made to them, and these facts were known to plaintiff, or if there was any understanding

or agreement between the plaintiff and the agent or superintendent, that the rule was not to be enforced against the plaintiff, in either of these cases, the existence of the rules can have no effect upon the decision of this case. In short, the rule must be settled, uniform and known to plaintiff. If you find they were thus settled, uniform and known to the plaintiff, and no exception was made by the agent of defendant in his favor, exonerating him from a compliance therewith, and you find that the contents and value of the packages sent by plaintiff were improperly concealed by him from the defendant for the purpose of depriving him of a part of the compensation the defendant would otherwise have claimed for the transportation and risk, the defendant would not be liable if using the ordinary vigilance which a prudent man would exercise over his own property of the same apparent value.

I instruct you further, that if by reason of the failure of the plaintiff to comply with the rules of the defendant, known to him, the defendant was ignorant of the value of the package, and in consequence thereof, was induced to entrust the package to a messenger who was employed only to deliver packages of no intrinsic value, and failed to place it in the hands of its messenger known to be honest and trustworthy, who was uniformly employed to deliver valuable packages, and by the dishonesty of the messenger to whom the package was entrusted, it was lost; in that case the defendant would not be liable.

If you should find for the defendant upon these issues, it would, nevertheless, be your duty to consider that branch of the plaintiff's case which arises upon what are called the common counts. Under them the plaintiff claims that the Adams Express Company is the agent of the defendant; that the Adams Company, as such agent, has not lost the money of plaintiff, or all of it, but has it or a large part of it in its possession, or has converted it to its own use. If you find under the instructions already given you, that the Adams Express Company is the agent of the defendant, and that it has retained the money of the plaintiff in its possession, or has recovered it from any person who stole it, then you should find a verdict for the plaintiff for the amount which you may decide has come to the possession of the Adams Express Company and is retained by it, or has been converted by it to its own use, with interest from the date of demand, if you shall find a demand has been made; if not, from the commencement of this suit. For, although the plaintiff may have knowingly violated the rules of the defendant in the manner of transmitting this money, still that does not divest the plaintiff of his property in the money, nor authorize the defendant, either by itself or agent, to confiscate it. The defendant is bound to pay it over on demand with interest from the date of demand.

The jury returned a verdict for defendant.

ST. JOHN'S PARISH (MAURO v.). See Case No. 9,313.

Case No. 12,229.

The ST. JOSEPH.

[Brown, Adm. 202; 1 Chi. Leg. News, 321; 4 Am. Law Rev. 186; 1 Leg. Gaz. 22.] [1]

District Court, W. D. Michigan. May 29, 1869.

MARITIME LIENS — ORDER OF DISTRIBUTION — MORTGAGEE AND MATERIAL-MEN — FOREIGN AND DOMESTIC—ADVANCES.

1. Strictly maritime liens have priority over mortgages, without reference to the period of time when they accrued. Material-men, having liens by local laws, have priority over mortgagees in the distribution of the surplus. In this case, the court ordered the different classes of liens paid as follows: First, maritime liens; second, liens given by state laws; third, mortgage liens; fourth, the assignee in bankruptcy of the owner.

[Cited in Moir v. The Dubuque, Case No. 9,696; The Alice Getty, Id. 193; The Theodore Perry, Id. 13,879; The Hiawatha, Id. 6,453; The Illinois, Id. 7,005; The E. A. Barnard, 2 Fed. 721; The General Burnside, 3 Fed. 230; The Canada, 7 Fed. 735; The Guiding Star, 9 Fed. 524; The Daisy Day, 40 Fed. 541.]

[Cited in Hammond v. Danielson, 126 Mass. 296.]

2. No unforeseen and unexpected emergency need be shown to warrant a lien in favor of a material-man. Where the master obtains supplies, they are generally supposed to be sold on the credit of the vessel, and in such cases the vessel is liable.

3. A part owner and general agent and superintendent of a line of boats, of which the respondent was one, has no lien for material, but must be regarded as having given credit to the company.

[Cited in The Two Marys, 10 Fed. 925; The Rapid Transit, 11 Fed. 327, 331; The Murphy Tugs, 28 Fed. 432.]

4. Advances made by a mortgagee to subsisting lien holders at the time of taking possession under the mortgage should be paid in the order in which the liens themselves would have been paid.

Motion for order of distribution.

Robert Rae, for material-men.

Chas. Hitchcock, for mortgagee.

WITHEY, District Judge. There has been a decree in favor of the libellants; the vessel has been sold; the proceeds paid into the registry, from which libellants have been paid their decree and costs, and there remains a surplus of $24,046.20. Nine supplemental suits, by petition, have been entered by rival claimants against these proceeds. They are, by material-men, under contracts civil and maritime; material-men, under statutory liens; a mortgagee, under a mortgage duly recorded according to the act of congress; and the assignee in bankruptcy of the owners. The fund is not sufficient to satisfy all. The principle is laid down by

[1] [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission. 4 Am. Law Rev. 186, and 1 Leg. Gaz. 22, contain only partial reports.]

the supreme court of the United States, in Andrews v. Wall, 3 How. [44 U. S.] 568, that it is an inherent incident to the jurisdiction of the admiralty court, to entertain supplemental suits by the parties in interest, to ascertain to whom those proceeds rightfully belong, and to deliver them over to the parties who establish the lawful ownership thereof. The admiralty courts of this country have generally applied this principle to claims arising upon liens given by state statutes, and to mortgages, as well as to strictly maritime liens. The important question, therefore, is as to the order of payment. As between the claimants before the court, maritime liens have priority over all the others; this was conceded at the hearing.

Until recently, we find no decision that does not give to the material-men having subsisting liens by local laws priority over a mortgagee in the distribution of surplus, while there are decisions giving priority to such material-men. Dudley v. The Superior [Case No. 4,115]; The Paragon [Id. 10,708]; The Hendrick Hudson [Id. 6,355]; Justi Pon v. The Arbustei [Id. 7,589]; Marsh v. The Minnie [Id. 9,117]; Provost v. Wilcox, 17 Ohio, 359. Counsel for mortgagee has read a newspaper report of the case of The Grace Greenwood [Case No. 5,652], recently decided by the district court of Northern Illinois, postponing material-men under local laws to the mortgage lien, on the ground that the mortgage becomes, by its record in the office of the collector of customs, as strong in equity as the claims of the material-men, and applies the surplus upon the principle that "that which is first in time is strongest in right." As will be seen by the authorities, this decision is at variance with former decisions, and it does not commend itself to our judgment. The water craft law of Michigan, under which some of the claims arise, postpones the mortgagee to the material-man, without reference to date of liens. Strictly maritime liens have always held priority over mortgages, without reference to the period of time when they accrued, on the ground that it is as much for the interest of the mortgagee as for the owner, that the ship should be kept in repair and supplied, to enable her to keep afloat and be in receipt of earnings; thus adding to the value of the mortgage security, as well as to the ability of the mortgagor or owner to pay the mortgage. We do not see why material-men, holding liens by the local law, have not the same position of priority as regards the mortgagee, and for an equally good reason, as is conceded to material-men having strictly maritime liens.

We do not understand the law of congress, in reference to recording mortgages, as affecting the question. We, therefore, hold to the following order of payments and priorities, as between the parties before the court: First, maritime liens; second, liens given by state laws; third, mortgage liens; fourth, the assignee in bankruptcy of the owner.

Before referring to the individual claims, we notice a point made by the mortgagee against a portion of the claims presented, viz: that no unforeseen and unexpected emergency is shown, and which it is claimed is necessary to justify holding that a lien exists. Until the case of Pratt v. Reed, decided in December, 1856, by the supreme court of the United States (19 How. [60 U. S.] 360), it had not been regarded as necessary to a maritime lien, that any unforeseen and unexpected emergency should exist for materials and supplies to a ship, when obtained by the master. And it has been questioned by high authority, whether the court, by that case, intended to change the law of liability for supplies to a vessel. The court does not intimate any such intention, and does not review the authorities or refer to the previous rulings of the courts of admiralty. The facts of the case were that the owner, who was also master, procured the supplies without any representations of necessity, and apparently under some general understanding and arrangement, which raised the presumption "that there could be no necessity for the implied hypothecation of the vessel."

His honor, Mr. Justice Swayne, at the June term, 1868, of the United States circuit court, at Detroit, is reported to have held, in the case of Kelly v. The Pittsburgh [Case No. 7,674], "that the case of Pratt v. Reed [supra] had not altered the law of liability for supplies furnished to a vessel. Where the master obtains supplies, they are generally supposed to be given on the credit of the vessel, and, in all such cases, the vessel is liable for them." Recently, his honor, Mr. Justice Davis, in the United States circuit court, at Chicago, held, that to create a maritime lien for supplies, it must appear not only that they were needful, but the existence of some unforeseen and unexpected emergency must be shown,—The Lady Franklin [Case No. 7,982]; thus, as we understand, holding that Pratt v. Reed did alter the law of liability for supplies, to which case the learned judge refers. In view of the rulings of the two distinguished members of the supreme court of the United States, taking different grounds as to the import of the decision in Pratt v. Reed [supra], it may be said the question is still an open one. We feel bound to follow the ruling of Judge Swayne; besides our own judgment is that such is the correct view.

In reference to the individual claims, under the views already given, we regard the claim of James E. Stevens as possessing no merits. Stevens was one of the owners, and was general agent and superintendent, at St. Joseph, Michigan, of the line of boats owned by the company—The Lake Michigan Transportation Company. He held sixty thousand dollars of the stock of the com-

pany; moneys were received by him during the season of navigation, and he must be regarded as having given credit to the company, and not to the vessel.

Hollister and Phelps, of Chicago, claim a lien under state laws—$1,978.11, accruing between June 27 and October, 1867, the balance between March 27 and April 4, 1868. By the laws of Illinois, a claimant must assert his lien against a vessel within nine months after the same is due, or the lien ceases as against subsequent incumbrancers, creditors, and bona fide purchasers. [Laws 1855, p. 149.] The vessel was taken possession of by the Third National Bank of Chicago, for breach of the conditions of its mortgage, October 16, 1868, and the libellants, Miller & Miller, did not file their libel until November 13. No excuse, therefore, is shown for delaying to assert this claim of 1867, until April 23, 1869. It must, we think, be postponed, at least to the payment of all the other subsisting claims; their claim, which accrued during the season of 1868, is allowed.

Farrar, Taft & Knight, of Buffalo, claim a maritime lien for materials and supplies which accrued between May and September, 1867. The greater portion of this claim is for machinery sent from Buffalo to Chicago on an order, and there delivered to, and received by, the vessel. This was a contract for which the owner would be liable, but creates no lien against the vessel. The other part of the claim, and that earliest furnished, has been allowed to lie so long without being asserted, that as against the other subsequent and subsisting claims by materialmen and the mortgagee, it should be regarded as stale, and be postponed to all the others, except the owner or his assignee.

Good & Co., of Chicago, claim both a maritime lien and, under the water craft law of Michigan, their claim is allowed, as are also the claims of Pratt & Coulson, Aaron D. Rowley, and R. A. Kapp & Co.

The mortgage claim of the Third National Bank of Chicago is allowed, together with such advances as were made by it to subsisting lien holders, when it took possession of the vessel under the mortgage, such advances having been made to seamen and others, to save expense and delay that would grow out of suits threatened against the ship. These advances will be paid in the order already announced in reference to priorities.

The amounts of the respective claims will be ascertained, and payment decreed accordingly.

Order of distribution.

NOTE. Under the recent decision in the case of The Lotawana, 21 How. [62 U. S.] 558, the principal question involved here becomes of considerable importance. See The Grace Greenwood [Case No. 5,652]; 2 Pars. Shipp. 149; Reeder v. George's Creek [Case No. 11,654]; In re Scott [Id. 12,517]; Francis v. The Harrison [Id. 5,038].

Case No. 12,230.

The ST. JOSEPH.

[10 Chi. Leg. News, 269; 7 N. Y. Wkly. Dig. 35.] [1]

District Court, E. D. Michigan. 1878.

ADMIRALTY — MARITIME CONTRACTS— SHIPPING—MASTER—TOLLS.

1. An undertaking whereby a propeller, in consideration of its freight for the carriage of goods, agrees to collect of the consignee advances and charges thereon, and repay them to the party from whom it receives the goods, is a maritime contract upon which a libel in rem will be sustained.

2. Such contracts are within the scope of the master's authority, where they are shown to be customary in the trade and made with the knowledge and assent of the owners of the vessel.

3. A libel in rem will lie for tolls imposed by a state statute, in favor of corporations organized for the improvement of rivers and harbors.

The libel of Ashley & Mitchell alleged that the libellants were forwarders and warehouse men, in Detroit, whose business it was to receive, forward and ship goods to various ports by lake vessels; that they delivered certain goods on board the St. Joseph, consigned to different ports upon the lakes, the master receiving them under an agreement to transport them to the place of delivery, collect libellant's charges for storage and advances, and pay them over to libellants; that there was due libellants $811 for such charges collected and not paid over, for which a lien was claimed upon the propeller. The libel of the Alpena Harbor Improvement Co. alleged its existence as a corporation for the purpose of improving the Alpena river and harbor; that under its charter it had made such improvements, by dredging out the channel and maintaining docks, piers and wharves in the river; and that by virtue of its charter it was entitled to collect and receive from each boat, vessel or craft using said channel, or passing through said improved river or the works of said company, and upon the cargo of such vessel such certain tolls and charges fixed by commissioners appointed under the statute, which tolls were a lien upon the vessel, under provision of the statute; that the propeller was engaged in the transportation of merchandise and passengers to and from the port of Alpena, which rendered it necessary for her to use libellant's improvements, whereby it became liable to pay such tolls and charges, and being liable, her master and owners promised to pay the same, and that there was due therefor $113.52.

Wm. A. Moore, for libellant.
H. C. Wisner, for claimants.

BROWN, District Judge. As to the libel of Ashley & Mitchell: It appears from the testimony that the propeller was engaged in

[1] [7 N. Y. Wkly. Dig. 35, contains only a partial report.]

trade from Cleveland to Saginaw; that libellant's claim was made up of charges advanced to the transportation companies from whom they had received the goods, and of their own charges for storage; that it is customary, not only in the line in which the Benton and St. Joseph ran, but among transportation companies generally upon the lakes, to carry goods charged with their advances, to collect them upon the delivery of the goods, and to repay them to the parties by whom the advances are made. It also appeared that the goods were delivered to the propeller, with bills of lading attached, showing the items of dockage and advance charges; that the Benton and St. Joseph were in the habit of stopping at libellant's dock each trip, and receiving passengers and freight. The testimony also shows that the owners of the propeller, the master also being a part owner, had full knowledge of, and consented to, this arrangement, and that each boat was in the habit of rendering a settlement every month; that the goods were principally consigned from New York to Saginaw, to be transported from Detroit by particular boats; that they were received at Detroit by libellants from the railway companies, to whom the charges for freight were paid, and were delivered by them to the steamers, under a like undertaking to pay their advances. This custom of doing business has existed for years upon the lakes, and is believed to be general among transportation companies throughout the United States.

Two questions arise in this case: (1) Is the contract maritime? (2) Had the master authority to bind the vessel by a contract of this description?

1. I see no reason to doubt the maritime character of this contract. The main business of the steamer was to transport the goods by water. This contract carries with it such incidental and subsidiary undertakings as is usual in the trade, and necessary for the convenient transaction of the business in which the propellers are engaged. A somewhat similar contract claimed the attention of the court in Monteith v. Kirkpatrick [Case No. 9,721], which was a suit by common carriers, from Albany to New York, against the consignee, for their own freight, and advance charges paid by them at Albany when they received the goods. The court held that under the usage of the trade proven in that case, the right to recover the advances stood upon the same footing as the right to the freight.

2. Had the master the power to bind the owners by this contract? While, if this were solitary instance, I should doubt whether the master would have authority to make such arrangement on behalf of the vessel, I deem it entirely clear that such power exists wherever the usage is general, and especially in this case, where it was sanctioned by the owners of the vessel. In the case of The Hardy [Case No. 6,056], it was held by the learned district judge for the district of Minnesota, that a contract by which a steamboat engages to carry goods, and collect from the consignee the freight money and all charges, advances and insurance upon the goods, together with the price thereof, and after deducting the freight to pay libellants the balance, was a maritime contract of which this court has jurisdiction by a proceeding in rem. So far as this case conflicts with that of The Robinson, decided by the late circuit judge of this circuit, and cited, though not reported, in The Williams [Case No. 17,710], I should feel constrained to follow the latter case. This case, however, extended only to the undertaking of the master in reference to the sale of the cargo and return of the proceeds under a C. O. D. bill of lading, and apparently does not touch the question of advance charges. The case of The Hardy [supra] was also followed by Judge Hill, of the district of Mississippi, in the unreported case of The Emma, in which a libel was sustained for failure to pay over the price of the goods collected upon a C. O. D. bill of lading.

As to the libel of the Alpena Harbor Improvement Co.: While the question was not formally discussed upon the argument, I may say in passing, that I see no valid objection, in the absence of congressional interference, to the enactment of laws for the internal improvement of rivers and harbors of a state. Under the constitution, the power of congress over commerce between the states is supreme, but in cases where congress has not seen fit to assert that power, the legality of improvements and even of obstructions, authorized by state authority, has been repeatedly affirmed by the supreme court of the United States. Wilson v. Brackbird Creet Marsh Co., 2 Pet. [27 U. S.] 245; Veazie v. Moore, 14 How. [55 U. S.] 568; Gilman v. Philadelphia, 3 Wall. [70 U. S.] 713; U. S. v. New Bedford Bridge [Case No. 15,867]; Kellogg v. Union Co., 12 Conn. 7; Thames Bank v. Lovell, 18 Conn. 500; People v. Rensselaer & S. R. Co., 15 Wend. 113; McReynolds v. Smallhouse, 8 Bush, 447; Craig v. Kline, 65 Pa. St. 400; Chicago v. McGinn, 51 Ill. 27; Duke v. Cahawba Nav. Co., 16 Ala. 372; Packet Co. v. Keokuk, 95 U. S. 80.

Chapter 84, Comp. Laws of this state, authorizes the formation of corporations for the purpose of constructing canals or harbors, or improving the navigation of rivers or streams in this state, by dredging out the channel, making new entrances, and constructing canals to straighten the same, etc. Section 11 of the act authorizes such company to charge such rates of toll for the use of said canal or harbor, or for the use of any such improved river or stream, or for any dock, wharf or other improvements as may be established by three commissioners; and provides that such tolls or charges shall be a lien upon

the vessel or boat using the improvements of said company, and may be collected under the provisions of the water craft law of the state; provided, however, "that no charge shall be made for the use of any river, where such improvement has been made, for any boat, vessel, raft or craft of any description, which might or could have used said river before said improvement had been made." Pursuant to this charter the libellant was organized as a corporation and proceeded to cut a channel through the bar at the mouth of Alpena river, to deepen the channel of the river, and also to construct wharves for the convenience of vessels. It is proven that the draft of the propeller St. Joseph was such that she would not have been able to enter the port of Alpena without making use of such improvements. This statute seems to me not only unobjectionable but a most wise and beneficent provision for promoting the commerce of the state.

Objection, however, is made to the jurisdiction of this court to entertain a libel in rem for tolls. I think the question is disposed of, however, in the opinions of the supreme court in Ex parte McVeil, 13 Wall. [80 U. S.] 236; and Ex parte Easton, 95 U. S. 68. In the first, a suit upon the admiralty side of the district court, was sustained for half pilotage fees, given by the state law to the pilot who first tendered his services to a vessel coming into port, notwithstanding he was refused. The law of the state of N. Y., provided for a system of licensed pilots, to be appointed upon recommendation of the board of wardens of the port of N. Y. The act further provides that the pilot who should first tender his services might demand of the master of any vessel to whom the tender was made, and by whom it was refused, half pilotage. The court held that this was not a penalty, but was a tender of services, upon which the law raised an implied promise to pay the amount provided in the statute, and that a court of admiralty had undoubted jurisdiction of such a contract. In the case of Ex parte Easton, the same learned court held that wharves, piers and landing places being essential to commerce, a contract for wharfage was a maritime contract, standing upon the same footing as materials and supplies, for which, if the craft be a foreign one, a maritime lien existed against the ship in favor of the proprietor of the wharf. It seems to me that the case under consideration falls within the scope of this decision. The contract is maritime. The law of the state gives the lien upon the ship, and this court is the proper tribunal for its enforcement. The Sottawanno, 21 Wall. [88 U. S.] 558.

A decree will be entered for the libellants in each case.

ST. JOSEPH, The (DIKE v.). See Case No. 3,908.

ST. JOSEPH & D. C. R. CO. (FARMERS' LOAN & TRUST CO. v.). See Case No. 4,669.

Case No. 12,231.

The ST. LAURENT.

[7 Ben. 7.] [1]

District Court, E. D. New York. July, 1873.

SHIPPING—DELIVERY OF CARGO—PRIVATE WHARF — NOTICE TO CONSIGNEE — NEGLIGENCE OF CARRIER.

1. Certain cases of goods were brought to New York on a steamship under an ordinary bill of lading. The owners of the steamship were the occupants of the wharf at which she discharged her cargo, and which they had inclosed. It was their mode of doing business that goods which were to be sent to the custom house under a general order, because their consignees had not obtained custom house permits for their landing, were deposited in a certain place of deposit on the wharf. One of the cases of the goods, after being marked for general order, was seen by a clerk of the steamship company standing in another part of the wharf with the goods of a passenger. They stood there for nearly a day, but the clerk gave no order and did nothing with reference to them. The consignee filed a libel against the steamship to recover for non-delivery of one of the cases. It did not appear that the missing case had ever been put in the place of deposit for general order goods. *Held*, that under the mode of delivery adopted by the ship, it was her duty to deposit the case in the part of the wharf designated for general order goods, and there to watch and preserve it for a reasonable time to enable the proper person to remove it; and the liability of the ship as carrier continued until the expiration of such reasonable time.

[Cited in Unnevehr v. The Hindoo, 1 Fed. 630.]

2. The delivery of the case in question upon the wharf, was not such a delivery of it upon a public wharf with notice to the consignee, as would discharge the ship from liability.

3. There was negligence in the clerk of the steamship in failing to remove the case marked "general order" to the proper deposit.

4. The ship was liable for the loss of the case.

In admiralty.

BENEDICT, District Judge. The question to be decided in this case is whether the evidence shows a constructive delivery to the libellant of a case of merchandise shipped at Havre, on board the steamship St. Laurent, to be transported to New York, and there delivered to the libellant.

One ground taken by the defence is, that the evidence shows a delivery of the missing case to the custom house authorities, who, as it is claimed, were the only persons by law entitled to receive the case, inasmuch as at the time of the landing of the case the libellant had failed to enter it at the custom house and pay the duties.

I am of the opinion that the evidence fails to show such a delivery of the case to the possession of the custom house authorities as would release the ship.

The case, not being permitted, was to be

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

taken from the wharf to the general order store by the custom house cartmen. For merchandise of that class there was a place of deposit on the wharf, which had been designated for that purpose by the steamship company. The wharf was their own wharf, which they had inclosed, and where they placed the cargoes of their steamers as they arrived, in accordance with a system which is disclosed in the evidence.

The duty of the ship in respect to this case was to deposit it in that portion of the inclosure, designated for general order goods, and there to watch and preserve it for a reasonable time, to enable the proper person to remove it; and the liability of the ship, as carrier, continued until the expiration of such reasonable time.

The evidence in this case fails to show that the missing case was ever so deposited. It is shown to have come out of the ship, and to have been taken upon a truck by an employee of the ship, and marked for deposit with general order goods; but there is no evidence that it was ever so deposited. It was at least incumbent on the carrier to show the case to have been placed in the place upon the wharf where the carman was to take it. Assuming, then, that there may be a delivery to the custom house authorities, which would release the ship in a case like this, it must, nevertheless, be held, that such a delivery was not accomplished by what was done here.

Another ground taken is, that, inasmuch as the evidence shows the case to have been landed from the ship upon the wharf, in the day time, with notice to the consignee of the discharge of the steamship, and inasmuch as the consignee failed to apply for the case within a reasonable time, the carrier is discharged, unless there be proof of negligence in the care and custody of the goods upon the wharf. But it is entirely plain that this mode of delivery was not attempted by the ship. Here was no delivery upon a public wharf. The steamship landed her cargo at a wharf owned by the steamship company, over which they maintained control, and where they had established a well known method of delivering cargoes. The wharf was inclosed, and in the inclosure was a place designated by the steamship company, and well known as the place, and the only proper place, for the deposit of all general order goods, in which place the employees of the steamship deposited all general order goods, and from which place they were taken by the government cartmen.

The case in question, which should have been deposited in this place, never could be found there, and there is no evidence that it ever went there. It was only after the lapse of a reasonable time after the deposit of the case in the proper place upon the wharf —if then even, under the method of delivery adopted by this steamship—that the liability of the carrier would terminate. No other place upon the wharf than the general order division of the wharf was the wharf within the meaning of the rule which makes landing upon a wharf, and the lapse of reasonable time to take the goods, equivalent to actual delivery.

A third ground of defence is based upon the phraseology of the bills of lading, but this is answered by the conceded fact that the ship obtained a general order for the cargo, and elected to deliver the cargo according to the system established on that pier.

These views make it unnecessary to consider whether, under the method of delivery adopted by this vessel, her liability as carrier for general order goods did not continue until the goods passed the gate leading from their inclosed wharf, where they had stationed a clerk who examined the loads as the carts passed out, took receipts if the goods were found correct, and turned back all goods not entitled to be taken by the cartman who was removing them. Nor is it necessary to discuss what lapse of time should be considered sufficient to terminate the ship's custody of goods, which she elects to deliver under a general order, when not the owner of the goods, but officials have the sole power to determine with what dispatch they will remove goods from the wharf.

In addition to these features of this case presented by counsel, there appears to me to be the further feature that the evidence affirmatively shows negligence on the part of the steamship in the care and custody of this case, after it was landed from the ship.

The evidence of the clerk of the steamship who had charge of the landing of this cargo is that he knew that the cases called for by this bill of lading were to be deposited in the general order division of the wharf, and that they were so marked while yet in the custody of the employees of the ship; and he also says that he saw one of the cases mentioned in this bill of lading, and which was believed by the employees of the vessel to be, and which doubtless was, the one now missing, in a place other than the general order division of the wharf, remaining out of any designated portion of the wharf, and standing with some goods of a passenger which were waiting for examination on the pier. There the case remained nearly all day, and yet the clerk did nothing, and said nothing, and knows nothing of what became of it. In my opinion, considering the method pursued in landing this cargo, the allowing such a case as this, after being marked for general order, to remain in such an irregular place for nearly a day, without calling attention to it, or directing its removal to its proper place, was negligence sufficient to render the ship liable upon that ground alone.

In either aspect of the case the decree must be for the libellant, with an order of reference.

Case No. 12,232.

The ST. LAWRENCE.

[1 Gall. 467.] [1]

Circuit Court, D. New Hampshire. Oct., 1813.[2]

PRIZE—PROPERTY IN ENEMY COUNTRY—RIGHT TO BRING AWAY — CONDEMNATION — SHIP'S PAPERS—CLAIM—NATURALIZATION.

1. A naturalized citizen cannot lawfully bring away his property from an enemy country after a knowledge of the war, without the license of the government.

See Curtis, Adm. Dig. pp. 203–209, where the cases may all be found. [See Case No. 12,258].

[See The Mary, Case No. 9,184.]

2. An obstinate suppression of the ship's papers, &c. coupled with a voyage from an enemy country, is sufficient cause of condemnation.

3. It is irregular for a mere nominal agent to interpose claims for his principal, where they are within the jurisdiction.

[Cited in Spear v. Place, 11 How. (52 U. S.) 527.]

4. If a party put himself in itinere to return to his native country, he is already deemed to have assumed the native character.

In admiralty.

Cummings & Pitman, for captors.
Mason, Webster & Cutts, for claimants.

STORY, Circuit Justice. The ship St. Lawrence and cargo were captured by the privateer America, John Kehew commander, on the 20th of June, 1813, on a voyage from Liverpool in Great Britain to the United States. From the papers and preparatory examinations it appears, that the St. Lawrence is an American ship; that she sailed from New York in the spring of 1812, and arrived at Liverpool in the ensuing summer. From thence she sailed to some port in Sweden, or in the Baltic, with a British license to protect her on her voyage thither, and on her return to Liverpool and the United States. She was frozen up in some northern port during the last winter, and returned to Liverpool in April, 1813. During all this time, she was owned by Messrs. Thompson & Dickey, American merchants residing at Baltimore. Early in the month of May, 1813, the agents of Messrs. Thompson & Dickey at Liverpool contracted for the sale of the ship, or actually sold her to the mercantile firm of Messrs. Ogden, Richards, & Selden, (of whom the two latter are resident merchants at Liverpool, and the former at New York,) the one half on their own account, or the account of one of the partners, the other half on account of the claimant, Mr. Alexander McGregore. After this supposed sale, the present master was appointed to the command by Messrs. Ogden, Richards, & Selden. No bill of sale of the ship was actually made, and the contract was left to be ratified by the original owners in the United States. No transfer has ever been made by the latter, and yet the ship is now claimed by Messrs. Ogden & McGregore, as their own property.

The cargo, which, with a very inconsiderable exception, consists of British manufactures, was taken on board at Liverpool, and the ship sailed from thence about the 30th of May, 1813, protected by a British license and passport from Lord Sidmouth, against British capture during the voyage. Mr. McGregore and family were passengers in the ship. From his examination in preparatory, and the papers on board, it appears that he is a native of Scotland; that in January, 1795, he was naturalized as a citizen of the United States; that for the last seven years he has resided, as a merchant, in Liverpool, where he married his present wife, and where four of his children were born. He seems to have received his permission to come to the United States, in the character of a British subject, by a passport from Lord Sidmouth; whereas the passports to other passengers, who were American citizens, were from the alien office. Mr. McGregore does not pretend that his residence in Liverpool was for temporary purposes; and it must therefore be taken upon general principles, as his place of permanent domicile for purposes of trade. The bills of lading of the cargo, which are all in a general form, consigned "to order," were delivered up to the captors; but all the invoices and letters, which respected the title and character thereof, though admitted to have been on board, were retained and suppressed by the master, who, to use his own expression, "has done with them what he had a right to do." Mr. McGregore states, that they have been delivered to the consignees. However this may be, they have been and still are studiously and obstinately suppressed; and have never been offered to the view of the court.

The conduct of the master is in the highest degree reprehensible. He has been guilty of a flagrant breach of duty; and since the suppression has been persevered in and countenanced by the consignees, it cannot but afford the most violent suspicions of concealed enemy interests. Under such circumstances, it would be difficult to relieve the great majority, if not the whole of the claims, from the imputation of an hostile character; and, coupling the suppression with the origin of the voyage, I should hold it my duty to pronounce a general confiscation. The cause however may well be disposed of upon other more general grounds, and I shall therefore waive the decision of it upon that, to which I have alluded.

Various claims have been interposed, independent of those of Messrs. Ogden & McGregore, (which cover the ship and part of the cargo) in behalf of citizens of the United States. The claiming party however, in all these cases, is Mr. Ogden, who seems to act

[1] [Reported by John Gallison, Esq.]
[2] [Affirmed in 8 Cranch (12 U. S.) 434.]

as general agent for all concerned. I cannot approve of this course. Where the parties live in the United States, and are under no disability, I can perceive no law or reason to countanance a claim and affidavit by a mere nominal agent. It cannot but lead to the most unjustifiable irregularities, and perhaps to the most mischievous frauds. A nominal party may set up his pretensions before the court, and, while he makes no affidavit of real interest, may find an easy agent to credit or to assert any plausible tale before the court, without any hazard of detection. I do not pretend to impute any such misconduct to the present parties; yet I think it would be difficult to say, that their conduct might not, if strictly scrutinized, warrant such an interpretation. I disclaim however any intention to make the inference, in this case.

All the claims thus interposed by Mr. Ogden, with one exception, claim the property as purchased with funds or debts due in England before the war. Mr. Penniman's claim alleges, that the goods were actually purchased before the war. Now I cannot but remark, that if these facts were material, it would be somewhat difficult to conjecture, how they should have been known to Mr. Ogden. He must take them upon the assertion of the parties; and if so, I beg to know, why they cannot also assert the facts in a more solemn manner, and with more solemn proof to the court?

The facts, however, are not in my judgment material. It is a principle of settled law, which cannot now be brought into controversy, that all trade with the public enemy without a license is illegal, and subjects the property engaged therein to condemnation. And it is no excuse, that the property was purchased before the war, much less that the funds only, and not the purchase, existed before the war in the enemy country.

The cases of The Lady Jane, The Juffrouw Louisa Margaretha, The William, and The St. Philip, cited in The Hoop, 1 C. Rob. Adm. 196, and Potts v. Bell, 8 Term R. 548, would alone be decisive; and on principle it seems to me, that the same must be the legal result. These cases clearly show, that the circumstances of funds in an enemy country, or purchase of goods before the war, will not shelter the party from the operation of the rule, as to illegal traffic. I will not, therefore, take up time by any elementary reasoning on the subject.

The claim of Mr. McGregore seems to have received a distinct consideration in the district court, upon the supposition that he was to be deemed an American citizen changing his domicile, and in itinere to resume his American character. I will not stop to consider, whether this is true in point of fact; because, admitting it in the broadest terms, it cannot exempt his property from confiscation. If an American citizen could not lawfully go to Great Britain, and take away merchandize purchased before the war, I am at a loss to perceive, how an American citizen, domiciled there, could acquire higher privileges. It is not pretended that Mr. McGregore purchased these goods before the war, and I will add, that he has not, in any affidavit, given us any particular account of the ownership. We have his word only for the title and the extent of his claim; a claim also made by an agent, although he was himself upon the very spot.

The cases, in which the party's putting himself in itinere, to return to his native country, has been held to exempt his property from the hostile character acquired by the residence, are cases where such property has been engaged in a trade completely lawful in the native character. But the principle never has been and never could be extended to protect a trade, which was illegal in a native citizen; more especially a trade which in the native character would be in the highest degree noxious. This distinction pervades the cases, and reconciles all the apparent inconsistency. See The William, cited in The Hoop, 1 C. Rob. Adm. 196, and 8 Term R. 548; The Indian Chief, 3 C. Rob. Adm. 12.

In either view, therefore, in the character of a British subject or an American citizen, Mr. McGregore's property is liable to confiscation. I should have been glad to have avoided the decision of this claim, from motives of delicacy, which are known to the counsel; but it has been required at my hands, and if I am wrong, it is a source of great consolation, that the cause can go to the highest tribunal.

As to the adventure claimed by Mr. Webb, the master, it appears that it consists partly of Russian manufactures, sent by him to England, and partly of British manufactures, purchased since the war, from his funds previously remitted there. Mr. Webb sailed from Archangel in June, 1812, and arrived in England in the following October. The goods purchased in England must of course be condemned. As to the Russian goods, I should have been glad to have given them a more indulgent consideration. But no case exists, to my knowledge, in which the origin of the goods has afforded a favorable distinction, to exempt them from the general rule. They are not of great value, and I hope that the captors, notwithstanding the master's misconduct, will not insist upon an application of the unrelaxed rule, in its full rigor, to either part of the master's adventure.

The claim of Messrs. Ogden & McGregore, so far as respects the ship, is utterly unsupported in fact. But let the ship belong to whom she may, enemies or citizens, she must share the general fate of the cargo.

I reverse the decree of the district court, reject the claims of the parties, and also the claim of the United States, interposed for a forfeiture of the ship and cargo under the non-importation act, and condemn the whole, as good and lawful prize to the captors.

After this decree was rendered, and an appeal allowed to the supreme court, the captors moved for a sale of the ship and cargo.

STORY, Circuit Justice. I consider that this motion is to be granted almost as of course. The practice is well settled; but considering all circumstances I shall order the proceeds of the sales to be retained by the court, and deposited in the public banks at Portsmouth, to await the final orders of the court.

[NOTE. On appeal to the supreme court the decree of the circuit court was affirmed, with costs, except so far as it condemned those portions of the cargo claimed by Penniman and McGregore, which the court decided to hold over until the next term. 8 Cranch (12 U. S.) 434. At the next term the judgment of the circuit court as to these claims was affirmed. 9 Cranch (13 U. S.) 120. Pending these two hearings, the cause having been remanded for further and final proceedings, an application was made to have the shares of the captain and some of the crew, when ascertained, paid into the hands of their particular agents, and not into the hands of the supposed general agent of the ship. The application was referred to commissioners. Case No. 12,233.]

Case No. 12,233.

The ST. LAWRENCE.

[2 Gall. 19.] [1]

Circuit Court, D. New Hampshire. May Term, 1814.

PRIZE—DISTRIBUTION—PRIZE AGENTS—OFFICERS AND CREW OF CAPTOR—COMMANDER.

1. A court of prize will take cognizance, not only of all questions of prize, but of every incident thereto, until a final adjustment of all claims arising from the capture. It will, therefore, entertain a supplemental suit for the distribution of prize proceeds.

2. Where the proceeds have been paid to prize agents, and the cause is no longer pending, the proper jurisdiction is the district court. Where the proceeds remain in the circuit court, application may be originally made there, to compel distribution.

[Cited in Jackson v. The Magnolia, 20 How. (61 U. S.) 328.]

3. The prize act of 27th Jan., 1813 [2 Stat. 794], c. 155, authorizing the marshal to make distribution, does not narrow this jurisdiction. He still acts subject to the control of the prize court.

4. That act does not apply to sales made under interlocutory decrees, but only to sales after final condemnation.

5. Of the appointment, duties and authority of prize agents.

See the very able opinion of Dr. Croke in 2 Hall's Law J. 133.

6. Prize agents have a lien on the prize proceeds for their disbursements and commissions. And this applies to prize agents de facto, though irregularly appointed.

7. In the absence of all other regular prize agents, the owners of the ship and their agents are entitled to the trust, management and control of the captured property for the benefit of all parties.

8. Prize agents have an authority coupled with an interest, and cannot be devested of their authority, so as to take away their title to claim from the proceeds their disbursements and commissions. But when these are paid, the officers and crew have a right to take their shares directly at the hands of the court.

9. A commander of a privateer, who is authorized to award certain reserved shares among the most deserving in the cruise, cannot award a share to himself. He is a trustee for others, and not for himself.

The decree of this court, condemning the ship St. Lawrence and cargo as prize to the captors [Case No. 12,232], having, with the exception of two suspended claims, (These claims were also rejected at the next term of the supreme court. 9 Cranch [13 U. S.] 120) been affirmed by the supreme court [8 Cranch (12 U. S.) 434], and the cause having been remanded for further and final proceedings, an application by way of petition was made in behalf of the captain and some of the officers and crew of the capturing ship (the America) to have their respective shares of the prize proceeds, when ascertained, paid into the hands of their particular agents, and not into the hands of the supposed general agents of the ship.

This application was resisted by Pitman, of counsel on the part of the ship owners, and the supposed general agents Messrs. Prince and Deland, who asserted their right to a delivery of the whole prize proceeds into their hands, to secure their equitable liens for advances, expenses, disbursements and commissions incurred or made during the cruise.

On the other hand, J. T. Austin, for petitioners, contended first, that Messrs. Prince and Deland were never legally appointed general agents; secondly, if legally appointed, that their authority had expired; thirdly, if the authority were permanent in its form, that it had been legally revoked, and lastly, that at all events they were entitled to a direct payment of their respective shares, after deducting all the legal charges of the agency.

STORY, Circuit Justice. There can be no doubt of the general jurisdiction of the admiralty to take cognizance not merely of the question of prize, but of every incident thereto until a final adjustment of all claims arising from the capture. This is a part of prize jurisdiction, which is settled by solemn authority, and indeed seems essential for the purposes of complete justice in all proceedings in rem. See Smart v. Wolff, 3 Term R. 323; Home v. Camden, 1 H. Bl. 476, 2 H. Bl. 533, etc. Independent therefore of any provision by statute, the right of regulating conflicting claims, of ascertaining the title, character and number, of the captors, and of awarding a final distribution of prize property, attaches as an ordinary incident to the possession of the principal cause. And the courts of the United States, in the exercise of admiralty and maritime jurisdiction, possess

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

the right in as ample a manner as the prize courts of Great Britain.

It is true, that the act of congress of the 27th of January, 1813 (chapter 155), has authorized the marshal to make distribution of prize proceeds, which come into his hands upon sales made after final condemnation. But this provision was not intended to narrow the jurisdiction of the proper prize court, but merely to avoid the delays incident to sales made during a vacation of the court, and in plain cases to facilitate to the parties the acquisition of their respective shares. Even in these cases, however, the distribution is still subject to the control and regulation of the prize court, whose duty it is to ascertain the proper parties entitled to share, and in case of doubt or difficulty to adjust the contested claims.

In the case before the court, the property was sold under an interlocutory order before final condemnation, and the proceeds brought into the registry to abide the final decision of the appellate court. The provisions of the act of congress do not therefore apply; the distribution must be made by the court itself in the exercise of its ordinary functions. It would seem to follow, that in order to make such distribution, the court must first adjust all the claims, which attach as equitable demands upon the prize proceeds, and perform in some sort that duty, which is ordinarily performed by the marshal.

Although the general jurisdiction for all these purposes seems incontestable; yet, at the argument, a suggestion was thrown out by the court, how far it ought to entertain cognizance as a mere appellate court, over some of the collateral questions which the parties had brought before it, some of these questions seeming more fit to be discussed before a court of original prize jurisdiction. Upon mature reflection and examination of authorities, I am entirely satisfied, that all questions relative to prize property, and of course all incidental claims upon it by reason of the capture, properly belong to the court having possession of the property either actually, or in contemplation of law through prize agents, or having a right to call for the property in order to execute its decrees, and enforce the rights of the parties connected with its proceedings; and that it is perfectly immaterial whether the court possess the cause as of original jurisdiction or by appeal. Not to mention authorities in the admiralty, the reasoning in Smart v. Wolff, 3 Term R. 323; Home v. Camden, 1 H. Bl. 476, 2 H. Bl. 533, 4 Term R. 382, and Willis v. Commissioners of Prize Appeals, 5 East, 22, is in my judgment decisive.

Having disposed of this preliminary ground, I come to the consideration of the questions, which have been made by the parties at the bar.

The 11th article of the shipping articles of the privateer provides, "that the captain and officers of said ship shall appoint an agent or agents for said vessel's company for and during the term of said vessel's cruise." Under color of this clause, the captain and the greater part, if not all, of the officers, by a printed instrument, better adapted in its language to the case of an agency for an individual of the crew, appointed Messrs. Prince and Deland, in terms, "their agents;" and the owners of the privateer also appointed the same gentlemen their agents for the cruise.

Several exceptions have been taken to the validity of this appointment, as a good appointment for the officers and crew under the shipping articles. The first is, that it does not, on its face, purport to be an appointment for the officers and crew, but only for the officers. And certainly, if we are to be governed by merely technical propriety, the objection seems well founded. But, inasmuch as the shipping articles did not require the appointment to be made in any technical or solemn form, I am unwilling, in an instrument executed by unskilful persons, relative to maritime transactions, to admit the strictness of the common law to destroy the manifest intention of the parties. Upon a reasonable construction of the articles, an appointment, made by the captain and officers, of their agents for the cruise, may well be held an appointment to enure for the benefit of the whole crew of the ship.

A second exception is, that the appointment was made by a majority of the officers, and not by all the officers as the articles require. Admitting the fact, that all the officers of the ship, entitled to vote in the appointment, did not coöperate, which seems questionable, I am not sure that an appointment by the captain and a majority of the officers ought not, in articles of this nature and for these purposes, to be deemed a good execution of the authority.

A third exception is, that the appointment was to subsist only during the cruise, and that by lapse of time, the cruise being ended, it has expired. In my judgment, it would be a violation of the obvious intent of the parties, to adopt this limited construction of the power to appoint. It would be saving the letter and extinguishing the spirit of the agreement. The manifest intent of the parties was, that the officers and crew should have agents to act for them in every thing touching that cruise, whose powers should exist as long as the business or objects of the cruise remained unaccomplished. But such agency was not to extend to any future cruise of the privateer.

A fourth exception is, that the appointment has been revoked. If this were true in point of fact, it could not be held to devest the agents of any previously acquired interests in the nature of liens on the prize proceeds; and if done without good cause, I do not think the court ought to refuse to allow a liberal recompense for their services. But in point of fact, there has been no revocation of the appointment by a majority of the officers;

and it would have been a breach of good faith towards the crew to have made any such revocation, if practicable, unless for good cause, followed up by a new appointment. The authority to appoint is joint and not several, and it would be highly injurious to all parties to suffer a general appointment to be controlled by the interested or perverse opposition of one or two individuals.

However, I do not think it necessary very nicely to sift these objections, or one of a more grave character, which was reluctantly urged by counsel, and if true, (which I do not incline to believe) would have cast a shade over the agency of these gentlemen; for there is one circumstance decisive against all these objections, and that is the fact, that Messrs. Prince and Deland have, with the entire acquiescence and tacit consent of all parties, acted as general agents from the commencement of the cruise to the present time. As general agents de facto, they have had the superintendence of all prizes, the payment of all advances and expenses, and the distribution of all prize proceeds; and from their hands the captain, officers and crew, have received their shares of such proceeds without a murmur or complaint. As agents then de facto they are entitled to every indulgence as to their claim, which the most formal appointment would have conferred upon them.

Another consideration also, which renders the discussion of the formal authority of Messrs. Prince and Deland from the officers in a great measure unimportant, is the fact, that they are the acknowledged agents of the owners of the privateer. In the absence of all other regular ship's agents, the owners of the ship and their agents must be entitled to the trust, management and control of the captured property for the benefit of all parties. They are considered as the duces facti; they are responsible to the government and to strangers for the conduct of the ship and crew; and this not merely by the regulations of statute, but by the general maritime law. This is laid down in emphatic terms by Bynkershoek (Quest. Jur. Pub. c. 19), and is the settled rule of prize courts. As general ship owners, and as parties upon whom the law devolves the general responsibility, I apprehend that they are entitled to direct the conduct of the privateer during the cruise, and regulate the prize proceedings, as to the captured property. The law constitutes them, in the absence of all contrary stipulations, the general trustees or agents for all parties. And I may add, that the acts of congress of the 26th of June, 1812, c. 107 [2 Stat. 759], and of the 27th of January, 1813 (chapter 155), evidently contemplate this general character of the owners. If, then, there was no valid appointment by the officers, the trust and management of the prize property devolved on the owners and their authorized agents. "Quacunque via data est," as agents de facto, or as agents of the owner, Messrs. Prince and Deland are entitled to all the rights, which the character of general agency confers over prize proceeds.

What these rights are, I next proceed to consider. The agents have certainly an authority coupled with an interest, and the authority cannot be taken away from them without in the first place discharging that interest. But when once that interest is discharged, I do not perceive, but that the respective parties entitled to share in the proceeds have a complete right to revoke their authority, so far as the agency may be considered as of a private character. The rights then of prize agents, as such, extend no further than to have all their reasonable charges, disbursements, and commissions, in the first instance, paid out of the prize funds, on which they have a claim in the nature of an equitable lien. The Franklin, 4 C. Rob. Adm. 404. It would be a contravention of the language and the intent of the acts of congress, and betray an undue disregard of the interests of persons reposing equally on public and private confidence, for the court to pass by the claims of the agents, and pay into the hands of the individuals of the crew, or their private agents, the gross amount of their shares, and leave the agents to their remedy at common law for a proportional contribution from the crew. In most cases this would be but a mockery of justice.

The prize court, therefore, will attend to the reasonable claims of the owners and agents, and will not disturb any legal or equitable liens, to which they may be entitled. It will pursue, in this respect, the course, which the law has prescribed in the distribution to be made by the marshal. But when it has allowed all these reasonable claims, it is not easy to perceive any reason, why it should withhold the residue from any favored private agent, whom the party entitled to it shall select, at the peril of paying a double commission. The discretion of such an application may well be doubted, but it is a consideration, which cannot be entertained before the prize tribunal.

What I shall do at present is, to refer this application to commissioners, with directions to state the accounts of the cruise, including the charges, disbursements, advances and commissions of the general agents, so far as they may respect the petitioners before the court—and further to state the shares to which the petitioners are entitled, and the number of shares in the whole concern—and the liens or special claims, if any, which the general agents have on any shares. The commissioners are to give notice to the agents or attorneys of the parties of the times and places of their meeting, and to report their doings to the court, as soon as conveniently may be.

With respect to the six shares, which by the shipping articles were reserved to be distributed by the captain among the most deserving of the crew, he has executed his authority by dividing five shares in quarters

among the crew, and awarding one whole share to himself as among the most deserving. The parties, to whom this bounty has been awarded, have now a vested interest in it, which the captain cannot vary or control. Of course, he has no right to have the proceeds paid into his hands. The share reserved by the captain for his own supposed extraordinary services must pass into the general fund, as an unappropriated sum. It can never be permitted to any person, in violation of the confidence of the owners and crew, to appropriate to himself those rewards, of which he is the mere trustee, for the exclusive benefit of others.

If any of the crew did not proceed on the cruise, under circumstances, which should exclude them from sharing, their shares should be deducted from the general statement.

The prize proceeds belonging to the owners, officers, and crew, who have not objected, will be paid to the general agents.

A special report was afterwards made by the commissioners, which was, after argument, confirmed by the court, and distribution decreed accordingly. [9 Cranch (13 U. S.) 120.]

Case No. 12,234.

The ST. LAWRENCE.

[3 Ware, 211.] [1]

District Court, D. Maine. 1859.

MARITIME LIENS—MATERIALMEN—MASTER—POWER TO CHARGE—DISTRICT FOR ENROLLING.

1. By the maritime law, every person who furnishes materials or labor for the building and repair of a ship has a lien or privilege on her for his pay unless the privilege is expressly waived by the terms of the contract.

[Cited in The Ellen Holgate, 30 Fed. 127.]

2. The legal right of the master to charge the vessel for repairs.

3. When a ship's husband had his legal domicile at Northport, in Maine, but passed two-thirds of his time, and did his business at New York, the latter was held to be the proper district for enrolling and licensing the vessel under the act of Feb. 18, 1793 [1 Stat. 305].

[Cited in The Rapid Transit, 11 Fed. 329; The Jennie B. Gilkey, 19 Fed. 129; The Ellen Holgate, 30 Fed. 126.]

In admiralty.

Mr. Barnes, for libellant.

Mr. Shepley, for respondent.

WARE, District Judge. This is a libel brought by Wm. J. Currier against the schooner St. Lawrence, for supplies and repairs furnished her while lying in the port of Bangor, in this state. It is not denied that the articles charged, the principal of which was a second-hand mainsail, were furnished, that they have not been paid for, or that the price is justly due to the creditor. But it is contended that he has mistaken his remedy; that in law the vessel is not liable for the debt, but that it is merely the personal debt of the owners, and entitled to no privilege against the ship. The schooner was owned in moieties by Wm. Bush of New York, and John Patterson of Northport, in this state. Patterson purchased his half April 8, 1858, and became ship's husband. She was enrolled by the owners, and licensed in New York, and let by them to John W. Dickey, as master, to be employed by him on shares in the coasting trade. Under this well-known contract, the profits are divided between the hirer and the owners; the hirer is at the expense of victualing and manning the vessel, certain port charges being paid in common, and the owners are to keep the vessel in repair. Patterson, the ship's husband, had his legal domicile in Northport, where his family resided, but his principal business was at New York, and that was his most usual place of residence.

By the general maritime law, every person who furnishes supplies for a vessel, whether repairs for the ship or provisions for the crew, has a privileged claim, in our law, called a lien against the vessel for the price of his supplies. It is a principle of the maritime law, as old as the law itself. He is considered as trusting the vessel itself; that is treated as his debtor, and the suit is in rem directly against the thing in specie, and not circuitously as in the Roman law against the person having the possession or claiming the ownership. But by the maritime law of this country, this privileged lien is held to exist only when the supplies are for a foreign ship. This was decided in the case of The Gen. Smith, 4 Wheat. [17 U. S.] 438. And in the same case it was decided that within the meaning of our maritime law, and for the purpose of creating this lien, a ship is to be considered as a foreign ship, when she is in a port of any one of the United States other than that to which she belongs. This vessel was enrolled and licensed in the district of New York, and within the rule established by the case of The Gen. Smith, she is to be considered and treated as a foreign vessel in Bangor, provided she was enrolled in the proper collection district. By the registry act of December, 1792 [1 Stat. 287], § 3, and the license act of Feb. 18, 1793 [1 Stat. 305], vessels are required to be registered or enrolled in the collection district that comprehends the port to which they belong; "which port shall be deemed to be that, at which or nearest which, the owner, if there be but one, or if more than one, the husband or managing owner of such ship or vessel usually resides." The managing owner in this case had his legal domicile at Northport, where his family resided, and where he exercised the right of ownership. But his business was in New York, and there he resided

[1] [Reported by George F. Emery, Esq.]

two-thirds of the year. I think that New York was the place of his usual residence within the meaning of our navigation laws, and that she was properly enrolled there; and that by our maritime law for the purposes of the lien here sought to be enforced the schooner in Bangor was a foreign vessel. The lien, therefore, attached, unless it is excluded by another objection urged by the claimant's counsel. These supplies were obtained on the order of the master, and it is contended that the master has no authority to charge the vessel for repairs or supplies, whether at home or abroad, when the owner is present, or when he has a correspondent, and they can be obtained on personal credit. And in this case, it is argued, that though the part owner, Patterson, was not present in person, his home was in the neighborhood, where the fortune of his family was found, and where he had a personal credit that was equivalent, at least, to a correspondent. Such as is stated is undoubtedly the limitation of the master's authority to charge the vessel by a bottomry bond with maritime interest. I am not prepared to admit that it follows as a legal consequence, that the same limitation applies to charging the vessel with the common maritime lien bearing common interest. Emerig. Cont. à la Grosse.

But however this may be, I do not think the question is necessarily involved in this case. The master, in his deposition, expressly says that the schooner needed a new mainsail, and it seems that both the owners thought so, also, and directed him to purchase a second-hand sail, which he accordingly did. The captain, therefore, may justly be considered as acting, not under his implied power as master, but under the express authority of the owners themselves. The contract will, therefore, have the same legal effect as though the supplies were furnished on the personal order of the owners. And in that case, the ship will be bound, unless by the terms of the contract her liability is excluded. So far from this being the case, the master, in his deposition, says the supplies were expressly furnished on the credit of the ship, and no terms of credit were given, which could be construed into an implied waiver of the lien. In that case, on the general and familiar principles of the maritime law, a lien results as a matter of course. Every person who loans money for the building or repair of a ship has a privilege against the ship for the repayment of the money, and the privilege extends as well to the person who furnishes the repairs and materials, as to the creditor who lends money to pay for them. Emerig. Cont. à la Grosse, c. 12, §§ 3, 4, and this text, as well as others of a like character, has been so often quoted as equally true in the maritime law, which, in fact, borrowed it from that of Rome, by all the writers of the highest authority, that if the doctrine is now to be brought into doubt, we may as well discard all tradition of the maritime law as a fiction or a dream. I am aware of the remark incidentally made by the judge who pronounced the opinion of the court in the case of The Sultana (Pratt v. Reed) 19 How. [60 U. S.] 361, which seems to imply that the owner himself cannot subject the vessel to this lien, when the supplies can be obtained on personal credit. That case might be well decided on its own particular facts, and did not of necessity require the decision of this general question. And I cannot suppose that the court intended to overthrow in this incidental way, a principle of the general and public maritime law, acknowledged and acted upon by the whole commercial world from the earliest times. I feel bound to pronounce for the lien.

ST. LAWRENCE, The (TUPPER v.). See Case No. 14,240.

ST. LOUIS (CHAFFIN v.). See Cases Nos. 2,572 and 2,573.

ST. LOUIS (ILLINOIS & ST. L. RAILROAD & CANAL CO. v.). See Case No. 7,007.

Case No. 12,235.

ST. LOUIS v. JOHNSON.

[5 Dill. 241;[1] 9 Cent. Law J. 91.]

Circuit Court, E. D. Missouri. July 10, 1879.

BANK—DEPOSIT—RELATION BETWEEN BANKER AND CUSTOMER — DEBTOR AND CREDITOR— PRINCIPAL AND AGENT.

The ordinary relation between a banker and his customer, as respects money deposited by the latter with the former, is that of debtor and creditor; but, on the special circumstances of this case, the relation between the two, as respects a specific sum of money remitted by the banker at the request of the customer to another bank to pay a specified debt of the customer, was held to be that of principal and agent, or trustee and cestui que trust, and not that of debtor and creditor.

[Cited in Welles v. Stout, 38 Fed. 811.]

[Cited in Peak v. Ellicott, 30 Kan. 162, 1 Pac. 499.]

In equity. The city of St. Louis and the receiver of the National Bank of the State of Missouri respectively claim to be entitled to the sum of $29,564.29 currency, and $8,570.60 gold, on deposit June 20th, 1877, to the credit of the above named bank, in the Bank of the Republic, in New York. Briefly, the material facts, as shown by the proofs, are these: The National Bank of the State of Missouri suspended payment and closed its doors on June 19th, 1877, and the defendant, Johnson, is the receiver thereof, duly appointed, under the act of congress, by the comptroller of currency. From 1870, and until its suspension, the bank was the depository of

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

the money of the city of St. Louis. In 1872, the bank gave a bond, with security, to the city, in the sum of $500,000, conditioned that, "whereas, the bank has been selected by the city as the bank in which the money of the city shall be deposited; and, whereas, the bank has agreed to keep, subject to the lawful orders of the lawful officers of the city, such moneys or deposits as may be so deposited with said bank by said city or its lawful officers: now, if said bank shall well and faithfully keep and safely hold all such money of the city now deposited or hereafter to be deposited with it, and accurately account with said city therefor, and promptly respond to all proper and lawful demands and orders upon such deposits, then the obligation to be void; otherwise to remain in full force." The money of the city was deposited in the bank by the city treasurer, and was kept in a "general current account" (pass-book "H"), and was subject to be drawn out on checks signed by the city treasurer. In addition to the current account, two other special accounts were kept by the bank with the city --one was the "coupon account, gold" (pass-book "G"), and the other the "bond and coupon account, currency" (pass-book "E")—and the three accounts were represented by three pass-books held by the city, the entries in which were made by the officers of the bank. The bonds and coupons of the city fell due from time to time, and were payable in the city of New York, and it was necessary to provide funds there to meet them. A portion of the bonds and coupons of the city was payable at the Bank of the Republic, in New York, and the rest at the Bank of Commerce, in that city. To provide for the payment of such bonds and coupons, the practice was for the city treasurer, upon the instruction of the city comptroller, to draw a check on the National Bank of the State of Missouri for the amount necessary to be placed in New York to meet maturing bonds and coupons, and endorse the check and deliver it to the bank, with written instructions to remit the amount to the National Bank of Commerce, or the National Bank of the Republic, or both, in the city of New York, to pay bonds and coupons of the city of St. Louis falling due. Thereupon the National Bank of the State of Missouri would remit, or provide a credit for the amounts specified, to the Bank of the Republic, or the Bank of Commerce, or both, with written instructions to said banks to pay, and charge to the general account of the National Bank of the State of Missouri, the bonds and coupons of the city of St. Louis maturing at said banks, and forward the same cancelled to the National Bank of the State of Missouri.

The following amounts (out of which the balances here in question arose) were remitted to New York, in the manner and for the purpose aforesaid, and at the dates stated:

April 25th, 1877.	
To National Bank of the Republic	$ 51,000 00
To National Bank of Commerce	122,300 00
Total	$173,300 00
May 25th, 1877.	
To National Bank of the Republic	$ 45,350 00
To National Bank of Commerce	189,800 00
Total	$235,150 00
May 29th, 1877.	
To National Bank of the Republic	$162,000 00

The present suit only relates to the balance of the fund thus provided which remained in the Bank of the Republic at the date of the suspension of the Bank of the State of Missouri, and which had been transmitted to the Bank of the Republic, in the manner hereinafter stated, to pay the coupons of the city made payable at that bank.

To exhibit the matter clearly, the correspondence attending the transaction of April 25th, 1877, is given in full, as follows: It commenced with the following letter from the city comptroller to the city treasurer:

"Treasury Department, Comptroller's Office, St. Louis, April 25th, 1877. A. Geisel, Esq., City Treasurer: Sir:—You will please remit the following amounts to pay bonds and interest falling due, for which warrants have been this day drawn in your favor, namely:

To National Bank of Commerce, New York:		
City sterling coupons, gold	$57,800 00	
Proceeds and exchange	5,000 00	$ 62,800 00
County interest coupons, gold	$15,000 00	
Proceeds and exchange	1,500 00	16,500 00
City currency coupons		43,000 00
		$122,300 00
To National Bank of the Republic, New York:		
City currency coupons	$11,000 00	
City bonds	40,000 00	51,000 00
		$173,300 00

"Very respectfully,

"Richard P. Hannenkamp, Comptroller."

Next in order is the letter of the city treasurer to the National Bank of the State of Missouri:

"City Treasurer's Office, St. Louis, Missouri, April 25th, 1877. To James H. Britton, Esq., President of National Bank of the State of Missouri: Sir:—Enclosed I hand you a check for one hundred and seventy-three thousand, three hundred dollars ($173,300), which you will please have remitted to New York to pay bonds and coupons of the city and county of St. Louis falling due in May proximo:

To National Bank of Commerce, New York:		
Sterling coupons, gold	$57,800 00	
Proceeds and exchange	5,000 00	
		$ 62,800 00
County coupons, gold	$15,000 00	
Proceeds and exchange	1,500 00	
		16,500 00
Currency coupons..		43,000 00
To National Bank of the Republic, New York:		
Currency coupons		11,000 00
City bonds		40,000 00
		$173,300 00

"Yours respectfully,

"Edward Brooks, Asst. Treasurer."

The check enclosed in the foregoing letter was in the words and figures following:

"City Treasurer, St. Louis, Mo., April 25th, 1877. No. 903. To National Bank of the State of Missouri, in St. Louis: Pay to the order of George Kissel, teller, one hundred and seventy-three thousand, three hundred dollars ($173,300). A. Geisel, Treasurer."

Endorsed: "Pay to the order of National Bank of the State of Missouri. George Kissel, Teller."

Thereupon the National Bank of the State of Missouri wrote to the National Bank of the Republic the following letter:

"National Bank of the State of Missouri, in St. Louis, St. Louis, April 28th, 1877. To Cashier of the National Bank of the Republic, New York: Dear Sir:—I enclose herein for credit in account Commerce, $51,000. Please pay and charge to our general account the bonds and coupons of the city of St. Louis maturing at your bank next month, and forward the same to us, as usual, cancelled. Yours respectfully, Edward P. Curtis, Cashier."

The above transaction appears in the pass-books held by the city, as follows: In the pass-book containing the "general current account" (Exhibit H), the city is charged with the check for $173,300, and its general balance in bank, subject to check, is reduced by the amount named. In the pass-book containing the "bond and coupon account, currency" (Exhibit E), the bank charges itself with the amount of $173,300, and credits itself with the purchase of gold as instructed (that is, currency paid therefor), and bonds and coupons paid in currency and cancelled, and returned to the city, and exchanged on remittances, and commissions. In the pass-book containing the "coupon account, gold" (Exhibit G), the bank charges itself with the gold purchased, $72,800 (not the cost thereof), and credits itself with bonds and coupons paid in gold and cancelled, and returned to the city. The same course precisely was pursued in the transaction of $235,150 on May 25th, 1877, and of $162,000 on May 29th, 1877.

The money remitted by the National Bank of the State of Missouri to the National Bank of the Republic, in New York, as aforesaid, was deposited, with the knowledge and by the direction of the city, to the credit of the National Bank of the State of Missouri, and coupons and bonds of the city, when paid by the National Bank of the Republic, were charged to the National Bank of Missouri, with commissions, and were cancelled and returned by express to the bank here, and by the bank were delivered to the city treasurer, and thereupon the bank entered in pass-book "E," if such coupons and bonds were paid in currency, a credit to itself for the amount thereof, with exchange for itself and with commissions paid to the Bank of the Republic; or if they were paid in gold, a credit was taken by the bank in pass-book "G," for the face of the coupons and bonds so paid in gold, with exchange and commissions. The money remitted to New York to pay bonds and coupons of the city, as aforesaid, was deposited to the credit of the National Bank of the State of Missouri, and not to the credit of the city, in pursuance of an arrangement to that end, made in 1870, to prevent the money of the city being attached in New York at the suit of the holders of coupons of the city, who claimed that the same were payable in gold, and not in currency, because the bonds to which they were attached did not specify in what funds said bonds were payable. The books of the National Bank of the State of Missouri exhibit its transactions with the city in three accounts, corresponding respectively with the accounts stated in the pass-books above mentioned. The Bank of Commerce was the general correspondent of the Bank of the State of Missouri, and this suit does not relate to any balance in that bank. The Bank of the Republic was not the correspondent of the Bank of the State of Missouri, and the only transactions between these two banks are those relating to the payment for a series of years of the bonds and coupons of the city with funds remitted or provided for that purpose from time to time by the Missouri bank, in the manner hereinbefore shown. This suit involves only the balance of the fund thus provided remaining on hand in the Bank of the Republic when the Missouri bank suspended, June 19th, 1877. It should also be stated that in April or May, 1877, an arrangement was made between the city and the National Bank of the State of Missouri, whereby the latter agreed to pay four per cent interest per annum on the average daily balance of the city in excess of $100,000, and this arrangement was thenceforward carried out; but under it no interest was paid save on the average daily balance of the current account, and none on sums remitted to New York, after the bank received the check of the city treasurer therefor. The city paid the bank here exchange on the sums which it remitted to New York. The bank in New York charged a commission for paying the coupons to the bank here, which

was in turn charged to and paid by the city. When the Bank of Missouri closed its doors, there was to its credit at the Bank of the Republic, in New York, $29,564.29 in currency, and $8,570.60 in gold, being balances of funds remitted to said bank under the orders of the city treasurer in the manner aforesaid.

This notice was served on the National Bank of the Republic:

"New York, June 30th, 1877. H. W. Ford, Esq., Cashier of National Bank of the Republic: The city of St. Louis claims that the balance standing to the credit of the National Bank of the State of Missouri, on the books of your institution, is the property of the city of St. Louis. Henry Overstolz, Mayor."

The National Bank of the Republic made no claim to the funds, and, by stipulation of parties, they were withdrawn from New York, and are on deposit in the sub-treasury at St. Louis, to abide the determination of this case; and the question here to be settled is, which party has the preferable right to the money—the city of St. Louis, or the receiver of the National Bank of the State of Missouri?

Leverett Bell and James E. Withrow, for plaintiff.

Henderson & Shields, for defendant.

DILLON, Circuit Judge. The receiver succeeds to all the rights of the National Bank of the State of Missouri; and, as there is no question of fraud, actual or constructive, in the case, he succeeds only to the rights of the bank as against the city to the balance on hand in the Bank of the Republic at the date of the failure of the Missouri bank.

As between the Missouri bank and the city, did those moneys in the Bank of the Republic belong to the city? Suppose the Missouri bank had not failed, and a contest had arisen between it and the city as to the balance on hand in the Bank of the Republic, would the city have been entitled to a judgment or decree that this balance was in law or in equity its money? If so, the same rights still remain. If, however, as respects this balance, the Missouri bank sustained towards the city the relation of a debtor only, this relation still remains, and the receiver is entitled to the fund, and the city must come in as a general creditor.

Suppose the Bank of the Republic had failed with the amount here in dispute on hand; on which would the loss have fallen, the city or the Missouri bank? Such an inquiry would involve the same principle which is presented in the cause now under consideration. The correct decision of the cause requires that the facts and circumstances which give it its peculiar character shall be closely regarded, and the intention and purposes of the bank and of the city kept constantly in view.

The general relation of the bank to the city was the usual relation of a banker to his customer, viz., the relation of debtor and creditor. That was the undoubted relation as to the account in the general pass-book "H." On the face of the special pass-books, "E," and "G," the same relation also exists, for the bank credits the city and charges itself with the amount received or transferred from the general account, and when it subsequently receives the coupons and surrenders them to the city, and not before, it charges the city on these books (and on its books, of which these are copies) with the amount of coupons surrendered, and with exchange on the sum remitted to New York, and also the commissions for services charged by the Bank of the Republic. It did not charge the city on the special books with the amount remitted to New York at the date of remittance, but, as just stated, only debited the city when the coupons were received here and surrendered to the city.

As between the bank here and the Bank of the Republic, the money was that of the Bank of Missouri, and not that of the city. It was intended to be so as between all three of the parties. Originally the city had a purpose in not having it appear that the money in New York to pay its obligations was its own—a purpose based upon a commendable precaution to protect its credit against unfounded pretences, and in no wise fraudulent—and that mode of transacting the business naturally continued after the reasons for it had probably ceased.

If we leave out of view the effect of the account shown in the special pass-books "E" and "G," the right of the city as against the bank would seem to be sufficiently clear. The case would then be this: The bank was the general debtor of the city, having funds subject to its check or draft. Let us take the transaction of April 25th, for it represents all the others. The city comptroller directs the city treasurer "to remit" to the Bank of the Republic $51,000 to pay the bonds and coupons of the city falling due at that bank on the following month. On the same day the city treasurer draws in favor of the bank his check for the amount and encloses it to the president of the bank, with directions, inter alia, "to remit" to the Bank of the Republic, in New York, $51,000, "to pay bonds and coupons of the city falling due (at that bank) in May next." The bank at once charges the amount of that check to the city, which has the effect to reduce the city's balance with the bank and to stop interest to that extent. If the money had passed over the counter to the city treasurer, and he had delivered it to another bank, with instructions to remit to a particular bank for a specified and definite purpose, such bank would have been the agent of the city to remit or transmit the money of the city; it would remain the money of the city, notwithstanding it may have been credited on account to the agent, and

not to the principal, and this with the consent of the two. If such bank had transmitted the money by express, the money would be the city's; if by draft, it would be the agent of the city for that purpose; but when its instructions were obeyed and the money duly received by the appointed depository, all liability would be at an end. If the appointed depository failed, the loss could not be thrown upon the agent.

But the money was not paid over the counter to the city, and the city did not select some other agent or bank to remit or transmit it to the Bank of the Republic, but selected its general depository to make the remittance, and accepted a credit in another account for the same sum. The bank remitted the sum, as directed by the city, to the Bank of the Republic, with specific directions to credit the amount to it, and to use the same "to pay the bonds and coupons of the city maturing at your bank next month," and charge the amount to the account of the bank here, and forward to this bank the bonds and coupons cancelled.

The letter of the treasurer to the president of the bank made the bank here the agent of the city to remit, and if the bank here did remit accordingly, and placed the sum with the designated bank, i. e., the Bank of the Republic, it did its duty, and would not be liable to the city if the Bank of the Republic had failed with this fund on hand. Though the amount stood on the books of the Bank of the Republic to the credit of the bank here, yet that was by the city's consent and for its convenience. It imposed, as between the bank here and the city, no additional liability on the bank, and it deprived the city of none of its rights; such would be the effect of the letter of the treasurer to the president of the bank, if there is nothing to qualify or change it in the other circumstances of the case. The main circumstance relied on is that the city, at the time it gave directions to remit, accepted on another account and pass-book a credit from the bank for the same sum—the bank, by such credit, acknowledging itself to be the debtor of the city for the amount it had undertaken to remit. If this is the controlling element in the case, then the relation of debtor and creditor between the city and bank never ceased, as respects the sum directed to be remitted, and remained the same as before, and continued so to remain after the sum was placed, as directed, with the Bank of the Republic.

But, in my judgment, this is not the controlling element in the cause. The special pass-books are to be regarded as in the nature of memoranda, and adopted for the sake of convenience, and have the same effect as if the bank had given to the city a receipt for the money received, and promised therein to remit the same to the Bank of the Republic for the purpose of paying the coupons of the city.

The bank charged the city with exchange on the amount it thus received, the same as it would have charged if the draft had been for any other customer. It became the agent of the city to transmit the money. The money, when placed in the Bank of the Republic, was, as between the Missouri bank and the city, the money of the latter. When the agent presented coupons cancelled, this showed that the agent had discharged the duty it had undertaken.

It is my judgment that the relation between the Missouri bank and the city, as respects the money deposited with the Bank of the Republic, was not that of debtor and creditor strictly, but that of principal and agent, with the duties and liabilities of the latter, and not those of the former relation. The moneys deposited by the Missouri bank in its name with the Bank of the Republic, were, as between the former bank and the city, trust moneys, and in equity they belong to the cestui que trust, and the latter has the right to pursue and claim them as against all persons who do not stand free of the trust.

This view is not regarded as at all in conflict with the cases cited and relied on by the defendant's counsel. Marine Bank v. Fulton Bank, 2 Wall. [69 U. S.] 252; Savings Bank Case [unreported], per Mr. Justice Miller.

A decree will be entered adjudging the money in controversy to belong to the city. Decree accordingly.

See Levi v. National Bank of Missouri [Case No. 8,289].

ST. LOUIS (NORTHWESTERN UNION PACKET CO. v.). See Case No. 10,345.

Case No. 12,236.

ST. LOUIS, A. & T. H. R. CO. v. INDIANAPOLIS & ST. L. R. CO. et al.

[9 Biss. 99.] [1]

Circuit Court, D. Indiana. Sept., 1879.

RAILROAD COMPANIES—LEASE—RENT—GUARANTY—EQUITY—JURISDICTION—REMEDY AT LAW.

1. Certain of the defendant railway corporations had made an agreement with the complainant corporation by which they had guaranteed, that the I. & St. L. R. R. Co., lessee of the complainant's railway lines, should pay to the complainant a certain minimum rental. The guarantor companies were the holders of the bonds of the I. & St. L. R. R., lessee, to a large extent, and the latter company having failed for nearly two years to pay the rental due complainant: *Held*, that the court would require the lessee to pay the minimum rental due complainant before the payment of any portion of the interest on such of its bonds as belonged to the guarantor corporations, or any other sums which might be due them, and that an injunction to that effect would be issued, and the guarantor corporations further enjoined from disposing of such bonds.

2. *Held*, further, that the fact that the complainant had a right of action at law against the guarantors for breach of warranty, did not

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deprive the court of equity of its jurisdiction of the case.

In equity.

McDonald & Butler, for complainant.

R. P. Ranney, S. Burke, Baker, Hord & Hendricks, and Dye & Harris, for defendants.

GRESHAM, District Judge. Previous to May, 1867, the Cleveland, Painesville & Ashtabula R. R. Co., owner of a road running east from the city of Cleveland, Ohio, since by consolidation becoming the Lake Shore & Michigan Southern Ry. Co., defendant; the Cleveland, Columbus & Cincinnati R. R. Co., owner of a road running from Cleveland to Cincinnati via Columbus, and the Bellefontaine Railway from Indianapolis to Crestline, said last two companies by consolidation becoming the Cleveland, Columbus, Cincinnati & Indianapolis Ry. Co., defendant; the Pittsburg, Fort Wayne & Chicago Ry. Co., owner of a road running from Pittsburg via Crestline to the city of Chicago, defendant; the Pennsylvania R. R. Co. and the Pennsylvania Co., defendants, then transacting their western business via the P., Ft. W. & C. to Crestline, and via the Bellefontaine road from Crestline to Indianapolis; and the Indianapolis, Cincinnati & Lafayette R. R. Co., operating a line from Cincinnati to Indianapolis; all being desirous of procuring and controlling a through line from Indianapolis to St. Louis, (the only railroads then connecting said last-named points being the Terre Haute & Indianapolis and the St. Louis, Alton & Terre Haute, complainant herein,) entered into negotiations with complainant for the use and control of its said railway from Terre Haute to East St. Louis. As a result of these negotiations, on May 17, 1867, said defendants above named entered into a contract with complainant, denominated in these proceedings as the first contract of guaranty, by the terms of which said defendants agreed that the T. H. & I. Co., on or before the first day of July, 1867, should execute as lessee the operating contract, or lease, mentioned in, and the foundation of, said first guaranty, or in default of said T. H. & I. R. R. Co. becoming lessee, "any other responsible corporation owning or constructing a railroad from Indianapolis to Terre Haute * * * shall be accepted in lieu of said T. H. & I. R. R. Co., provided that if such substitution be made the party of the fifth part," complainant herein, "shall be fully indemnified for all loss, damage or temporary diminution of business which may result therefrom," and by the terms of which said first guaranty said defendants further promised and agreed "that the said T. H. & I. R. R. Co., or such other corporation as may be substituted therefor, shall at all times hereafter keep, observe and perform all and singular the covenants, conditions and provisions of the aforesaid contract, provided, nevertheless, that all the obligations of each of the said parties of the first, second, third and fourth parts, created hereby, shall be several and not joint, and as to each of them for the equal fourth part of any damage arising from any default of the said T. H. & I. Co. or the said other corporation, or for any breach by all said parties of this agreement." This first guaranty was executed by the I., C. & L. R. R. Co., the P., Ft. W. & C. Ry. Co., the Penn. R. R. Co., the Bellefontaine Ry. Co., the C., C. & C. R. R. Co., the C., P. & A. R. R. Co.

On the same day, May 17, 1867, and as a part of the same instrument and agreement, the St. L., A. & T. H. R. R. Co., complainant, executed and delivered to said guarantors the operating contract or lease with the T. H. & I. R. R. Co. as lessee and party of the first part, by the terms of which it was, in substance, agreed that said T. H. & I. R. R. Co. should have the use, possession and control of complainant's railway from Terre Haute to East St. Louis, including the Alton branch, together with the equipment thereof, as then owned and used by said complainant upon said part of its railway, for the period of ninety-nine years from and after June 1, 1867; that said lessee should, by or before December 31, 1868, expend in repairs and betterments of complainant's said railway the sum of $500,000; and should at all times during said period keep and maintain complainant's road-bed, track and property in the condition of first-class western railways; and that said lessee should, during all of said period, procure and own, together with complainant's said equipment, an equipment ample and sufficient to do the entire business of the road, without resorting to any hired equipment; and that said lessee should at all times, at its own cost, keep said equipment in the condition and repair of first-class western railways; and by article 19 of said lease it was provided that "this contract shall become operative as of the first day of June, 1867;" and by article 11 of said contract it was provided that if at any time complainant defaulted in interest upon its bonds, said lessee should have the right to pay said interest so in default, and charge the sum so paid against complainant's rent reserved; and by article 16 of said contract it was provided that if the lessee failed to pay the rent reserved and stipulated for, complainant might re-enter and take possession of its said road, or might take such other or further action for the enforcement thereof as it might deem advisable. The material parts of said lease are contained in articles 5, 6, 7, 8, 9, and 12, which are as follows:

"Article 5. The party of the first part, operating said railroads during the term aforesaid, shall, from time to time, have full authority to fix all rates of passenger fares and of freights on all business done upon the said main line of railroad and the said Al-

ton branch thereof; provided, however, and it is hereby expressly declared and agreed, that for the purpose of expressing the limitation of such authority hereinbefore provided, all business which shall be done partly on the St. L., A. & T. H. R. R., and partly on either the I., C. & L. R. R., or on the Bellefontaine Ry., or on the C., C. & C. Ry., or on the C., P. & A. R. R., or on the P., Ft. W. & C. Ry., or the Penn. R. R., is herein denominated joint business; and that the rates on such joint business shall at no time, and in no instance be fixed lower per mile for the said St. L., A. & T. H. R. R., or the branch thereof, or for any part of the same, after proper allowance shall have been first made and deducted for terminal expenses, than shall be charged per mile on such joint business by or for the said T. H. & I. R. R., or by or for either of the aforesaid railroads upon which such joint business shall be partly done.

"Article 6. The said party of the first part, keeping and performing all and singular the terms, provisions and conditions of these presents, and making the payments hereinafter required, shall and may, at all times during the period of ninety-nine years aforesaid, demand, collect and receive any and all fares, charges, freights, tolls, rents, revenues, issues and profits of the said main line of railroad extending from Terre Haute to East St. Louis aforesaid, and of the said branch thereof to Alton aforesaid.

"Article 7. The party of the first part shall, in each and every year of the term of ninety-nine years, pay, or cause to be paid, to the party of the second part, in the manner and at the times hereinafter provided, thirty per cent. of the gross earnings of the said railroad from Terre Haute to East St. Louis, and the branch thereof to Alton, until such gross earnings for such year shall amount to the aggregate sum of two millions of dollars, and twenty-five per cent. of any excess over two millions of dollars, until the whole earnings for such year shall amount to three millions of dollars, and twenty per cent. of any excess over three millions of dollars of gross earnings for such year; and such percentage of the gross earnings for each such year shall be paid over without any deduction, abatement or diminution for any cause whatsoever, every demand or claim accruing, or to accrue, to the party of the first part, being hereby declared to be chargeable on that portion of the gross earnings which the said party is, by the next succeeding article hereof, empowered to retain as therein provided; but it is hereby expressly agreed that the aforesaid payments shall amount in each and every year to at least four hundred and fifty thousand dollars, which is hereby agreed upon as a minimum for each and every year, and is to be paid absolutely, without reference to the percentage which it forms of the gross earnings of such year, and without leaving or creating any claim or charge upon the earnings of any future year.

"The manner and time of payment hereinbefore provided shall be as follows: On the first day of July, 1867, and of every month in each year thereafter, shall be paid thirty-seven thousand and five hundred dollars for the month, being one equal twelfth part of the minimum payment herein provided to be made for each and every year of the term aforesaid; and on the first day of August, 1867, there shall be paid a sum which, added to the said thirty-seven thousand and five hundred dollars, shall amount to thirty per cent. upon the gross earnings for the month of June preceding, so far as such earnings can be approximately ascertained according to the usual practice of railroad companies in making up their monthly accounts of gross earnings; and for each month after the said month of June payment shall in like manner be made of the excess over thirty-seven thousand five hundred dollars for such month on the first day of the second month thereafter, and as soon as practicable after the close of each year, and within sixty days after such close, the aggregate gross earnings for the whole year shall be ascertained, and the balance, if any, from one party to the other adjusted and paid in conformity to the general provisions of this agreement. As soon as experience shall show that the fixed rate of thirty per cent. for the approximate monthly payments will regularly exceed the amount to be found payable in the yearly settlements, the rate for the approximate monthly payments shall be reduced in such extent and manner as the parties hereto may agree, but not at any time so as to create a foreseen balance from the party of the first part which has the custody of the accounts and of the income.

"For the convenience of having each fiscal year terminate with the thirty-first day of December in such year, the period between the first day of June, 1867, and the first day of January, 1868, shall be adjusted and settled as if the first year had completely terminated; but provided, nevertheless, that if it shall so happen that the amount of the gross earnings for such fraction of a year shall be larger than its proportion of a whole year, such excess beyond such proportion shall not operate to reduce the rate of the percentage payable to the party of the second part for such portion of a year; all payments herein required to be made to the party of the second part shall be made in the city of New York.

"Article 8. The party of the first part shall be entitled to retain each and every year of the aforesaid term all excess of gross earnings for such year over and beyond the payments to the party of the second part in the last preceding article provided, and to apply the same to and for the purposes of this agreement, and for fulfilling all the undertakings of the said party of the first part here-

in expressed, and to apply to its own benefit any surplus which may remain in any such year as compensation for the services, acts and things done or to be done by the said party of the first part in pursuance of these presents.

"Article 9. The said party of the first part shall, at all times during the term aforesaid, bear and at its own proper cost and expense pay and discharge any and all costs, expenses and charges whatsoever of operating and carrying on the business of said main line of railroad and said Alton branch thereof, or either or any part of either of said railroads, or in any manner connected with, arising out of, or appertaining to business operation or management of the same; and shall and will at all times during said term hold, save and keep harmless and indemnified the said party of the second part of, from and against any and all costs, charges and expenses, suits, damages and claims of any and every kind whatsoever arising out of or in any manner appertaining to or connected with the management or operation during said term of the said railroads or either or any part of either thereof, including not only the expenses of operating and carrying on the business of said roads, but also any and all claims for injuries to persons or property occurring on said roads or either or any part of either that may occur during said term, and any and all claims, suits and demands for non-performance or breach of contract in respect to any person or thing to be transported over the same, and any and all claims and demands for the loss or destruction by whatever cause of any property whatsoever while under the control of the party of the first part or which it shall have undertaken to carry on or transport over any portion of said railroads."

"Article 12. All business destined to the east which may originate over the Belleville branch, or any extension thereof to Athens or Du Quoin shall, so far as it may be properly influenced by the said party of the second part, be sent by way of the aforesaid main line from East St. Louis to Terre Haute, and the said party of the first part hereby agrees that all business passing west over the said main line of railroad destined to points south of East St. Louis shall, as far as can be so controlled, be sent over the Belleville branch, now worked or as the same shall be when completed to Du Quoin, or to any other point south of Belleville."

The complainant delivered its road and equipment to the guarantors, on June 1, 1867, under and by virtue of the first guaranty and the lease of May 17, 1867. Soon after the execution of the first guaranty the Penn. R. R. Co. withdrew from the combination and entered into negotiations for an independent line from Pittsburgh to St. Louis. The T. H. & I. R. R. Co. failed and refused to become lessee in the operating contract. The remaining guarantors, aside from the Penn. R. R. Co. and the Penn. Co., on August 28, 1867, caused and procured the organization of the I. & St. L. R. R. Co. to construct a railway from Indianapolis to a point on the Indiana state line, at which it would meet and intersect complainant's railway. On September 11, 1867, the I., C. & L. Ry. Co., the P., Ft. W. & C. Ry. Co., the C., C., C. & I. Ry. Co., and the L. S. & M. S. Ry. Co.—then the L. S. R. R. Co.—procured the complainant to accept the I. & St. L. R. R. Co. as lessee or party of the first part, in the place of the T. H. & I. R. R. Co. in the lease of May 17, 1867, and caused and procured complainant to enter into a supplemental agreement, by the terms of which complainant accepted the I. & St. L. R. R. Co. as lessee, and by the terms of which the I. & St. L. R. R. Co. and complainant mutually adopted the lease of May 17, 1867, under which the guarantors, except the Penn. R. R. Co. and the Penn. Co., were then in possession of the complainant's road. On the same day, September 11, 1867, the last named guarantors, with the exceptions named, made and entered into a supplemental agreement of guaranty with complainant, which was as follows:

"This indenture, made the 11th day of September, A. D. one thousand eight hundred and sixty-seven, between the Indianapolis, Cincinnati & Lafayette Railway Company of the first part, the Pittsburgh, Fort Wayne & Chicago Railway of the second part, the Bellefontaine Railway Company, the Cleveland, Columbus & Cincinnati Railroad Company, and the Cleveland, Painesville & Ashtabula Railroad Company, jointly of the third part, and the St. Louis, Alton & Terre Haute Railroad Company of the fourth part;

"Whereas, heretofore, to-wit, on or about the seventeenth day of May, one thousand eight hundred and sixty-seven, the said party of the fourth part executed a certain instrument in writing, bearing date on said last-mentioned day, and purporting to be an indenture between the Terre Haute & Indianapolis Railroad Company, and the said party of the fourth part, whereby it was agreed that the said Terre Haute & Indianapolis Railroad Company should manage, operate and carry on the business of the main line of the railroad of the said party of the fourth part, extending from Terre Haute, in the state of Indiana, to East St. Louis, in the said state of Illinois, together with the branch thereof to Alton, in the said state of Illinois, upon the terms, agreements and conditions in the said indenture mentioned and set forth, as by reference to said indenture, which, for greater convenience, is hereinafter designated and referred to as an operating contract, will more fully appear.

"And whereas, the said operating contract was duly executed by the said St. Louis, Alton & Terre Haute Railroad Company, as the party of the second part thereto, at the special instance and request of the said parties of the first, second and third parts to

these presents, and of the Pennsylvania Railroad Company, and upon the execution by or on behalf of the said parties of the first, second and third parts, and the said Pennsylvania Railroad Company, of an agreement bearing date on said last mentioned day, and which is hereinafter for more convenient reference thereto denominated an agreement of guaranty.

"And whereas, in and by the said agreement of guaranty the said parties of the first, second and third parts hereto, and the said Pennsylvania Railroad Company, for and in consideration of the execution of said operating contract by the said party of the fourth part, and of the sum of one dollar to each of them duly paid, promised, agreed, and guaranteed to and with the said party of the fourth part, to these presents; that the said Terre Haute & Indianapolis Railroad Company should, on or before the first day of July next succeeding the date thereof, duly execute and deliver to the said party of the fourth part to these presents the operating contract aforesaid, provided, however, that in case of the failure of the said Terre Haute & Indianapolis Railroad Company so to do, any other responsible corporation owning or constructing a railroad from Indianapolis to Terre Haute aforesaid, or to some point on the road of the said St. Louis, Alton & Terre Haute Railroad Company westwardly of Terre Haute aforesaid, should be accepted in lieu of the said Terre Haute & Indianapolis Railroad Company on certain conditions in the said agreement of guaranty contained.

"And whereas, in and by the said agreement of guaranty the said parties of the first, second and third parts to these presents and the said Pennsylvania Railroad Company did further promise and agree and guarantee that the said Terre Haute & Indianapolis Railroad Company, or such other corporation as might be substituted therefor, should at all times thereafter keep, observe and perform all and singular the covenants, conditions and provisions of the aforesaid contract, to-wit, the contract herein designated as an operating contract.

"And whereas, the said contract of guaranty contained the following provisions, viz.: 'Provided, nevertheless, that all the obligations of each of the said parties of the first, second, third and fourth parts created hereby, shall be several and not joint, and as to each of them for the equal fourth part of any damages arising from any default of the said Terre Haute & Indianapolis Railroad Company, or the said other corporation, or for any breach by all said parties to this agreement.'

"And whereas, the said Terre Haute & Indianapolis Railroad Company has failed to execute the aforesaid operating contract, and the said Pennsylvania Railroad Company has failed to assist or take part in providing or nominating another corporation in place of the said Terre Haute & Indianapolis Railroad Company as party of the first part to said operating contract as contemplated by the said agreement of guaranty, and the said parties of the first, second and third parts to these presents are desirous that a corporation nominated by them shall be accepted by the said St. Louis, Alton & Terre Haute Railroad Company as party to said operating contract, in place and stead of the said Terre Haute & Indianapolis Railroad Company, but without prejudice, however, to any claim or claims which the said parties hereto, or any or either of them, have or may hereafter have against the said Pennsylvania Railroad Company arising out of the execution by or on behalf of said Pennsylvania Railroad Company of the aforesaid agreement of guaranty.

"And whereas, the said parties of the first, second and third parts have caused a new company to be duly organized under the laws of the state of Indiana, and by the name of the Indianapolis & St. Louis Railroad Company, and have requested the said party of the fourth part to accept said new company as the party of the first part to the said operating contract, and the said party of the fourth part has in compliance with such request agreed to accept the said new company in the place and stead of the Terre Haute & Indianapolis Railroad Company, but without waiving or intending to waive any claim against the said Pennsylvania Railroad Company, or any other party, arising out of anything in the premises mentioned or otherwise, and has, at the special instance and request of the parties of the first, second and third parts hereto, and in consideration of the execution of these presents, this day duly executed and delivered to the said Indianapolis & St. Louis Railroad Company, an instrument in writing bearing even date herewith, whereby the said Indianapolis & St. Louis Railroad Company has been substituted for and put in the place of the said Terre Haute & Indianapolis Railroad Company upon the terms and conditions therein and the said agreement of guaranty contained.

"Now, therefore, this indenture witnesseth, that for and in consideration of the premises, and of the sum of one dollar to each of them duly paid, the receipt whereof is hereby acknowledged, the said parties of the first, second and third parts to these presents, for themselves, their successors and assigns, have covenanted, promised and agreed, and by these presents do covenant, promise, agree and guarantee, to and with the said party of the fourth part, its successors and assigns, that the said Indianapolis & St. Louis Railroad Company shall and will at all times hereafter keep, observe and perform all and singular the covenants, conditions and provisions of the said operating contract, bearing date on the 17th day of May, in the year of our Lord 1867, and of the said instrument bearing even date herewith, by which the said Indianapolis & St. Louis Railroad Company has assumed, adopted or become liable

to carry out the said operating contract according to the true intent and meaning thereof: provided, nevertheless, that all the obligations of the parties of the first, second and third parts hereto, shall be several and not joint, and as to each of them for the equal third part of any and all damages which may arise from any default of the said Indianapolis & St. Louis Railroad Company, its successors or assigns in the premises, or for any breach of this agreement by the said parties of the first, second and third parts hereto."

In the original organization of the Indianapolis & St. Louis R. R. Co., all of the stock was taken and subscribed for by said guarantors or persons in their interest, excepting about eighty shares.

Shortly after the organization of the I. & St. L. R. R. Co., and shortly after the execution of said guaranty, the I., C. & L. Ry. Co. became financially embarrassed and withdrew from any further connection with the joint enterprise, leaving the P., Ft. W. & C. as one party, the C., C., C. & I. R. R. Co. and the L. S. & M. S. Ry. Co. jointly as the second party to carry out the joint enterprise.

The last named parties did, after the withdrawal of the I., C. & L., carry on the construction of the I. & St. L., and the business of the joint enterprise, as equal parties therein and as two parties controlling the same, instead of two out of three parties.

From June 1, 1867, until the opening for traffic of the Vandalia Line from Indianapolis to St. Louis, by the Penn. R. R. Co. and the T. H. & I. R. R. Co., the thirty per cent. of the gross earnings of complainant's road exceeded the minimum rental reserved in the lease.

In June, 1869, the Penn. R. R. Co. leased the P., Ft. W. & C. Ry., and by the terms of the lease specifically and in terms, assumed to carry out and perform the guaranty and contract in the place of the P., Ft. W. & C. Ry. Co.

In performance of this assumption the Penn. R. R. Co. took from the P., Ft. W. & C. Ry. Co. the bonds and stock of the I. & St. L., then held by the P., Ft. W. & C., and the Penn. R. R. Co. still holds a large amount of the bonds and stock of the I. & St. L. R. R. Co., either in its own name or in the name of the Penn. Co.; the latter being a corporation owned and controlled by the Penn. R. R. Co.

The officers and directors of the I. & St. L. are, and have always been, officers and directors of the said guarantor companies, or of the Penn. Co., in connection with the guarantor companies, as lessee of the P., Ft. W. & C.

Nearly all the stock of the I. & St. L. is now held and controlled by the C., C., C. & I. and the P., Ft. W. & C., or its lessee, the Penn. R. R. Co., or the Penn. Co., in equal proportions: i. e., the C., C., C. & I. representing one-half, and the P., Ft. W. & C., or its lessee, the Penn. R. R. Co., representing the other half.

A large portion of the bonds of the I. & St. L. were originally taken in equal proportions by the C., C., C. & I. and the P., Ft. W. & C., and a large amount of the different issues are now held by the defendants, the C., C., C. & I. and the Penn. R. R. Co., as lessee of the P., Ft. W. & C., either in its own name or in the name of the Penn. Co.

After the opening of the Vandalia Line as a rival route from Indianapolis to St. Louis, the Penn. R. R. Co., instead of carrying out the obligations of the P., Ft. W. & C. Ry. Co., in the guaranty and lease, diverted all the trade and traffic it could control from the Crestline Route and complainant's road, to the Pan-Handle and Vandalia Route, thereby greatly diminishing the gross receipts of complainant's road. By reason of its not complying with the lease, requiring it to own a full traffic equipment for its own and complainant's road, and by reason of the large amount of interest drawn from its earnings by defendant guarantors upon bonds held by them, the I. & St. L. Co. has become and is, insolvent, and unable to pay the rent reserved in the lease.

For some five or six years past the I. & St. L. R. R. Co. has been unable to pay its interest and the rental reserved to complainant, and recognizing the obligation resting upon them by virtue of their contracts, the C., C., C. & I., in connection with the L. S. & M. S. and the P., Ft. W. & C., or its lessee, the Penn. R. R. Co., have from time to time advanced large sums of money to the I. & St. L. to enable it to pay its interest and complainant's rental, the advancements being made in equal proportions by the C., C., C. & I. and the P., Ft. W. & C., or its lessee, the Penn. R. R. Co.

The I. & St. L. Co. has not purchased and owned, and does not own, an equipment sufficient to do the business of the line, and has been, and is, resorting to the use of hired equipment. The I. & St. L. is still in the possession of and operating complainant's road, and has received all the gross earnings and income thereof, but it has refused to pay complainant's rental, or any part thereof, since April 1, 1878, and it is retaining the rental, and unless the rental due the complainant is paid according to the terms of the lease, the mortgages upon the complainant's road, upon which interest is already due and unpaid, will be foreclosed, and the property sacrificed. These are the substantial facts stated in the bill.

The complainant prays that an account be taken of the amount due as rental under the lease from and after April 1, 1878; that the C., C., C. & I., the L. S. & M. S., the P., Ft. W. & C., the Penn. R. R. Co., and the Penn. Co. may be enjoined from selling, assigning, transferring, or parting with the mortgage or equipment bonds of the I. & St. L. R. R. Co., without first satisfactorily securing the

complainant to the extent of the interest payable on said bonds, against any default in the payment during the residue of the term created by said lease, of the rent to accrue during such term; that said complainant may have a decree against said defendants, the C., C., C. & I., the L. S. & M. S., the P., Ft. W. & C., the Penn. R. R. Co. and the Penn. Co., for a specific performance of their agreement and guaranty; that the said I. & St. L. R. R. Co. be required to specifically perform the covenants of said agreement within a reasonable time, to be fixed by the court, and that in default thereof, that the C., C., C. & I., the P., Ft. W. & C., or its representative, the Penn. R. R. Co., may be required to specifically perform the same; that a receiver may be appointed of the following portion of the earnings of the I. & St. L., to-wit: Thirty per cent. of the gross earnings of complainant's road since the first day of April last, and as they may accrue, and of so much of the earnings of the residue of the line operated by the I. & St. L. Co. as may be necessary to make up the amount of rental under said contract from month to month, or that such moneys be paid into court from time to time as they accrue under said contract, to be disbursed by the order and direction of the court; and that the I. & St. L. may be enjoined from paying any interest to any of said guarantors upon the bonds of the I. & St. L. Co. held by them, or either of them, and from paying to said guarantors, or either of them, any moneys on account of advances made by said guarantors to said I. & St. L., and that said I. & St. L. may be enjoined from paying out or using any part of thirty per cent. of the gross earnings of complainant's road, accrued since the first day of last April, or that may accrue, for any other purpose than the payment of complainant's rental reserved.

It is clear from the affidavits filed by the defendants that since 1871, the net earnings of the leased line have been less than the minimum rental, and it sufficiently appears that from time to time the C., C., C. & I., the L. S. & M. S., the P., Ft. W. & C., or its lessee, the Pennsylvania R. R. or the Pennsylvania Co., have advanced to the lessee, to enable it to operate the leased line, $1,167,170.24; that the C., C., C. & I. has done what it could to send business over the leased road, and has never sought to divert business therefrom; that the lessor, as a corporation, or by its officers in its interest, assisted in the organization of the I. & St. L. by taking a small amount of its stock and $500,000 of its bonds.

The question argued was whether the plaintiff was entitled to a preliminary injunction. The motion was submitted on bill and affidavits, no answer having been filed. The substance of the argument by counsel for the defendants was that the I. & St. L. was organized by individuals in the ordinary way, and just as all railroad corporations have been organized in Indiana; that it was insolvent and not able to operate its own road and the leased line and pay the minimum rental; that the leased line was a public highway, and as such the lessee must maintain it, and in doing so, might, if necessary, use the entire earnings; that if the lessee was compelled to thus use the entire earnings, the lessor had its remedy on the guaranty; that the taking of the guaranty showed this to have been what both lessor and lessee contemplated, and that full and adequate relief could be had in a court of law against the guarantors, there being no evidence that they were not perfectly solvent. It is undoubtedly true, as a general rule, that the plaintiff's remedy is at law when his demand can be satisfied with a certain sum of money.

The situation of the parties and the inducements which prompted them to enter into the several obligations have been already stated. Those in charge of and interested in the guarantor companies, except the Pennsylvania R. R. Co. and the Pennsylvania Co., took possession of the leased road June 1, 1867, and operated it until it was turned over to the I. & St. L., on the 11th of September, 1867, that being the date of the substitution of the new company as lessee, after the I. & T. H. had declined the lease, and passed under the control of the Penn. R. R. Co. as a part of the rival line, known as the "Vandalia Line." The guarantors, except the Penn. R. R. Co. and the Penn. Co., organized the I. & St. L. on the 28th day of August, 1867, and took all the stock but a fraction, which was subscribed by the leased road, and a few others.

The new company was created for the express purpose of being substituted as lessee. At the time of substitution it existed on paper only. After the substitution, and before any work was done on the new road, the I., C. & L., on account of financial embarrassment or otherwise, seems to have abandoned the joint enterprise. Whether the other parties to the combination consented to this withdrawal we are not informed. No process or relief is prayed against the I. C. & L.

It is too plain for controversy that, leaving out the Penn. R. R. Co., the Penn. Co., and the I., C. & L., the remaining guarantors built the new road and officered it in their own interest, that being the only way for them to get a line from Indianapolis to St. Louis. The new road was built in the name of the I. & St. L. as an Indiana corporation, because it could be built in no other way. Practically the companies named owned the I. & St. L., and to-day they own the stock in this road, with the exception of what is held by others to qualify them to act as directors.

The guarantors, with the exceptions named, created the lessee company for their own convenience and profit, and have never ceased to be its managers and governors.

Viewing the case as between the lessor and lessee only, the latter took the former's road, agreeing to keep it in repair and operate it, paying, as rental, thirty per cent. of the gross earnings in monthly installments at New York, where the lessor had to have money to pay interest on its bonds. Since April, 1878, no rental has been paid, and the lessee is insolvent and still in possession of the road. On these facts alone, if the guarantors had not become parties to the lease, the complainant might, with more reason and justice, be sent to a court of law. But equity will regard the I. & St. L. as the mere instrument of the companies that built its road, including the Pennsylvania Railroad Company as lessee of the P., Ft. W. & C., and while the rent is in arrear, those companies which guaranteed its payment, will not be allowed to apply the earnings in payment of interest due on bonds of the I. & St. L. held by them.

Although the Penn. R. R. Co. took no part in the organization of the I. & St. L. and the construction of its road, yet it must be remembered that some two years after the substitution of the new company as lessee, the Penn. R. R. Co. leased the P., Ft. W. & C., and expressly assumed its obligations, including this lease by name.

The I. & St. L. has never ceased to pay interest on its bonds, in the hands of the guarantors, out of the earnings of the leased road, and those companies still insist that the interest due on their bonds shall be paid whether the rental is paid or not. There is no equity in this demand, and the interest due on bonds held by the guarantors must be postponed in favor of the lessors' claim for its rental. It would be inequitable to allow those companies to collect interest on their bonds out of the earnings of the road, while the rental, which they agreed to pay in case the lessee did not, remains due and unpaid. If the guarantors are solvent, as they claim to be, they should pay the rent according to their contract, and thereby enable the lessor to pay interest on its own bonded debt, and avoid foreclosure.

If the guarantors may collect interest on their bonds out of the earnings of the road, whether the rent is paid or not, and the only remedy of the lessor is an action at law on the contract of guaranty as often as there is default in the payment of the rent, then the lease is of little value.

It was said that the lessor might re-enter and put an end to the lease. This argument will not avail the guarantors. While those companies may stand behind the I. & St. L. in law, a court of equity, regarding substance rather then shadow or form, will treat them as real owners or lessees.

A further important consideration on the question of jurisdiction remains, viz.: The right of the complainant to go into a court of equity to enforce the obligation of the Penn. R. R. Co. to pay any sum due from the P., Ft. W. & C. on its contract of guaranty. If the jurisdiction properly attaches for this purpose, as we think it does, all the parties and the subject of controversy being before the court, it will take jurisdiction for all purposes.

A preliminary injunction will not be granted, even though failure to grant it may cause some damage to the plaintiff, if granting it will inflict still greater damage to defendant; nor when the court can see that damage will result thereby to third parties. But it will not damage the guarantors to require them to pay the rental due before they appropriate earnings of the road in payment of interest on bonds of the lessee in their hands, for that is only requiring them to perform their contract.

It is no answer to this to say that the interest is a secured debt—a lien—while the rent due is a debt at large. It is doubtless true that the second contract of guaranty abrogated the first as to the parties to the second; but whether the parties who signed the first and did not sign the second are released from liability, is a question which need not now be decided.

Until final hearing, the I. & St. L. will be required to pay into court monthly for and on account of the rental, thirty per cent. of the gross earnings of the leased line, and it will be enjoined from paying to the C., C., C. & I., the L. S. & M. S., the P., Ft. W. & C., the Penn. R. R. Co. and the Penn. Co. interest on any of its mortgage or equipment bonds, owned or held by these companies, or either of them, so long as thirty per cent. of the gross earnings shall not equal the minimum rental; also from paying to such companies, or either of them, any moneys on account of advances made as aforesaid by them, or either of them, to the I. & St. L., and the said companies will be enjoined from receiving from the I. & St. L. any portion of the earnings of the leased line in payment of principal or interest of mortgage or equipment bonds of the I. & St. L., owned or held by the guarantors or either of them; also from receiving from the I. & St. L. any sum or payment, in whole or part, of advances made as aforesaid by such companies, or either of them, to the I. & St. L.; also from selling, transferring or otherwise disposing of any mortgage or equipment bonds of the I. & St. L., owned or held by said companies, or either of them.

See, also, St. Louis, A. & T. H. R. Co. v. Indianapolis & St. L. R. Co. [Case No. 12,237].

[NOTE. A final decree was entered in this case for $664,874.70, with costs, and an injunction against several of the defendants, from which both parties appealed to the supreme court. That court reversed the decree as to all defendants except the Indianapolis, St. L., etc., Co. St. Louis, A. & T. H. R. Co. v. Pennsylvania R. Co., 118 U. S. 290, 6 Sup. Ct. 1094.]

Case No. 12,237.

ST. LOUIS, A. & T. H. R. CO. v. INDIANAPOLIS & ST. L. R. CO. et al.

[9 Biss. 144; 9 Reporter, 103; 12 Chi. Leg. News, 73, 4 Cin. Law Bul. 922.][1]

Circuit Court, D. Indiana. Oct. 25, 1879.

EQUITY—INADEQUATE REMEDY AT LAW—CORPORATIONS—CITIZENSHIP OF SHAREHOLDERS—CONSOLIDATION—COURTS—FEDERAL JURISDICTION.

1. Where a contract and lease relating to the operation of a railroad had been performed for a time and then the parties failed to meet their engagements; on a bill filed to enforce the contract and asking for various restraining orders against some of the defendants, the application being made because of the contract and the various relations which existed between the parties: *Held*, that these facts constitute a case where there may not be a full remedy at law and which is properly brought in a court of equity.

2. Where a corporation sues in a federal court, the court in order to assume jurisdiction, will conclusively regard all the shareholders as citizens of the state which created the corporation.

[See Bank of Cumberland v. Willis, Case No. 885.]

3. The fact that two railroad corporations created by different states, have been consolidated under the laws of those states, and the railroad operated, by virtue of that consolidation, as one entire line of road, will not prevent one of these corporations from bringing suit in the federal court as a corporation of that state where it was created, against the corporation with which it is consolidated which was created by the other state.

[Cited in C. & W. I. R. Co. v. L. S. & M. S. Ry. Co., 5 Fed. 22; Uphoff v. Chicago, St. L. & N. O. R. Co., Id. 549; Burger v. Grand Rapids & I. R. Co., 22 Fed. 562; Colgate v. Louisville, N. A. & C. Ry. Co., Id. 569; Fitzgerald v. Missouri Pac. Ry. Co., 45 Fed. 815. Quoted in Nashua & L. R. Corp. v. Boston & L. R. Corp., 136 U. S. 377, 10 Sup. Ct. 1,009.]

In equity.

McDonald & Butler, for complainant.

Baker, Hord & Hendricks, for defendants.

DRUMMOND, Circuit Judge. This is a bill filed by the St. Louis, Alton and Terre Haute Railroad Company against the Indianapolis and St. Louis Railroad Company, and other railroad companies, to enforce the obligations of a contract, part of which was a lease made in 1867, between the parties, and of which some of the defendants were guarantors.[2]

In the bill the plaintiff is alleged to be a corporation created under the laws of Illinois, and the defendants are alleged to be corporations created under the laws of Indiana and of Pennsylvania.

We propose now to decide but two questions in the case: one as to the jurisdiction of the court, and the other whether this is a case properly cognizable in a court of equity, instead of a court of law.

There is another question which was somewhat argued by the counsel of the respective parties, but which I think ought to be reserved for the final hearing of the case, viz.: whether the guarantee, made by some of the defendants, of the contract was ultra vires; that is, beyond the power of the companies respectively under their charters. It is sufficient as to this last point to say, that I do not think there is anything in the case as now presented which would authorize the court to declare absolutely that these contracts of guarantee were ultra vires. That question will properly come up at the hearing.

We think there can be no doubt that a court of chancery has jurisdiction in this case.

The controversy grows out of a contract and lease made in 1867, containing various provisions, and relating to the operation of a railroad between Terre Haute and East St. Louis, by which a certain rental was to be paid, and various other stipulations were to be performed by the lessee, and which were guaranteed by some of the defendant railroad companies.

The plaintiff asks that this contract shall be enforced as against these various parties. It was performed till 1878, when they failed to meet their engagements. The plaintiff asks that various restraining orders shall be made against some of the defendants to prevent injustice from being done to it, the application being made because of the contract, and of various relations which exist between the parties; for example, the holding by some of the defendants of certain bonds which are the subject of controversy and in relation to which the plaintiff claims that the defendants should not be permitted, while they are under the obligations of the contract, to collect interest due upon coupons.

Now, these facts in themselves, thus briefly stated, we think constitute a case where there may not be a full remedy in a court of law, and where it may be proper for the plaintiff to apply to a court of chancery to have complete equity done.

However, that which has been regarded by counsel as the most important question in the case, and which has perhaps been more fully argued than any other, and to which the attention of the court has been particularly directed, is whether the circuit court of the United States for the district of Indiana in which the bill was filed, has jurisdiction. That depends entirely upon the citizenship of the parties. It is conceded that there is no federal question necessarily arising in the case which per se would give jurisdiction to the court.

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[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 9 Reporter, 103, contains only a partial report.]

[2] For a full statement of the facts in this case, see another opinion in same case [No. 12,236].

As the plaintiff is alleged in the bill to be a corporation created by the laws of the state of Illinois, and the defendants are alleged to be corporations created respectively by the laws of the state of Indiana and of Pennsylvania, it appears prima facie that there is no objection to the jurisdiction of the court. But there is a plea interposed to the bill in which it is alleged that under various acts of the legislatures of Illinois and Indiana there are two corporations: one the plaintiff, the St. Louis, Alton and Terre Haute Railroad Company, and another, the same company in name; and that there has been a consolidation of the two corporations, created respectively by the state of Illinois and Indiana, and that they are inseparably connected together in such a way that the plaintiff is really a corporation as well of Indiana as of Illinois, and as some of the defendants are corporations of the state of Indiana, the court cannot have jurisdiction of the case. If this is so, then jurisdiction in the federal court does not exist, and we cannot hear the case or decide it upon its merits. I think we must assume upon the allegations of the plea, that there are two corporations, one created by the state of Illinois, and the other by the state of Indiana.

It will be borne in mind, that while the larger portion of the railroad is within the territory of the state of Illinois, namely, from East St. Louis to the eastern boundary of the state, there is a portion of the line within the territory of the state of Indiana, from the western boundary of the state to Terre Haute, a distance of a few miles, and in order to control, own and operate the whole line of road from Terre Haute to East St. Louis, it was necessary to obtain authority from both states. And accordingly authority has been given by both states. And it is alleged in the plea that under the act of 1861 (Priv. Laws Ill. 1861, p. 530) of Illinois, and the act of the same year of the state of Indiana, a corporation of Illinois and Indiana has been created; that a consolidation has taken place, and that it has become one corporation, owning, controlling and operating the road between East St. Louis and Terre Haute.

There is an allegation in the bill, that under and by virtue of the statutes of the states of Indiana and Illinois, "your orator was, and is the owner of a railroad extending from the city of Terre Haute, in the county of Vigo, in the state of Indiana, to East St. Louis, on the Mississippi river, in the state of Illinois, with a branch to Alton, in the said last named state, having the power to operate and maintain its said road under the laws of said states."

The manner in which the supreme court of the United States has reached the conclusions which are now adopted as law in relation to the citizenship of corporations, is well known to the profession, and was adverted to by the counsel on both sides in the argument of this case. That court held in the first instance, that in order to give the federal court jurisdiction where a corporation was a party, on the ground of citizenship, it was necessary that all the corporators should be citizens of a particular state, and that the adversary party should be citizens of another state different from that of the corporators, and if it turned out that any one of the corporators was a citizen of the same state as the adversary party, the jurisdiction of the court was gone. That rule, however, was afterwards changed, and the court finally reached this result: that it would assume as conclusively established, that all the stockholders or shareholders of a corporation were citizens of the state which created the corporation.

So, while it was true that a corporation was not a citizen within the ordinary meaning of the word as used in the constitution, and the laws of congress, still that the shareholders were citizens of the same state that created the corporation, and nothing could be heard in denial of that fact; the result of which was, that by a fiction of law the corporation became a citizen of the state which created it. That was the state of the law when the case of Ohio & M. R. Co. v. Wheeler, 1 Black [66 U. S.] 286, was decided, and which was much relied on by the counsel of the defendants. In that case, there were two corporations created by the states of Indiana and Ohio, or rather there was a corporation created by the state of Indiana, and a license given to the Indiana corporation by the state of Ohio to operate a railroad and to own property in the latter state, and the suit was brought against a citizen of Indiana, in the circuit court of the United States of that district. The declaration alleged "that the plaintiff was a corporation created by the laws of the states of Indiana and Ohio, having its principal place of business in Cincinnati, in the state of Ohio, a citizen of the state of Ohio." Objection was taken that the court had no jurisdiction of the case, on the ground that the defendant Wheeler was a citizen of Indiana, and that the plaintiff was also a citizen of Indiana; and the supreme court of the United States so held. Taney, C. J., in giving the opinion of the court, says: "It follows from the decisions, that this suit in the corporate name is, in contemplation of law, the suit of the individual persons who compose it, and must, therefore, be regarded and treated as a suit in which citizens of Ohio and Indiana are joined as plaintiffs in an action against a citizen of the last mentioned state;" and he holds that "such an action cannot be maintained in a court of the United States;" and he says: "In such a suit it can make no difference whether the plaintiffs sue in their own proper names or by the corporate names and style by which they are described." It will be observed that the chief justice in this opinion treats the plaintiff as a corporation of the state of Ohio and of In-

diana. He says nothing about its being a corporation of Indiana, licensed by the state of Ohio. The case then decides this principle: that it is not competent for a plaintiff, which is a corporation of two different states, to bring a suit against a citizen of one of the states, where the declaration alleges the fact that the plaintiff is a citizen of both states or a corporation created by both states, which for the purpose of pleading, is the same thing. It must be conceded I think, that in principle, at least, this case has not been strictly followed in subsequent decisions of the supreme court of the United States, and so it is not the duty of the court to follow it unless in a case within its terms.

The case of Railroad Co. v. Harris, 12 Wall. [79 U. S.] 65, is perhaps only important in consequence of some observations made by the court upon the case of Ohio & M. R. Co. v. Wheeler, supra. The question in this case of Railroad Co. v. Harris was whether the defendant railroad company was a person, and could be sued within the District of Columbia under acts of congress which require that a defendant should be an inhabitant of the state where the suit was brought, or should there be found. The corporation—the defendant against which the suit was brought—had been created by the state of Maryland, and authority had been given by the state of Virginia to extend the railroad into that state, and authority had also been given by congress to extend it into the District of Columbia, and the suit was brought in the District. The objection was taken that it was not competent to bring the suit there, because the defendant was not an inhabitant of the District, and was not there found. That objection was overruled by the court, although there was no act of congress in force that authorized a suit to be brought against a foreign corporation doing business in the District, and the court held that the railroad company had its habitat within the District of Columbia, so that process could be served upon one of the officers of the company.

The court says, in its opinion: "We see no reason why several states cannot, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into a single one." The court proceeds: "The jurisdictional effect of the existence of such a corporation, as regards the federal court, is the same as that of a copartnership of individual citizens residing in different states. Nor do we see any reason why one state may not make a corporation of another state, as there organized and conducted, a corporation of its own, quoad hoc any property within its territorial jurisdiction."

That is what has been done in this case, giving full scope, as claimed, to the allegations of the plea, namely: The state of Indiana has given authority to the corporation of the state of Illinois to hold property and to operate a railroad within the state of Indiana.

"It is well settled," the court further remarks, "that corporations of one state may exercise their faculties in another, so far, and on such terms, and to such extent as may be permitted by the latter. We hold that the case before us is in this latter category. The question is always one of legislative intent, and not one of legislative power, or legal possibility. So far as there is anything in the language of the court in the case of Ohio & M. R. Co. v. Wheeler, in conflict with what has been here said, it is intended to be restrained and qualified by this opinion. We will add, however, that as the case appears in the report, we think the judgment of the court was correctly given. It was the case of an Indiana railroad company licensed by Ohio."

The court seems to consider that the case of Ohio & M. R. Co. v. Wheeler was substantially a suit brought by a corporation of Indiana against a citizen of Indiana, and therefore, the jurisdiction of the court could not be maintained.

The next case is Railroad Co. v. Whitton, 13 Wall. [80 U. S.] 270. Whitton was a citizen of Illinois, and caused the transfer of a suit against the Northwestern Railroad Company from the state court to the circuit court of the United States for the district of Wisconsin, alleging that the defendant was a corporation created by the laws of Wisconsin, and a citizen of that state. In fact the defendant, while it was a corporation created by the laws of Wisconsin, was also a corporation created by the laws of Illinois and of Michigan, and was a consolidated company under the authority of the three states, and operated a road throughout its entire length, in the three states by the same board of directors and by the same officers, and, therefore, had as complete unity as it is possible for two or more railroad corporations created by different states to have.

The objection was taken that as Whitton was a citizen of Illinois, and the defendant was also a citizen of Illinois, being a corporation created by that state, and consolidated with a corporation created by the states of Wisconsin and Michigan, in the nature of the case it was impossible to sever the corporations so as to give the federal court jurisdiction, and consequently it was true, as a matter of fact and law, that the plaintiff and defendant were citizens of Illinois, and so the court could not have jurisdiction.

That objection was overruled in the court below, and that ruling was sustained in the supreme court of the United States. Field, J., in giving the opinion of the court, said: "And here the objection to the jurisdiction arises, that the defendant is also a corporation under the laws of Illinois, and therefore is a citizen of the same state with the plaintiff. The answer to this position is obvious. In Wisconsin tne laws of Illinois have no op-

eration. The defendant is a corporation, and as such a citizen, of Wisconsin by the laws of that state. It is not there a corporation or a citizen of any other state. Being there sued, it could only be brought into court as a citizen of that state, whatever its status or citizenship may be elsewhere."

So that when the suit was transferred to the federal court of Wisconsin, it mattered not that the defendant had a status and citizenship elsewhere, as in Illinois and Michigan, and that it was as a corporation a citizen of those states. It was in the suit in the state of Wisconsin to be treated only as a citizen of that state, and of course subject to the jurisdiction of the federal court as such, if the citizenship of the plaintiff authorized the suit to be transferred.

Muller v. Dows, 94 U. S. 444, was a case where a suit was originally brought in the federal court by several plaintiffs, one of whom was a citizen of the state of Missouri, against defendants, one of whom was a corporation of the state of Iowa; and if the corporation was a citizen of Missouri, of course there was no jurisdiction in the court. The defendant alleged, and it was conceded, that there were two corporations, one created by the laws of Iowa, and another by the laws of Missouri, and that they were a consolidated company, and the objection was that, being a consolidated company, the Iowa corporation was merged, or so connected with the Missouri corporation, that one of the plaintiffs could not maintain a suit in a federal court. It is to be observed that in these two cases last referred to there is nothing said about any license, but it is conceded that the corporations were to all intents and purposes, separate, entire corporations, created by the laws of the respective states, and that under those laws the railroad company had become a consolidated company, operated throughout by virtue of those laws.

Mr. Justice Strong, in giving the opinion of the court, and I believe this is the last decision of the court upon this subject, says: "Still it is argued on behalf of appellants, that the Chicago & Southwestern Railroad Company cannot claim to be a corporation created by the laws of Iowa, because it was formed by the consolidation of the Iowa company with another of the same name, chartered by the laws of Missouri, the consolidation having been allowed by the statute of each state. Hence, it is argued that the corporation was created by the laws of Iowa and of Missouri; and as Burnes, one of the plaintiffs, is a citizen of Missouri, it is inferred that the circuit court has no jurisdiction. We cannot assent to this inference." The court further says, "The laws of Missouri had no operation in Iowa. It is, however, unnecessary to discuss this subject further." The court then cites the case of Railroad Co. v. Whitton, supra, which is, it must be admitted, substantially like the case then under consideration.

Perhaps I ought to advert to the decision which was cited by counsel in Allegheny Co. v. Cleveland & P. R. Co., 51 Pa. St. 228. That, however, was assumed to be like the case of Ohio & M. R. Co. v. Wheeler, supra, and was decided upon the authority of that case.

Now the state of the law upon this subject, as decided by the supreme court of the United States, appears to be this: that the fact that there are railroad corporations created by different states, which have been consolidated under the laws of those states, and the railroad operated by virtue of that consolidation as one entire line of road, will not prevent the corporation from being sued in one of those states as a corporation created by the laws of that state, provided the plaintiff is a citizen of a state other than that of the state which creates the corporation. The only law that operates upon it is the law of its own state. If the corporation is a defendant, that is expressly decided by the court in the two cases last cited. Now, if that is so as to the defendant, why is there any difference where the plaintiff as a corporation brings the suit?

If the defendant corporation, though consolidated with another of a different state, can be sued in the federal court, in the state of its creation, as a citizen thereof, why can it not sue as a citizen of the state which created it? I can see no difference in principle. It seems to me that when the plaintiff comes into the federal court, if a corporation of another state, it is clothed with all the attributes of citizenship which the laws of that state confer, and the shareholders of that corporation must be conclusively regarded as citizens of the state which created the corporation, precisely the same as if it were a defendant. So I do not see why, if the plaintiff in this case alleges, as it does, that it is a corporation created by the laws of Illinois, it cannot institute a suit in the circuit court of the United States of Indiana, against a corporation of that state.

There is one question which we have considered, and about which, perhaps, there may be some doubt, and that is this: It is said by the defendants that this is a contract made by the two corporations, the one of Illinois and the other of Indiana, and as a united corporation of both states, and therefore that there is a defect of parties because the corporation created by the state of Indiana, and which is consolidated with the Illinois corporation, is not made a party. It may be admitted that there is considerable force in the objection. The bill alleges, as before stated, that by virtue of the laws of the two states, the plaintiff owns and operates a railroad in the two states between Terre Haute and East St. Louis. What would be the effect, if the Indiana corporation were made a party defendant in this case? We think that it would not oust the jurisdiction of the court, because, as already

stated, the two corporations must be considered as distinct, the one having its habitat in Illinois, and the other in Indiana, and the shareholders in one being conclusively considered as citizens of Illinois, and of the other as citizens of Indiana. But it is to be borne in mind that the Illinois corporation, as such, and by virtue of the laws of Illinois, holds and controls the whole line of the road from East St. Louis to the east boundary of Illinois, and that the Indiana corporation has only a small part of road between the termini, Terre Haute and East St. Louis and there is no controversy existing between the two corporations. There is no relief sought by the Illinois corporation against the Indiana corporation. If the Indiana corporation were a defendant, it would be only a nominal party against which no relief was asked, and between which and the plaintiff there was no controversy whatever; so that, while I think it would have been competent for the plaintiff to have made the Indiana corporation, which owned a part of its line, a party defendant, I do not think it is absolutely necessary for it so to do, because I am inclined to think that under the allegations of the bill and on the facts as they are conceded and under the law, the Indiana corporation as such would be estopped by any decree rendered in this case, and, therefore, I hold that the fact that the Indiana corporation is not made a party does not prevent the court from proceeding with the case.

At the same time, it seems to me that it might be desirable, and I suggest it, therefore, to the counsel of the plaintiff, for an allegation to be put in the bill of the fact of the existence of the Indiana corporation, or an allegation might be inserted that the Illinois corporation, represents, for all the equities sought by the bill, the Indiana corporation.

We hold, therefore, first, that a court of equity has jurisdiction of the case made by the bill. And, secondly, that the federal court of Indiana has jurisdiction of the case on account of the citizenship of the parties.

See, also, St. Louis, A. & T. H. R. Co. v. Indianapolis & St. L. R. Co. [Case No. 12,236.]

[NOTE. A final decree was entered for $664,874.70, with costs, and an injunction against several of the defendants, from which both parties appealed to the supreme court. That court reversed the decree as to all defendants except the Indianapolis and St. Louis Railroad Company, 118 U. S. 290, 6 Sup. Ct. 1094. For hearing on the question of the jurisdiction of the circuit court, see Case No. 12,236.]

ST. LOUIS & ST. J. R. R. ASS'N (KAPPNER v.). See Case No. 7,612.

ST. LOUIS, I. M. & S. R. CO. (PARMLEY v.). See Cases Nos. 10,767 and 10,768.

ST. LOUIS, I. M. & S. R. CO. (UNION TRUST CO. v.). See Cases Nos. 14,402 and 14,403.

Case No. 12,238.

ST. LOUIS INS. CO. v. ST. LOUIS, V. & T. H. R. CO.

[6 Reporter, 231; 7 Ins. Law J. 343; 1 Month. Jur. 750; 24 Int. Rev. Rec. 236; 26 Pittsb. Leg. J. 11.] [1]

Circuit Court, E. D. Missouri. March 19, 1878.[2]

CARRIERS — EXPRESS COMPANY — LIABILITY OF AGENT—CONTRACT.

1. Where a contract is made with an express company, it is primarily liable to the shipper under its contract. If the shipper seeks to hold the agents of the express company responsible, he can do so only through the contract made by the express company with himself.

2. If the agent of the express company be a common carrier, it is held, so far as the shipper is concerned, to all the obligations of a common carrier, subject to the lawful restrictions made by the contract with the express company.

In 1875 Meier & Co. shipped a quantity of cotton from St. Louis to Liverpool by the Erie and Pacific Dispatch Co. and the White Star Line, on a through bill of lading. The cotton was carried on defendant's road to Indianapolis, thence by the Panhandle route to Columbus, Ohio, and thence by the Erie Railroad to New York, where it was placed in the docks of the White Star Line, for shipment to Liverpool. While so placed the cotton caught fire and was burnt. Meier & Co. assigned the interest in the cotton to the insurance company on payment of loss, and the latter brought suit against the railroad company to recover the loss.

TREAT, District Judge. The controlling doctrine was announced in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344, which doctrine has been fully recognized in all subsequent cases before the United States supreme court. That doctrine rests on sound and elemental principles. When a contract is made with an express company, whether such exists for the transportation of small packages or for general shipment, the shipper deals primarily with such company, and looks to it under its contract. But as such companies may have no means of their own for transportation according to the terms of the contract, and have to employ steamers or railroads as their agents, if the shipper seeks to hold their agents responsible he must do so only through the contract made by the express company with himself. So far as he is concerned, the express company is the principal, and must respond. As between the express company and its agents, their respective liabilities inter se can neither restrict nor enlarge the obligations of the original parties. The shipper can hold the express company to its contract, and can, through that con-

[1] [Reprinted from 6 Reporter, 231, by permission. 26 Pittsb. Leg. J. 11, contains only a partial report.]

[2] [Affirmed in 104 U. S. 146.]

tract, pursue its agent. The latter is held, if a common carrier, so far as the shipper is concerned, to all the obligations of a common carrier as the same may exist under the lawful restrictions made by the contract with the express company, and no farther.

In this case the contract was with the Dispatch Co. for transportation from St. Louis to Liverpool. No inland route was designated, but the ocean-bound route was to be the White Star Line from New York. The Dispatch Co. had arrangements whereby it could forward to New York by any one of the several railroad routes. No order was given by the shipper for any designated route, nor any contract made for a specified route to New York. The contract, however, with the Dispatch Co. did limit the liabilities of the defendant, under the facts stated, to losses which might occur while the property was on its route. The facts, undisputed, are that the defendant did receive and forward the cotton beyond its line, in due time and in good order and condition. That is all it agreed to do, and is all that the Dispatch Co., by its contract of affreightment, agreed should be done by the defendant. The wrong or injury complained of did not occur through any act or agency of the defendant, but long after it had ceased to have the cotton in its possession. If wrong there were for which a common carrier would be liable, that wrong occurred when the Erie Railroad had control or possession of the cotton shipped. The contention, however, is, that inasmuch as the several railroad companies whose roads constituted a continuous line from St. Louis to New York had an agreement inter se for the transportation of goods from the point of delivery to the point of destination, whereby they would pro-rate freight, the first road to which the cotton is delivered is bound as a common carrier, not only for its own conduct, but also for the conduct of each and every railroad company intermediate between it and the point of destination. In some cases that obligation exists, and should be strictly enforced. In the cause under consideration, however, the defendant did not contract to have the cotton transported from St. Louis to New York, nor did it receive compensation for any such through shipment. Its contract, as set out specifically in the bill of lading given by the Dispatch Co., limited its liability to what occurred on its own road; and the plaintiff, suing through that contract with the Dispatch Co., cannot enlarge its terms as to the defendant so as to hold it to a greater liability than that contract imposed. If the defendant is bound as a common carrier by the contract of the Dispatch Co., because it was one of the railroads employed, then it cannot be bound beyond the terms of said contract or its obligations as a common carrier, independent of said contract. As a common carrier it was bound, in the absence of an express agreement to the contrary, by what occurred solely on its own road. By the contract of the Dispatch Co. its liability was expressly limited to that measure of obligation. Hence it can be held to no liability, either under said contract or as a common carrier, for the loss that occurred in New York, long after its duties with respect thereto had ceased. Judgment for defendant.

[This judgment was affirmed by the supreme court, where it was carried on writ of error. 104 U. S. 146.]

ST. LOUIS, K. C. & N. R. CO. (EAKIN v.). See Case No. 4,236.

ST. LOUIS LIFE INS. CO. (MACUMBER v.). See Case No. 8,929.

ST. LOUIS LIFE INS. CO. (NETTLETON v.). See Case No. 10,128.

ST. LOUIS MUT. LIFE INS. CO. (ANDERSON v.). See Case No. 362.

ST. LOUIS. MUT. LIFE INS. CO. (JARMAN v.). See Case No. 7,221.

ST. LOUIS MUT. LIFE INS. CO. (ROBINSON v.). See Case No. 11,964.

Case No. 12,239.

ST. LOUIS NAT. BANK v. PAPIN. NATIONAL BANK OF MISSOURI v. SAME. THIRD NAT. BANK v. SAME. FOURTH NAT. BANK v. SAME. VALLEY NAT. BANK v. SAME. MERCHANTS' NAT. BANK v. SAME.

[4 Dill. 29;[1] 22 Int. Rev. Rec. 343; 3 Cent. Law J. 669; 1 Thomp. Nat. Bank Cas. 326.]

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

TAXATION OF SHARES — NATIONAL BANKS — REV. ST. § 5219.

1. Shares in banks being taxable and no excessive valuation being complained of, equity will not restrain the collection of the taxes, though the assessing officers may have arrived at a correct result by some erroneous method.

2. Where an act of the legislature is susceptible of two interpretations, one of which will overthrow the act or make it unconstitutional, and the other will support the act and give it effect, the latter is to be adopted by the judicial branch of the government. This principle is one which commends itself to the federal courts with great force, in all cases where they are called upon to expound and apply state legislation, and especially so where they are asked to overthrow the revenue laws of the states.

3. By the section of the national banking act (Rev. St. § 5219 [13 Stat. 99]) which permits the states to authorize all the shares held in national banks by any person, to be included in the valuation of his personal property, and to be assessed at the place where the national bank is located, subject to the restriction "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals," congress has limited the states to taxation upon the shares in national banks as distinguished from taxation of the banks eo nomine upon their property or capital. A state cannot evade the restrictions of

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

the act by requiring the value of the property of the bank to be added to the value of the shares otherwise ascertained, and thus produce an unfavorable discrimination in the taxation of bank shares.

4. As regards national banks, section 35 of the revenue act of 1872 of Missouri [Wag. St. c. 118] may be construed as intended to impose a tax upon the shares only in such banks at their actual cash value, to be estimated by the taxing officers upon an inquiry inter alia into the actual value of the property of the banks, so far as it imparts a value to the shares.

The national banking act permits the states to authorize all the shares held in national banks by any person to be included in the valuation of his personal property, and to be assessed at the place where the national bank is located, subject to the restriction (the only one here involved) that such shares shall not be taxed "at a greater rate than is assessed upon other moneyed capital in the hands of individuals." Rev. St. § 5219. The constitution of Missouri requires all property to be taxed in proportion to its value. In the revenue act of the state of Missouri, approved March 30, 1872 (Wag. St. c. 118), are the following provisions in respect to the taxation of property and shares in corporations. Section 35 of this act provides as follows: "Persons owning shares of stock in banks or any joint stock institution or association doing a banking business, or any insurance company, whether fire, marine, life, health, accident, or other insurance, incorporated under or by any law of the United States or of this state, are not required to deliver to the assessor a list thereof; but the president or other chief officers of such corporation shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the names of the persons who hold the same, and shall also state the actual cash value of such stock and all the property belonging to such corporation. In estimating the value of such stock and property, the officer making the same shall estimate and include all reserve funds, undivided profits, premiums, or earnings, and all other values belonging to such corporation, which cash value shall be assessed and taxed as other personal property. Insurance companies, or any corporation doing business on the mutual plan, without capital stock, shall make like returns of the net value of all assets or values belonging thereto, which net value shall be assessed and taxed in like manner; private bankers, brokers, money brokers, and exchange dealers shall in like manner make returns of all moneys or values of any description invested in, or used in, their business, which shall be taxed as other personal property." Section 36: "The taxes assessed on shares of stock embraced in such list shall be paid by the corporations respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares, and the amount so paid shall be a lien on such shares respectively, and shall be paid before a transfer thereof can be made." Sections 37, 118, and 120 of the act refer to the mode of proceeding to collect the taxes, and penalties for non-compliance with its provisions. Six of the national banks located in St. Louis brought in this court bills in equity for an injunction to restrain the collection of taxes amounting to $158,772.53, levied for the year 1875, under the authority of the revenue laws of the state, upon the shares of the respective shareholders of the said banks. Answers were filed and proofs taken, and the cases were argued and submitted together.

James O. Broadhead, Henry Hitchcock, Noble & Orrick, and M. B. Jonas, for plaintiffs.

F. J. Bowman, Samuel Reber, and G. A. Madill, for defendants.

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

DILLON, Circuit Judge. The bills do not allege that the state has taxed or attempted to assess any tax against any of the banks eo nomine in respect of property (other than real estate) owned by them in their corporate capacity. The only tax assessed by the state or under its authority, except a tax on the real estate, of which no complaint is made, is a tax upon the shares of the shareholders. It is not alleged in the bills, as a ground for injunction or relief, that the shares have in fact been valued for taxation at more than their actual cash value.

But the special ground of complaint is that the taxes in question are not authorized, and if authorized, are authorized by section 35 of the revenue act of 1872, above quoted, and that that section prescribes a mode of ascertaining and fixing the valuation of the shares (which mode the taxing officers of the state are bound to follow) in conflict with the permission given in the national banking act to the states to tax the shares, and which, if carried out, as it must be if any taxes whatever are levied under it, results necessarily, as contended, in taxing these shares more than the other moneyed capital in the state is taxed, thus at once contravening the restriction in this respect contained in the act of congress, and the provision as to equality of taxation contained in the constitution of the state.

It is contended by the counsel for the banks that by section 35 of the revenue act of 1872, above given, the legislature has provided for taxing the shareholders not only upon the value of their shares as such, but, in addition to this, for taxing them through their shares upon all the property of the bank, by commanding the taxing officers to "include" the value of all such property in the valuation of the shares.

It is probably a sound view of the federal legislation, as it stands (Rev. St. § 5219), that congress has limited the states to taxation upon the shares in national banks, as distinguished from taxation of the banks eo nom-

ine upon their property or capital, and if so, the states could not evade the restrictions of the act of congress by requiring the value of the property of the bank to be added to the value of the shares otherwise ascertained, and thus produce an unfavorable discrimination in the taxation of bank shares. The question is, whether the legislature of Missouri has done what the counsel for the banks assert.

It must be admitted that the language of section 35 is not free from obscurity, and that has been quite manifest upon the argument before us, since it showed that the counsel for the defendant have put different constructions upon it. In reaching a conclusion, the court must bear in mind certain established principles of construction. One is, that where an act of the legislature is susceptible of two interpretations, one of which will overthrow the act or make it unconstitutional, and the other will support the act and give it effect, the latter is to be adopted by the judicial branch of the government. This principle is one that commends itself to the federal courts with great force, in all cases where they are called upon to expound and apply state legislation, and with more than ordinary persuasiveness in cases in which these courts are asked to overthrow the revenue law of the states.

The court is of opinion that section 35, in respect of the valuation of the shares in national banks, does not necessarily require the construction which the banks put upon it; that is to say, it does not require the value of the property of the bank as a corporate entity to be added to the value of the shares, and the whole to be divided by the number of shares, the quotient giving the value of each share. But its requirement is to ascertain and tax the share at its actual cash value; but in ascertaining that value, the officer is directed to regard and include in his estimate all reserve funds, profits, earnings, and other values. Why not? These are important elements in the question of value, and they should be included in estimating the value of the stock. From these, indeed, the stock derives its principal pecuniary value. Suppose the direction to the taxing officers was to assess the shares at their cash value, without prescribing how that value should be ascertained. The cash value may be more or less than the par value, or more or less than the market value. The actual value of shares depends chiefly upon the capital, property, and values owned by the bank. Any intelligent determination of the value of a share involves an inquiry into the assets and property of the bank.

The act did not intend to make the estimate of value fixed by the president of the bank conclusive. The duty of estimating the value is devolved on the officers of the state; and as respects national banks, the provision requiring the president of the bank to return the property of the bank and state its value, can and should be regarded as intended to supply the assessing officer with data to form a just and fair judgment as to the actual value of the shares. To this end, and to preclude controversy, the act directs "reserve funds, undivided profits, premiums or earnings, or other values belonging to the corporations," to be included in estimating the value of the shares. It does not seem to us that the act excludes from the consideration of the assessor the liabilities of the bank, since these must be taken into account, if the "actual cash value" of the stock and no more is to be ascertained and taxed. This view is confirmed by the next sentence, which requires corporations on the mutual plan to "make like returns of the net value"—which would allow liabilities to be regarded in ascertaining the value of the assets to be taxed.

We do not think a fair construction of section 35 requires the assessing officers to exclude from their consideration the liabilities and actual instead of nominal value of the assets of the bank, in ascertaining the taxable value of the property of the bank, as one means of arriving at the value of the shares.

As respects national banks, our judgment is that the act of the legislature can be fairly construed as intended to impose a tax upon the shares only in national banks at their actual cash value; that such cash value is to be estimated by the taxing officers upon an inquiry, inter alia, into the actual value of the property of the banks, so far as this imparts or confers a value upon the shares, and that this is the purpose which should be judicially ascribed to the legislature, rather than a purpose to impose taxes upon an illegal valuation. The proofs do not show that the valuation of the shares by the taxing officers is excessive; at all events, an excessive valuation in fact is not made a ground of relief in the bills. Inasmuch as the shares are taxable and no excessive valuation is complained of, equity would not restrain the collection of the taxes, even though the assessing officers may have arrived at a correct result by some erroneous method.

A decree will be entered in each case dismissing the bill of complaint. Decree accordingly.

This decision was acquiesced in by the banks, and the taxes assessed against them were paid.

Case No. 12,239a.

ST. LOUIS SMELTING & REFINING CO. v. KEMP et al.

[King Laws & Prac. Colo. 197.]

Circuit Court, D. Colorado. Nov., 1879.[1]

MINES AND MINING—PATENTS FOR PLACER CLAIMS—FOREIGN CORPORATIONS.

[1. Under the act of congress of 1870, no individual or association could obtain a valid patent for a placer claim covering more than 160 acres; and after the act of 1872, no individ-

[1] [Reversed in 104 U. S. 636.]

ual could obtain a patent covering more than 20 acres.]

[2. Under the acts of 1866, 1870, and 1872, it was necessary, in order to obtain a valid patent for placer land, where the claimant owned several adjacent locations, to make separate application for each, and take separately, in respect to each, all the statutory steps; and a patent issued for the whole tract upon a single application is void.]

[3. A foreign corporation, organized for the purpose of reducing ores, is not bound, in purchasing land for the erection of its works, to confine itself to the amount actually needed at that time, and, if it afterwards finds that the whole tract will not be required, it may sell the parts not needed.]

[This was an action of ejectment brought by the St. Louis Smelting & Refining Company against Thomas Kemp and others.]

HALLETT, District Judge (charging jury). This action is brought by the plaintiff to recover possession of a lot in the town of Leadville, lot No. 5, block No. 1, in the addition of the St. Louis Smelting and Refining Company to the town of Leadville. The plaintiff attempts to show its right to this lot, and relies upon a patent which was issued in March last to one Thomas Starr, and upon a conveyance from Thomas Starr to August R. Meyer, and from August R. Meyer to the plaintiff. This patent was introduced in evidence, and appears to be for 164.61 acres of land, and the question has arisen as to whether a patent may lawfully issue for so much land as a placer claim under the mineral laws of the United States. Of course, if the patent is not valid, as the plaintiff's title is derived from that, it cannot recover in this action, and therefore it becomes material to consider whether the patent is valid and effectual to convey the land or not. No question is made as to the conveyances from Mr. Starr to Meyer, and from Meyer to the St. Louis company, nor as to whether the lot in controversy is in the tract mentioned in the patent, and in that part of the same conveyed to Meyer, and by Meyer to the plaintiff; so that the substantial question for your consideration is, whether the patent is a valid instrument or not. Now, upon that subject, congress, in 1870 [16 Stat. 217], passed an act giving claimants of placer claims the right to obtain from the government a patent for such claim. An act had been passed prior to that, in the year 1866 [14 Stat. 66], giving such right as to lode claims, to persons having lode claims upon the public lands, to obtain a patent from the government by complying with the terms of the act, and that act, in its provisions, was very direct and specific as to the things to be done by the claimant in order to obtain a patent. He was to make a diagram of his location, and file it in the local land office; he was to post a notice upon the claim for the time specified, with his application, and also publish a notice in a newspaper, which was to be designated by the land officer, describing his claim; and all this was intended to give to persons who might have an adverse claim an opportunity to come in and show their rights, and when they came, they were to file a statement of their claim in the local land office, and thereupon the parties were referred to the courts in which to settle their controversy. The adverse claimant was required to bring suit in a court of competent jurisdiction against the claimant of the original applicant for a patent, and upon that suit between the parties was the right to be determined. The patent was to be awarded to the party who should be successful in that suit.

In this act of 1870 [supra] it was provided that the title to placer mines was to be obtained in the same manner and upon similar proceedings; that whatever was specified in the act of 1866 as to the method of proceeding as to lode claims was also made applicable to placer claims by this act of 1870; and it was provided in that act, also, that no location of a placer claim thereafter made should exceed one hundred and sixty acres for any one person or association of persons, so that locations thereafter to be made were to be limited to that number of acres, if the rules of the local district in which the claim was situated would allow them to take so much. The provision was that the claim should not exceed one hundred and sixty acres. From what would appear—that they were to conform with the local rules of the district as to the extent of these claims subject to this provision—they could not get more than one hundred and sixty acres, and they might be limited to less, if the rules of the district so prescribed. In 1872 an act [17 Stat. 88] was passed which embraced the whole subject of lode and placer claims, and that was intended by congress to comprehend both acts—the act of 1866 and this act of 1870—in respect to placer claims. By that act an individual claimant was not allowed to take more than twenty acres. He was limited to twenty acres as to the extent of his claim, but nothing was said as to the amount that could be taken by an association of persons, and, probably, the provisions of that act upon that question are still retained.

These provisions of the several acts of 1866, 1870 and 1872 have been embodied in the Revised Statutes, and so they are the law at the present time, and were the law at the time this patent was applied for and when it was issued. Now, upon these several provisions to which I have referred, it is to be said that a patent for a claim since 1870 can in no case exceed one hundred and sixty acres—that is, for a single claim; and it cannot be so much except in the case of an association of persons. An association of persons may take one hundred and sixty acres; an individual claimant in the locations made since 1872 can have only twenty acres. I think I stated to you that in the act of 1870 individuals and associations were put upon the same footing,—that either might take one

hundred and sixty acres; but when the act of 1872 went into force, an individual claimant was limited to twenty acres, and as nothing was said in that act as to the quantity to be taken by an association of persons, they might still take one hundred and sixty acres. So that, since 1872, the law has been that an individual claimant may have twenty acres, and an association of persons can have one hundred and sixty acres, and no more. Locations prior to 1870 must conform to the local laws of the district, because nothing is said in the act of congress as to the extent of a location prior to that date, and by the laws of the district locations made prior to that time may be governed entirely. So that when this patent came to be introduced, for the purpose of showing whether it was upon a location made prior to 1870, we allowed the defendants to introduce the proceedings had in the land office, which show distinctly that the claim of Mr. Starr was based upon a number of locations,—twelve or fifteen of them,—some of twenty or thirty acres, perhaps, and some of a less number of acres; and these locations were made from time to time, some prior to July 9, 1870 (the date of the first act upon the subject), and some of them since that time up to 1877. And so it cannot be said that this patent issued upon a location made prior to July 9, 1870, but it is shown clearly that it was issued on the consolidation of several claims, some of them made prior to that time, and some since that time.

Now, upon that, if Mr. Starr was the owner of these claims, if he had obtained them by purchase, and they were valid and regular locations, he would, under the act, be required, if he desired to obtain a patent for them, to make the application for each one of them, to post the notice as required by the statute and give the notice by publication, and file his plat and survey, and do all these things which are required in the several claims, upon each one of them. And if he had done so, and his right had been supported as to all of them, and the patent had been issued for all these claims, and each of them, described in the patent, there would have been no objection to the patent; but it was not competent for him to consolidate these claims, and put them all in as one claim, and upon notice given as one claim, and publication as one claim, and proceeding throughout as one claim, embracing one hundred and sixty acres. It is to be said that the officers of the land department had no authority in law to proceed in that way; therefore the patent upon which the plaintiff relies is void and their title fails.

Now, upon another question which is in the case, and would be contested if this one, which I have submitted to your consideration, were not decisive: If the plaintiff purchased this land at the time when there was no town upon it, and for the purpose of its organization, it cannot be regarded as an objection to the patent that it is now occupied for town purposes. The question is, whether the plaintiff, being a corporation, is competent to hold property of this kind, that is, in use for town purposes; and the position assumed by the defendants is, that the plaintiff, being a corporation for the purpose of smelting and refining ores, organized for that purpose, that it has no right to deal in town property. That, as a general proposition, is correct; but it appears here in evidence that the property was purchased before any town was located upon it, and that it was purchased for the use of the corporation, and whether they got less or more than was necessary for their use. If it was bought for the purpose of carrying on the business of the corporation, the title of the plaintiff is complete, and the plaintiff, in making its purchase, was not bound to confine itself to what was necessary for its use at that time, but could purchase a quantity of more than enough for its present use. If that was done, no objection could be raised as to its title at least; that is to say, as to the quantity of land here mentioned. I suppose there are works in this country which cover a great deal more than thirty acres; it would not be difficult to point them out. We have such in mind, so that it cannot be said that as to the quantity of land, if it was bought for the use of the corporation, and with the intention of locating their works upon it, that it was excessive; and having bought it for a legitimate purpose, if, afterwards, they found it necessary or expedient or desirable to sell a portion of it, whether for the use of the town or otherwise is immaterial; their title in the property being good and valid, no question can now be raised in respect to it. But that is not the controlling question for present consideration. The question, in the first instance, is as to whether the plaintiff has any title to this property, and on that question the law has decided against them.

[NOTE. The jury found for defendants, and judgment in their favor was accordingly entered. The cause was carried by writ of error to the supreme court, where it was first heard on a motion to set aside submission, which was done. 103 U. S. 666. The supreme court reversed the judgment of the circuit court, and remanded the cause for a new trial. 104 U. S. 636.]

Case No. 12,239b.

ST. LOUIS SMELTING & REFINING CO. v. RAY et al.

[King, Laws & Pr. Colo. 202.]

Circuit Court, D. Colorado. Nov., 1879.[1]

MINES AND MINING—ISSUANCE OF PATENTS FOR PLACER CLAIMS—FOREIGN CORPORATIONS—POWER TO BUY AND SELL LAND.

[1. Under the acts of congress of 1866, 1870, and 1872, a purchaser of several adjacent placer mining claims, in order to procure a valid patent, must make separate applications for each

[1] [Reversed in 104 U. S. 657, note.]

location, and take separately all the statutory steps in respect to each one of them. Therefore a patent covering several claims, and issued on one application, is no evidence of title.]

[2. While a foreign corporation organized for the purpose of reducing ores cannot engage in the business of buying and selling real estate, yet, having purchased a considerable tract for the purpose of erecting its works thereon, it may sell portions thereof which it finds unnecessary for its purposes, and the court will not look closely into the question whether the original purchase was of a larger tract than necessary.]

[This was an action of ejectment brought by the St. Louis Smelting & Refining Company against Mrs. Sarah Ray and others.]

BY THE COURT. The judge charged the jury as follows:

Gentlemen: We have come to an understanding about the law in this case, which will relieve you from any attentive consideration of the evidence. The plaintiff brings this action against the defendants to recover certain lots in the town of Leadville, and of course, assuming the affirmative in relation to that matter, the defendants being in possession of the property, and resisting the plaintiff's claim, it is upon the plaintiff to show title to the property by a preponderance of evidence. Upon that point, the plaintiff has introduced a patent issued to one Thomas Starr for a placer claim, covering 164.61 acres, and upon that a question is presented as to whether a patent for so much land can be issued, under the laws of congress as they now stand, to one person. Upon examining the law, we find, in the first place, that an act was passed July 9, 1870 [16 Stat. 217], the first one passed by congress giving authority to obtain title from the government for placer claims, and in that act it was provided, in the way of an amendment to a previous act which had been passed, respecting lode claims, that persons having a right to such could obtain title thereto under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; and it was provided in the same section of the act that no location of a placer claim hereafter shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys. That clause of the act put individuals and associations of persons upon the same footing; that is to say, subject to the local rules of the different mining districts, they could obtain a title for one hundred and sixty acres of land as a placer claim, if the local rules would admit of their taking so much.

If the local rules restricted them to a less quantity, then they would have to conform to the local rules. The provision is, that the claim shall not exceed one hundred and sixty acres; it may be smaller if the local rules so provided, and the provision, as you may have noticed, as I gave it to you in the first place, is that they may obtain the entry and patent under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims. Now, an act of congress was passed in 1866 [14 Stat. 66] prescribing the conditions upon which a title could be obtained for lode claims; that is to say, the applicant was required to make a diagram of the claim, showing the extent of it upon the surface of the ground, so as to include the top or apex of the lode; he was required to post a notice upon that claim for a certain length of time, and publish a notice in a newspaper, of his application; to file his diagram in the local land office; and perhaps do other things which I need not enumerate. This was for the purpose of giving notice to persons who might have a claim to the property adverse to the applicant, that they might come in and go before the local officers, for the purpose of showing their right, and if they came in and filed what was called an "adverse claim," that is to say, another claim to the same property, that the parties would be required to go into court (some court of competent jurisdiction) and there litigate the matter in issue between them; that is to say, by a suit regularly brought in court and tried by a jury. They would determine the controversy which had arisen between them in regard to the title of the property, and the successful party to that suit was to be entitled to receive a patent from the government. In 1872 another act was passed upon that subject, which was somewhat different from that of 1866, but, so far as it relates to the matters we have under consideration at this time, we may say that it was substantially the same. It required that the persons desiring to obtain a patent for land claimed for mining purposes should file an application for patent, a plat and field notes of the claim in the local land office, and should post a copy of the plat, together with a notice of his application, upon the claim, and should publish a notice of his application, and so on, in order to give to other claimants who might have some right to the property an opportunity to come in and show their right, and contest with him the question of ownership, if they desired to do so. And that act contains similar provisions in respect to placer claims, also; provisions which, in part, were designed to take the place of that of 1870, to which I have called your attention, and I believe that it does not wholly repeal the act of 1870, and perhaps it left some of the provisions of that act still in force.

But taking the two acts together, the act of 1870 and the act of 1872 [17 Stat. 88], it is to be said that it was required of a claimant for a placer mine that he should post a notice upon his claim, and that he should give notice by publication, and that he should show that improvements had been made upon the claim as required by the act of 1872. And that law was in force at the time that this patent was applied for, at the time it

was issued, and is still in force. So that it has become a question whether the patent which is before you was issued in accordance with the provisions of law. Now, upon that we have to say that it was not, because, as we have ascertained from an examination of the patent, and from some of the testimony that has been received with it, testimony of the proceedings in the land office, this was an application made since the year 1870, since this act was passed, upon several claims (twelve or fifteen perhaps, was the number), and those claims are all embodied in this one claim, which is described in the patent; the application appears to have been made as for one claim, and embodying twelve or fifteen locations that were made at different times, from perhaps 1865, or some time prior to the year 1870, up to the year 1877; and these were all embodied in one claim and one application, and the land offices have issued a patent upon that for one claim. Now this, as we may say, was not in conformity with the acts of congress. If there were twelve or fifteen claims, it was incumbent upon the applicant, Mr. Starr, to show his right to each of these claims, to have each of them surveyed, to have the notice posted upon each, to give notice by publication, and take the same proceedings as to each one of the claims. If he had so done, it would be no objection that he had purchased some of them from the first locators, or from the grantees of the first locators, or that perhaps he had located others of them himself; we would not inquire how he had acquired the right to these several claims if he had taken the steps which the law required of him, as to each one of them, but not having done that, having attempted to embody all of these claims in one application, and having made it substantially one claim, the proceeding was entirely irregular, under the statute. If it had appeared that this application was made for one claim located before the year 1870, in pursuance to the rules of California mining district, then his application would have been regular, if the local laws of California mining district, existing before the passage of this act of 1870, had provided that one person might hold so much as one hundred and sixty acres; if this claim had been taken according to the local rules at that time, then his application would have been regular and proper; but, as I stated to you before, we have ascertained that the application was not of that character; that there are a number of claims consolidated in one, or one application made upon all of these claims, for a quantity of land in excess of that which may be taken by one individual under these acts of congress. For that reason we declare, as a matter of law, that this patent is void, and upon that the plaintiff fails altogether.

Now, there is another question which was presented in the case, as to the power and authority of the plaintiff, being a foreign corporation, to hold this land. It was alleged on the part of the defendants that the plaintiff, being a foreign corporation, and being organized for the purpose of reducing ores, in its name a smelting and refining company, they could have no authority to hold lands other than for the purpose for which it was created. That is to say, that it might buy lands necessary for its use in erecting its smelting works, all that should be required for carrying on its business; but whenever it should exceed that limit, and acquire more land than was necessary for its purpose, it was beyond the power conferred upon it in its certificate of organization. And that, as a general proposition, is true. A corporation, created for a certain purpose, must confine itself to the matter for which it was created; but it would seem, from what is shown here in evidence, that this corporation purchased these lands before the town of Leadville grew up, when it was vacant and unoccupied,—purchased it in the year 1877 from this Mr. Starr, who subsequently got a patent for it, about which we have been talking, and for its use as a smelting company, and that it has erected works upon some part of the land. Now, if that be true, if these are the facts, we should not be able to say that it was beyond the power of the corporation to get land for that purpose, and though it may have been something more than was, perhaps, required for its use at that time, getting a tract of thirty acres, or thirty-one acres,—something like that,—from Mr. Starr, yet we would not look very closely into that matter. If they could make a more judicious purchase of thirty-one acres than of a less quantity, it would be proper for them to do so; so that if they did not then know precisely what the requirements of their business would be, and purchased so much with the reasonable expectation that it might become of use thereafter for the purpose of a smelting and refining company, that would be regular, also; and having purchased it for a legitimate purpose,—purchased it for the purpose of its organization and the use for which the company was created,—if they afterwards found that they had no use for a part of it, and sold a portion of it, that would be perfectly regular. And they could sell it for any purpose for which they could find a purchaser, as for use as a town lot, or any other manner. They were not bound to direct the use which a purchaser should make of it. So far as that matter has gone, upon the evidence that we have heard, the law would be with the plaintiff. But upon what I have said to you in respect to this patent, and its invalidity, we find no title whatever in the plaintiff for this tract of land, and therefore it has become your duty, gentlemen, to return a verdict for the defendants.

[This judgment was, upon writ of error, reversed by the supreme court. 104 U. S. 657.]

Case No. 12,240.

ST. LOUIS STAMPING CO. v. QUINBY et al.

[4 Ban. & A. 192:[1] 16 O. G. 135.]

Circuit Court, E. D. Missouri. March, 1879.

PATENTS — ENAMELLED IRON-WARE — SPECIFICATIONS—SCIENTIFIC REASONS—REISSUE.

1. In the original patent, it was stated, generally, that any well-known enamelling mixture, if used in connection with stamped iron-ware in the manner described, would effect the end sought. In the reissue, the patentee described a formula for an enamelling mixture to be so used: *Held*, under the circumstances of the case, not to be new matter.

2. It is not essential that the patentee should be able to state the scientific reasons for the operation of the process, or the production of the result, which he patents. It is sufficient, if his description will enable one skilled in the business to practice the process or accomplish the result.

3. The reissued patent No. 7,779, granted to Frederick G. Niedringhaus and William F. Niedringhaus, July 3d, 1877, for improvement in the manufacture of enamelled iron-ware (the original patent having been dated May 30, 1876, and numbered 177,953), are valid.

[This was a bill in equity by the St. Louis Stamping Company against E. C. Quinby and others for the infringement of reissued letters patent No. 7,779, granted to F. G. & W. F. Niedringhaus July 3, 1877, the original letters patent, No. 177,953, having been granted May 30, 1876.]

S. S. Boyd, for complainant.

Overall & Judson, for defendants.

TREAT, District Judge. There has been submitted, after full hearing and a large amount of evidence, the case of the St. Louis Stamping Company against E. C. Quinby and others. The St. Louis Stamping Company is the assignee of reissued letters patent No. 7,779, granted to Frederick G. and William F. Niedringhaus, July 3d, 1877, for improvement in the manufacture of enamelled iron-ware. There are various defences set up. The first is one always initial where the controversy pertains to a reissue patent, viz.; whether the reissue patent is for other than the invention included in the original patent. As to that objection, the defendants are evidently mistaken. The original patent was for a process and a product. The only change made is the mere introduction into the reissued patent of a formula as to an enamelling mixture which could work out the result, while, in the original it was stated, generally, that any well-known enamelling mixture, if used in connection with stamped ware in the manner described, would effect the end sought.

The claims in the original patent are as follows: "(1) The herein-described process of enamelling iron-ware, by oxidizing the iron during the process of drying the glaze, substantially as set forth." That phraseology is not changed in the reissued patent. The second claim is: "(2) A new manufacture of enamel sheet-iron ware, enamelled substantially as described." In the reissue the phraseology is: "(2) As a new manufacture, mottled enamelled sheet-iron ware, having the oxidized base fused with the surface-glaze." Now, in the original patent, it is stated in the specification that, "by reason of this oxidation" (after describing the mode of treating the iron), "the enamel is caused to enter the pores of the iron and become more intimately incorporated with the metal, thus rendering the enamel more durable," which is substantially what is stated in the second claim. Instead of saying "substantially as herein set forth," it is stated specifically, in the claim, what was declared in the original patent—only defining what was therein "substantially as set forth."

There is a large amount of testimony in this case proceeding on what seems to be an erroneous idea. This is a patent for a process and a product; and, as to the process, the gist is that, if the iron is treated in the manner set out, then, by using any enamel-glaze, the end desired—viz.; to produce the product—can be effected. It was well known before this patent that iron as well as other ware could be glazed or enamelled. There is nothing new in that. Hence the special merit of this invention, and its utility, depend on the process named in the patent. If stamped iron-ware is passed through the described acid and other baths, as occasion may require, under the directions given, then dipped into the enamel-mixture, and afterward put into a heated oven and muffle in the way stated, the result named will follow. The record shows that this process patent relates to the peculiar mode of treating the iron on which the enamel is to be placed; that by this mode of treatment, with the oxidizing of the metallic base, the desired mottling is produced, whence comes the beauty of the ware, in part, and, very largely, the durability of the glaze. Then all of the testimony, of which there is a large amount, concerning the formula for mixing the glaze, does not bear on the case, if there is any enamelling mixture which will effect the end. There have been produced before the court many specimens of enamelling under the Hickling, Paris, and Brooman patents, which, it is alleged, antedated plaintiff's patent, in order to show that an enamel might be produced under said anticipatory patents, irrespective of the representations or descriptions of this patent. It appears, however, on examining those patents and the products thereof, under the test experiments made, that none of them could effect the desired end without using the essential operations in treating the iron, and, in most instances, actually adopting the idea of the plaintiff in that regard. The experts differ very largely in their speculative ideas as to the philosophy of this patent. The plain-

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

tiff speaks of the use of the acid baths, and at what particular stage of the operation he oxidizes the metallic base, and of the use of ordinary acids in the enamelling mixture; and, in his reissue patent, he sets forth more, particularly, one formula which will effect the end. Some of the defendants' experts say all glazes will oxidize the metallic base under certain conditions. Plaintiff says, that an artisan operating this patent by following the general directions prescribed, is enabled to regulate the oxidizing of the metallic base to suit the purpose he may have specially in view, or, in other words, to produce ware of a finer or coarser mottle, as may be desired. There have been a great many chemical experiments with regard to this matter. We have on the one side Professors Potter, Riggs and Hedrick, and, on the other, Professor Chauvenet, and they seem to differ very largely, more on the speculative ideas than on the actual facts. We encounter the plain fact, however, which very often occurs with regard to patents, that some person not skilled in chemistry, and not very well learned in mathematics, will invent a process, in one instance, or a mathematical contrivance, in another, without being able to state the chemical or mathematical rules with accuracy, in the light of which learned men would solve the underlying problem, scientifically considered. It is sufficient if his description will enable one skilled in the business to accomplish the desired result. Whether the inventor could stand a successful examination as to the speculative ideas involved, is immaterial. This case has been presented to the court, more with respect to such ideas than to the actual facts.

The process is this, viz.; the treatment of the metallic base by an acid and alkaline bath, as indicated, thus leaving, as asserted, the acid still operating on the metallic base, and, after having so done, subjecting the metallic base, either under a wet or a dry process, to a muffle, previously having the metal dipped into an enamelling mixture where the oxidizing of the metallic base was such that the mixture would inhere. When the operation has thus taken place a mottled enamel would be so fixed into the iron that it could not be chipped or rubbed off. If the facts show that this result could be accomplished through the intermediate treatment under the patentee's description or by other known mixtures for enamelling, nothing occurs to the court to show that this patent is invalid because of the other patents mentioned. The Hickling, Paris, and Brooman patents never contemplated any product of this kind. None of them describe the process or result obtained by the plaintiff's mode. It is said, however, that this patent should be declared void because the patentees concealed what is considered an essential ingredient in their enamel mixture. What has already been stated with regard to that is a sufficient answer. The plaintiffs give in their specification an enamelling mixture, not confining themselves to that. They state that the one mentioned is only one formula by which the result may be worked out, adding that, by the use of coloring matter, brown or blue or other colored ware may be produced. Specimens have been presented by experts following the plaintiff's formula and working out the end which the patentee said could be effected. Now, the coloring matter indicated may be alkaline in its qualities or otherwise —larger or less increase of the alkaline or acid matter, as the patentee has specifically indicated in the patent. Hence, there is no solid foundation for the defence as to change of formula. To explain this matter in extenso, by the aid of the specimens produced and those resulting from the test experiments, would require more time than is at command, and it must suffice, for the purposes of this case, to say that the reissued patent is for precisely the same invention as stated in the original patent, and that the alleged anticipatory patents of Hickling, Paris, and Brooman do not disclose the steps nor describe the product set forth in plaintiffs' patent. The statements made by Mr. Crowley, who has been a workman for some gentlemen in Connecticut, must fall, by reason of two essential facts, namely, that his employers, Manning, Bowman & Co., after having the benefit of his skill in England and this country, the moment they heard of this patent, sought the right to use this product for the purpose of mounting ware enamelled under plaintiff's process; secondly, that Mr. Crowley himself, after a great deal of hesitancy, as if he had a great secret to reveal, produced specimens made by the mode alleged to be known to him long prior to this patent, which specimens are very different from the specimens produced under this patent. They are the result of his experiments and of his previous knowledge, and show that, so far as he is concerned, he knew nothing of this process, nor what it would effect.

The conclusion reached, then, is, first, that the patent in the case is a valid subsisting patent; second, that the defendants have infringed it, for there is no doubt, on examination of their patent, reissue No. 7,900, dated October 2d, 1877, and a comparison of the ware, that they are operating the process, and making, selling and using the product covered by plaintiff's patent.

Therefore, a decree will be entered, and a reference to some one, as master, to ascertain the profits and damages. If the counsel agree on the person, the court will name him; otherwise it will name him of its own accord.

[Counsel agree on and reference is made to Mr. Joseph Shippen as master.] [2]

[For hearing on exceptions to the master's report, see Case No. 12,240a.]

[2] [From 16 O. G. 135.]

Case No. 12,240a.

ST. LOUIS STAMPING CO. v. QUINBY et al.

[5 Ban. & A. 275;[1] 18 O. G. 571.]

Circuit Court, E. D. Missouri. March 15, 1880.

PATENTS—ACCOUNTING—PROFITS—CORPORATIONS—PERSONAL LIABILITY OF CORPORATORS.

1. Where, upon an accounting before the master, no profits were proved to have been made by the defendants, the complainant cannot recover, as damages, the profits which it would have made on the articles sold by the defendants.

2. Remarks by the court on the personal liability of the corporators of private corporations incorporated under the state statute of Missouri, for acts of infringement by the corporation.

[Cited in Mergenthaler Linotype Co. v. Ridder, 65 Fed. 854.]

In equity. The defendants [E. C. Quinby and others] were stockholders of a corporation. The infringement consisted in making and selling an article of manufacture. St. Louis Stamping Co. v. Quinby [Case No. 12,240]. It appeared that defendants had made no profit by such manufacture. The complainant contended that it was entitled to recover, as damages, the profits it would have made on the articles sold by the defendants, but offered no other proof as to damages. It was also contended that the defendants were liable jointly and severally for such damages. The master, in his report, negatived both of these propositions, and the following opinion was delivered upon the case coming up on exceptions to the master's report.

S. S. Boyd, for complainant.

Overall & Judson, for defendants.

TREAT, District Judge. The exceptions involve many interesting propositions, some of which, conclusive as to the matters before the court, might, if to be ruled upon de novo, be held otherwise than as in decided cases. Inasmuch as the United States supreme court has, in repeated cases, laid down the rule of damages to be the same as the master has followed, the exceptions to his report must be overruled.

In thus ruling on the exceptions, I wish it understood that I do not assent to the proposition that, if a few persons form themselves into a corporation under the Missouri statute, the business of which is a necessary infringement of a patent, they can escape individual liability for the acts done in the corporate name. The Missouri statute as to private corporations, and the formation of corporations thereunder, cannot be interposed as a shield by the corporators to protect them against wrongful acts. Were this otherwise, then the organization of an insolvent or worthless corporation, in whose name the wrong was done, would enable infringers to destroy the value of a patent, and escape harmless.

I pass upon the case as presented; and as no profits or actual damages have been proved, within prescribed rules, the exceptions are overruled.

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

ST. LOUIS, V. & T. H. R. CO. (ST. LOUIS INS. CO. v.). See Case No. 12,238.

ST. LOUIS WIRE-GOODS CO. (ADAMS & W. MANUF'G CO. v.). See Case No. 72.

Case No. 12,241.

ST. LUKE'S HOSPITAL v. BARCLAY et al.

[3 Blatchf. 259.][1]

Circuit Court, S. D. New York. March, 1855.

COURTS—FEDERAL—JURISDICTION—CITIZENSHIP—EQUITY—TRUSTS—CONSULS.

1. Where a bill in equity is filed in this court, to stay proceedings at law pending in this court, the equity suit is auxiliary to the action at law, and may be maintained without regard to the citizenship or alienage of the parties to the record, and although the court may not have jurisdiction over the parties for other relief.

[Cited in Merchants' Nat. Bank of Lowell v. Leland, Case No. 9,452; Re Sabin, Id. 12,195; O'Brien Co. v. Brown, Id. 10,399.]

2. A cestui que trust may maintain a bill for an injunction against his trustee, to prevent his collecting, appropriating, or disposing of the trust property.

3. This court has jurisdiction of an original civil suit in which the plaintiff is a citizen, and the defendant is an alien, even though the defendant is a resident foreign consul duly admitted as such by the president.

[Cited in State v. Lewis, 14 Fed. 67.]

4. The consular character of an alien only exempts him from the jurisdiction of state courts in civil suits, and he may be sued in this court as well as in a district court.

[Cited in Börs v. Preston, 111 U. S. 259, 4 Sup. Ct. 410; Ames v. State, 111 U. S. 468, 4 Sup. Ct. 446.]

This was a bill in equity, filed by St. Luke's Hospital, a New York corporation. The defendants [Anthony Barclay and Robert Bunch] were aliens. The bill prayed for an injunction to restrain them from prosecuting a suit instituted by them in this court, against the New York Life Insurance and Trust Company, for the recovery of $10,000, held on deposit by that company in the names of the defendants. The bill set forth, that in October, 1845, the rector, church wardens, and vestrymen of the Anglo-American free church of St. George the Martyr, became incorporated under the laws of New York, as a religious corporation; that in May, 1848, the corporation of the city of New York granted to the said religious corporation, a lot of land, situate on the 5th avenue, between 54th and 55th streets, upon condition that said church should erect thereon a hospital and chapel for the relief of British emi-

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

grants, on or before the 1st of May, 1853, in default whereof the premises were to revert to the city of New York; that the church did not erect such hospital and chapel within the time limited, and possessed no means for so doing, and had no prospect of obtaining them; that in April, 1850, the plaintiffs became incorporated, for the purpose of establishing, founding, carrying on and managing a hospital in New York; that it is part of the design of the plaintiffs that their hospital be connected with the Protestant Episcopal Church of the United States, as one of the charitable institutions of that church; that its benefits are mainly intended for the poor of that church; that a chapel is also to be attached to the hospital, in which services are to be conducted according to the liturgy and discipline of that church, the doctrine and discipline of which are substantially the same with those of the Church of England; that the rector, church wardens, and vestrymen of St. George the martyr, being unable to fulfil the conditions of such grant to them, agreed that the land so granted to them should be transferred to the plaintiffs, and be used for the erection of buildings for their corporate purposes, and of a hospital with a church or chapel of the Protestant Episcopal Church attached thereto, and that, in consideration of such transfer, a wing ward, or department of said hospital should be appropriated to the special benefit and relief of British emigrants, as a substitute for the hospital originally contemplated by said Church of St. George the Martyr; that, after such arrangement was made, but before it was fully consummated, Bunch, one of the defendants, proceeded to England, to collect funds from members of the Church of England, for the endowment and support of said proposed hospital and chapel, to be included in and form part of the plaintiff's buildings, and, for that purpose, circulated a paper seeking donations, and setting forth the object to be as above stated, and that a fusion of St. Luke's Hospital and the Church of St. George the Martyr had been made to that end; that about $11,000 was received by said Bunch, in contributions to the object, under such appeal, and was given in expectation that most of such contributions would be applied to the aid of the plaintiff's undertaking; that in October, 1852, the fusion was completed, and the officers of the Church of St. George the Martyr conveyed to the plaintiffs the premises granted to them by the city of New York, and the plaintiffs, on the same day, executed to the Church of St. George the Martyr, an agreement under seal, in fulfilment of the mutual arrangement entered into between the parties; that, thereupon, the plaintiffs entered into possession of the land, and had commenced the erection thereon of suitable buildings for a hospital and a church or chapel thereto annexed, and were prosecuting the same to completion with all diligence, and were possessed of means sufficient therefor; that subsequently the defendant Bunch paid to the plaintiffs $823.50, for the benefit of St. George's ward, alleging that to be the whole amount collected for that object; that, about the same time, he deposited in the New York Life Insurance and Trust Company the balance of the money so by him collected, being about $10,000, in his own name and that of the defendant Barclay, and that they had since claimed the exclusive right to hold and disburse said sum; that the principal part of said sum was intended, by the donors, for the British Emigrant Hospital in New York, now known as the ward of St. George the Martyr, in St. Luke's Hospital; and that said sum ought to be applied to the endowment and use of said hospital. The bill prayed that the defendants be decreed to apply and dispose of said fund according to the design and intent of the donors, and that such charitable design be carried into effect under the decree of this court; that the defendants account for said fund, and be enjoined from collecting or receiving any part thereof; that the said suit at law be stayed; and that the New York Life Insurance and Trust Company be directed to pay said fund into court. Barclay opposed the motion, on his answer.

Marshall S. Bidwell, for plaintiffs.
Charles Edwards, for defendants.

BETTS, District Judge. All the equities set up by the bill are denied by the answer, and until the proofs come in, the court will not inquire in which party the legal or equitable right to the fund in question is vested. In disposing of the motion to enjoin the suit at law prosecuted by the defendants, the court will limit its decision to the point, whether the action at law for the recovery of the fund in dispute shall be stayed, and, if so, upon what terms or conditions.

In opposition to the motion, it is insisted by the defendants, that the case is not within the cognizance of this court, either in respect to parties or subject matter; and that, if otherwise, then all the equity shown by the bill, for the interposition of the court to stay the action at law, is removed by the answer.

The jurisdiction of the court is resisted upon two grounds: First, that the defendants are both of them consuls of Great Britain, acknowledged by the United States, and are, in that capacity, exempt from suit in a circuit court of the United States; second, that no remedy can be had in this court upon the facts alleged in the bill.

This proceeding is not by original bill solely, seeking relief upon the equities of the case; but, in so far as regards the injunction asked to stay the proceedings at law, it is auxiliary to that action, and may be maintained here to that end, although the court may not have jurisdiction over the parties

for other relief. The authority of a circuit court over this class of suits has been considered and settled by the supreme court in two instances. In Simms v. Guthrie, 9 Cranch [13 U. S.] 19, it was decided, that a bill to enjoin a judgment at law in a circuit court of the United States, must be brought in that court, and that the court did not, in such case, regard a defect of jurisdiction in relation to some of the parties named. In Dunn v. Clarke, 8 Pet. [33 U. S.] 3, the court say, that an injunction bill to stay proceedings at law, is not considered as an original bill between the same parties, but that, if other parties are made in the bill, and different interests are involved, it must be considered, to that extent at least, an original bill, and the jurisdiction of the circuit court must depend upon the citizenship of the parties.

A cestui que trust may maintain a bill for an injunction against his trustee, to prevent his collecting, appropriating, or disposing of the trust property. 1 Eden, Inj. (by Waterman) 172, note 1. In this case, the allegations in the bill are sufficient to bring the parties within the jurisdiction of this court, if the bill be considered an original one in that point of view. The plaintiffs are averred to be citizens of the state of New York, and the defendants are aliens. The latter consideration is of no consequence in this case, except in so far as the proceeding may be regarded as an original suit; for, if the interest of the plaintiffs is of such a character that, under it, they would be entitled, in ordinary cases, to stay the suit prosecuted at law by the defendants for the recovery of the money in question, they are enabled to do this because the defendants are seeking, in that suit, to get possession of funds equitably belonging to the plaintiffs. And the capacity of the defendants, as suitors in the court, prosecuting for the recovery of the fund claimed by the plaintiffs, also fixes upon them a liability to be controlled, in the management of that suit, at the discretion of the court, as a court of equity. The court thus acquires jurisdiction over the present defendants in their character of parties to the record, without regard to the fact of citizenship or alienage.

If the present plaintiffs had been parties to the action at law prosecuted in this court by the defendants against The New York Life Insurance and Trust Company, they might have had that action stayed, as in ordinary cases, by bill or even motion, even though the official character of the defendants might exempt them from amenability to an original suit. The United States cannot be sued in any court of justice; but, if plaintiffs themselves, they stand subject to the authority of the court, in their capacity as suitors, in the same manner as private parties. Cohens v. Virginia, 6 Wheat. [21 U. S.] 406. Without regard, then, to the circumstance that the party applying by bill to stay proceedings at law is not a party to those proceedings, or is incapable of maintaining an original action in his own name against the one he seeks to enjoin, equity will entertain a bill in his favor for that purpose, when, on facts of which the court cannot take cognizance between the parties to the action at law, it is made to appear to be against conscience that the party prosecuting at law should proceed in his cause. 2 Story, Eq. Jur. § 875. The case of a trustee attempting to pervert his trust, or employ it to the prejudice of his cestui que trust, by a proceeding at law in which the cestui que trust would be barred of an adequate protection, is particularly appropriate for the interference of equity to restrain the proceeding by injunction. Id. § 882.

The defendants being, then, suitors at law, prosecuting for the possession of the fund which the bill avers to be a charity belonging to the plaintiffs to distribute, the effect of which suit, if successful, will be to transfer that trust fund from a public depository to the hands of individuals, the case is one proper for the interference of the court, to stay such change of possession, until the question of fiduciary right can be determined. That question belongs to equity, and necessarily, in the present case, because no defence can be made at law to the action there, inasmuch as the defendants took a certificate of deposit in their individual names, and the trust company will not be permitted to question their legal title, against that certificate. The protection of the present plaintiffs must be found in the aid of a court of equity, to prevent the charitable fund from being transferred to parties who deny the trust, and design to appropriate the money in a manner to place it out of the control of the plaintiffs.

The defendants, being aliens, are amenable to the jurisdiction of the circuit court in a suit in favor of citizens, and their consular character exempts them only from the jurisdiction of state courts. The act of congress gives to the district courts of the United States jurisdiction in civil actions, in suits against consuls, exclusively only of the state courts. By the law of nations, consuls are subject to the ordinary jurisdiction of the tribunals of the country to which they are accredited. 1 Kent, Comm. 43, 45; Wheat. Law Nat. p. 293, § 22; U. S. v. Ortega, 11 Wheat. [24 U. S.] 469, note. There seems, therefore, to be no legal impediment to the application of the eleventh section of the judiciary act of 1789 (1 Stat. 78) to actions by citizens against consuls, in the circuit courts of the United States.

On both points, in my opinion, this court has cognizance of this case, and the injunction prayed for ought to issue, and be enforced until the further order of the court.

Subsequently, Bunch pleaded to the jurisdiction of the court, that, at the commencement of the suit, he was the British consul

at Charleston, S. C., and Barclay was the British consul at New York, both of them admitted by the president, and that they ought to be sued in the supreme court of the United States, or in some district court of the United States, and not elsewhere. After argument before NELSON, Circuit Justice, and BETTS, District Judge, by Marshall S. Bidwell, for the plaintiffs, and Charles Edwards, for Bunch, the court (October 2d, 1855) overruled the plea, with costs.

Case No. 12,242.

The ST. MARY.

[2 Blatchf. 329.] [1]

Circuit Court, S. D. New York. Oct. 7, 1851.

MARITIME LIENS—UNDER STATE STATUTE—BILL OF SALE—DISBURSEMENTS—PRIORITIES.

1. It is sufficient to give a lien, under the statute of New York (2 Rev. St. p. 493, § 1), against a domestic vessel, for money advanced for supplies furnished to her in her home port, that the items of account for such advances amount in the aggregate to $50. It is not necessary that each item should amount to $50.

2. Where S., having a claim against F. for $5,000, as the balance of $12,000, purchase-money of a vessel, took a bill of sale of the vessel from F., with power to sell her and pay himself said balance, and at that time W. had a claim against F., for disbursements for stores and supplies for the vessel and for a commission for services in fitting the vessel for sea and procuring freight and passengers for her, of which claim S. had knowledge at the time, *held*, on a libel in rem filed by W. to recover his claim, that S. was entitled to payment of his claim for the balance of the purchase-money, before W. could receive any part of his claim, but that W.'s claim had priority over a claim by S. for disbursements made by him, after taking said bill of sale, in fitting the vessel for sea.

3. The terms of the bill of sale, considered.

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

This was a libel in rem, filed on the 23d of November, 1849, in the district court, by Albert A. Warner against the ship St. Mary, an American vessel. The facts stated in the libel were these: Warner, as agent for one French, the owner of the vessel, was engaged at New York from the 15th of September, 1849, to the 22d of November, 1849, in procuring equipments and supplies and freight and passengers for the vessel, for a voyage from New York to San Francisco, and, during that time, paid and advanced to and for French, and at his request, large sums of money for stores, supplies, provisions and otherwise. After crediting various sums received by Warner for freight and passage-money, there remained due to him, on the 21st of November, 1849, for moneys so advanced, including his charge for commissions, a balance of $2,501.30. The charge for commissions was $1,250, being 5 per cent. on $25,000. Several of the items of account claimed were less than $50 each. On the 21st of November, 1849, the vessel being ready for sea, Warner presented his account to French, who examined it and acknowledged its contents, and, on the same day, gave Warner a mortgage on the vessel to secure the $2,501.30, with interest. The firm of Simes & Huffer, as claimants, put in an answer, which set up these facts: French purchased the vessel from them on the 15th of September, 1849, at New York, for $12,000. On the same day French executed to them a paper, reciting the sale for $12,000, and setting forth that $3,000 of it was to be paid on the 17th of that month, $4,000 in thirty days from date, and the balance within sixty days from date and before the vessel should leave New York; that no transfer of the vessel was to be made until the whole amount should be paid; that, in case of default in any of the payments, the vessel was to be sold at public sale, on account of French and at his expense; that Simes & Huffer were to be at liberty to purchase at the sale; and that French was to pay the deficiency, if any. Warner knew the terms of French's purchase at the time it was made, or shortly after. French took possession of the vessel, and paid the $7,000, as agreed. On the 26th of October, 1849, $5,000 of the purchase-money being unpaid, French made to Simes & Huffer a proposal, in writing, that they should "take possession of the ship, and charge of the management of her business for loading and getting to sea," "with the understanding that whenever" they should be "in receipt of a sufficient amount of money to cover the balance due for purchase-money, and any liabilities" they might "be under, growing out of this transaction and connection," French should "be entitled to a bill of sale of the ship, in order that" he might "sell or hypothecate her to another party, under the condition that the proceeds of such sale or hypothecation" should "pass into" their "hands for the disbursement of the ship." The proposal concluded as follows: "I further agree that, before the ship goes to sea, you shall be placed in funds sufficient to cover all the liabilities of the ship and outfits. If, therefore, you accept this proposition, you will please cause the ship to be loaded and prepared for sea with all due diligence and despatch, and, in compensation for your services, I agree to allow you two and one-half per cent. commission on the amount of her freight and passage-money, warranting the same to amount to twenty-five thousand dollars." On the same day, Simes & Huffer and Warner signed a memorandum indorsed on said proposal, in these words: "We accept the within proposition of Mr. French, and it is understood that Mr. A. A. Warner is to be associated with us so far as the passenger part of the business is concerned. All bills of lading are to be signed at our office, and all bills against the ship to pass through the hands of Simes & Huffer."

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

Simes & Huffer forthwith took possession of the ship under the agreement, with Warner's knowledge, and rendered the services and made the disbursements necessary to fit her for sea. They claimed a lien on the vessel for a balance of $7,042.37 due them for their disbursements for her, over and above the $5,000 balance of purchase-money and interest. On the 26th of October, 1849, Warner gave to Simes & Huffer a written paper, in these words: "Having this day entered into an agreement with Messrs. Simes & Huffer, to conduct the passenger part of the ship St. Mary, now advertised for California, it is hereby agreed by me, that the amount of funds received by me from passengers is to be applied solely to the account of the ship St. Mary, or subject to the order of Messrs. Simes & Huffer for the use of said ship." On the 22d of November, 1849, another agreement was made between French and Simes & Huffer, by which, after a recital that French still owed them, on his purchase, $5,000, and interest from November 15th, 1849, and that they had paid bills in relation to the contemplated voyage to San Francisco, and other bills had been incurred and were outstanding against the ship or on account of the voyage, French assigned and transferred to them all his right, title and interest in the ship, "her tackle, apparel and furniture, and in her freight and passage-money and all sums of money due or to become due, for freight or passage-money or otherwise," to the ship, or to French on her account or on account of the voyage, and authorized them to take the entire control and management of her and of the voyage, and to collect and compromise any claims due to French on account thereof, and to settle, and, if they saw fit, to compromise any claims against French or the ship on account thereof, and to sell the ship on such terms and at such time as they might think best, and, if they thought best, to provide a voyage for her return to the United States or elsewhere. The agreement further provided that, from the earnings of the ship, and her proceeds, if sold, Simes & Huffer were to pay themselves the balance due on her and all disbursements made by them on her account or connected therewith, and twenty per cent. commission on the receipts and disbursements, as their compensation; that, if there should be a surplus when the affairs were closed, Simes & Huffer should pay it to French; and that Simes & Huffer should appoint an agent in San Francisco, with authority, in case French should there pay the full amount due them or for which they were liable, including commissions, to transfer and give a bill of sale of the ship to French, provided no previous transfer should have been made. The answer set up, that the court had no jurisdiction to enforce Warner's claim against the vessel; that Warner had no right to arrest the ship or interfere with her voyage; that the greater part if not the whole of Warner's account, as set forth in the libel, was not a lien on the vessel, either by the laws of New York or under the admiralty law; and that Warner's rights were subordinate to those of the claimants. The other facts necessary to an understanding of the case are stated in the opinion of the court. After a decree by the district court in favor of the libellant [case unreported], the claimants appealed to this court.

Edward H. Owen, for libellant.
George C. Goddard, for claimants.

NELSON, Circuit Justice. The merits in this case are with the libellant, and I think that the decree below is maintainable upon principles of law. I lay out of view the mortgage given upon the vessel, and put the decision upon the original indebtedness.

The per centage which French agreed to allow the libellant for fitting out the vessel and procuring freight and passengers for her voyage to San Francisco, as compensation for the service and responsibility, partakes of the same nature and character as the disbursements made in the course of the service, in furnishing stores, &c., in fitting the vessel out. The reasonableness of the amount is not in question, as French determined that for himself, and it was a matter in which he alone was concerned at the time. For aught that appears, the compensation was the customary rate allowed in fitting up and freighting these California passenger vessels.

As respects other parts of the claim, which, it is conceded, are properly chargeable against the ship, I do not agree with the counsel that each claim must exceed the amount of fifty dollars, in order to bring the lien within the state statute. 2 Rev. St. p. 493, § 1. It is sufficient if the amount in the aggregate reaches that sum.

I agree that Simes & Huffer had a prior lien on the vessel for the five thousand dollars and interest, the balance of the purchase-money, at the time they resumed the possession of her, and that they were entitled to its payment out of her proceeds, before any distribution to the libellant. But it must be remembered that, when the vessel passed into their hands, under the arrangement of the 22d of November, French had an interest in her to the amount of $7,000, he having paid that portion of the purchase-money. This interest passed into their hands on the re-transfer, and was fairly subject to the charges of the libellant. She was ample security for both demands. Beyond this balance of the purchase-money, Simes & Huffer had no prior lien on the vessel over the libellant; and it is apparent, from the transactions between all the parties, that they were fully aware of his claim at the time of the arrangement of the 22d of November. The libellant had been engaged in equipping the ship and procuring freight and passengers, from the 17th of

September down to the 26th of October; when Simes & Huffer became jointly concerned with him in the business, and I must hold them chargeable with a knowledge of the service he had already performed in this respect, and of the disbursements made and accounts outstanding at the time they became concerned with him. With a few trifling exceptions, his whole account had then already accrued against the vessel. It is true, some evidence was given tending to show that an account, the balance of which amounted to some $386, had been rendered by the libellant at this time; but it is altogether too indefinite and uncertain to be relied on for this purpose. The writings that were made at the time make no mention of it, or of the amount of the indebtedness to the libellant. That the amount now claimed existed at the time, is too well established to be doubted.

What strengthens very much the equity and justice of the claim of the libellant, under the circumstances, is the nature and character of the arrangement of the 22d of November, between Simes & Huffer and French. It not only assigns all the interest of the latter in the vessel, freight and passenger money, and authorizes them to sell and dispose of her, and requires them, after paying themselves, to pay the surplus, if any, over to French, but provides, also, that, if the vessel is not sold, they shall appoint an agent at San Francisco, with authority, in case French shall pay the full amount due them or for which they may be liable, to make a bill of sale of the vessel to French. By this arrangement, the claims of the libellant are not only entirely disregarded, but the interest of French in the vessel, over and beyond the lien of Simes & Huffer for the balance of the purchase-money, is placed out of the libellant's reach. We have seen that he had the next lien on the vessel, and was entitled to have it enforced before any other of the claims of Simes & Huffer. Besides, it is by no means certain that they did not bind themselves to French, by the arrangement of the 22d of November, to pay the claim of the libellant. Among other stipulations, they agree "to settle, and, if they see fit, to compromise, any claims against the said French or said ship, on account thereof."

It seems to me that the libellant had a valid lien upon the interest of French in the vessel, when it passed into the hands of the claimants on the 22d of November, and that it was sufficient, over and beyond their prior lien for the balance of the purchase-money, to satisfy his claim. They had sold her to French, on the 15th of September previous, for $12,000, and, on the 23d of November, she appears to have been insured at the value of $16,000.

The libellant had no interest in the voyage. He had been employed to fit up the ship and procure freight and passengers, and was concerned only in this service, and in securing his compensation for the same and for his disbursements; and I do not see that he was bound to forego these claims rather than break up the voyage. This was a question for those interested or who had become interested in getting the vessel to sea and in making the voyage—not for the libellant. I see nothing in the case to restrain him from enforcing his rights, even at the expense of breaking up the voyage. French or those who had taken his place were bound to look to this, and to relieve the vessel from the charge.

In every view I have been able to take of the case, I think that the decree below was right and should be affirmed.

ST. OLOFF, The (WEIBERG v.). See Case No. 17,357.

Case No. 12,243.

The ST. PAUL.

[10 Chi. Leg. News, 252; 3 Cin. Law Bul. 321.] [1]

District Court, E. D. Michigan. 1878.

COLLISION—VESSELS FOLLOWING—RIGHT OF WAY—ATTEMPT TO EMBARRASS PASSING VESSEL.

While the forward one of two vessels, pursuing the same course, has the right of way, she ought not to thwart or embarrass the other in passing her; and if she is willfully thrown across the path of the overtaking vessel, and a collision ensues, she cannot recover, though the rear vessel be not without fault.

The collision [between the propellors Wenona and St. Paul] took place at 6 o'clock on the morning of the 26th of August, 1876, about a quarter of a mile below Grassy Island light, in the Detroit river. Both vessels were bound up, the Wenona somewhat ahead, and proceeding at their usual rate of speed; the Wenona at eight and a half, and the St. Paul at ten miles an hour. The collision occurred in an attempt of the St. Paul to pass the Wenona. The theory of the libellant was that the Wenona was coming up on the usual course of vessels at that point, and about the middle of the channel; that the St. Paul came up astern of her, and, though the Wenona kept steadily on her course, continued, without slackening her speed, to crowd her stern out into the stream, and her bow toward Grassy Island, until she struck her with the bluff of her bow upon her port quarter; that the St. Paul still followed and crowded the Wenona, and before she could stop, caused her to ground on Grassy Island; and when she was hard aground, the St. Paul backed up and went on her course, disregarding the calls of the master for assistance. The libel also charged the St. Paul with the following specified faults: (1) In neglecting to keep out of the way of the Wenona. (2) In not

[1] [3 Cin. Law Bul. 321, contains only a partial report.]

indicating, by signal, that she was about to attempt to pass her. (3) In not slackening her speed.

The answer claimed that the St. Paul, being the faster vessel, approached the Wenona in the vicinity of Mammy Judy light, about two miles below the place of collision, with the intention of passing her on her starboard side, she being then about mid channel; that, as she began to gain upon the Wenona, the latter commenced to swing to starboard as if under a port wheel, and as if to cross the bows of the St. Paul, on seeing which the St. Paul put her wheel to starboard, thinking to pass on the port side of the Wenona, as there was abundant room to do; that, as the St. Paul came up again to the stern of the Wenona, the latter swung to port and headed across the bows of the St. Paul; that she continued to head across her bows, and finally ran on to Grassy Island, on the port side of the channel; that at this time the St. Paul was close on to the port hand bank; that before the Wenona struck, the officers of the St. Paul hailed her to keep off, but she failed to do so, and ran aground across the bows of the St. Paul. The answer also charges the following faults upon the part of the Wenona: (1) In running across the bows of the St. Paul, and in changing her course for the purpose of preventing the St. Paul, which was the faster vessel, from passing her at her usual speed. (2) That, had the Wenona kept her course, the St. Paul would have passed without touching her, or interfering with her navigation; and that the grounding arose from the willful and deliberate action of the officers of the Wenona. The answer admitted barely touching the Wenona, and denied that any damage was done thereby.

H. H. Swan and Alfred Russell, for libellant.

Moore & Canfield, for claimant.

BROWN, District Judge. This collision took place in clear weather, and in broad daylight, and was wholly inexcusable. Upon a careful perusal of the testimony, I am satisfied the Wenona was endeavoring to embarrass and thwart the St. Paul in her attempt to pass her. It is clearly proven that when the St. Paul overhauled her, opposite Mammy Judy light, the Wenona was near the center of the channel; that, as the St. Paul ported and attempted to pass her, she also ported and crossed over as near to Fighting Island on the Canada shore as was safe under the circumstances; that the St. Paul, seeing that an attempt to pass upon the starboard side was useless, starboarded her wheel with the intention of passing upon the port side; that the Wenona, seeing this maneuver, also starboarded and passed over towards Grassy Island, near which the collision occurred. The excuse given by the Wenona was that she was pursuing the usual course of vessels bound up. This is wholly disproved, however, by the officers of the St. Paul and by those of the Northwest, a steamer plying daily between Detroit and Cleveland. The chart, too, exhibits a channel of nearly uniform depth across the river, which at that point is about three-eighths of a mile wide, and very nearly straight from Mammy Judy to Grassy Island light. Upon no other theory than that of a wish to baffle the St. Paul, in her efforts to pass her, can the maneuver of the Wenona be accounted for. All the men upon the deck of the St. Paul swear that this was her evident purpose. It is admitted by the wheelsman of the Wenona herself, (whose testimony, however, it is but fair to say, is open to some suspicion,) and but feebly denied by the officer in charge. The watch upon the deck of the Northwest, which was passing up at the time, also noticed and remarked upon the evident attempts of the Wenona to prevent the St. Paul from passing. Indeed, the evidence tends to show that the maneuver of the Wenona in crossing to Fighting Island, and thence to Grassy Island, which is charged in the libel to have been attempted but once, was, in fact, repeated. But whether this be so or not, the purpose of the Wenona in preventing the St. Paul passing her is too clearly proven to admit of doubt.

Under article 17, it is unquestionably the duty of every vessel overtaking another vessel to keep out of her way; but under article 18, there is a corresponding duty on the part of the forward vessel to keep her course. She is not bound to give way or to yield her position in the channel, but she must not embarrass or thwart the faster vessel in passing her. If such efforts are made and a collision ensues, such collision upon her part is willful and reckless. The Rhode Island [Cases Nos. 11,745 and 11,743]; The Columbia, 10 Wall. [77 U. S.] 246; The Great Republic, 23 Wall. [90 U. S.] 20; The Newport [Case No. 10,185]; McNally v. Meyer [Id. 8,909]; The Narragansett [Id. 10,018]; The W. H. Clark [Id. 17,482]; The A. G. Brooks [Id. 98]; The Governor [Id. 5,645]. Had the Wenona been proceeding up the river upon her usual course and the St. Paul had followed her, as she did, hanging for some considerable distance within 50 feet of her stern, and finally run into her quarter, I should have had no hesitation in condemning the St. Paul for the collision; but the facts show very clearly that the collision was caused by an effort of the Wenona to prevent the St. Paul from passing her; that while the latter was endeavoring to take advantage of her greater speed, she hit the Wenona with the bluff of her starboard bow upon the port quarter of the Wenona, and thereby turned her stern to starboard and her bow to port, and probably caused her to run aground. It appears, however, that as soon as the officers of the St. Paul saw the Wenona was becoming unmanageable and was likely to ground, they at once stopped and backed away from her before

the bow of the St. Paul passed the stern of the Wenona.

While I think the St. Paul was guilty of negligence in pressing the Wenona so close, there is no evidence that the collision on her part was willful or reckless, and the case turns upon the question whether a vessel which has brought about a collision by her willful misconduct can claim contribution of another which has been guilty of simple negligence. I find no case directly in point. In The R. L. Maybey [Case No. 11,870], the district court found that the collision occurred by the willful fault or intentional wrong of both parties, and consequently that the vessel complaining, having voluntarily taken her chances in the collision, must abide the loss. The circuit court sustained this view [Id. 11,871], the learned justice observing: "I have found no case where an apportionment has been made in a case like the present, viz., where the collision occurred by the willful and intentional act of both parties, and I shall not be the first to make the precedent. If two vessels choose voluntarily to take the chance of knocking off each other's heads, I shall lay down no rule that will invite the unfortunate one into a court of admiralty for redress. The remedy for the owner is to discharge his master and crew and man his vessel with competent and prudent hands." The case was reversed in the supreme court (Sturgis v. Clough, 21 How. [62 U. S.] 451), the court holding one of the tugs in fault, but in delivering the opinion Mr. Justice Grier apparently conceded the general principle acted upon in the court below. "Cases may occur in which two steamboats engaged in unlawful racing may recklessly or willfully dash against each other, and the court treating them both as criminals, may refuse to sustain an action or decide which was most to blame, leaving each to suffer the consequences of his own folly and recklessness."

It is true, this case is not directly in point. There was no intention on the part of either vessel here to bring about a collision. The Wenona, however, committed a willful violation of the rules of navigation, and deliberately thrust herself into a position where a collision was natural and probable. While this, of course, would not authorize a reckless attempt on the part of the St. Paul to run her down, it is scarcely to be expected that her officers would exercise the same care and caution in passing her, which would have been required under the circumstances. Having executed a maneuver which invited disaster, libellant ought not to complain that the invitation was accepted. Even if this case be considered one of mutual fault, it seems to me the faults are so egregiously unequal as to require the court to refuse an apportionment. The Great Republic 23 Wall. [90 U. S.] 20; Ralston v. The State Rights [Case No. 11,540]. The libel will be dismissed.

ST. PAUL (NORTHWESTERN UNION PACKET CO. v.). See Case No. 10,346.

ST. PAUL (WARREN v.). See Case No. 17,199.

ST. PAUL & C. RY. CO. (McLEAN v.). See Cases Nos. 8,892 and 8,893.

ST. PAUL & P. R. CO. (HOPKINS v.). See Case No. 6,690.

ST. PAUL & P. R. CO. (KENNEDY v.). See Cases Nos. 7,706 and 7,707.

ST. PAUL & P. R. CO. (WETMORE v.). See 3 Fed. 177.

ST. PAUL & S. C. R. CO. (CHAMBERLAIN v.). See Case No. 2,578.

Case No. 12,244.

ST. PAUL FIRE & MARINE INS. CO. v. The LAKE SUPERIOR. CITIZENS' INS. CO. v. SAME. AMERICAN CENT. INS. CO. v. SAME.

[7 Chi. Leg. News, 259; 5 Ins. Law J. 73.]

District Court, D. Minnesota. March 20, 1875.

ADMIRALTY—JURISDICTION—INSURANCE—SUBROGATION—DUTY OF PILOTS.

1. *Held*, that the claimant by pleading to the merits has waived any irregularity existing on account of filing the libel at a time when the vessel was not within the district.

2. The libelants having paid the amount of insurance upon the freight which is alleged to have been lost through the fault of the steamboat Lake Superior, are by proper proceedings subrogated to all the rights of the original owners, and they have full authority to institute these suits to enforce their several claims.

3. The court on reviewing the evidence comes to the conclusion that the claim is not stale.

4. The court states the duty of pilots of steamers passing each other on the Mississippi river.

In Admiralty.

The above entitled suits have been consolidated for trial and argument. These are actions growing out of a collision which occurred Oct. 16, 1872, about 4 p. m., on the Mississippi river, near the town of Louisiana, in the state of Missouri, between the steamboats Northwestern and Lake Superior. Both vessels were descending the river, the Northwestern with two loaded barges in tow, one on each side, and the Superior "flying light," or nearly so, without barges. The Superior was astern, and had made a crossing of the river, which brought her nearer the Missouri or western bank, and had straightened down, so that both vessels were in the regular steamboat channel. When the Superior had reached within 50 or 100 yards of the Northwestern, she blew her whistle to pass to the starboard, which was favorably answered. At that time the Northwestern was about 250 feet from the Missouri shore, and about one-fourth of a mile above the usual steamboat landing in Louisiana. The Missouri shore at this point was rocky, with large stones and boulders lying in the river. The Superior, in passing the Northwestern, struck her starboard barge on the after quarter with

her larboard wheel, walking up on it, breaking in the deck and causing it to sink. The grain and other freight in the barge that was struck being insured by the libelants, each has libeled the steamboat Lake Superior, claiming to have been subrogated to all the rights of the original owners. The libelants allege that the Superior was wholly at fault, while the claimant insists that the collision occurred for the reason that the pilot of the Northwestern, after he had answered the signal of the Superior, crowded her, and when she was passing and abreast of her, carelessly, and negligently, and unskillfully put his wheel hard to port, thereby causing the stern of the barge in tow on her starboard side to swing under the guard of the Superior just forward of her larboard wheel, and that it was impossible, on account of this faulty movement, for the steamer's wheel to avoid striking the barge. The Keokuk Northern Line Packet Company intervene as owners of the steamboat.

J. Ham Davidson, for libelants.

Davis, O'Brien & Wilson and William Hull, for claimant.

NELSON, District Judge. Several questions preliminary to the merits have been raised by the proctors for the claimant, and must be passed upon.

Jurisdiction.—The question raised in regard to the jurisdiction of the court is, in my opinion, against the claimant. The libel was filed upon the 29th of April, 1874, and the seizure under the process was made May 15th, following. The libel contained the usual allegation that the vessel was within the district, and it is undisputed that the seizure was made here. The claimant without objection intervenes, enters its appearance, and provides the necessary stipulation for the release of the vessel. Subsequently an answer was put in which went to the merits of the controversy, although it contained an allegation that the vessel was not within the jurisdiction of the court at the time the libel was filed. I am of opinion, inasmuch as no question is raised as to the service of the process within the district, the claimant, by pleading to the merits, has waived any irregularity existing on account of filing the libel at a time when the vessel was not within the district.

Insurance and Subrogation.—The libelants having paid the amount of insurance upon the freight which is alleged to have been lost through the fault of the steamboat Lake Superior, are by proper proceedings subrogated to all the rights of the original owners, and they have full authority to institute these suits to enforce their several claims. It is sufficient to say that in my opinion the proof of insurance is ample.

Staleness of Claim.—The claims are not stale. The collision occurred Oct. 16, 1872. At that time the steamboat Lake Superior was owned by the Northern Line Packet Company. March 13, 1873, she was sold to the Keokuk Northern Line Packet Company, the claimant defending, a company organized by a consolidation or purchase of the property of several packet companies, including "The Northern Line Packet Company," and "The Keokuk Packet Company," but although the transfer of the vessel was made at that time, the purchase price was not paid until some time in March, 1874. The officers of the claimant were fully advised of the claims made by the insurance companies before the purchase price was paid, and during the summer of 1873, and further the payment was made in the stock of the new company. The libelants were also for some time attempting a settlement without suit by negotiation, and as soon as they were convinced this could not be done, commenced these proceedings in admiralty.

Finding of Facts.—We come now to the merits of the controversy, and as the libelants do not allege the loss to have occurred through any fault of the Northwestern towing the barge, they can only recover upon the ground that the Superior was solely at fault, and that there was no negligence on the part of the Northwestern.

As usual in cases of collision, the testimony of the persons connected with the two boats is considerably in conflict, but from all the testimony introduced, I have been enabled to arrive at a satisfactory conclusion. On October 16, 1872, the collision took place near Louisiana landing. in the state of Missouri. The steamboat Northwestern, with two loaded barges in tow, and the steamboat Superior flying light, without any barges, were descending the Mississippi river. The Northwestern was ahead, followed by the Superior, and both boats were headed for the Louisiana landing. When the Superior had reached within fifty or a hundred yards of the Northwestern, and being nearer the Missouri shore, or west side of the river, than the latter, blew her whistle to pass on the starboard, or Missouri side, which was answered favorably. The Superior, when she reached the Northwestern and was in the act of passing, struck the starboard tow of the Northwestern "walking up" on the stern of the barge quartering, wounding it so that the loss complained of occurred. At the time of the collision, the Superior was distant on her starboard side about two hundred and fifty feet from the Missouri shore, and the Northwestern about five or six hundred yards from the Illinois shore, on her larboard side. There was plenty of room for the Superior to have passed the Northwestern on the larboard side when she whistled for the starboard. The Missouri shore and the bottom of the river at the place of collision was rocky and sandy, and the Superior could not with safety have gone nearer in attempting to pass than she did—if, however, she had slowed her engines, and run carefully, she could have passed on the starboard side of the Northwestern, unless the latter had turned toward either shore. After the

signals were exchanged the pilot of the Northwestern turned her bow to the larboard, and when the Superior came up alongside he kept her as nearly steady as possible. As the Superior commenced lapping on, the course of the Northwestern was again changed a little to larboard, which brought the barge in front of the Superior's wheel. The Superior did not slacken her speed after she gave the signal to pass, but kept right on and put herself in such near proximity that the gradual holding of the bow of the Northwestern to larboard when the Superior was abreast, rendered the collision unavoidable.

Conclusions.—It was the duty of the Superior to have exercised very great precaution when she gave the signal to pass on the Missouri side, which was stony and sandy at the point where the collision took place, particularly as there was plenty of room and water on the larboard side of the Northwestern. Under the 17th article of the act of congress of April 29, 1864 [13 Stat. 58], it was her duty to keep out of the way of the Northwestern, and if she desired to pass to the starboard when the Northwestern was heading for a landing on that side, less than one-fourth of a mile distant, she took the chances of there being sufficient and safe navigation to permit her passage under the circumstances. The 8th rule for the government of pilots which took effect January 1st, 1872, reads as follows: Rule 8th: "When steamers are running in the same direction, and the pilot of the boat which is astern shall desire to pass either side of the boat ahead, he shall give the signal as in rule 1, (viz.: one sound of the whistle to keep to the right, and two sounds to keep to the left,) and the pilot of the boat ahead shall answer by the same signal, or if he prefer to keep on his course, he shall make the necessary signals, and the boat wishing to pass must govern herself accordingly, but the boat ahead shall in no case attempt to cross her bow or crowd upon her course." This rule has reference in its application to the circumstances under which a passage is made. The boat ahead must not crowd or attempt to cross the bow of the boat astern, yet the latter boat must keep out of the way, and be governed in her efforts to pass so as to avoid a collision.

The signal of the Superior when answered gave her the right to pass to the starboard, and governed the pilot of the Northwestern in the management of his vessel, but the 8th rule when interpreted in the light of the 17th, 18th, 19th and 20th articles of the act of congress, of April 20th, 1864 [supra], cannot excuse bad management on the part of the Superior, or the neglect of any proper precaution on the part of her officers. The Superior thus attempting to pass to starboard suffered the vessels to get into dangerous proximity, and was in fault. The Northwestern was not justified in holding her bow to the larboard when she found the Superior was passing. The character of the shore and bottom of the river on the starboard side, and her position should have prevented a favorable answer to the signal of the Superior, but when the pilot had given the starboard side to her, he should not have executed the movement he did by porting the helm just as the Superior came abreast. The sudden turn of the bow was a faulty movement, and cannot be excused. It contributed to bring about the collision, and there was no emergency that demanded it.

The vessel towing the barge being equally at fault there can be no recovery in these suits, and the libels must be dismissed. Decrees accordingly.

ST. PAUL FIRE & MARINE INS. CO. (SIBLEY v.). See Case No. 12,830.

ST. PAUL WATER CO. (WARE v.). See Case No. 17,172.

Case No. 12,245.

The ST. THOMAS.

[Cited in Treat v. The Rainbow, Case No. 14,161. Nowhere reported; opinion not now accessible.]

Case No. 12,246.

SALA et al. v. NEW ORLEANS et al.

[2 Woods, 188.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1875.

CONSTITUTIONAL LAW — ACTS IMPAIRING OBLIGATIONS OF CONTRACTS — CITY BONDS — CORPORATIONS—STOCKOWNERS.

1. The charter of a bank authorized it to construct water-works for the city of New Orleans, and declared that after the expiration of thirty-five years, it should be lawful for the city to purchase said water-works on certain prescribed terms, and pay for them in its bonds, and the bank was, on the election of the city to purchase, required to sell on the terms prescribed: *Held* that this charter was a contract with the bank and that any act of the legislature afterwards passed imposing onerous conditions upon the issue of bonds by the city, so far as they might apply to bonds to be issued in payment for the water-works, impaired the obligation of the contract with the bank and was void.

2. Where the contract for the purchase of the water-works was executed and the city got the water-works and paid its bonds to the bank therefor, and the city did not deny its obligation to pay the bonds, nor threaten to do so, the bank could not repudiate the contract of sale on account of any supposed infirmity in the bonds.

3. The city having authority to issue the bonds, they are good in the hands of bona fide holders for value, whether the conditions precedent to their issue were observed by the city or not.

4. Therefore, parties holding only a portion of the bonds issued by the city in payment for the water-works could not undertake to repudiate the contract of sale without the consent of all the other holders of such bonds.

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

5. The ownership of the bonds issued in payment for the water-works did not make the holders thereof stockholders in the bank from which the water-works were purchased.

6. The ownership of stock in an incorporated company does not give the stockholders any title to the property of the company.

In equity. Heard on pleadings, proofs and arguments of counsel for final decree. The case as made by the pleadings and evidence was in substance as follows: The complainants [Pablo Sala and others] were holders of bonds of the par value of $116,300, issued by the city of New Orleans, and dated January 1, 1869—known as water-works bonds—and they filed the bill for themselves and all holders of similar bonds who might consent to become parties and contribute to the expenses of the suit. On the 1st day of April, 1833, the legislature of Louisiana passed an act [Laws 1831–32, p. 151] to incorporate the Commercial Bank of New Orleans, and by the same act, conferred on the bank the exclusive privilege of supplying the inhabitants and city of New Orleans with water, from the Mississippi river, by means of pipes, engines, and other machinery. Said act provided, however, that at any time after the expiration of thirty-five years it should be lawful for the city of New Orleans to purchase from said bank the water-works constructed by it, and that said bank should not refuse to sell the works aforesaid, on the terms prescribed by the act. By said act it was further provided that the price to be paid by the city of New Orleans for the water-works should be fixed by arbitrators, whose decision was to be conclusive, and the price so fixed was to be paid in the bonds of the mayor, aldermen and inhabitants of New Orleans, bearing five per cent. interest, and payable semi-annually, and on such payment being made the water-works were to be delivered to the city. On the 27th of March, 1868, the city council of New Orleans resolved to purchase said water-works on the terms prescribed by the act of 1833. The works were appraised by arbitrators at the price of $2,000,000, payable in city bonds. In pursuance of said award, the city and the Commercial Bank agreed that the said amount should be paid as follows: As the city was a stockholder in the bank to the amount of a half million of dollars, the city was allowed a credit for that amount on the said purchase price, and an additional credit of $106,600, that sum being the share of the city as a stockholder in said bank in a sinking fund belonging to the bank. After crediting these sums to the city, there remained a balance of said purchase money of $1,393,400, payable in city bonds. On the 19th of January, 1869, the bank, by an act passed before a notary public, sold and delivered the water-works to the city, and the said balance due on the purchase price thereof was paid to the bank in city bonds, having thirty years to run. These bonds were authorized by an act of the legislature, approved July 22, 1868 [Laws 1868, p. 6], which simply empowered the city to execute and deliver to the bank the bonds of the city in payment for the balance due on the purchase of the water-works, pursuant to the provisions of the said act of 1833, whenever there should have been an award as prescribed in said act, any law in force to the contrary notwithstanding. After the passage of the act of 1833, to wit, on February 23, 1852, the legislature passed an act by which the city was prohibited from issuing any bonds or contracting any debt, unless the same should be authorized by the vote of a majority of the qualified electors of the city, and which further declared that no ordinance of the city creating a debt or loan, should be valid unless such ordinance should provide for the full payment of such debt or loan, both principal and interest. Acts 1852, p. 42, No. 72. Afterwards, by an act approved April 29, 1853 (Sess. Acts 1853, p. 234, No. 258), the city of New Orleans was again prohibited from contracting any debt without providing in the ordinance creating the debt, for its full payment. This provision was reënacted by act No. 263, approved March 15, 1855 [Laws 1855, p. 325]. These acts of 1852, 1853 and 1855, it is alleged, were in full force until long after the issue of said water-works bonds to the bank.

The resolutions of the city council of New Orleans, providing for the purchase of said water-works, contained no provision for the payment of the principal and interest of the bonds delivered to the bank as the price thereof, and no vote was ever taken on the question of contracting the debt and issuing the bonds. It was alleged that the bonds issued by the city in payment for said water-works were and are null and void, because the provisions of the acts of 1852, 1853 and 1855, before referred to, were not observed; that the city had no authority to issue said bonds, and therefore paid nothing for the water-works, and obtained possession thereof without consideration; that the city had no power to make the contract of sale, and said contract should be rescinded and annulled, and said water-works declared to be the property of said bank, its stockholders and their assigns or representatives. The bill further alleged that the said one million three hundred and ninety-three thousand four hundred dollars of city bonds were distributed among the stockholders of the bank in proportion to their stock, but the interest of the city in said bank was balanced by a credit allowed on the purchase price of the water-works, as above set forth. Since the distribution of said bonds, which took place in 1869, the said bank had been deemed by its officers defunct, and there was no board of directors competent to manage its affairs, and no quorum of the late board could be convoked, on account of the death or absence of its members. It was charged that the city of New Orleans was negotiating for the sale or lease of said water-works, and if such

sale or lease was made, that it would work irreparable injury to complainants.

The bonds issued to the bank in payment for the water-works were widely distributed throughout the United States and Europe. The city of New Orleans had paid all interest on said water-works bonds due prior to January 1, 1875, and had paid the interest due January 1, 1875, to all persons who had presented their coupons for payment; but this last named interest was not paid until June, 1875, and the interest due July 1, 1875, and January 1, 1876, had not been paid. The reason for this failure to pay was want of funds to make the payment. It was claimed that those bondholders who were not stockholders in the bank at the time of the distribution of the bonds to the stockholders, were in equity entitled to all the rights vested in the stockholders of the Commercial Bank, who in the first instance received said bonds from the city. After the failure of the city to pay the interest due January 1, 1875, the complainants requested Jules Labitut, who was the last president of the Commercial Bank, to convoke a meeting of the persons who composed the last board of directors, to take legal steps in the name of the bank to rescind the sale made to the city of the waterworks, and to recover possession of the same, to which Labitut replied that he could not comply, because a quorum of the late board could not be called together, on account of the death of some members and the removal from the state of others. Several holders of the water-works bonds, whose bonds in the aggregate amount to $220,000, were made defendants to the bill. The prayer of the bill was that the city of New Orleans might be enjoined from selling, leasing or hypothecating the water-works, and that a receiver might be appointed to take possession of and conduct the same, collect and disburse the revenues under the order of the court, and hold the water-works until the final hearing of the cause. The bill prayed for no ultimate disposition of the waterworks, nor did it contain any prayer for general relief.

The answer of the city of New Orleans denied that the act of July 22, 1868, by which the city was authorized to issue its bonds in payment for the water-works, was void; denied that the act of February 23, 1852, or the act of April 29, 1853, or the act of March 15, 1855, prohibited the city from issuing such bonds as those issued in payment for the water-works, and averred that these acts were passed long subsequent to the act incorporating the Commercial Bank and authorizing the city to purchase the water-works and issue its bonds therefor, and that the provisions of said last named act were not inconsistent with or repealed by the provisions of the former acts. That the act incorporating the bank was an act which the legislature had the power to enact; that it had never been repealed; that the provision for the sale by the bank to the city of the water-works had all the force and effect of a contract, not only between the state and the city but between the bank and the state, which could not be affected by subsequent legislation. The answer denied that the water-works bonds issued by the city were void, but on the contrary averred that they were valid and binding obligations and were received by the bank in full payment of the purchase price of the water-works, and were the identical consideration for which the bank contracted. The answer further alleged that since the year 1869, when the charter of the bank expired, it has had no corporate existence either in law or in fact; that it has neither officers, board of directors, nor stockholders, and cannot be revived, and no person whatever has the right to represent it; and denied that those holders of water-works bonds who were not stockholders in the bank were in any manner subrogated to the rights of the stockholders who in the first instance received the bonds. The answer further insisted that there was no equity in the bill and that it ought on that ground to be dismissed.

Thomas J. Semmes and Robert Mott, for complainants, who cited Oneida Bank v. Ontario Bank, 21 N. Y. 497; Tracy v. Talmage, 14 N. Y. 162; City of Memphis v. Brown, 20 Wall. [87 U. S.] 319; McCracken v. City of San Francisco, 16 Cal. 628.

B. F. Jonas, City Atty., for defendants.

WOODS, Circuit Judge. As the cause is now submitted for final decree, it is too late to grant that part of the prayer of the bill which asks for a receiver to take possession and charge of the water-works until the final disposition of the case. The only other prayer is that the city may be restrained from selling, leasing or hypothecating the water-works. The theory of the complainants seems to be that the bonds issued by the city in payment for the water-works, being absolutely void for want of power in the city to issue the bonds and therefore to make the contract of sale, in which the issue of bonds formed a necessary stipulation, the sale was void and the Commercial Bank still remained the owner of the water-works; that the present holders of the city water-works bonds are subrogated to the rights and property of the bank, and the city ought to be enjoined from any act which would embarrass the title of the bondholders. In my judgment, the theory of the complainants is unsound.

The act of April 1, 1833, "to incorporate the Commercial Bank of New Orleans," and which constitutes the charter of the bank, with all its material provisions, is a contract between the state and the bank, the obligation of which cannot be impaired by subsequent legislation. Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 518; Providence Bank v. Billings, 4 Pet. [29 U. S.] 514; State Bank of Ohio v. Knoop, 16 How. [57 U.

S.] 369; Dodge v. Woolsey, 18 How. [59 U. S.] 331; Jefferson Branch Bank v. Skelly, 1 Black [66 U. S.] 436; The Binghampton Bridge, 3 Wall. [70 U. S.] 51; Allen v. McKean [Case No. 229]. As already seen, the charter provided, that at the expiration of thirty-five years, the city of New Orleans might purchase from the bank its water-works at an appraised value, and the bank was at the time specified, and on the terms specified, in case the city elected to purchase, required to sell. And section 42 of the act of incorporation declared, that the amount of the purchase price should be payable in the bonds of the city of New Orleans, bearing interest at the rate of five per cent. per annum, payable semi-annually, redeemable in not less than ten nor more than thirty years.

It seems to me, that the power of the city to issue bonds, in payment of the purchase money of the water-works, was clearly given by the charter of the Commercial Bank. It is just as clear, that the power of the city to buy the water-works and to issue its bonds therefor, was a provision of the charter of the bank, beneficial to the bank, and that it formed a part of the contract of the state with the bank, expressed in the charter of the bank. The state could not take away from the city the power of purchasing the water-works without interfering with the charter of the bank in a material particular. It seems to me clear, that after the thirty-five years from the passage of the charter have expired, and the city has, through its proper officers, elected to purchase the water-works, an act of the legislature forbidding the issue of the bonds, or imposing onerous conditions upon their issue, not in force at the date of the charter of the bank, would be a direct and palpable invasion of the chartered privileges of the bank. As soon as the city made its election to purchase, the right of the bank to sell the water works became absolute. The state had agreed, that under such circumstances the city should have power to purchase, and should purchase, and the bank should be compelled to sell, and should, in fact, have the right to sell, and should receive city bonds in payment, which bonds the city was authorized to issue. Any legislation which interfered with these powers and obligations, or any material terms thereof, the state was incompetent to pass. If, therefore, the acts of 1852, 1853 and 1855, were intended to impose conditions upon the issue of water-works bonds, not contained in the charter of the bank, they impaired the obligation of the contract between the state and the bank contained in the charter, and were, therefore, to that extent unconstitutional and ineffectual. The city, therefore, had power to issue the water-works bonds, they are not void, and the superstructure of the complainants, built on the theory that they were void, falls to the ground.

Another and conclusive answer to the complainants' claims is this: The bank agreed to take the city bonds for its water-works. The contract was executed and the exact consideration paid. The bank got the bonds and the city the water-works. The city has never repudiated the bonds or denied its obligation to pay them, principal and interest, and does not propose to repudiate them. Until it does so, the bank cannot rescind the contract and ask to have its property restored.

Another difficulty with the complainants' case is, that the bonds are valid and binding on the city in the hands of bona fide holders, whether the conditions precedent to their issue were observed or not. Van Hostrup v. Madison, 1 Wall. [68 U. S.] 291; Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 175. The city cannot, therefore, repudiate the bonds held by bona fide purchasers, if it would, and all holders are presumed to be bona fide.

The complainants and the defendants, who concur in the objects of the bill, only hold $400,000 of the water-works bonds, and there are nearly a million of other water-works bonds scattered over the United States and Europe. How does this court know whether this large majority of bondholders is willing to take back the water-works and surrender their bonds? The bonds are good in their hands and binding on the city.

Ought the possession of the city of its water-works, or its title thereto, to be interfered with until the bondholders express, at least, a willingness to give up the city's bonds which were paid as the purchase price of the property? Are not the parties to this bill assuming a good deal, when they, representing $400,000 of bonds, undertake to repudiate the contract of sale without consulting the holders of the other $900,000 worth of bonds, constituting a large majority of the whole? Suppose the holders of these $900,000 of bonds prefer their bonds to the water-works, and hold on to their bonds and insist on payment as they have the right to do, where does this court get the power to rescind their contract for them, and compel them to give up their bonds and take the water-works against their protest? It must also be borne in mind, that the city itself is an owner of the water-works to the extent of $606,000 in $2,000,000. Are we to pay no attention to this circumstance in passing upon the rights of the city?

But there are other difficulties in the way of any relief on this bill. The great mass of bondholders were not, at the date of the purchase, stockholders in the Commercial Bank, and never were. They hold city bonds, not stock in the Commercial Bank. And if the city had repudiated the bonds the day after their issue, that would not have made the holders of city bonds stockholders in the bank. And if it had that effect, neither they nor the original stockholders would have acquired any rights in the property of the Commercial Bank. The ownership of stock does not give the stockholders any title to the property of the corporation. Morgan v. Railroad Co. [Case No. 9,806]. The water-works

belong either to the city of New Orleans or to the Commercial Bank. But the latter is dead beyond resuscitation. It expired in 1869 by the terms of its charter, when it sold out its water-works. It may have made a bad sale but a sale was made. The bank got precisely what it contracted for. It has used the consideration paid for its property by distributing it among its stockholders, and having thus accomplished the purpose of its creation, it ceased to exist. It has been dead seven years. It has no charter, no officers, no board of directors, no property, no stock, no stockholders. This court cannot breathe into it the breath of life, and the relief contemplated by the bill can be granted only by the resuscitation of this defunct corporation.

I do not think the complainants are entitled to any relief upon the case made by the bill, least of all the relief which they ask. The bill must be dismissed at complainants' costs.

Case No. 12,247.

SALDERONDO v. The NOSTRA SIGNORA DEL CAMINO et al.

[Bee, 43.] [1]

District Court, D. South Carolina. Sept. 8, 1794.

TREATIES—PRIVATEER'S COMMISSION—NEUTRALITY LAWS—ALTERATIONS.

1. The courts of the United States cannot question the validity of the commission of a French privateer, whose prize is brought into our ports, by virtue of the 17th article of our treaty with France [8 Stat. 186].

2. What alterations in the equipment of such privateer will amount to a breach of neutrality.

[This was a libel by Don Josiah Ramon De Salderondo against the ship Nostra Signora del Camino and Hervieux and others.]

BEE, District Judge. It appears from the pleadings and evidence produced in this cause that this ship, the property of Spanish subjects, sailed from Cuba in May last, with a valuable cargo, bound to Spain. That on the 23d May she was captured on the high seas by the armed schooner Minerva, commanded by Hervieux, who put a prize-master and crew on board, and ordered her for Charleston. That two days after the Sans-pareille privateer joined them at sea, and also sent some men on board. That on the arrival of the prize at Charleston, she was entered at the customhouse as prize to the Sans-pareille: and that the cargo has been sold to several persons. It appeared in evidence that the Minerva was a French bottom, built at St. Domingo, and fitted out in the year 1792, to act against the brigands in that island. That on the breaking out of war she was the first vessel equipped and commissioned to cruize against the enemies of the French republic, and that she made some prizes. That when the British took Jeremie in 1793, this schooner was in the harbour, and was carried off by seven Frenchmen who passed the forts, notwithstanding they were fired upon. That she was soon after taken and carried to Jamaica, from whence she sailed again as an English privateer to cruize against the French. That she was then captured by the Atalanta, a French privateer, and sent to this port as prize. That she remained here from the month of January, till May, when she sailed from this port, and was reported at the customhouse as prize, both at coming in, and going out. It appeared that she had eight guns and eight swivels mounted, and two guns and two swivels in the hold; and that she was pierced for twelve guns. That she had also on board several boxes of arms at the time she was taken by the Atalanta, and that she had been furnished with new sails at Jamaica. The collector proved that she was reported and entered at the customhouse as having ten guns. That she went out with that number, and was not armed or equipped here. No proof was offered of her having any other commission than that under which she sailed before she was taken by the British. Two witnesses proved that she had received repairs in this port. Her quarterdeck was cut down, and maindeck laid flush, and four new swivel stocks were put up. She had a new foremast, sweeps, and new spars fore and aft, and some new sails. She was also furnished with ringbolts, bolts, iron stanchions, and an iron tiller. Five exhibits were filed, but are inadmissible, except the copy of the Sans-pareille's commission. Indeed, after the rejection of many of the same nature, not coming within either the letter or the spirit of the consular convention with France, I was rather surprised to find these introduced. In future, that the proceedings may not be too voluminous, I shall consider such exhibits on their first production, and admit or repel them then.

It was contended for the actor that all fitments for war in the ports of a neutral nation are illegal. That the law of nations protects Spain in this respect, though we have no treaty with her. That capture by a vessel having no commission, is unlawful; and prizes so taken, if brought into a neutral port, must be restored. That no change of property can take place before condemnation by some authorized tribunal; and that as the Minerva was made an English vessel by capture and condemnation, her original French character could only be restored in the same way. That by the marine law of France, certain regulations must be complied with before a commission to cruize will be granted; and that these regulations were not observed in this instance. That as Hervieux had no commission, he could have no right, and could transfer none to the captain of the Sans-pareille. That as no jus post-liminii could apply to the vessel, after condemna-

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

tion, neither could it renew the efficacy of the commission. That, even if the original commission could have survived, it must inure to the original possessor, and not to Hervieux. Moll. de J. Mar. pp. 9, 41; was quoted to shew a distinction between prizes made by public ships of war, and such as are made by privateers, and letters of marque; which last, if brought into a neutral port, before condemnation, must be given up. And it was added that, by more modern authorities, even public ships of war were subject to the same law. That though the 17th article of the treaty between the United States and France [8 Stat. 186] allows a temporary asylum, yet as no condemnation has taken place, and the property been sold here, the original owners may recover it.

The claimants, in support of their plea to the jurisdiction, rely on the 17th article abovementioned, as conclusive. They admit that by the general law of nations, property captured and brought into neutral ports may be delivered to the original owner; but they contend that the treaty alone must decide this case. That this treaty is the supreme law of the land, and takes away all jurisdiction from this court.

It was also conceded that the court could grant redress in the following circumstances: (1) Where American citizens capture the property of a nation, as the Dutch, with whom we have a treaty to the contrary. Such was the case of Talbot v. Janson [3 Dall. (3 U. S.) 133]. (2) Where French citizens capture American property, and bring the same infra præsidia of the courts of the United States. (3) Where the capture is made within neutral limits. (4) Where the capturing vessel has been equipped in our ports, contrary to the rights and duties of neutrality.

It is contended, however, that the present case does not come within either of these classes. That the citizens of France may rightfully capture the vessels of her enemies, with or without a commission, so far as concerns neutrals. That, in this case, the property having been sold, and passed into the hands of a third person, the spes recuperandi is gone. That the repairs made to the Minerva in our port were lawful, and that all the powers at war were privileged to the same extent. That the act of congress of 5th June, 1794, had settled the limits of jurisdiction in this court, and that they did not comprehend the present case. From this view of the evidence and arguments it is clear that the interference of this court can only be justified by such equipment of the privateer in this port as contravened the laws of neutrality.

All the cases, from Molloy, Vattel, Bynkershoek and others, relative to delivery up of prizes brought into neutral ports before condemnation, are superseded by our treaty with France. This has altered the general law of nations quoad the parties thereto, and all independent nations have a right to do this. Authorities to support the position are too common to need enumeration. Great stress was laid on the marine law of France, as containing indispensable regulations without due attention to which no lawful prize could be made. This might have weight before French tribunals on a question of right between the uncommissioned captor and his sovereign; and the lex loci might well apply. All the civil law writers admit that the prize might be made for the benefit of the sovereign; and it has been doubted whether the nation suffering by such unauthorized capture might punish the captor for piracy, if he should fall into their hands. But it never was supposed that a neutral nation could do this.

It must also be conceded that a distinction was formerly taken between national and private ships of war, as to the restitution of prizes brought into a neutral port. But this difference is no longer made; and the whole matter seems finally settled by modern decisions, particularly by the case in 4 Durn. & E. [4 Term R.] 386, 387 [Lord Camden v. Home], which must enforce conviction wherever it is read. In the case of Talbot v. Janson, 3 Dall. [3 U. S.] 133, the prize was restored because our treaty with Holland had been violated. No such thing is pretended now. This vessel has been proved to have been originally French, and this court will not inquire into the circumstances of her capture by the British, and subsequent recapture by a vessel of her own nation. She came into our ports armed and equipped for war; and the alterations and repairs made during her stay here did not amount to an infringement of our neutral rights. The fixing of four new stocks for swivels, and procuring two carriages for the guns in her hold might have brought her within the act of the 5th June; but she had sailed previously to the passing of that act. The president's instructions permitted such alterations and additions, even if doubtful in their nature, as regarded defence or war; and all the belligerents were entitled to the same privilege.

Upon the whole, I consider the 17th article of our treaty with France as conclusive against the jurisdiction of this court, and I dismiss the libel with costs.

SALE (PENNINGTON v.). See Case No. 10,939.

SALEM (WYTHE v.). See Case No. 18,121.

SALEM FLOURING MILLS CO. (OLIPHANT v.). See Case No. 10,486.

Case No. 12,248.

The SALEM'S CARGO.

[1 Spr. 389;[1] 20 Law Rep. 669.]

District Court, D. Massachusetts. March, 1858.

CHARTER PARTY — WAIVER — GOODS SOLD AT INTERMEDIATE PORT — PENAL SUM — SHIPPING — MASTER.

1. Where a libel against the cargo was filed, to recover the balance due under a charter-party, before the cargo had been discharged from the vessel, *held*, that a previous agreement by the claimant, that such a libel should be commenced, and his assisting the officer in arresting the goods, and afterwards obtaining them, by giving stipulation, without objection, was a waiver of any right which he might have had to object to the time of instituting the suit, as premature.

[Cited in The Hyperion's Cargo, Case No. 6,987; The L. B. Snow, 15 Fed. 284; The Peer of the Realm, 19 Fed. 217; Clark v. Five Hundred and Five Thousand Feet of Lumber, 12 C. C. A. 628, 65 Fed. 242.]

2. The master of a vessel cannot vary the contract made by his employers with the charterers.

3. He has no authority, by signing bills of lading, to waive the lien of the ship-owner, on the goods of the charterer, and such bills of lading will not give a right to persons who take them, with knowledge of the charter-party, to have the goods free from the lien.

[Cited in The Eliza, Case No. 4,347; Borland v. Zittlosen, 27 Fed. 133.]

4. Where certain goods shipped abroad, were sold at an intermediate port, and the proceeds applied to the payment of freight, under the charter-party, such goods were not subject to a lien for the charter-money due, on arriving at the ultimate port of destination.

[Cited in The Hyperion's Cargo, Case No. 6,987.]

5. The lien of a ship-owner, on the goods of a charterer, is not limited by the amount of the penal sum in the charter-party.

[Cited in Watts v. Camors, 115 U. S. 361, 6 Sup. Ct. 94.]

The libel in this case was brought by the owner of the bark Salem, to recover the balance due under a charter-party. The bark was chartered in August, 1856, by Barnes, Jennings & Co., of Boston, for a voyage to one or more ports on the east coast of South America, and back to any port in the United States, except New York, at the rate of $1,200 per calendar month, payable in United States currency, or its equivalent; what the master might require in South America, to the extent of the charter earned, was payable there, the balance to be paid on return, and discharge of the cargo in the United States. The master was instrucied by the owner of the vessel, to collect all the freight-money that should be due, before discharging the cargo in South America. The penal sum in the charter-party was $7,000. The vessel proceeded to Rosario, South America, with a cargo belonging to the charterers, which was there discharged, the master taking a guaranty from a merchant in that place, for the payment of the freight due. Subsequently, Mr. Henry Brackett, one of the firm that chartered the bark, who went out on board of her, induced the captain, by paying him $400, to give up the guaranty, and take drafts to the amount of $4,800,—the freight money then due,—drawn by said Brackett on Barnes, Jennings & Co., the charterers, the captain signing a receipt to that amount, on account of charter-party. Mr. Brackett testified that the cash was worth $800 more to him, at Rosario, than the drafts. He then purchased seven bales of horse hair, seven hundred hides, thirty-nine bales of Cordova wool, together with a few other goods, shipped them on board of the bark, for a return cargo, and proceeded to Buenos Ayres, before her. There he invested the balance of the proceeds of the outward cargo in wool, and other parties shipped goods on freight. When the bark arrived there, the master was in want of money, and the charterer was obliged to sell the seven hundred hides, and nine bales of the Cordova wool, to raise funds, which were paid over to the master, on account of the charter-party. The master gave the purchasers bills of lading, agreeing to deliver the goods at Boston, for a stipulated freight. Mr. Brackett, finding it impossible to procure a cargo with his own funds, or on freight, applied to the claimants [Hugo Bunge and others], merchants in Buenos Ayres and New York, for an advance. They agreed to advance $24,000, a large part of which was to be invested in goods to be shipped by them to their house in New York, as security for the advance. For further security, it was agreed that, for the goods already purchased by the charterer, and a part of which, at least, was on board, bills of lading should be procured from the master, reciting that the goods were shipped by Daniel Gowland & Co., per order of Henry Brackett, to be delivered at Boston to order or assigns, and that such bills of lading should be indorsed to the claimants. The claimants knew of the existence of the charter-party, and refused, in consequence of difficulties which they had previously had, growing out of charter-parties, to make the advances, unless the master would sign bills of lading, agreeing to deliver the goods at a certain freight. These bills of lading were signed by the master, and indorsed by Gowland & Co., to the claimants, and the advance was made.

The drafts received by the master were never accepted or paid, and the charterers became insolvent, long before the bark returned to Boston. On her arrival there, the libellant claimed to hold the cargo to secure the payment of the whole balance due under the charter-party, amounting to nearly $9,000, and offered to discharge and deliver the cargo, on payment of that sum. The claimants refused, in any event, to pay more than

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

the amount due under the bills of lading, which was about $1,300. The claimants entered the goods at the custom-house, and paid the duties, and a permit to discharge the cargo was under their control. While the bark was in the charge of the revenue officers, a creditor of the charterers attempted to attach the goods, and placed a keeper on board of the bark. It was agreed between the libellant and the claimants, that, for the purposes of any suit to be brought by the former, a tender of the amount due, according to the terms of the bills of lading, should be considered as having been made. It was also agreed between them, before the libel was filed, that the inspector, with the permit, should accompany the marshal of the United States to the vessel, to give him an opportunity to arrest the goods, as soon as the hatches should be opened, and that as soon as they were arrested, they should, while in the custody of the marshal, be stored in the warehouses of the claimants, and at their expense. After the goods were arrested, the claimants obtained possession of them by stipulating in court.

At the hearing, the libellant contended that the master had no authority to sign the bills of lading which were indorsed to the claimants, and that he had a lien on the goods shipped by Gowland & Co., for the whole balance due under the charter-party, after deducting a small amount due, under the bills of lading, for the freight of goods shipped by third parties.

The claimants, among other things, contended that the master had authority to sign the bills of lading, and that they were entitled to the goods, on payment of the freight due under such bills of lading; that if the goods in question were liable for any more than that amount, the other goods shipped by the charterers at Rosario, were equally liable with them, and should pay their proportion of the charter money; that the drafts taken by the master at Rosario were received in payment, and that the lien on the goods, for the amount for which they were taken, was thereby waived; that the claim of the libellants was limited to the amount of the penal sum mentioned in the charter-party; and finally, that the libel, having been filed before the discharge of the goods, was prematurely brought, and should therefore be dismissed.

P. W. Chandler and G. O. Shattuck, for libellants.

F. C. Loring and C. F. Choate, for claimants.

SPRAGUE, District Judge. The acts and agreement of the claimants are a waiver of any objection which he might have had to the time of bringing the libel. And if there had been no waiver, it would be in the power of the court, by giving costs or otherwise, to give to the claimant a complete indemnity for all the loss or inconvenience he can sustain by the premature commencement of the suit. And it would not have been necessary to dismiss the libel, which, as the goods have now gone beyond the reach of process, would defeat the remedy against them. It is not the practice of courts of admiralty to favor formal or technical objections, to the sacrifice of substantial justice.

The taking of the drafts by the master did not in law constitute a payment. It was not shown, and it is not to be presumed, that the master intended to receive them in payment, and they had no effect upon the lien which the ship-owner might have for the amount due him.

By the charter-party, the owner of the vessel was entitled to a lien upon all the goods of the charterers, at least, if not upon those of other parties, for the payment of all that should be due to him. This was, in legal effect, a part of the contract between the owner of the vessel and the charterers. It is clear, upon principle, and well established by authority, that the master cannot change the contract made by his employers with the charterers. He could not, therefore, while at Buenos Ayres, rightfully make any agreement by which the goods of the charterer should be shipped, and not be subject to the lien for freight under the charter-party; and such agreement, if made by him, would give no rights to a person who entered into it with the knowledge of the charter-party. Nor would the master's attempt afterwards to carry such an agreement into effect, by giving a bill of lading pursuant thereto, strengthen the right of such person. It appears by the testimony of Brackett, who was a witness for the claimants, that they knew of the existence of the charter-party, and declared that they had been troubled on former occasions by charter-parties, and therefore entered into an agreement for the bills of lading, and received it for the purpose of depriving the ship-owner of his lien. If such an arrangement had been made with the libellant himself, it would have been valid, but as the master had no authority to make it, it cannot bind the libellant, or give any right to the claimants. The hides and nine bales of wool purchased at Cordova, having been sold at Buenos Ayres, and the proceeds having been applied to the payment of the freight under the charter-party, they have contributed their proportion of it, and are not now liable for the balance. The amount of the ship-owner's claim on the goods is not limited to the penal sum mentioned in the charter-party.

A decree was entered for the libellant for the full amount claimed and costs.

NOTE. Foster v. Colby, 3 Hurl. & N. 704; Kirchner v. Venus, 33 Law T. 81; Certain Logs of Mahogany [Case No. 2,559]; The Volunteer [Id. 16,991]; Ruggles v. Bucknor [Id. 12,115]; Raymond v. Tyson, 17 How. [58 U. S.] 59; Pinney v. Wells, 10 Conn. 104; The Freeman, 18 How. [59 U. S.] 182; Gilkison v. Middleton, 2 C. B. (N. S.) 134; Gracie v. Palmer,

8 Wheat. [21 U. S.] 605; Gledstanes v. Allen, 12 C. B. 202; Lamb v. Parkman [Case No. 8,020].

Case No. 12,249.

SALEM & L. R. CO. v. BOSTON & L. R. CO.

[21 Law Rep. 210.]

Circuit Court, D. Massachusetts. May Term, 1857.

REMOVAL OF CAUSES — APPLICATION FOR WRIT — WHAT MUST STATE.

An application for a writ of certiorari to remove a cause from a state court to the circuit court of the United States, under the act of congress of March 2, 1833 (4 Stat. 632), must state facts sufficient to enable the court to decide whether the case is one within the provisions of the act. It is not enough that the petitioner alleges in general terms that he intends to rely, in his defence to the suit, upon the revenue laws of the United States.

This was an application for a writ of certiorari, to remove to this court for trial the record of a cause pending in the supreme judicial court of the commonwealth of Massachusetts. The application was made under the act of March 2, 1833 (4 Stat. 632.) After alleging that a suit in equity had been brought and was pending in the state court against the petitioners as defendants, the application proceeded: "And the said defendants further represent, that in the defence of said suit or prosecution, they claim right, authority and title to do all the acts which have been done by them, and all the acts which they intend to do in the premises, under a revenue law of the United States of America, to wit, under the second section of an act of congress, passed and approved by the president of the United States of America, on the seventh day of July, in the year eighteen hundred and thirty-eight, entitled 'An act to establish certain post routes, and to discontinue others;' and under other revenue laws of the United States of America."

G. Minot and T. Wentworth, for petitioners.

R. Choate, contra.

CURTIS, Circuit Justice. The third section of this act [4 Stat. 632] provides in substance for the removal to this court of any suit or prosecution commenced in a state court against any person who asserts a justification or excuse for the act complained of, under the revenue laws of the United States. The first step towards such a removal is the presentation of such a petition as is required by the act. In enumerating the particulars which are to be contained in or are to accompany the petition, it is not expressly mentioned that the petition must show that the acts complained of in the suit or prosecution were done, or are asserted to have been done, under a revenue law of the United States. But as this is made by the act the essential cause for the removal, and is the only substantive ground, under the constitution of the United States, for transferring the case from a state court to a court of the United States; and as the object of requiring a petition is to show the grounds for such a removal, and the allowance of the writ of certiorari and the removal of the case are based, by the act, on the petition, it cannot be presumed that the act has failed to require this main and essential ground to be shown by the petition The mode in which the act of congress has provided for this is in the requirement that the petition should set forth "the nature of the case." Having granted the right of removal in a case where the act complained of was done under or by color of the revenue laws of the United States, in other words, wherein there is a question to be tried whether a justification or excuse can be made out under those laws, and having provided for a petition to be filed showing "the nature of such suit or prosecution," the inference is that its nature must be shown, for the purpose of determining whether it be a case the removal of which is authorized. And if so, the petition must show a case of such a nature that there is to be tried in it a justification or excuse in some way arising under the revenue laws of the United States. It must be added that the facts stated must show such a case. It is not enough that the petitioner should show that a certain suit or prosecution has been commenced against him, and then should allege that he intends to rely on some revenue law of the United States in his defence. He must so far exhibit the nature of the case, including not only the grounds of the claim or complaint, but of his defence thereto, that, upon the facts, it may appear that some material question may arise under those laws. Otherwise the petition would not state a case for removal, but only the request of the petitioner, and his opinion and that of his counsel that he had such a case. I do not think the just interpretation of the act authorizes a writ of certiorari upon such a statement of the mere opinion of the petitioner and his counsel. In compliance with the requirement of the statute to state the nature of the case, facts, and not merely opinions or conclusions of law, should be set forth, so that it may appear whether in judgment of law such a case exists as enables the petitioner to call for a removal.

As was said by Chief Justice Marshall, in Randolph v. Barbour, 6 Wheat. [19 U. S.] 127: In summary proceedings, where a court exercises an extraordinary power, under a special statute prescribing its course, we think that course ought to be exactly observed, and those facts especially which give jurisdiction ought to appear, in order to show that its proceedings are coram judice. Nor does the provision that this writ may be issued by the clerk, in vacation, show that such facts as in judgment of law are essential to make a case of jurisdiction, need not be stated in the petition. For though the clerk cannot exercise any part of the judicial

power of the United States, and therefore cannot say with any conclusive effect whether a case is or is not made by the petition, yet whenever the court is next in session, a motion to quash the certiorari issued by the clerk, and remand the cause, because the petition does not show a case for removal, would bring the judgment of the court to operate on the petition and to decide whether it was sufficient. Besides, this argument that the petition need not state a case which in point of fact showed a defence under the revenue laws of the United States to be possible, in judgment of law, because in vacation the clerk is required to issue the writ, would exempt the petitioner from every requirement of the statute. Some judgment and discretion and knowledge of the law are necessary for the performance of the duty, to see that the petition contains what is required by the statute upon any construction which may be given to it. This is to be done by the clerk, if in vacation. If he does the act, he acts ministerially, and in subordination to the controlling power which the court exercises over the acts of all its officers. If the court does the act, it acts judicially and finally, subject only to appellate power. But whether one or the other allows the writ, the requirements of the statute must be complied with, whatever those requirements may be.

The case is this. A suit or prosecution has been rightly commenced and is pending in a court of a state; it is to be removed from that jurisdiction, and transferred to a court of the United States by an exercise of the supremacy of the constitution and laws of the United States. It is reasonable in itself, and is demanded by the long settled rules concerning similar cases, that the facts constituting a case or the exercise of that supremacy, under the constitution and laws of the United States, should appear on the record as the basis of the jurisdiction. So it was held from the origin of our federal courts, even where suits were originally commenced therein; so it was required by the twelfth section of the judiciary act of 1789 [1 Stat. 73], and so I consider it is required by this act, when it says, "the nature of the case" must be set forth. The petition now presented does not meet this requirement. It does not state any case which enables the court to see that its nature is such that the acts complained of were done, or alleged to be done, under any revenue law of the United States; or that its trial will, in any way, involve an adjudication upon any defence arising under one of those laws. It represents the opinion of the petitioners and their counsel, that the acts complained of were done under and by virtue of a particular law specified, and other revenue laws. If the acts complained of, and the other facts constituting the nature of the case, were exhibited, the court might or might not accord with the opinion expressed in the petition. But before it acts it must form its own opinion upon that question on which its jurisdiction depends, viz., whether this suit, the removal of which is prayed, is founded on anything done under the revenue laws of the United States, or under color thereof; and to form such opinion it must be possessed of the facts upon which that opinion is a conclusion of law.

For the reason that this petition shows no such case, its prayer must be denied. Nor is this merely a technical objection, one which, being disregarded, there is still matter enough on the face of the petition to enable the court to act upon its merits. In my opinion the question whether a law concerning the carriage of the mail is a revenue law, within the meaning of the act of 1833, now in question, cannot safely be determined upon a mere inspection of the law itself without knowing what are the particular facts upon which the question arises. I am not now prepared to say, that under no circumstances can a right or title be claimed under such a law, which would enable the defendant in a suit or prosecution to remove the case to this court for trial under the act of 1833; I must judge on each case as it arises, and to do so I must know what this act terms "the nature of the case." Petition dismissed.

Case No. 12,250.

SALENTINE v. FINK.

O'NEIL v. SAME.

[8 Biss. 503; 8 Reporter, 489; 11 Chi. Leg. News, 384; 20 Alb. Law J. 335.] [1]

Circuit Court, E. D. Wisconsin. April, 1879.

EXEMPTIONS—HOMESTEAD—CONGRESS—PRESUMPTIONS—PRINCIPAL AND SURETY—ACTION AGAINST SURETY.

1. In final process on a judgment in a suit upon a bond given to relieve property from seizure for violation of the revenue law, the homesteads of the sureties upon such bond, in Wisconsin, are exempt. The action and judgment upon the bond must be considered as a civil proceeding.

2. It is competent for congress to pass laws declaring whether there shall be an exemption or not, but there having been no legislation upon that subject, it may fairly be inferred that it was intended to leave the question to the legislation of the states respectively.

3. Where there is no language in the exemption law indicating whether or not such exemption is to apply to the government, it will be construed as applying as well to the state as to the individual.

4. Congress not having legislated upon the subject, a writ in favor of the United States in a civil case cannot be levied upon a homestead exempt by the state law from levy under process of the state courts. It seems: that if congress chooses to legislate on the subject, the U. S. courts would not be bound by state exemption laws.

[These were actions by Matthias Salentine against Henry Fink, marshal, and Thomas

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 8 Reporter, 489, and 20 Alb. Law J. 335, contain only partial reports.]

O'Neil against the same defendant, asking that Fink, as marshal, be restrained from selling plaintiffs' homesteads.]

Murphey & Goodwin, for plaintiff.
G. W. Hazleton, Dist. Atty., for defendant.

DRUMMOND, Circuit Judge. These cases grow out of the following facts: Salentine was a rectifier, and for a violation of the internal revenue laws his property was seized under a process issued by the United States. While thus in possession of the officer a bond was executed by himself and sureties, and his property released from seizure. After this was done, a suit was brought by the United States on the bond against Salentine and the sureties, and a judgment recovered. Upon that judgment the United States sued out an execution, and the homesteads of the sureties were levied on under the execution. Thereupon, the sureties each filed a bill against the marshal who had the writ and who made the levy, asking that he be restrained from selling the homesteads of the plaintiffs.

The question is, whether, under a judgment and execution thus obtained by the United States against a resident of this state, under the law as it stands, a homestead can be levied on and sold. I am of the opinion that it cannot. It is to be observed that this must be considered, at least as to the sureties, a judgment in a civil suit. It was rendered because the defendants in the suit had not complied with the condition of the bond. It was, therefore, simply an action and a judgment upon the bond which had been given. Under the law of this state, the homestead of everyone is reserved from execution and sale, without regard to its value. The language of the statute of this state is:

"A homestead, to be selected by the owner thereof, consisting, when not included in any city or village, of any quantity of land not exceeding forty acres, used for agricultural purposes, and when included in any city or village, of a quantity of land not exceeding one-fourth of an acre and the dwelling house thereon and its appurtenances, owned and occupied by any resident of this state." Rev. St. Wis. 1878, c. 130, § 2983.

The question is whether that is applicable to the United States. It must be borne in mind that real estate was not at common law subject to lien and sale on execution.

I have no doubt that it is entirely competent for congress to pass such laws upon the subject of executions issuing out of the courts of the United States as it chooses. It can declare whether there shall be an exemption or not, and to what extent, but there has been no legislation of congress upon the general subject in cases of civil actions brought by the government against citizens or residents of the United States. This question has been left almost exclusively to the legislation of the states. And the main ground upon which I put the case, and hold that the United States cannot levy upon and sell the property of the plaintiffs, is, that there has been no legislation of congress upon the subject, and because it is fairly inferable that it was intended to leave the question to the legislation of the states, respectively.

Undoubtedly these statutes of exemption by the states do not include cases where property is liable for taxation, unless the language clearly indicates that for the taxes the property shall not be liable to seizure and execution, and if this were for a tax that had been imposed by the government upon the land, of course it would not be exempt from execution and sale. But I find that the general current of authority clearly is that where there is no language in the statute of a state used to indicate whether or not the exemption is to apply to the state, that the courts have generally construed it to apply as well to the state as to individuals. See the authorities cited in Thomp. Homest. & Ex. § 385. Therefore, if this were a judgment recovered by the state against these parties for an ordinary debt due upon a bond, the homestead would be exempt under these decisions, and being so exempt in the case of a judgment for a debt, obtained by the state, and execution thereon, it is also exempt, I think, under the same circumstances where the execution issues on the part of the United States. The case in Kentucky, cited on the argument, seems to be an exception to the general current of authority upon this subject.

Of course the law of this state is very liberal in relation to the value of the homestead. It is without limit as to value, and many people think that it is even unreasonable. But it is a question for the legislature of the state or for congress, and not for the courts. If congress sees fit to legislate upon the subject, its legislation would be binding upon the property of the citizens and residents of the states, respectively, because congress undoubtedly has a right to prescribe what shall be taken on execution in favor of the United States, on judgments obtained in its own courts.

I think this view is strengthened by section 916 of the Revised Statutes of the United States: "The party recovering a judgment in any common law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted, which may be adopted by general rules of such circuit or district court."

It may be said it was not intended to include the government by the term, "the party recovering a judgment." And that would have great force, if, as I have already intimated, it had not been decided by the vari-

ous courts that have had the question before them, that although the state is not named, it is included. So that, in the absence of any legislation by congress upon the subject, we must hold that the homestead in this case was exempt from levy and sale on execution.

SALENTINE (UNITED STATES v.). See Case No. 16,213.

SALINE COUNTY (MERRIWETHER v.). See Case No. 9,485.

SALINE COUNTY (PEPPER v.). See Case No. 10,972.

Case No. 12,251.

SALISBURY v. SANDS.

[2 Dill. 270.] [1]

Circuit Court, D. Nebraska. 1871.

NEBRASKA ORGANIC ACT — TERRITORIAL COURT JURISDICTION—SERVICE ON NON RESIDENTS —VALIDITY OF DECREE.

1. Under the organic act, the legislative authority of the territory of Nebraska could provide, in suits relating to property in the territory, for personal service upon non residents outside of the territory, or for constructive service by publication, notwithstanding the provision in section 11 of the judiciary act [1 Stat. 78] requiring personal service in the district.

2. A decree of foreclosure rendered by the territorial court upon personal service outside of the territory and constructive service by publication is not void when collaterally attacked, although there may have been defects or irregularities in the proceedings for which the decree might have been reversed on appeal.

3. Legislation of the territory of Nebraska respecting mode of procedure in the territorial courts reviewed.

4. The territorial district courts possessed general original chancery jurisdiction, and a foreclosure decree therein, when collaterally attacked, is entitled to the usual presumption in favor of the jurisdiction of the court and the regularity of its proceedings.

The complainant, Mrs. Salisbury, made to the defendant, Sands, in 1858, a mortgage upon certain real property in Omaha, in the then territory of Nebraska. At that time Mrs. S. resided in Omaha, but subsequently removed to, and now resides in, St. Louis, in the state of Missouri; and this bill—filed in this court in 1870, as stated in Sands v. Smith [Case No. 12,305]—is to redeem the property from the mortgage. In 1861 the mortgage was foreclosed, or attempted to be, in the proper district court of the territory of Nebraska. The principal controversy between the parties is whether the right to redeem is barred by the foreclosure decree, which the bill charges to be void for want of jurisdiction in the court which rendered it. In respect to those proceedings the bill avers in substance, the following: That Sands brought his bill to foreclose on February 14, 1861, in the territorial district court, and at the November term in that year obtained a decree of foreclosure. It is stated that this decree was void, because the complainant (Mrs. Salisbury) was not served with process, nor was there any publication of the suit as required by statute in case of non-residents, nor did she appear to the suit. She avers that she resided at the time in St. Louis, and distinctly states that she was not personally served. The affidavit of publication is alleged by the bill to be defective in that it did not show the cause of action to be of the kind in which service by publication was authorized, nor that complainant could not be served within the territory. It appears from the record of that suit that a subpœna in chancery was issued, February 14, 1861; that the sheriff authorized, by written indorsement thereon, one Rawle to serve it in St. Louis, and Rawle's affidavit, annexed to it, and his testimony taken in this suit, each shows that he served the same by reading it to the complainant in St. Louis, and delivering her a copy thereof on the 25th day of February, 1861, but it does not appear that she was served with a copy of the bill of complaint. The subpœna thus served in St. Louis was returned with affidavit of service annexed, and filed in the court, March 2, 1861. On the same day (March 2, 1861) the attorney for the plaintiff in the foreclosure suit filed an affidavit in the cause stating that the cause of action arose in the territory, and that the defendant therein (present plaintiff) was a non-resident thereof. The affidavit does not state, otherwise than by stating that the defendant was a non-resident, that service could not be made within the territory; nor does it state that the action was for the foreclosure of a mortgage, although the bill showed, as well as the published notice, that such was th nature of the suit. No order of publication, made by a judge or master, appears in the record of the foreclosure proceeding, but the record thereof contains a notice of publication, dated March 9, 1861, directed to the defendant in the suit (Mrs. Salisbury) stating that a bill of foreclosure was filed, the time when she must plead, and the object and prayer of the bill; and an affidavit of publication in the Nebraskian accompanies it, showing that it was published in that paper for five consecutive weeks from and after March 9, 1861. The order of court referring the cause to a master, passed October 16, 1861, recites that it appears "that there has been due service of process upon the defendant, Lydia A. Salisbury;" and on November 4, 1861, a decree of foreclosure pro confesso was entered in due form, on which the property mortgaged was soon afterwards sold to the mortgagee, the present defendant, who entered at once into the possession thereof.

J. M. Woolworth, for complainant.

Redick & Briggs and Henry R. Mygatt, for defendant.

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

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

DILLON, Circuit Judge. It is insisted by the complainant that the decree of foreclosure is void because the service made out of the territory was in violation of section 11 of the judiciary act, which provides that "no civil suit shall be brought before either of said courts (i. e. circuit and district courts of the United States) in any other district than that of which he (the defendant) is an inhabitant or may be found at the time of serving the writ."

In my opinion, this restriction did not apply to the territorial courts of Nebraska; at all events, it did not limit the legislative power of the territory under the organic act, which was declared (section 24) "to extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act." The organic act declared that the district courts of the territory should "possess chancery as well as common law jurisdiction," which jurisdiction "shall be as limited by law." Section 27. It was not competent for the territorial legislature to deprive the courts of chancery jurisdiction. Dunphy v. Kleinsmith, 11 Wall. [78 U. S.] 610. But it was competent for it to provide, notwithstanding section 11 of the judiciary act, that non-residents (in suits relating to property in the territory) might be served personally outside the territory or by publication in the manner practised in all the states.

On the 1st day of November, 1858, the territorial legislature adopted a Code of Civil Procedure for the territory. On the 4th day of November, 1858, it was specially enacted "the judges of the district courts shall establish rules to regulate remedies and proceedings in chancery." The Code expressly authorized summons in certain cases to be served out of the territory, and provided the mode. Code 1858, § 60.

In the rules in chancery adopted by the judges under the statute of November 4, 1858, they provided that a subpœna should be the first process in equity, and as to the mode of service and return adopted the provisions of the Code of Civil Procedure, and declared that it should include foreclosure suits.

The Civil Code provided (section 69) for service by publication in certain cases relating to property, and in terms included an action for the sale of real property under a mortgage (section 44). The Code provides that "before service can be made by publication an affidavit must be filed that service of a summons cannot be made within the territory on the defendant, and that the case is one of those mentioned in the preceding section." When such affidavit is filed, the party may proceed to make service by publication. Section 70.

The fifth equity rule adopted by the judges also provided for service by publication, but required the affidavit setting forth the facts authorizing service in this mode to be presented to the judge or master, who was to order the publication and name the newspaper.

No such order appears in the record of the proceedings of the foreclosure suit. The Code of 1853 contained this provision: "Sec. 73. In all cases where service may be made by publication, personal service of a copy of the summons and complaint may be made out of the territory." This section was amended by an act passed January 11, 1861, which provides that section 73 of the Code be so amended as to read as follows: "In all cases where service may be made by publication, and in all other cases where the defendants are non-residents, and the cause of action arose in the territory, suit may be brought in the county where the cause of action arose, and personal service of the summons may be made out of the territory, by the sheriff or some person appointed by him for that purpose."

Service upon the defendant in the foreclosure suit was made or attempted to be made in two ways: First, by personal service of process in St. Louis; second, by publication in the manner before stated.

The question is, whether the decree rendered on this service is void. It is to be recollected that the court rendering it was one of general original jurisdiction, and that a bill had been regularly filed relating to a subject matter confessedly within its cognizance. I am inclined to think that personal service in a foreclosure suit was authorized by the Code, §§ 44, 60, 69, 73, which in terms extends to foreclosure suits, but if not, then by the power which was given to the judges by the special act of November 4, 1858, above mentioned, and their action, expressly adopting by rule those provisions of the Code authorizing such extra-territorial service.

If it be conceded that regularly a copy of the bill should have been served with the subpœna, this defect, although one for which the decree might have been reversed, does not make it void.

But I rest my opinion that the decree was not void upon the effect which I give to the publication of the notice. The Code, § 44, provides that actions "for the sale of real property under a mortgage lien," etc., shall be brought in the county where the subject of the action is situated. Section 69 of the Code enacts that "service may be made by publication in either of the following cases: in actions brought under the forty-fourth (44) section of this Code, where the defendants reside out of the territory;" and the next section (70) authorizes such publication upon the filing of an affidavit therein mentioned without any order of court. The rules of the judges authorized publication in such cases, but required a previous order of a judge or master.

It is contended by the complainant: First, that the Code has no relation to chancery

suits, and hence it does not apply to this foreclosure proceeding; and, second, that the power given to the judges "to regulate proceedings and remedies in chancery" did not authorize them to adopt rules on the subject of serving non-residents, either personally or by publication, or, if it did, that their rule was not complied with, because the affidavit for the publication was defective and no previous order was obtained. If these positions are sound, it would probably have the effect to invalidate nearly every decree rendered by the territorial courts against non-residents or their property. I do not agree to the position that no portion of the Code can apply to chancery suits. Construing section 69 with section 44, to which it refers, I see no difficulty in holding that it authorized publication in foreclosure suits in the manner therein provided. But if this were not so, and if no part of the Code relates or was intended to relate to chancery suits, I could not then resist the conviction that in the special act of November 4, 1858, the legislature intended to confer authority of a most extensive nature upon the judges, one sufficient to authorize them to adopt the rules they did in respect to service by publication.

I therefore place my opinion that the decree was not void upon the ground that here was a publication substantially as required, both by the Code and by the rules of the judges. The defects, entirely technical, in the affidavit, do not have the effect to render the decree that was pronounced void for want of jurisdiction. If an order of publication were necessary to a regular service in this mode, it may have been made and be lost; at all events, the decree of the court expressly finds that due service of process had been made upon the defendants, and in this proceeding, which is not an appeal from, but a collateral attack on, the decree, every presumption is in favor of the regularity of the proceedings and the jurisdiction of the court. The rule is this: Where the subject matter of the suit is one which falls within the cognizance of a court of general jurisdiction, and a petition or bill calling for the exercise of the power of the court is filed, and service of process made, which the court finds or holds to be sufficient, and renders judgment, such judgment, though it may be reversed on error or appeal, is not void for reason of defects in the petition or in the mode of service or return of the officer. Miller v. U. S., 11 Wall. [78 U. S.] 268, 299, per Strong, J.; Grignon's Lessee v. Astor, 2 How. [43 U. S.] 339; Railroad Co. v. Stimpson, 14 Pet. [39 U. S.] 458; Cooper v. Reynolds, 10 Wall. [77 U. S.] 308; Voorhees v. Bank, 10 Pet. [35 U. S.] 449, 474; Morrow v. Weed, 4 Iowa, 77, and authorities there cited; Hart v. Seixas, 21 Wend. 40; 1 Smith, Lead. Cas. 378, and American notes to Crepps v. Durden [Cowp. 640]. Any other rule would unsettle titles, and has nothing to recommend it in a new state, where property is so rapidly increasing in value. Bill dismissed.

NOTE. As to jurisdiction and collateral attacks on judgments and decrees, see Smith v. Pomeroy [Case No. 13,092]. As to territorial legislative courts: Clinton v. Englebrecht, 13 Wall. [80 U. S.] 434.

SALISBURY (STEPHENS v.). See Case No. 13,369.

SALISBURY (UNITED STATES v.). See Case No. 16,214.

SALISBURY, The D. C. See Case No. 3,694.

Case No. 12,252.

In re SALKEY.

[5 Biss. 486; 9 N. B. R. 107; 6 Chi. Leg. News, 69; 2 Am. Law Rec. 502; 21 Pittsb. Leg. J. 56.] [1]

Circuit Court, N. D. Illinois. Nov., 1873.

BANKRUPTCY — EXAMINATION OF DEBTOR BEFORE ADJUDICATION—WHEN ALLOWED.

1. The district court may order the examination of the debtor against whom a petition in bankruptcy has been filed, prior to the adjudication, even though he denies both the indebtedness and the act of bankruptcy.

2. Such an examination should not be allowed for the purpose of gratifying malice or curiosity, but simply in the furtherance of justice, and to protect the rights of the creditors.

[In review of the action of the district court of the United States for the Northern district of Illinois.]

In bankruptcy.

This was a revisory petition under the 2d section of the bankrupt act [of 1867 (14 Stat. 518)], to review an order of the district court granting the petitioning creditors leave to examine the debtors before the register. [Case unreported.] On the filing of the petition by the creditors, Rindskoff, Barbe & Co., on the 8th day of October, 1873, a rule to show cause was issued and served upon the respondents, Samuel Salkey and Joseph Gerson, who appeared and filed a denial of the indebtedness claimed in the petition, and also denying the acts of bankruptcy alleged, and asking for a trial upon the issues by a jury. This order for the examination of the debtors was granted on the 14th day of October, 1873, before adjudication of bankruptcy.

Tenneys, Flower & Abercrombie, for petitioning creditors.

Grant & Swift, for respondent.

DRUMMOND, Circuit Judge. The question is whether it is competent for the district court, when a petition in bankruptcy is filed, to make an order for the examination of the debtor, prior to an adjudication of bankruptcy. No question is raised as to the propriety or necessity for the examination in this case, but it is denied that the district court has power, under the bankrupt law, to authorize an examination before an adjudication in bankruptcy.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 21 Pittsb. Leg. J. 56, contains only a partial report.]

The question arises under the 26th section of the bankrupt law. That section provides that the court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times, require the "bankrupt," upon reasonable notice, to attend and submit to an examination, on oath, upon certain matters therein specified.

It is said that the word "bankrupt" is used here, and that there is a distinction made in the bankrupt law, prior to and subsequent to the adjudication in bankruptcy —the law speaking of the party against whom the application is made, in the one case, as a "debtor," and in the other as a "bankrupt." And it is insisted that the word "bankrupt" indicates that an examination can not be had until after an adjudication in bankruptcy; because, strictly speaking, the debtor can not be said to be a "bankrupt" until he is so adjudicated by the court.

In one sense this is true. He does not necessarily become, technically, a bankrupt, until he is decided so to be by the court; but the argument urged that this inquisitorial power should not be exercised over the debtor for the purpose of prying into his business affairs, and because the examination might be injurious to his credit, by disclosing facts affecting the same, can hardly have much weight, when it is recollected that the law provides certain means by which the court may proceed to determine whether or not the debtor committed an act of bankruptcy. The power of the court seems to be plenary, prior to the adjudication, not only over the debtor's property, but over his person.

It might be said, with as much reason, that the court should not exercise this power over either his property or his person, until it had actually decided him to be a bankrupt, because if, upon a trial of the fact of bankruptcy, he should be decided not a bankrupt, of course all the proceedings would become irregular.

An examination under the order as made in this case, is something which necessarily grows out of the administration of the law, which gives to the court, under certain circumstances prescribed therein, power over the person and property of the debtor, for the purpose of protecting the rights of creditors.

It would seem, therefore, that the word "bankrupt," in the 26th section, might not necessarily mean a debtor who has been adjudicated a bankrupt, but only one against whom proceedings in bankruptcy have been commenced.

Independently of the 26th section, however, and whatever may be the true construction of the language there used, it would seem to follow, as a necessary consequence from the general scope of the bankrupt law, that circumstances might exist, after the commencement of proceedings in bankruptcy, and after the debtor is brought within the control of the court, which would warrant an immediate examination. This should not be allowed when sought for the purpose of gratifying an unwarrantable curiosity, or for prying into the business or secrets of a debtor, but simply in furtherance of justice and to protect the rights of creditors.

It will be observed that the 26th section not only permits this examination upon the application of the assignee, or of a creditor, but authorizes the court of its own motion, to direct an examination.

But it would be the duty of the court, undoubtedly, at any time, when satisfied that an examination had been sought or was being carried on to gratify malice or mere curiosity, and not to promote justice, at once to arrest it.

The bankrupt law allows proceedings in bankruptcy to be commenced under a certain state of facts, at the same time that it throws around the debtor guaranties against unwarrantable and unnecessary proceedings, by requiring that these facts shall be proved by the oaths of witnesses. That being done, a prima facie case exists, and then the law clothes the court with all the powers necessary to accomplish the great object in view—namely, to protect the general creditors of the debtor, by discovering and taking possession of all his property for equal distribution among them.

One of the principal objects of the law would be frustrated if adequate means were not provided for the ascertainment of all the facts affecting the property of the debtor, as if it could call only upon the debtor himself, and not as well upon other persons, to disclose all his and their knowledge with reference thereto; and so the 26th section expressly gives this power to the courts as to other witnesses.

So that, on the whole, in view of the purpose of the 26th section, and the general scope of the bankrupt law, I cannot doubt the existence of the power exercised, in this instance, by the district court.

Undoubtedly, it should not be exerted prior to adjudication in bankruptcy unless in case of actual necessity. It is not as of course, but only under such exigencies as seem to require its exercise for the purpose of promoting justice and the rights of creditors.

The order of the district court is affirmed.

[For subsequent proceedings in this litigation, see Cases Nos. 12,253 and 12,254.]

Case No. 12,253.

In re SALKEY et al.

[6 Biss. 269;[1] 11 N. B. R. 423; 7 Chi. Leg. News, 178.]

District Court, N. D. Illinois. Jan. 9, 1875.

BANKRUPTCY — SURRENDER OF PROPERTY — DEPLETION OF STOCK—FAILURE TO ACCOUNT—CONTEMPT.

1. If it appears to the district court that a bankrupt has neglected or refused to surrender

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any property which ought to come into the bankruptcy court, or fails or refuses to give a satisfactory account of his property or his dealings previous to bankruptcy, the court may order him to surrender such property, or properly account for it, and on failure so to do he may be committed for contempt.

[Cited in Re Mooney, Case No. 9,748; In re How, Id. 6,747.]

2. Where property is traced to the bankrupt, it is not a sufficient answer that he cannot say what became of it. The court must be satisfied that the bankrupt has fully and honestly accounted for the property according to the facts.

3. Where just prior to the proceedings in bankruptcy the bankrupt's stock of goods was rapidly diminishing, and not in the ordinary course of business, the legitimate conclusion is that it was fraudulently removed and concealed, and the bankrupt will be presumed to still have control of it.

In bankruptcy. Motion to commit bankrupts [Samuel Salkey and Joseph Gerson] for contempt in not accounting for assets.

On the 8th of October, 1873, certain creditors of Salkey & Gerson filed their petition asking that they be adjudicated bankrupts; and on the 23d of December a trial was had upon the issues in the case, denying the acts of bankruptcy charged, and a verdict rendered, finding the debtors guilty of the several acts of bankruptcy charged, upon which they were adjudicated bankrupt in due form. Pending the proceedings, and before the trial, on the application of the provisional assignee and certain creditors, an examination of the bankrupts was had under oath, before the register touching their estate. And on the 19th of January, a further examination was had at the instance of certain creditors, under the 26th section of the bankrupt law [of 1867 (14 Stat. 529)], which examination was duly reported to the court by the register, and from which it appeared, first, that the bankrupts were, from the first day of January, 1873, to the filing of the petition in bankruptcy against them, co-partners doing business as merchants in Chicago, under the firm name of Salkey & Gerson, their business being mainly that of wholesale and retail dealers in clothing and gentlemen's furnishing goods, and to some extent manufacturers of such goods; second, that said firm had, at the time of commencing business as aforesaid, goods and merchandise of the value of eleven thousand dollars on hand; that they had also outstanding accounts of the firm of Salkey, Lebrecht & Co., of which Salkey & Gerson were the successors, to the value of over forty-five hundred dollars; and owed Lebrecht, the late partner, forty-five hundred dollars, for which he held the accounts of the old firm as security; in other words, that Salkey & Gerson, at the time they commenced business, had invested in goods at a fair cash valuation, for the purposes of their business, over eleven thousand dollars, and owed, substantially, nothing; third, that between the said first day of January, 1873, and the filing of said petition in bankruptcy, said firm purchased goods and merchandise which went into their store, and which had not been paid for at the time proceedings in bankruptcy were commenced, to the amount of over thirty-five thousand dollars; fourth, that the total assets turned over by said firm to the assignee, were not, at the valuation put upon them by the bankrupts themselves, worth over nine thousand dollars, and no attempt was made to account for this deficiency. On the returning into court of the evidence taken before the register on this examination, a hearing was had, in which the court found and adjudged from said proof, that said bankrupts had a large amount of assets in their hands during the year preceding their bankruptcy, for which they gave no satisfactory account, and ordered that the bankrupts appear before H. N. Hibbard, Esq., one of the registers of this court, on the 31st day of January, 1874, and such other times as the register should appoint, and give a true and satisfactory statement and account of the assets of said firm, and what had become of the same, and where they then were; and that said statement be given under oath and reduced to writing by the register, and returned into court. The bankrupts accordingly appeared before the register on the day named in said order, and stated under oath, in substance, that they had no further account to give of their said assets. Motion was then made that the bankrupts be committed to jail for contempt in not accounting for and delivering to their assignee the said deficiency between the assets traced to their hands by their own admissions under oath, and what they had already surrendered.

[For prior proceedings in this litigation, see Case No. 12,252.]

Tenneys, Flower & Abercrombie, for creditors.

Grant & Swift, for bankrupts.

BLODGETT, District Judge. This motion has been taken under advisement, and carefully considered, because of the importance of the question involved, bearing not only upon the rights and interests of these men, but upon the general administration of the bankrupt law.

By the 26th section of the bankrupt law it is provided: "That the court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination on oath, upon all matters relating to the disposal or condition of his property; to his trade and dealings with others, and his accounts concerning the same; to all debts due or claimed from him; and to all other matters concerning his property and estate, and the due settlement thereof according to law; which examination shall be in writing, and shall be signed by the bankrupt, and

be filed with the other proceedings." * * *

"The bankrupt shall, at all times until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do and perform all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated; and for neglect or refusal to obey any order of the court, such bankrupt may be committed and punished as for a contempt of court. * * * He shall also be at liberty, from time to time, upon oath, to amend and correct his schedule of creditors and property so that the same shall conform to the facts."

I have been able to find few, if any, adjudged cases under our bankrupt law, throwing any light upon the powers and duties of the court in this proceeding, and must be guided mainly by general principles, and some analogous proceedings in the English bankrupt courts and courts of equity.

By the 160th section of 12 & 13 Vict., it is provided, that if the bankrupt shall not fully answer any lawful question put to him by the court, to the satisfaction of the court, he may be committed. And under this section it was held by the common bench of England, in Ex parte Bradbury, 78 E. C. L. 15, that where a bankrupt, on his examination before a commissioner, being asked why a certain check for £100, had been drawn in favor of his brother, who he admitted did not receive the money, and how the proceeds were appropriated, answered that his memory did not serve him, the commissioner committed him to prison for not answering to his satisfaction, and the court held that he was justified in so doing, Jervis, C. J., saying: "The question is, whether the commissioner was reasonably bound to be satisfied, when the bankrupt, in answer to inquiries as to why his brother's name was inserted in the £100 check, and how the money was appropriated, merely said that his memory did not serve him. The substance of his answer, is, 'I know nothing at all about the transaction.' That clearly could not be satisfactory. If the bankrupt had assigned any reason for his want of recollection, the commissioner might have pursued the inquiry, but all inquiry was effectually closed by the answer." Maule, J., says: "I agree with my lord chief justice, in thinking that there is no ground to quarrel with the commitment in this case. The commissioner must, to say the least, be a very credulous person, if he had been satisfied with such answers as those set out in the warrant. Here is a sum of £100 drawn out of the banker's on a particular and not very distant day; the man is asked what became of it, and he professes that his mind is a perfect blank on the subject. It would really be too absurd to be satisfied with such an answer."

In Ex parte Nowlan, reported in 6 Durn. & E. [6 Term R.] 118, it is in substance said: If on the examination of a bankrupt touching the disposition of his property, he swear to an account of the same, which appears to be incredible, the commissioners may commit him to prison.

This case arose under the bankrupt act passed in 5 Geo. II. which authorizes the commissioners to commit the bankrupt if he do not answer to their satisfaction. Lord Kenyon, C. J., says: "There are no technical rules, by which cases of this kind are determined, but the question in each particular case is, whether the answers given by the bankrupt be or be not sufficient to satisfy the mind of any reasonable person." Ashhurst, J., says: "It would be a ridiculous ceremony for the commissioners to go through in examining a bankrupt, if they were bound to give credit to his account, however improbable or absurd it might be, merely because he has the effrontery to swear to it. In these cases they are to exercise their judgment upon the whole."

In Taylor's Case, reported in 8 Ves. 328, the commital of a bankrupt was held valid, though he swore positively to his answers, as it was made to appear that they were not reasonably satisfactory to the commissioners, Lord Chancellor Eldon saying that the answers "must be reasonably satisfactory to the mind that is to decide" upon them. "The commissioners have a duty imposed upon them, as well as an authority to get out an account and discovery for the benefit of the creditors; and if he does not make a satisfactory answer for the purpose of enabling them to exercise their duty, they have authority to commit. If the authority depends upon the point whether the answer is satisfactory, those who have that authority must exercise it upon their judicial examination and view of the answer upon the point, whether it is satisfactory or not."

So too, in Ex parte Lord, 16 Mees. & W. 462, the court refused to discharge the bankrupt from custody "for not answering questions to the satisfaction of the commissioner, where they were of opinion that the story contained in his answers is not such as to satisfy a reasonable person of its truth."

There is also a close analogy between this case and that of a defendant in a suit in equity, brought by creditors when the debtor is required to surrender his assets to a receiver, in which any refusal to deliver over assets, or satisfactorily account for them, is punished as a contempt. 2 Daniell, Ch. Prac. 1742.

So a refusal by a party in a chancery suit, to obey any order of the court, subjects the party guilty of such refusal to punishment for contempt. Crook v. People, 16 Ill. 534; Hill v. Crandall, 52 Ill. 70; Wightman v. Wightman, 45 Ill. 167.

The district court as a court in bankruptcy is clothed with all the powers of a court of equity. When a man is adjudicated bankrupt, he is bound to schedule and surrender to

the proper officers of the court all his assets. And if it is made to appear to the court by an examination under the 26th section, or in any other manner, that the bankrupt has refused or neglected to surrender any portion of his property which he ought to have surrendered in the first instance, he may be ordered to surrender such property, and if he fails to do so he may be punished for contempt. And the delegation to the court of power to require an account to be given by the bankrupt of all matters relating to the disposal of his estate, and his dealings with others, and acts concerning the same, implies of itself a power to punish if a satisfactory account is not given. The court, in other words, must be satisfied that the bankrupt has rendered a full and complete account of his property, and given a true statement of the disposal of the same, and if the bankrupt fails to so satisfy the court, he is liable to the process for contempt. Not that the court can capriciously or unreasonably insist upon explanations which are not necessary to a full understanding of the bankrupt's affairs, but the judicial mind must be satisfied, after full examination and opportunity for explanation, that the bankrupt has not fully accounted for the property which has been in his possession.

The power vested in a court of justice to punish for contempt, for the purpose of enforcing its decrees and orders, and, especially in cases like this, is one which should be, to use the language of Lord Eldon in Taylor's Case, "sparingly exercised," and only in cases where there can be no doubt of its propriety.

In Dresser's Case [Case No. 4,077], the bankrupt returned by his schedule a sum of money on hand; failing to deliver it to his assignee, he was called upon to account for it, and stated that he had used it between the time of filing his petition and the election of the assignee, and the court ordered him committed for contempt, until he should pay it over to the assignee.

Our bankrupt law contains no special authority to commit for refusal to answer or account to the satisfaction of the court; and yet it seems to me there can be no doubt that the principle running through all the cases which I have cited is clearly involved in our law. The bankrupt, when on examination, after admitting the possession of property, must clearly account for the same to the satisfaction of the court; otherwise he must be held to still have it in his possession, and be able to hand it over to his assignee, and on failing or refusing to account in a reasonable manner for the disposition of assets which have been traced to him, must be held to be acting in contempt of the jurisdiction of the court.

The bankrupts in this case occupy substantially the attitude of saying to the court: We have had in our possession assets to the value of over $20,000, between January and October, 1873, and refuse to give any account thereof. We have not turned them over to our assignee. We do not admit we have them now in our possession. The court and creditors must help themselves; do the best you can; we stand mute, and refuse to throw any light upon the subject of the disposition of this large amount of funds.

Is the court to sit tamely by and be baffled by such acts of practical contumacy on the part of a bankrupt? Perhaps no more forcible illustration of the necessity of the exercise of the powers specifically granted to the English bankrupt court, and as I have claimed, impliedly granted to the bankrupt courts under our law, could be imagined than the case before us. Here the bankrupts admit that between the first of January, 1873, and the time that proceedings in bankruptcy were commenced against them, they had merchandise and property in their possession which they had purchased on credit and not paid for, to the value of over $35,000. They refuse to explain what has become of that property; they offer no hypothesis to account for its disappearance; but simply say, in response to the final order for accounting, that they have no further account to give. Can it be said that any reasonable mind should be satisfied with such an accounting by a bankrupt for his assets? Can it be said that a court charged with the administration of the estate of a bankrupt, and bound to see that all the estate goes to the assignee for the benefit of creditors, is to be satisfied on such a showing that the bankrupts have honestly turned over to the officers of the court all their assets? Ought the court to be put off with mere silence or refusal, or neglect to account in a reasonable manner for assets traced clearly to and admitted by the bankrupts themselves to have been in their hands and under their control at so recent a date? The administration of bankrupt estates is in the main unsatisfactory enough at best, but how much more must it be if there is no power to unearth concealed assets, and compel bankrupts to disgorge their hidden property? The duty of the bankrupt is to honestly account for his assets according to facts. He may have lost his property by unfortunate speculations, or gambling even, so that it is beyond his reach or that of his assignees, and a true statement of the facts would be an accounting for it. That is a showing what has become of it, within the intention of the law, but until some explanation is made, the court must hold the bankrupt answerable.

If upon such an examination it is made to appear to the satisfaction of the court that a bankrupt has assets secreted which he has not delivered to his assignee, surely it could not be expected that the court should be content with the mere barren results of the information which the examination should give; but the court clearly has the power to enforce the surrender of the property, if it appears to the satisfaction of the court that it is still in the control of the bankrupts

themselves, or no disclosure is made to show that any other person has possession of it.

The conclusion is inevitable, from the admissions of the bankrupts in the examinations, that they still have the possession in some manner of those goods or their proceeds; or they have information and knowledge as to where the goods or proceeds can be found, and fraudulently withhold such information.

It appears from the evidence in this case, that for several weeks prior to the proceedings in bankruptcy, the goods of the bankrupts were manifestly disappearing from their store. Creditors calling there to collect their overdue bills, saw from day to day and from time to time, as they called, that the stock of goods was diminishing rapidly. And it cannot be supposed that the bankrupts, who were every day about the store, did not know where these goods went. They were not sold on credit in the usual way, for their books of account contain no outstanding accounts of any consequence. The only natural and legitimate conclusion must be that they have been fraudulently removed and concealed, for the purpose of defrauding the creditors, and that the bankrupts now know where these goods or their proceeds are. Honest men would at least make some attempt to explain this large depletion. It even appears that when creditors called for their pay, and mentioned the fact that the stock in the store was rapidly diminishing, they were laughed at, derided and defied by the bankrupts, and told they could not help themselves. And when the store was finally closed by the proceedings in bankruptcy, only goods to the beggarly amount of $6,000, at the bankrupts' own valuation, remained to represent the $35,000 of indebtedness which had been contracted by these men for goods which had gone into their store in the preceding eight months, and remained unpaid for.

There were no outstandings upon their books; no bills receivable; no assets, except the remnant of the stock of goods subsequently sold for less than $3,000, and the store fixtures.

If ever there was a case where the circumstances pointed indubitably to the conclusion that the bankrupts had deliberately and wilfully secreted their goods or the proceeds thereof, for the purpose of preventing them from coming into the hands of their creditors, this is such a case. And yet, on being arraigned and asked by the court to account for these goods, the bankrupts coolly say, they have no further account to give.

It seems to me that the court ought not to allow itself and the creditors of these men to be mocked in this way. It ought to compel these men to account for these goods, to tell where they have gone, to disgorge the proceeds or tell who has them, in order that the assignee may obtain them, and that not only that justice may be done to the creditors of these bankrupts, but that such high-handed and impudent attempts at swindling may, as far as possible, be prevented in future.

The order of the court, therefore, will be that the bankrupts stand committed to jail until they shall account for the goods thus traced into their hands.

On petition to Judge Drummond for a writ of habeas corpus this ruling was affirmed. See [Case No. 12,254.]

Case No. 12,254.

In re SALKEY et al.

[6 Biss. 280; [1] 11 N. B. R. 516; 7 Chi. Leg. News, 195.]

Circuit Court, N. D. Illinois. Feb., 1875.

BANKRUPTCY—FAILURE BY BANKRUPT TO ACCOUNT —FULL DISCLOSURE—RE-EXAMINATION.

1. Under the twenty-sixth section of the bankrupt act the district court has authority to commit a bankrupt, if satisfied that he has not fully disclosed the facts concerning his property.

[Cited in Re How, Case No. 6,747.]

2. The court is not bound to accept his answer that he has told all that he knows about his property, if it clearly appears that there is still property unaccounted for.

3. The district court must be satisfied that he has made a full disclosure, and it seems that the circuit court has power to review the finding if the evidence is brought before it.

[Cited in Re Mooney, Case No. 9,748.]

4. The circuit court may direct the district court to allow the bankrupt to be re-examined before the register; and on the return of an attachment the court should examine the bankrupt.

[Cited in Re Mooney, Case No. 9,748.]

In bankruptcy. Application by bankrupts [Samuel Salkey and Joseph Gerson] for a writ of habeas corpus, to discharge them from an order of commitment for contempt made by the district court. For opinion of the district court on the commitment, see [Case No. 12,253].

[For prior proceedings in this litigation, see Case No. 12,252.]

Grant & Swift, for petitioners.

Tenneys, Flower & Abercrombie, for creditors.

DRUMMOND, Circuit Judge. The material facts in this case are these: Proceedings in bankruptcy were commenced against the petitioners in the district court of this district, and while they were pending, application was made to the court for leave to examine the alleged bankrupts under the twenty-sixth section of the bankrupt law, and they were accordingly examined. The result of the examination seems not to have been satisfactory to the creditors, and an application was again made to the court and the court required the parties to go before the

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

register a second time, the court not being satisfied that the bankrupts had given a full and true account of their property. They, in pursuance of the order of the court, went before the register again, and were interrogated in a general way, and required to give a full and satisfactory account of all their assets, and they in substance stated that they had given all the account they could; that they had turned over their property to the marshal under the warrant issued, and that that, together with their losses, was the only account they could give.

This being reported to the court, an attachment was issued against them, and they were brought before the court, and the question argued as to the right of the court to commit them for not giving a satisfactory account of their property. And I think the fair inference is, that they had taken their stand upon the answer they had given, and were not inclined to say anything further; because it is manifest, if they had come before the court, and had said that they were willing to give further answers in relation to their property, the court would not have made the order of committal. The court accordingly directed the parties to be imprisoned for non-compliance with its order.

There is not brought before me on this application for a writ of habeas corpus, the testimony which was considered by the district court, and on which that court found that the parties had not given a full and satisfactory account of their property. The result was an adjudication by the district court to this effect: That there was shown to be in possession of the bankrupts, at a certain time, property not contained in their schedule, and of which they gave no account, to the amount of about $20,000; that the parties had fraudulently, and with the intent to deceive, delay and hinder their creditors and the officers of the court in the administration of their affairs, concealed the $20,000 worth of merchandise, or the proceeds thereof, and refused to account for the same; therefore the court committed them.

It seems to me that the only inquiry in this court at present is, whether the district court had, in the case stated, the power to imprison the parties. The clause of the 26th section of the bankrupt law declares that, "The bankrupt shall at all times, until his discharge, be subject to the order of the court, and shall at the expense of the estate, execute all proper writings and instruments, and do and perform all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover and receive all the property and estate assigned, wherever situated. And for neglect or refusal to obey any order of the court, such bankrupt may be committed and punished for a contempt of court."

Now, upon the theory on which the court proceeded, and if the facts were as found by the court, had the court authority to imprison these parties, although, upon being recalled before the register, they said they had told all they knew upon the subject?

Was the court absolutely bound by that answer? It seems to me very clear that it was not. The main object of the bankrupt law is to distribute the property of the bankrupt to his creditors equally. The creditors are entitled (or the assignee representing the creditors is entitled), to all his property, and the bankrupt law assumes that the bankrupt may possess knowledge in relation to the property which should be communicated to the creditors and the assignee; therefore it is that the law gives authority for the examination of the bankrupt, and requires him to make a full disclosure as to his property.

It would be a most extraordinary state of affairs if the bankrupt could spirit away any amount of property, and that fact should be made manifest to the court, and there should be no power in the court to compel him to state what had become of it. That would be manifestly a most unsatisfactory bankrupt law, if the bankrupt could hold back and say, "I have given all the information on this subject that I choose to give or that I can give, and you must help yourselves as best you can," although it may be manifest beyond all controversy, that he has concealed a large amount of property.

It seems to me that it was one of the objects of the 26th section to provide that the bankrupt should impart all the information he possesses in relation to the property; and that is one of the grounds upon which the court proceeded, that they did not tell where the property was, or what had become of it. One of the objects of the law is, "to enable the assignee to demand, recover and receive all the property and estate assigned, wherever situated."

Now suppose in this case that the bankrupts have turned over to their wives, or some near relative or friend, for their own use, twenty thousand dollars worth of property. Is the court to be satisfied simply because they say: "We do not know anything about it; we have said all that we can upon the subject"? It seems to me that it cannot be so, and it is not necessary to cite authorities upon the subject. The authority is in the statute. Can the court make the order? Can it require the bankrupt to disclose? It is said that all that can be done is, if the bankrupts have stated what is untrue, that they can be prosecuted criminally. I answered during the argument, and I repeat now, a criminal prosecution does not pay the claims of the creditors.

The creditors have a right to all the property of the bankrupt, and it is a poor comfort to them to be told that the bankrupt can hide his property, and for such concealment, or for giving false evidence in relation to the property, he can be prosecuted criminally.

I cannot doubt therefore, if it clearly appeared that the bankrupts spirited away prop-

erty to the amount of $20,000, that the court was not deprived of the right to punish them for the non-disclosure of the facts in the case, because they have stated they have told all they know about it.

I cannot look into this evidence. It is not all before me; I, therefore, cannot say, in this inquiry, whether or not the opinion of the court upon the evidence was well founded. I have to take the conclusion of the court upon that subject, and, if that conclusion was right, I can have no doubt of the authority of the court to make the order which was made. Undoubtedly, wherever it satisfactorily appears that the bankrupts have made a full disclosure, the imprisonment would be unlawful; and if, instead of bringing a writ of habeas corpus, the parties had asked this court to review the decision of the district court upon the evidence before it, then this court could determine whether the conclusion of the district court upon the evidence was correct or not; whether, in other words, it did satisfactorily appear that the bankrupts had not made a full disclosure.

The objection is made that it may be difficult, if not impossible, to satisfy the court; the answer to all which is, that there must be placed, somewhere, a power to judge of this. The law has placed it in the district court, its action, of course, subject to review by this court. There must always be a last resort for the determination of legal questions; and in all litigation the court must be satisfied in order to decide. And so, in this case, whether or not the parties have made a full disclosure, whether or not they are subject to punishment, are questions for the district court in the first instance to decide; and there is no other or greater objection in this case than there is in any other case where questions come up for decision in the course of litigation.

But as I said during the progress of the argument, my desire is to have the parties make a full disclosure of all the facts within their knowledge, if they have not, and I think the case is a little different from the position of an ordinary writ of habeas corpus, and as this is a case under the bankrupt law, that the court may possess more power over the real controversy in this case than exists generally where applications are made for such writs; therefore I shall direct the district court to allow these parties to go before the register, and to be re-examined by him, and to have the register report, as the result, his opinion whether or not, upon all the facts, they have made a full disclosure of what they know.

I think, perhaps, that under ordinary circumstances, the true rule would have been in such a case, where the attachment for contempt was issued, and the parties appeared before the court, for the court itself to examine them, and satisfy itself upon the examination whether or not they had made a full disclosure.

But, as I have said before, I infer that the parties had taken their position and had resolved that they would not say anything more upon the subject, but would stand upon what they considered their reserved rights.

I shall therefore not discharge these parties upon this writ, but refer the case back to the district court with the direction that I have stated; then, if they are dissatisfied with any order which the district court may make, they can bring it for revision to this court.

Case No. 12,255.

Ex parte SALLEE.

[See Case No. 12,256.]

Case No. 12,256.

In re SALLEE.

[2 N. B. R. 228 (Quarto, 78); 2 Am. Law T. Rep. Bankr. 7; 1 Gaz. 78.] [1]

District Court, D. Kentucky. 1868.

BANKRUPTCY—JUDGMENT IN FAVOR OF BANKRUPT—SCHEDULE OF PROPERTY.

1. Where judgment should be set forth in schedule of bankrupt's property.

2. A judgment in favor of a bankrupt should be set forth in Schedule B, No. 2, under letter b. A bankrupt in preparing Schedule B, No. 2, is not restricted to the letters therein printed. He may exhaust the alphabet if he chooses, and then use other marks, if necessary, to describe his personal property accurately or lucidly.

In this case the register, John W. Tuttle, certifies for decision by the court the question "whether a judgment should be set forth on Schedule B, No. 2 or 3." The register expresses the opinion that B, No. 2, letter b, is the proper place, and as the attorney for the bankrupt insisted otherwise, at his request the question is certified for decision.

It does not clearly appear, from the certificate, whether the "judgment" referred to is in favor of the bankrupt or against him; but assuming that it is in his favor, I am of the opinion that the register is clearly right.

Judgments are in one sense "choses in action," but in the sense of the Schedule B, No. 2, they are "personal property," and are not "unliquidated claims," within the meaning of Schedule B, No. 3, letter d.

Judgments, therefore, in favor of the bankrupt, should be set forth in Schedule B, No. 2, under letter b. It would also, I think, not be improper to set them forth in that schedule under letter m. The bankrupt, in preparing Schedule B, No. 2, is not restricted to the letters therein printed. He may ex-

[1] [Reprinted from 2 N. B. R. 228 (Quarto, 78), by permission. 2 Am. Law T. Rep. Bankr. 7, contains only a partial report.]

haust the alphabet, if he chooses, and then use other marks, if he can thereby describe his "personal property" accurately or lucidly.

SALLIE C. MORTON, The (WOOD v.). See Case No. 17,962.

Case No. 12,257.

The SALLY.

[1 Gall. 58.] [1]

Circuit Court, D. Massachusetts. May Term, 1812.

EMBARGO—FOREIGN VESSEL.

Under the 5th section of embargo act of Jan. 9, 1808, c. 8 [2 Stat. 454], a foreign vessel means a vessel navigating under the flag of a foreign power, and not a vessel owned in whole or part by foreigners domiciled in the United States.

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

In admiralty.

G. Blake, for the United States.

Thurston & Dexter, for claimant.

STORY, Circuit Justice. The libel in this case contains three counts. I shall confine myself to the first, because, on the hearing, the others were abandoned by the counsel for the United States. That count alleges, that during the continuance of the embargo, to wit, in the month of September, 1808, the said vessel, being a foreign bottom, within the district of Boston and Charlestown, did take on board certain goods, wares and merchandize, mentioned in the schedule annexed to the libel, contrary to the act laying an embargo, and the act supplementary thereto: whereby the said vessel, and the goods, wares and merchandize found on board the same vessel, have become wholly forfeited.

The facts appear to be these. Previous to the seizure, (which was in September, 1808,) the vessel belonged to Messrs. Newhall and Niles, American citizens, by whom she had been employed in the fisheries, under a license and enrolment, which some months before had expired, and had been cancelled. The vessel was afterwards sold (whether really or colorably I pretend not to say) to Mackenzie, the claimant, who is proved to have been at the time of the sale, (which was about six weeks or two months before the seizure,) a British subject, resident in Boston. On the morning of the seizure, the vessel was found near Harris's wharf in Boston, on the flats, nearly laden with flour and other articles mentioned in the libel. Every appearance indicated, that she had been recently laden, and it is proved, that she must have been laden after the sale to Mackenzie. It is admitted, that the vessel had not proceeded out of the port after being laden.

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

The single question presented to the court by the counsel is, whether this vessel was a foreign vessel within the true intent and meaning of the 5th section of the act of 9th Jan., 1808, c. 8. That section is in these words: "That if any foreign ship or vessel, shall, during the continuance of the act to which this act is a supplement, take on board any specie, or any goods, wares or merchandize, other than the provisions, and sea stores necessary for the voyage, such ship or vessel, and the specie and cargo on board shall be wholly forfeited, and may be seized and condemned in any court of the United States, having competent jurisdiction, and every person concerned in such unlawful shipment shall forfeit and pay a sum not exceeding twenty thousand dollars, nor less than one thousand dollars, for every such offence." 9 Laws [Weightman's Ed.] 13 [2 Stat. 454].

The attorney for the United States contends, that the true meaning of "foreign ship or vessel," used in the act, is a vessel owned in whole or in part by foreigners domiciled in the United States, and he cites the registry act (2 Laws [Folwell's Ed.] 148, § 16 [1 Stat. 295]), to show the effect of transferring a registered vessel to a foreigner, and also the supplementary act 27th June, 1797, c. 5 (4 Laws [Folwell's Ed.] 11 [1 Stat. 523]), which declares that all registered vessels, which shall be captured and condemned and pass into the ownership of third persons, shall be deemed foreign vessels. This argument applies to registered vessels only, and does not appear to me to carry much weight with it. Undoubtedly the appellation of "foreign vessels" may sometimes be applied to all vessels not registered or licensed, in reference to the privileges derived from the revenue system; but it is as certain, that in a variety of instances our laws also contemplate the use of the words in their appropriate sense, to wit, vessels navigating under the flag and with the papers of a foreign sovereign. It may be remarked also, that there is no provision in our laws, declaring, that a licensed vessel, transferred to an alien, shall be deemed a foreign vessel; but in such case the vessel is undoubtedly forfeited under the coasting act. Act Feb. 18, 1793, c. 8, § 32 (2 Laws [Folwell's Ed.] 193 [1 Stat. 316]).

Let us now endeavor to seek the true construction of the section in question, by comparing it with other provisions in the embargo acts, for these acts being all in pari materia, must be construed together, as one statute. The act laying an embargo on all ships and vessels within the limits of the United States, bound to a foreign port, expressly allows the departure of any foreign ship or vessel, either in ballast or with the cargo then on board. There can be no doubt, that this act meant by foreign ships such as were owned by foreigners, and navigating under the protection and papers of a foreign government. Any other construction would defeat the obvious intent of the legislature.

The same act exempted from the operation of the embargo all armed vessels, possessing public commissions from any foreign power. The 4th section of the act of 9th Jan. 1808, c. 8, provides, that this exemption shall apply only to public armed vessels, and not to privateers or letters of marque, or any private armed vessels, but that such private armed vessels shall be permitted to depart in the same manner, as is provided for other private foreign ships or vessels. Here again it is manifest, that the legislature speak, not of vessels owned by citizens and domiciled foreigners, having no foreign papers, but of ships armed or sailing under the authority of a foreign sovereign. Then follows the section in controversy, which seems to be directly governed in its language by the preceding. Soon afterwards the legislature, by the act 12th March, 1808, c. 323 [2 Stat. 473], provided, that no foreign vessel should depart from any port of the United States, with a cargo destined for another part of the United States, without giving bonds to reland the cargo in the United States; and the same security was required of vessels owned by citizens of the United States not registered, licensed, or possessing a sea letter. In this act, the words "American" and "foreign" are used in opposition to each other, and import, as I apprehend, vessels navigating under the flag of different powers. Still the coasting trade from port to port of the United States was lawful to aliens. But by the 9th section of the act of 25th April, 1808, c. 66 [2 Stat. 501], it was expressly prohibited.

In all these various provisions I can perceive only a progressive system of rigor towards the same class of vessels. The obvious intent of the legislature was, to prohibit all American citizens and American property from a commerce with foreign countries. Yet at no time was it illegal for a foreign vessel to depart from the United States to a foreign country in ballast; and if the construction contended for by the attorney for the United States be correct, a mere colorable transfer of any undivided portion of an American ship to a foreigner would have enabled such ship to depart for a foreign port, and thereby in effect the whole operation of the embargo acts would have been defeated. I am therefore satisfied, that the true construction of the 5th section requires, "ut res magis valeat, quam pereat," that the foreign vessels named therein should be deemed such, as have the acknowledged character and papers of vessels navigated under the protection and laws of a foreign realm. I must therefore affirm the decree. I cannot however but remark, that the libel is very defective in not alleging, that the goods taken on board were not sea stores or provisions necessary for the voyage, for it was certainly lawful to load such goods, and they constitute an express exception in the statute.

Let the decree be affirmed, and certify reasonable cause of seizure.

Case No. 12,258.

The SALLY.

[1 Gall. 401.] [1]

Circuit Court, D. Massachusetts. May Term, 1813.

EMBARGO — TRADING WITH ENEMY — FURTHER PROOF—WHEN ALLOWED—FEES.

1. Trading with the enemy. Case of violent suspicions.

See the great case of Griswold v. Waddington, 15 Johns. 57; Same Case on appeal, 16 Johns. 438. See Scholefield v. Eichelberger, 7 Pet. [32 U. S.] 536; Story, Partn. § 240.

2. A claim in the prize court should always be by the owner, if within the jurisdiction.

[Cited in Re Stover, Case No. 13,507; Spear v. Place, 11 How. (52 U. S.) 527.]

3. Further proof is never allowed to a party, who is guilty of fraud, or of illegal conduct. It is granted only to honest ignorance or mistake.

[Cited in brief in The Revere, Case No. 11,716. Cited in U. S. v. One Hundred Barrels of Cement, Id. 15,945; U. S. v. Seven Barrels of Distilled Oil, Id. 16,253.]

4. On further proof, the affidavits of the captors are admissible evidence without a release.

5. Where a claim is rejected, the claimant is liable to pay all expenses which have accrued in consequence of his claim; but not such as arise in the cause independently of it.

6. Of the clerk's fees, marshal's fees, and custody fees: what allowable, and when a charge on the property.

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

In admiralty.

Mr. Savage, for captors.

Mr. Hubbard, for claimants.

STORY, Circuit Justice. The schooner Sally and cargo were captured as prize by the privateer Dromo, Frederick Slocomb, commander, at Cape Split Harbor in the district of Maine, on the 28th of November, 1812, for an alleged trading with the enemy. From the papers brought into the registry and the depositions in preparatory, it appears, that the schooner was licensed for the coasting trade, and was at Eastport in the fore part of November, 1812, and cleared out from that place for Boston, on the 16th of the same month, having on board, according to the manifest sworn to by the master before the collector, a cargo consisting of five hundred bushels of salt. The only papers found on board were the enrolment and license for the coasting trade. And although it appears from the examination of the master that he had a bill of lading on board, and also a letter of instructions from the shippers, neither of them were produced by him, and the instructions are yet withheld from the view of the court. The real cargo on board is nearly three thousand bushels of salt. The claim for the cargo is made by

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

Brigham and Bigelow, as agents for Messrs. Josiah Dana, Wheeler and Bartlett, of Eastport, the asserted owners, who are citizens of the United States. And the claim for the schooner is made by the master, in behalf of the asserted owners, Messrs. Thomas Waiscoat and Reuben Cousins, of Eden, in the district of Maine, who are also citizens of the United States. Reuben Cousins was the mate of the schooner during her voyage. And although he left her, for no assigned cause, after the capture, he has been admitted, through great indulgence, to give his deposition in preparatory. I cannot but notice, that the ship and cargo are both claimed by agents of the owners, although the owners are themselves citizens of, and resident within the state of Massachusetts. I cannot approve of this practice. In all cases where it is practicable, it is the duty of the owners to claim in person, or at least to annex their own affidavit to the special facts stated in support of the claim. There is great danger from a different course; it leads to the substitution of the oaths of mere uninformed agents, who can in general testify only to their belief, instead of the oaths of the parties, who are conversant with the facts, and have the most weighty responsibility attached to their conduct. There is yet less reason, in the case before the court, for the claim of that part of the schooner, which is owned by Reuben Cousins. He is on the spot, and ought to have made his own personal claim; and I am utterly at a loss to conjecture, upon fair grounds, why his interests should, in preference, have been entrusted to the common agency of the master.

Upon the hearing of the cause in the district court, the learned judge, on account of the extraordinary difference between the manifest and the real cargo on board, the nature of the voyage in the immediate vicinity of the British dominions, and other suspicious circumstances, directed further proof to be made, by plea and proof. This solemn mode of proceeding, so seldom resorted to, was of itself calculated to excite the utmost diligence of all the parties in interest. "Plea and proof," says Sir William Scott, in The Magnus, 1 C. Rob. Adm. 31, "is an awakening thing: it admonishes the parties of the difficulties of their situation, and calls for all the proof, that their case can supply." It was therefore to be expected, that the claimants would have given the most plenary and circumstantial account, by competent testimony, of the actual loading of the whole cargo at Eastport, and the most explicit denial of an intercourse with the British provinces. How far this most just expectation has been realized. I shall have occasion by and by to consider. Whether the present was a case, in which further proof ought to have been allowed, it does not become necessary now to decide, because no exception has been taken to the allowance; otherwise, perhaps, it might have admitted of great question, how far a party would be entitled to set up his own illegal conduct as a title to further proof. The rule adopted, and as I apprehend now firmly established, that no person shall be permitted, in the prize courts, to found a claim to property upon any act, which is illegal and reprobated by the law of the country, applies with stronger force to a case requiring further proof. Such an indulgence is allowed to honest mistake or negligence, but never to fraud or illegal conduct.

In the examinations in preparatory, the master has not given his testimony in a manner entitling him to extraordinary credit. He contents himself with general statements of facts, respecting which he must be presumed to have accurate knowledge. He says "he cannot recollect the day precisely, on which he sailed from Passamaquoddy, the last clearing port, but it was between the 16th and 28th of November." He cleared out, as his manifest shows, on the 16th of November, and he was captured, as he himself declares, on the 28th of November. Surely a man ordinarily intent upon declaring the exact truth could not have dealt in such vague and ambiguous terms respecting facts, of which a master of a vessel cannot be presumed ignorant. He states also, that the cargo "was all put on board betwixt the 14th and 16th of November," "that the whole of said lading was put on board at one port, at the time before stated," and "some of it was taken from the stores of the shippers, in Eastport, and the rest from a lighter or schooner sent by the shippers alongside the Sally." He admits that the cause of capture was the great difference between the cargo and the manifest. The mate is not more explicit, as to the time of the sailing on the voyage. He says that the schooner sailed from Eastport between the 15th and 26th of November: and as to the other facts, he concurs with the master. There are great difficulties in reconciling this testimony with the papers in the cause. If on the 16th of November the whole cargo of salt was on board, why was it not included in the manifest? It is impossible to contend, that the master did not know the difference between five hundred and three thousand bushels. He was bound to know the quantity on board; and he was guilty of the grossest departure from truth, if the whole cargo was then actually on board. He deliberately applied to the custom-house for a clearance, delivered a manifest of his cargo, and made oath to the verity thereof. What then is the court to believe? The solemn asseveration of the master, made at the time of his clearance, of facts then within his admitted knowledge, which he had then no inducement to conceal or deny, or his examinations taken when he has become materially interested to gloss over the transactions of his voyage and to give color to his former conduct? I confess that I am strongly inclined to lean in favor of the for-

mer. But it is sufficient if the master has so conducted himself, as to take away all reasonable credit from his assertions. He is so necessary a witness, that if he be completely discredited or brought into disrepute, a case must be very clear of all enemy contamination, not to be weighed down by his prevarications, especially when his counsel can support the innocence of his present statements, only by admitting his palpable contravention of the laws.

By the act for the regulation of the coasting trade (Act Feb. 18, 1793, c. 8, §§ 14, 18, [1 Stat. 309, 312]) the master of every vessel engaged in the coasting trade between ports of the same state, and having on board goods of foreign growth or manufacture exceeding $800 in value, is required to subscribe and deliver to the collector of the customs a duplicate manifest of his whole cargo, attested by his oath, under a penalty of $100. And if the value be less than $800, he is required to have on board a manifest of his cargo, under the penalty of $40, and the forfeiture of all foreign goods on board, which are not included in the manifest. I must take the value of the present cargo of salt to have exceeded $800; it was therefore necessary to have obtained a clearance from the custom-house: and this could only be done by delivering a duplicate manifest of the whole cargo, according to the act.

Upon the supposition of the whole cargo being laden at Eastport, it has been attempted to excuse the conduct of the master, by evidence tending to show, that it has been a common usage at that place, to obtain a clearance of foreign goods not liable to duties at the custom-house, under a manifest grossly varying from the real cargo. One witness states, that he has presented manifests of cargoes of salt, from five hundred to one thousand bushels, which have generally measured from four thousand to five thousand bushels. Another witness (and these two are the only witnesses to the point) states his belief, that it is the practice for vessels to clear out from Eastport with salt, without paying much regard to the exact quantity, frequently carrying a larger number of bushels than are cleared out, and that the collector is not, to his knowledge, scrupulous as to the exact quantity shipped.

It is hardly necessary to observe, that the attempt to establish a usage in contravention of law, must ever be a difficult, if not an impracticable task. Such a usage can never have a legal existence, and if it derive effect from the connivance or negligence of public officers, it deserves the most severe reprehension. If indeed the revenue officers of this district can be laid asleep, I trust and hope that the law has yet vigor enough to awaken them from their slumbers, and to dispel the dream of imagined security from the violators of its precepts. But there is not a shadow of evidence to establish any such usage. The practice of one or two persons, to falsify their own solemn oaths by evasions of the laws, cannot be admitted to establish a general presumption, that all persons so conduct themselves. It might as well be contended that the existence of proofs of frequent smuggling established the position, that the whole mercantile community indulged in the odious practice. I hold myself bound to reject all presumptions in favor of the party, who claims protection from illicit conduct; and if a reasonable presumption arise, from other circumstances in the case, of a trade with the enemy, I shall feel little difficulty in applying it pro salute legis.

From the geographical situation of Eastport, we all know that it is within the immediate vicinity of the British provinces. It is scarcely removed more than two or three miles, and the dividing waters are common to both nations. It is asserted by the claimants, that salt at Eastport is not worth more than from twenty-three to twenty-five cents per bushel, and at Boston it is said to be worth fifty cents per bushel. The temptation, therefore, to illegal intercourse was great, and the opportunity every way favorable. If the whole cargo was taken on board at Eastport, what possible inducement could there have been to conceal the real quantity at the custom-house? None has been, and I presume no honest one could be suggested. That a part of the cargo, about five hundred bushels, was actually taken on board at that port, seems conceded on all sides; and if the intention were, under cover of this circumstance and the supposed irregularity of the custom-house, to complete the cargo by commerce with the enemy, the conduct of the master was precisely what it should have been. He was at liberty to make a truce with his conscience, and if detected, to shield himself without scruple under the protection of an infraction of the municipal regulations of his country.

Upon the original hearing, the case was so pregnant with difficulties and suspicions, that it called loudly for further proof of the most unquestionable and explicit nature. What has been produced? The mere loose, general and inaccurate affidavits of witnesses, who testify that salt was laden on board the schooner at Eastport, partly from a wharf, and partly from a schooner alongside of the Sally. This is not denied. It is remarkable that not one witness speaks of the quantity, and every word of the testimony is perfectly consistent with the supposition, that five hundred bushels only were laden there. There is obviously in the wording of the affidavits, an intention to avoid the statement of any precise quantity. This is not all. The claimants, who were upon the spot, have not given their own affidavits, as to the quantity. They have furnished no accounts of purchases, and no vouchers. From the circumstances relied on of the lading of a part of the cargo from a schooner, it is obvious that there must then have been a recent purchase

of that part of the cargo; yet no account of the quantity of the purchase is produced.

Further: Where was the Sally between the 16th and the 28th of November, the day on which she was captured? No account whatsoever is given of her; a perfect silence reigns over this part of the case; and yet, considering the place of capture, and the direct plea and allegation of a trade with the enemy, it was of the last importance to establish the whole course of her voyage. The master and the mate, notwithstanding their original examinations were taken within a month after the capture, say nothing precise on the subject; and no attempt has been made on the part of the claimants to escape from the obscurity or generality of their statements, by giving more exact information. The court have a right to expect the most accurate information from parties, having within our own jurisdiction the means in their own power, if they choose to use them, for clearing up every obscurity. They have not so done. What then must be the legal presumption? I think it must unavoidably be, that if the whole facts were truly disclosed, they would not avail in favor of the claimants. If we turn to the affidavits introduced by the captors, there can no reasonable doubt remain, as to an actual trading with the enemy. They state explicitly, that they saw the Sally and two other schooners lying in Clam Cove, in the province of New Brunswick, about the 20th of November, and a small black vessel delivering salt to one of them.

It has been argued, that these affidavits are not admissible, because the captors are not in any case competent witnesses. The objection, supposing it valid, certainly does not apply to the testimony of William Waller and Isaac Strout, for they did not belong to the crew; and taking their testimony together, it is certainly unfavorable to the claimants. The testimony also of William Gillpatrick, an officer of the Dromo, seems free from this objection; for he swears that he had disposed of all his interest in the prizes made during the cruise, and he may therefore be considered as standing in the situation of a witness under a release.[2] Now if he is fully credited, there is complete evidence of a trading with the enemy; and corroborated as he is by Waller, I think it difficult to resist the belief of his statements. But how stands the objection in point of law? If it is to prevail, it must be upon the footing of the prize law, and not of the common law; for the latter has, in general, no connexion with the course of prize proceedings. It is a general rule in the prize law of England, (from which ours may be considered to be derived,) that the evidence to acquit or condemn must, in the first instance, come from the ship's papers and the preparatory examinations of the master and crew of the captured ship. By the French law, the depositions also of the captors are admissible; but in this stage of the inquiry, the law of England will not suffer them to be received (Coll. Marit. 76; Duke of Newcastle's Letter, Coll. Jurid.), and it is rarely permitted to the captors to produce any evidence, on account of its obvious tendency to derange the simplicity of prize proceedings, which the court is at all times solicitous to preserve. But in cases of pregnant suspicion, or to induce an order for further proof, extrinsic evidence on the part of the captors is sometimes admitted; and in exercising this authority, no exact rule can be laid down, and the court must be governed by a reasonable discretion under the particular circumstances of the case. After an order of plea and proof, the cause is always open for evidence to both parties; and in such cases, and also on an order for further proof, it is clear that the claimant's own affidavits and documentary evidence are admissible. Why not, on plea and proof, the affidavits of the captors, as to facts within their own knowledge? It is said that they have a direct interest in the event of the suit. This also is true as to the claimants; and upon principle I can perceive no ground to exclude the captors' affidavits, which would not also apply to the claimants.

No authority has been produced at the argument to show, that in cases, where the captors are admitted to give evidence on further proof, their affidavits are inadmissible. At first view the cases of The Drie Gebroeders, 5 C. Rob. Adm. 343, note a, and Amitie, 6 C. Rob. Adm. 269, note a, would seem to sustain the objection. The common law distinction, as to competency and credit, is there taken and admitted. The controversy was between persons claiming to share as joint captors, and the court rejected a witness who had been released, but still admitted that he thought himself entitled at law, and admitted a witness who was released, and yet declared, that though barred at law, he expected to share from the bounty of the master, if the claim succeeded. Neither of these were cases of further proof granted as an indulgence to claimants. In the case of The Haabet, 6 Rob. 54, the court, on the original hearing, refused to admit the affidavits of the captors for the purpose of working condemnation, or at least to save the captors from expenses, upon the ground that there was an utter defect of all circumstances of suspicion in the original evidence. Sir W. Scott said: "If I should accede to this demand, the consequence would be, that I must do it upon a uniform principle of admitting affidavits universally and in all cases, though there should be nothing to excite suspicion in the original evidence, and though the language of all the witnesses is as precise as possible. I can come to no such conclusion." "Looking to the depositions (of the

[2] An assignment of prize property is good at common law; and after condemnation the title becomes by a retro-active operation perfect in the assignee. Morrough v. Comyns, 1 Wils. 211.

captured) I am obliged to hold, that the affidavits of the captors are inadmissible." In the Glierktigheit, Id. 58, note a, when, on the original hearing, affidavits of the captors were offered to prove the destination of the ship, Sir W. Scott said: "Certainly if the captors' evidence could alone be taken, it would be sufficient to substantiate this averment, but the court is under the necessity of not taking their representation alone, and if that is positively contradicted, the court finds itself under a dilemma, to which it must always expect to be reduced by admitting such affidavits. When the facts are positively denied, and that denial cannot be invalidated by any adequate means of estimating the credit of the witnesses, there is no other way of proceeding, but by laying out of the case all this extrinsic matter, and by recurring to the original evidence." The ground then, on which these determinations rest, is, that if the testimony of the captured is positive and direct, and no circumstances of suspicion intervene, the court, on the original hearing, will adhere to the original evidence, in preference to extrinsic evidence offered by the captors. But it is not intimated in either case, that the affidavits of the captors are inadmissible, on the general ground of the incompetency of the witnesses; and there is no suggestion of a release.

On the whole, I cannot find any sufficient authority, which precludes the court from receiving the affidavits of the captors, in cases of further proof, where any evidence on their part is admissible; and of facts, which are within their special knowledge if suspicion attaches to the original transaction, I see no reason to preclude them from giving testimony, at least for the purpose of requiring the most explicit disavowal on the part of the claimants. Where further proof is required, the captors are not more interested than the claimants. There is a foundation laid, at least, in the original defects of evidence, to call the vigilant attention of the court; and though, if the testimony were balanced, the court ought to incline to the side of the claimants, I can easily conceive of cases, where at least equal credit would belong to the captors. I admitted therefore the affidavits of the captors to be read at the hearing; and I am not yet satisfied that that proceeding impugned any known rule of the prize court. The Maria, 1 C. Rob. Adm. 340, 349, note a. But I am free to acknowledge, that my present judgment is not founded on the affidavits, to which the exception would legally apply. Independent of these, there were such vehement suspicions and mala fides attached to the transactions, that if they were not removed by the further proof of the claimants, a condemnation seemed inevitable. That further proof has been made, and I have no hesitation in pronouncing, that it is wholly unsatisfactory to prove the innocence of the claimants. By the general rule of the prize court, the onus probandi lies on the claimants, and if it were otherwise in this particular case, the order for further proof would impose on them the same responsibility. I feel a thorough conviction, that I am doing no injustice to the claimants by declaring the schooner and her cargo good and lawful prize to the captors, on account of illegal traffic with the enemy. Decree reversed.

(Second Hearing.)

STORY, Circuit Justice. The principal questions on the merits having been now disposed of, an application has been made to the court respecting the taxation of the costs and expenses against the claimants. The bill presented to the court is as follows, viz.:

Attorney's fee		$ 25 00
Depositions.		
F. Slocomb	$ 6 00	
S. Lee	6 00	
W. Gillpatrick	3 00	
W. Walter	2 00	
J. Strout	2 00	
		19 00
Survey and Appraisement.		
Surveyor's fees	$24 00	
Marshal's do	9 50	
Clerk's do	4 00	
		37 50
Marshal's fees and charges		75 94
Clerk's fees, entry, filing, recording, &c.		25 00
		$182 44
Circuit Court, May, 1813.		
Copies		$ 35 00
Attorney's fee		25 00
Filing, recording, &c.		25 00
John Rice's bill		82 67
		$350 11

The items objected to by the claimants are, 1. The clerk's fees for recording the proceedings, and for the copy thereof transmitted to this court. 2. The marshal and clerk's fees on the sale under a perishable monition. And 3. Mr. Rice's bill for dockage and custody.

It is the unquestionable rule of the court, that the claimants shall not be liable for expenses, which would have been incurred independently of the interposition of their claim; but for all charges and expenses, which grow out of their claim, they must be held responsible. On this ground, the commissioners' fees for the depositions taken under the standing interrogatories, though not objected to, must be deducted; but the expenses of the depositions of Slocomb and others, which were admissible on the order for further proof, are properly chargeable. The survey and appraisement, having been made at the instance of the claimants, fall under the same consideration.

The objection to the clerk's fees for recording, &c. rests upon the ground, that he is not obliged to record all the proceedings in the circuit court; and, at all events, is not obliged to record the evidence. But however true the latter position may be under our practice, as to causes on the instance side of the admiralty, (on which I give no opinion), I am well satisfied, that the clerk is bound to

record the whole proceedings in this court in prize causes, as the evidence is always in writing, and inseparable from the allegations of the parties.

The ship's papers and preparatory examinations constitute the essential and indispensable proofs of a right to acquittal or condemnation; and foreign nations, as well as our own citizens, are interested in the preservation of a perfect record of all the evidence submitted to prize tribunals; and I take upon me to say, that such is the general practice in the admiralty courts of other countries. It is not contended, that the sum charged by the clerk is more than a reasonable compensation for the labor of recording the proceedings, and it must therefore be allowed, unless it exceed the sum allowable by law.

As to the fees for the copy of the proceedings, it is a mere question of fact, whether the sum claimed by the clerk is to be allowed or not. The statute of 1st of March, 1793, c. 20 [1 Stat. 332], has prescribed the fees of the clerk for services of this nature, and the court is bound to apply the regulations. It will be easy for the counsel to ascertain the amount which will become thus due to the clerk, and that sum and no more can be allowed.

As to the marshal's and clerk's commissions on the sales of the cargo by order of court, I think that, in general, it must be considered a charge on the property itself. It is a proceeding adopted for the benefit of all parties, and unless in very special cases, should be paid by the party, to whom the property is ultimately awarded. Nothing has been presented to the court, to distinguish the present case from the general rule.

As to the dockage of the schooner, I think it must be allowed against the claimants, from the time of the interposition of their claim to the time of the delivery on bail. This expense was necessarily incurred for the preservation of the vessel, during the litigation of their claim; and they have not, in my judgment, entitled themselves to be relieved from the burthen. Cases may occur, in which it would be highly proper to make this a charge on the property.

With respect to the charge of Mr. Rice for custody, the allowance of it depends altogether upon the facts. If a person was actually employed to take care of the schooner during the whole time, a proper compensation for his services ought to be allowed. If no person was employed, I should not, as at present advised, incline to grant a compensation for ideal custody. There should be an actual superintendence over the property, to entitle the party to a beneficial recompense. And even in cases of actual custody, if there be gross negligence or fraud, I should have no difficulty in refusing the party any compensation. Let the captors show, by affidavit, whether there has been any actual custody, and what would be a reasonable compensation. If actual custody, with competent diligence, be shown, I shall allow the item against the claimants, as this is not a case entitling them to a very favorable consideration in this court.

SALLY (UNITED STATES v.). See Case No. 16,215.

Case No. 12,259.

The SALLY MAGEE.

[Blatchf. Pr. Cas. 379.] [1]

District Court. S. D. New York. July 30, 1863.

PRIZE—ENEMY PROPERTY.

Vessel and cargo condemned as enemy property, the claimants being, at the time of the capture, citizens and residents of one of the seceded states of the Union.

In admiralty.

BETTS, District Judge. The above suit, as presented on the hearing before the court, on the pleadings and proofs therein, raised two main questions for the consideration of the court: First, whether the claimants, being citizens and residents of one of the seceded states of the Union at the time of the capture of the above vessel and cargo, had imputable to and impressed upon them the character of alien enemies because of the condition of public hostilities then subsisting between the state of their residence and the United States; and, second, whether, upon the proofs in the case, the claimants possessed such proprietary interest in the cargo captured as to constitute them owners thereof, within the rules of the prize law; and, due deliberation being had in the premises, it is considered and found by the court that the aforesaid vessel and cargo so seized were, at the time, enemy property, and that the claimants then possessed the legal ownership thereof. Wherefore, judgment of condemnation and forfeiture against the same is ordered. Decree accordingly.

An appeal was taken to the supreme court from this decree, as to the cargo but not as to the vessel. That court, at the December term, 1865, affirmed the decree of the district court [as rendered in Case No. 12,260]. See [Fry v. U. S.] 3 Wall. [70 U. S. 451.] [See, also, Case No. 12,261.]

Case No. 12,260.

The SALLY MAGEE.

[1 Blatchf. Pr. Cas. 382; [1] Betts, Pr. Cas.]

District Court, S. D. New York. July 30, 1863.[2]

PRIZE—AVERMENTS—PROPERTY OF CONSIGNEES—BELLIGERENT CAPTORS—NEUTRAL CREDITORS—POWERS OF UNITED STATES—TEST OATH.

1. Suppression, in the test oath to the claim, of the fact that the claimants were resident

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

[2] [Affirmed in 3 Wall. (70 U. S.) 451.]

traders in the enemy's country, it averring that they were citizens of the United States.

2. The case of The Hiawatha, 2 Black [67 U. S.] 635, determines that the United States givernment is, in this war, clothed with all the rights conferred by international law upon separate nationalities in a state of public hostilities with each other; and that a vessel and the cargo on board of her, being the property of residents in an insurrectionary state of the United States, are enemy's property, and subject, in the federal court, to condemnation, on capture at sea, as lawful prize.

3. A libel in a prize case need contain no further averment than that the property seized is prize of war.

4. In contemplation of war, the cargo in this case became the property of the consignees from the time of its being laden on board of the vessel and from the execution of the bills of lading therefor.

5. It is a settled principle of the prize procedure that belligerent captors are discharged of liens or equities of neutral creditors resting upon the effects of an enemy seized at sea. The acts of congress of July 13, 1861, August 6, 1861, and March 3, 1863 (12 Stat. 255, 319, 762), relate to confiscations for intraterritorial offences, and not to capture at sea.

In admiralty.

BETTS, District Judge. The above vessel and cargo were captured, as prize, at sea, off Cape Henry, June 26, 1861, by the United States ship-of-war Quaker City, and were sent to this port for adjudication. A libel was filed against the prize July 9 thereafter, in which were set forth, under special allegations, various causes of seizure, amounting to confiscable offences, according to public law. Three several claims were interposed thereto by the same proctor, July 23, 1861, in which, on the accompanying test oaths, it is attempted to raise particular issues of pleading in the suit.

1. Alexander Soule intervened, as master of the vessel, on behalf of David Currie, William Currie, George Allen, Isaac Davenport, Jr., Robert Edmond, and James H. Blair, as owners of the vessel, her tackle, and furniture, averring that they were citizens of "the United States of America," and not disclosing the fact that they were resident traders in Richmond, Virginia, an insurrectionary state, then in open rebellion and war against the United States, although the master attached his test oath to the claim, asserting his knowledge of the ownership and citizenship of the claimants.

2. Charles M. Fry, Overton M. Price, and Chapman J. Leigh intervened on behalf of themselves and Dunlop, Moncure & Co., and claimed 473 bags of coffee marked "X," and 1,450 bags marked "D M," of the said cargo, on the allegation, in substance, that the consignment made on the voyage to Dunlop, Moncure & Co., the last-mentioned firm, was, on arrival of the said vessel as prize, liable to the claimants in the sum of $35,326 and upwards, for acceptances and advances of money agreed to be made, and actually made, in good faith, and that the claimants were directed and authorized to receive the said coffee, and take charge of and sell the same, and apply the proceeds thereof, so far as needed, towards the payment of their own demands, and to hold the surplus for account of Dunlop, Moncure & Co. The test oath to this claim was made by Overton M. Price, one of the claimants.

3. The same claimants intervened and filed a further claim in the name of C. M. Fry & Co., to 1,529 bags of coffee marked "E D," and 10 half barrels of tapioca, part of the cargo of the vessel, and alleged their right and title to the coffee and tapioca to have thus accrued: that the firm of Charles Coleman & Co., of Rio Janeiro, were directed, as factors and commission merchants, there residing, to purchase and ship the merchandise above specified, for the account and to the consignment of Edmond, Davenport & Co., but that, by its invoice, it appearing that the purchase was not made at, or within the limits as to price, the said Davenport & Co., refused it as purchasers, or otherwise than on account of the shippers, Charles Coleman & Co., and Davenport & Co., authorized the claims to receive the same in their place and behalf; and that the firm of Coleman & Co. is composed of subjects of the queen of England, residents in Rio Janeiro, and that of Davenport & Co. of citizens of the United States. The test oath to this claim was made by Overton M. Price, one of the claimants, who swears to the residence and citizenship of the respective parties from his own knowledge, excepting that no other than his own firm reside within this district; and he adds that he believes, from the correspondence of the parties, the other facts to be true. But he omits to state, what he must necessarily have ascertained from the correspondence, that the firm of Davenport & Co. were citizens and residents of Virginia, an insurrectionary state.

It appears from the ship's papers, the proofs taken in preparatorio, and the oath on the ship's registry, that the vessel was built at Baltimore, in 1857, and was registered in the port and district of Richmond, in Virginia, on the 5th of August, 1857, in the name of David Currie, William Currie, George W. Allen, Robert Edmond, Isaac Davenport, Jr., and James H. Blair, all of Richmond, aforesaid, her only owners, and on the oath of one of the said owners. It was admitted, on the hearing, by both parties, that the vessel was despatched from Richmond, on the outward voyage in question, January 2, 1861, laden with the cargo of American produce, shipped by Davenport & Co., of that place, (Dunlop, Moncure & Co., of the same place, being in part interested in the same shipment and in bill of lading therefor,) consigned by Davenport & Co. to Charles Coleman & Co., of Rio Janeiro. The vessel took in her return cargo at Rio, May 10, 1861, bound to Richmond. The cargo was consigned in part by Coleman & Co. to Dunlop, Moncure & Co., and the resi-

due to Davenport & Co., at Richmond, or their assigns, he or they paying freight, and with no other condition or reservation annexed thereto. The transaction, accordingly, appears, upon the face of the ship's papers, to be a trading between two firms, resident in Richmond, Virginia, and another in Rio Janeiro, by the consignment of domestic products by the Richmond houses to Coleman & Co., in Rio, and the transmission back by the latter of the proceeds thereof, in native products of the country of those consignees. The vessel sailed on her outward voyage before the war commenced, and she returned and was captured off our coast without previous knowledge or notice of the state of war, or of the blockade of the port of Richmond, to which she was destined and sailing. The defence of the pleadings was put in with a view to contest on the merits the cardinal questions then pending in litigation in relation to the validity and effect of the war measures of the government and the lawful authority of the judiciary under the existing state of rebellion, which matters have since been determined by the supreme court of the United States in the case of The Hiawatha, 2 Black [67 U. S.] 635. The judgment of the court in that case determines that the United States government is, in this war, clothed with all the rights conferred by international law upon separate nationalities in a state of public hostilities with each other. That case settles the further point presented in this, and adjudges that a ship and the cargo on board of her, being the property of residents in an insurrectionary state of the United States, are enemy's property, and subject, in the federal courts, to condemnation, on capture at sea, as lawful prize.

There is no just ground of exception to the sufficiency of the allegations in the libel. It is needlessly special and diffuse, and would have adequately complied with the rules of pleading in prize causes had it contained no further averment than that the seized property is prize of war. The Adeline, 9 Cranch [13 U. S.] 244; The Fortuna, 1 Dod. 81; Hall. Int. Law, c. 31, § 22. No prejudice is, therefore, worked to the claimants, if the libellants fail to prove with exactness all the allegations spread out upon the libel, or if the manner of pleading the offence be faulty in point of form, since the averments set forth the seizure at sea of the vessel and cargo, as prize of war, by a public ship of the United States. 2 Wheat. Append. [15 U. S.] 19. The vessel was, at the time of capture, approaching the port of Richmond, free from all inculpable intentions, inasmuch as she was without warning or knowledge of the existing blockade, and her condemnation is asked by the government solely upon the ground that both ship and cargo are enemy property. The claimants can secure no exemption for the prize by means of the character which they so reservedly and guardedly apply to themselves of "citizens of the United States." The actual owners of the property seized are domiciled traders in Virginia, and the supreme court, in their late decision above referred to, declare that citizens of the United States in rebellion and war against their country are enemies. The public are not yet in possession of the full judgment of the supreme court, exhibiting all the facts and doctrines it establishes in the various particular cases covered by that decision; but it is believed that the forthcoming publication of the official report of the cases comprised in the decision will show that it disposes of the main points involved in this case.

So far as the evidence before the court fixes the interest and posture of these claimants in respect to the cargo, they stand only as creditors of the consignees, Dunlop, Moncure & Co., having no lien on the property, even as against them, and no demand subsisting against the consignment to Davenport & Co., or their assigns personally, or against the consignors of the cargo, Coleman & Co. In contemplation of law, the cargo became the property of the consignees from the time of its being laden on board of the ship, and from the execution of the bills of lading therefor at Rio Janeiro, May 10, 1861. This is a settled doctrine of the American courts of law and admiralty, and, correlatively, of prize courts. Grove v. Brien, 8 How. [49 U. S.] 429; Fitzhugh v. Wiman (in error) 9 N. Y. (5 Seld.) 562; Lawrence v. Minturn, 17 How. [58 U. S.] 100, 107; McKinlay v. Morrish, 21 How. [62 U. S.] 355; The Merrimack, 8 Cranch [12 U. S.] 317. The intervention of the claimants rests upon a supposed right or equity in them to counteract the operation of that rule, and to rescue these consignments from its effect by the interposition of tacit priorities possessed by them. There is scarcely a principle more unquestionably recognized in prize procedures than that belligerent captors are discharged of liens or equities of neutral creditors resting upon the effects of an enemy seized at sea. Upton, Mar. Law (2d Ed.) and cases collected, 153, 158. Neither the ship's papers nor the proofs in preparatorio afford any evidence that the consignees did not acquire full title to this cargo. It is proved that the existence of the war was not known until the capture of the ship and cargo had been consummated; and the transaction suggested in the claim, that Davenport & Co. refused to accept the consignment made to them, and authorized the claimants to receive it, must necessarily have been a transaction subsequent to the actual seizure of the goods as prize, because the necessity and possible availableness of such a procedure could not be known to the parties until the capture was actually perfected. It cannot be implied that a transaction of that character could divest the ownership vested by law in the consignees originally, or impair the validity of the prize captures. Such cap-

ture acquires a force and privilege of no less vigor than the arrest of the property on an execution against the consignees in favor of a judgment creditor. A voluntary shifting of the apparent ownership of the property for the purpose indicated cannot be sustained except upon very satisfactory evidence of bona fides and justness in the operation. The allegations in the claims and test oaths must, therefore, be accepted as a legal construction of their rights adopted by the claimants, and not as the result of any evidence in the case proving a lawful change of interests in the cargo after the commencement of the voyage.

The acts of congress (12 Stat. 255, 319, 762) cited by the claimants relate to confiscations for interterritorial offences, and not to captures at sea of prize of war, and contain no provisions applicable to this suit. The cargo became, therefore, upon the facts, stamped with the character of the consignees and the ship from the inception of the voyage, and could not, by the subsequent interference of other parties in the adventure, be so varied from that condition as to avoid belligerent rights attached to it. The Mary and Susan, 1 Wheat. [14 U. S.] 25.

I am of opinion, accordingly, upon the whole case, that the facts and the law appertaining to it support the prosecution. The Aurora, 4 C. Rob. Adm. 218; The St. Jose Indiano, 1 Wheat. [14 U. S.] 208. A decree of condemnation and forfeiture of the vessel and cargo is, therefore, ordered.

NOTE. The counsel for the claimants, in the written brief submitted by them, state: "If any doubt is entertained by the court as to the truth and good faith of the claimants' claim, further proof will set it at rest." On the 10th of August thereafter the claimants filed their appeal from the judgment to the supreme court without previous application to this court for leave to give further proof in the suit.

An appeal was taken to the supreme court from this decree as to the cargo, but not as to the vessel, and the decree was affirmed March 12, 1866. [3 Wall (70 U. S.) 451. For hearing on pleadings and proof, see Case No. 12,259. See, also, Case No. 12,261.]

Case No. 12,261.

The SALLY MAGEE.

The FOREST KING.

The WINIFRED.

The LYNCHBURG.

[Blatchf. Pr. Cas. 596.] [1]

District Court, S. D. New York. Jan., 1864.

PRIZE PROPERTY—COMPENSATION OF APPRAISER—TAXATION AS COSTS—CHARGES FOR BONDING—AMOUNT ALLOWED BY STATUTE.

1. An appraiser appointed by the court, on the application of the claimant, to appraise the prize property, with a view to its delivery on bail to the claimant, not having been paid his compensation, applied to the court to tax his costs for the service, and direct them to be paid out of the proceeds of the property, but the application was denied.

2. The charges of appraising and bonding such property must be borne by the party who applies to have it bonded.

3. The appraiser having charged 1 per cent. on the value of the property appraised, and the prize commissioners having reported that one-half of that amount would be a proper compensation, *held*, that the appraiser had no right to demand a quantum meruit for his services, or any further reward than the per diem allowance provided by statute or the standing rules of the court for that description of services.

[In admiralty. See Cases Nos. 12,259 and 12,260.]

BETTS, District Judge. Proceedings were taken before the court, in the term of July, 1861, after the arrest and prosecution of the above vessels and portions of their cargoes in prize, to obtain, on the part of the claimants, an appraisal of the coffee laden on board each vessel, with a view to bonding the several vessels and the coffee seized with them.

In the case of the Sallie Magee and her cargo, it appears that the district attorney objected specifically to the allowance of the application made by the claimants to have the prize delivered up on bail, but it does not appear that the libelants either disputed or agreed to the motions made for like orders in the other above-mentioned suits. Orders were, however, granted, in all the cases, that the vessels and cargoes should be delivered to the claimants, on bond, after appraisal by a single appraiser, designated in the respective orders, who, it seems, took the oath of an appraiser, and assumed the duties of the office, and made return of his valuations in the matters submitted to him, and his report, which was duly placed upon the files of the court. It is to be implied that the respective parties were cognizant of the action of the appraiser in all the suits, and assented to or acquiesced in its result.

The compensation claimed by the appraiser not having been paid to him, his counsel applies to the court to adjust or tax his costs for those services, and order their satisfaction out of the prize products remaining within the jurisdiction of the court. Notice of such application was served by his counsel on the United States attorney, but no appearance in opposition to the motion has been formally made by any party. The court has hesitated to act upon this application, and has required explanations of facts and law, to justify interference in these matters judicially, and an award of costs individually to or against any party to these suits, or an imposition of them on the proceeds of the above prizes yet remaining within the authority of the court.

In the first place, no practice in prize actions is pointed out which entitles claimants in prize suits to demand a delivery of prize property on bail to them, or for their benefit, as against government captors, or to inter-

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

meddle with it at all, except for its preservation when in a perishing condition. These proceedings were not based upon allegations of that character, and do not appear to have been further noticed on the part of the government, than in the refusal of the district attorney to consent to the application of the claimants to bail or appraise the prize property. If, however, the acts of the captors are to be considered as an acquiescence on their part, in the entry of orders by the court to name an appraiser and surrender the prizes to bail on appraisal thereof, yet it is in no way shown to the court that the libelants proceeded affirmatively in the matter, or possessed any interest or authority in or over the appraisements. The entire transaction seems to have been induced and carried to completion at the instance and for the convenience of the claimants solely. The natural result would be, that expenses so created should be defrayed by those alone who incurred them. The court is not aware of any rule in the civil or common law which subjects a suitor in rem to repay expenses made by a respondent in reclaiming from the custody of the law to his own possession property under seizure pendente lite, as to the legal title to such possession. At first impression, most assuredly, the charges of appraising seized property and bonding it fall exclusively upon the party who seeks to force it out of the custody of the law.

No evidence is furnished to the court that any judgment or decree has been pronounced in these suits, imposing costs of any amount upon the libelants carrying on these several actions, or that there has been any recognition, on the part of the United States, of a legal or equitable liability for the services rendered on the occasion in question. There does not appear to have been any previous stipulation in court, or any personal arrangement between the parties, that the compensation claimed by the appraiser shall be allowed for his services out of the arrested effects, if such arrangement could be lawfully made obligatory upon the government.

Feeling the difficulties of acting upon these claims for costs, I sought explanations from the claimant, on the first presentation of the bills for taxation, on the supposition that the claim might be sustainable on some legal or equitable grounds, as to what period of time had been devoted to making the appraisal, and as to the circumstances attendant upon the transaction. Obtaining no clear satisfaction on the subject, and the gross charges, amounting to $2,980, being moved for immediate allowance by the counsel for the appraiser, the court, on the attendance of the counsel for the appraiser, and of the United States attorney, and on their consent thereto, on the 7th of October, 1863, ordered that the bills of the appraiser be referred to the prize commissioners, to ascertain and report whether any, and if so, what, sum or sums should be allowed to him for the services mentioned in the bills and affidavits upon which the motion was made. The commissioners reported November 6th, thereafter, in substance, that the charge rested upon a demand by the appraiser of 1 per cent. on the gross value of the goods appraised, being $2,980, and that in their opinion, the sum should be 50 per cent. less, or $1,490. It appears, from the claim of the appraiser, and the evidence reported by the commissioners to the court, that the basis of the allowance claimed was the skill and experience of the appraiser in the employment, and not at all the time or labor bestowed in the performance of the service. No authority is pointed out to the court, sanctioning the application of so vague and indeterminate a rule of compensation for the common service of appraising merchandise merely for the purpose of bailing it. The notion of some of the witnesses, that the reward for such class of services is "regulated by commercial usage, and that a per diem allowance would not be in accordance with such usage," is clearly a misapprehension of the law governing the proceedings of the judiciary of the United States. The public business continually demands the "skill and experience" of mercantile men, in ascertaining and determining the value of merchantable commodities in the markets of the great importing and exporting ports of the country; and congress, aware of the necessity for the employment of such agencies, has naturally made provision for their use and compensation.

By the act of March 1, 1823 (3 Stat. 735, 736, §§ 16, 17), the president is required to appoint in various ports appraisers qualified for the duty, to appraise merchandise,—in this port, one at an annual salary of $2,000, to transact the class of business performed by Mr. Scott, the appraiser now in question; and, if a merchant appraiser is designated by the court to the duty, he is to be paid at the rate of $5 per day. A subsequent law augments the salary, but makes no change in regard to the compensation to merchant appraisers. 9 Stat. 618, § 5. So, by the standing rules of the district court, appraisers selected for similar duties under its authority receive a reward therefor of $3 per diem. District Court Rules of 1838, rule 67. The compensation is limited to that sum "for each day necessarily employed in making the appraisement." It would thus appear, that the claimant, his counsel, and the prize commissioners were under a grave misapprehension in supposing that the value of the services rendered in this case is to be determined by commercial usage, and that a per diem allowance is not in accordance with such usage; and also in their conclusion that a very large percentage in amount was the legal measure of reward for services of exceedingly vague duration and difficulty.

It appears, by the papers on file, that, in the case of the Sally Magee, the appraiser was sworn into office July 29, 1861, and re-

ported his valuation of the cargo the next day, with $690.40 fees therefor. The oath in the case of the bark Winifred was subscribed July 15th, and the appraisal reported was filed July 19th, with $806.40 fees therefor. The files in the cases of The Forest King [Case No. 4,937] and The Lynchburg [Id. 8,638] do not show when the appraiser was qualified or the time of his report. The fees claimed by him are $600 in the case of the Lynchburg, and $883.20 in the case of the Forest King. The prize commissioners, as before stated, report the value of these services to be, in the aggregate, a moiety of the sum charged, but assign no reason for that diminution of the amount, or why the deduction should not be a greatly larger proportion of the original demand, or upon what principles of quantum meruit the discretion of the court should be induced to adopt $1,490 as a fair and reasonable allowance. No guide, legal or equitable, is indicated in the report of the prize commissioners, which should lead the court to select the sum suggested by them in place of that claimed by the appraiser, nor any that does not as well support the per diem allowance fixed by statute and the rule of court for similar services. The time which the agent is to give to his employment is a cardinal element in estimating the reward to be allowed therefor. Manifestly, congress so regards it in fixing the salaries and per diem compensation to this class of agents. The salaries granted to the chief and assistant appraisers, and to merchant appraisers for occasional acts of appraisement, approximate so closely as to denote that congress intended the scale of reward to be framed upon a common consideration. It would be unreasonable to suppose that the government intended that the man called in to render a single service of a day or two, or even only a few hours' continuance, should be entitled to receive a compensation greatly surpassing what is allowed for the employment of an entire year devoted to the same line of duties, and those generally of surpassing difficulty and importance, inasmuch as the official appraiser is expected to be competently qualified to determine the values of numerous and diversified merchandise, while the merchant appraiser is expected to furnish an opinion upon an article familiar to his experience. In illustration, Mr. Scott, a coffee dealer, is required to pronounce his opinion upon the value of parcels imported in four vessels, and there is no evidence that a week, or half of that time, was expended in fulfilling the duty imposed upon him by the reference. For this service he claims to be paid $2,980, and the prize commissioners report him to be entitled to $1,490, while the law gives but $2,000, or, in the extreme, $2,500 a year, as compensation to the official appraiser for services embracing the examination and valuation of all descriptions of merchandise, natural products, and fabrics of art. I cannot contend that the law contemplates such inequalities in its application or construction.

Examining this application upon its particular facts, and also upon general principles, I feel constrained to determine as follows:

1. It is not made to appear to the court that the appraisals of the cargoes of coffee, in these proceedings, were moved for and ordered by the court in the interest of the United States, or that the United States are legally or equitably responsible for the services performed by the applicant, or that the coffee, as prize property, is subject, in kind, to the demand of the applicant.

2. Clearly, the appraisements sought for and ordered in these suits were in the interests of the parties claimants in the suits, and, according to the regular course of practice in admiralty, would be at their charge, they alone being benefited by the delivery of the property to their possession. If anything different from that was understood between the proctors in the cases, that was matter of private arrangement between them personally, and was in no way embraced or contemplated in the orders of the court. The court possesses no authority, in law, to enforce arrangements of that character, in rem, against public property in the custody of the law, or the proceeds of it in the charge of public depositaries.

3. An order in a cause pending in court on the seizure of property by the United States, made in invitum against either party, and by the mutual assent of both, with a view to an appraisement preparatory to bailing the property, imports no right in the appraiser to demand for his services in the matter a quantum meruit compensation, or any further reward than the ordinary per diem allowance provided by statute or by the standing rules of the court for that description of services. A different rate of taxation, if acquiesced in or expressly consented to by the counsel for the respective parties, cannot be enforced by the court.

Having no adequate proof before me that the coffee, or its proceeds, if yet within the jurisdiction of the court, is liable, in law, to the claim under this application, or that the lawful amount of compensation claimed by the applicant is recoverable out of the property or fund referred to in the application, the motion to the court upon the papers must be denied. The application and the papers are, accordingly, left subject to the orders of the applicant.

SALLY MAGEE, The (UNITED STATES v.). See Case No. 16,216.

Case No. 12,262.

SALMON et al. v. BURGESS.

[1 Hughes, 356; [1] 21 Int. Rev. Rec. 333.]

Circuit Court, E. D. Virginia. Sept., 1875.[2]

STATUTES—DAY OF PASSAGE—EX POST FACTO LAWS.

1. The fiction of law requiring a statute to be construed as in force during the whole of the day on which it passed, is a rule of mere convenience, and must give way when the priority of different events comes in question, and the right and justice of the case require.

2. An act of congress increasing taxes and denouncing penalties, falls within the provisions of the first article of the national constitution prohibiting ex post facto laws, and giving effect to statures only from the time of their receiving the president's signature.

3. The proviso in the act of March 3d, 1875 [18 Stat. 339], entitled "An act to protect the sinking fund and providing for the exigencies of the government," declaring that the increase of tax on tobacco therein provided for shall not apply to tobacco on which the tax had been paid when the act took effect, refers to the hour of the day on which the president's signature was affixed, and not to any antecedent part of the day.

This action is heard now, by consent of counsel, on the facts as set forth in the declaration, and on the general demurrer filed by the district attorney. The declaration, embracing several counts, sets forth in substance that, as to 9445 pounds of tobacco manufactured by the plaintiffs [Salmon & Hancock], they had before 3 o'clock p. m., of the 3d of March, 1875, purchased stamps of the proper officer, at the rate of 20 cents a pound, and affixed them to boxes of tobacco duly cancelled, and shipped the boxes from their factory, and thereby parted with all property in or control over the tobacco; that until 5 o'clock p. m., of the same day, the collector of internal revenue at Richmond, Rush Burgess, the defendant, had received of the plaintiffs and of tobacco manufacturers generally, 20 cents a pound for stamps on tobacco, and issued the stamps at that rate, doing so under express instructions from the commissioner of internal revenue at Washington, directing him to continue to do so until otherwise instructed; that these instructions continued in force until 5 o'clock p. m., of the said 3d day of March, 1875, and were at that hour revoked; that 20 cents per pound was the tax required to be paid by the law, at the time when the plaintiff stamped and shipped the said 9445 pounds of tobacco; that the act increasing the tax from 20 cents to 24 cents, entitled "An act to protect the sinking fund and provide for the exigencies of government," was not signed and approved by the president of the United States, until 9 o'clock p. m. of the said 3d of March, 1875; that some time after the said last-mentioned date, the said collector applied to and collected from the plaintiffs an additional four cents a pound on the said 9445 pounds of tobacco, amounting to $377.80; that the plaintiffs paid this additional amount under protest, and appealed against it to the commissioner of internal revenue at Washington; that the said appeal was denied by the said commissioner, and that in consequence of this denial, and of the wrongful collection by the defendant of the additional amount of $377.80, which has been often demanded, and payment thereof and of any part thereof refused, the plaintiffs now bring this action. The suit was brought in the circuit court of Richmond, and has been removed into this court by certiorari; some half dozen suits at law involving the same facts and questions of law are pending which, it is agreed on both sides, shall await the result of this suit. The case is heard upon the general demurrer of the defendant, which of course confesses all the facts that have been above recited. The act of the 3d of March, 1875, which is averred to have been signed and approved by the president at 9 o'clock p. m. on that day, enacts in its second section as follows: "That section three thousand three hundred and sixty-eight of the Revised Statutes be, and the same is hereby amended by striking out the words 20 cents a pound and inserting in lieu thereof 24 cents a pound; * * * provided, that the increase of tax herein provided for shall not apply to tobacco on which the tax under existing law shall have been paid when this act takes effect."

Wm. P. Barwell, for plaintiffs.

L. L. Lewis, U. S. Atty., for collector.

HUGHES, District Judge. The question for decision is, whether the court can take notice of fractions of a day, and consider the act of March 3d, 1875, increasing the tax on tobacco four cents on the pound, as having "taken effect" at 9 o'clock p. m. on that day, according to the fact as admitted in the pleadings and according to the apparent intention of the proviso of the act; or, whether it is bound by a fiction of the law, which gives a statute efficiency throughout the day on which it is enacted, to construe the statute as having been in force throughout the 3d day of March, 1875. Another fact conceded in the pleadings is, that express instructions have been received by the collector in Richmond, from the commissioner in Washington, to continue to receive as the tax and issue stamps for tobacco at the rate of 20 cents per pound on that day, and that throughout the business hours of the day those instructions remained in force, and were not revoked until 5 o'clock p. m. Fictions of law are intended merely for convenience, and are now never enforced in prejudice of the right and justice of a case. "Fictio juris neminem lædere debet." Many fictions of law which were observed in former times are no longer enforced. It was formerly, for instance, a fiction of law that an act of parliament, passed at any day of a session, related back to and became a law as of the

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

[2] [Affirmed in 97 U. S. 381.]

first day of the session, if the time for its taking effect were not mentioned in the act itself. A similar fiction was observed as to judgments at law, which were held to relate back and bear date as of the first day of the term of the court at which they were rendered. As to the fiction relating to statutes, it was never abrogated in England until the act of 33 Geo. III. c. 13, when it was enacted by parliament that each act should take effect from the day of its passage, or the day mentioned in the act itself. But this statute was not passed until 1793, and was never in force in the thirteen colonies. It is presumed that most of the states of the Union passed laws similar to the act of Geo. III. just mentioned. Be that as it may, we have to do in the present case only with a law of congress; and the constitution of the United States embodies provisions restricting the operation of acts of congress to the time of their passage. Article first of that instrument contains two provisions, one of them disabling congress from passing any ex post facto law; and the other declaring that, before a bill shall become a law, it shall have been presented to the president, and either signed by him or passed over his veto by two-thirds of both houses of congress. In point of fact, this approval and signing, by the president, of the act of congress now under consideration, as conceded in the pleadings, did not occur until 9 o'clock p. m. of the 3d of March, 1875, several hours after the close of business in Richmond on that day, and after the tobacco in question had passed from the plaintiff's control. The question here is, not between different days, as was the question in the cases of Arnold v. U. S., 9 Cranch [13 U. S.] 104, and of Matthews v. Zane, 7 Wheat. [20 U. S.] 164; for counsel on both sides concede that it went into effect on the 3d of March, 1875. But the question here is upon fractions of the same day. It is a fiction of law, applied for convenience, that there are no fractions of a day; but is this fiction to be enforced in spite of the fact admitted upon the record, against express provisions of the constitution of the United States? The cases just cited decide that a law of congress must go into operation on the day of its passage, rather than on a day subsequent, a proposition conceded by the plaintiffs. Every act does unquestionably take effect from the day of its passage or the day mentioned in the act itself. The question behind the one decided in 9 Cranch [13 U. S., supra] and 7 Wheat. [20 U. S., supra] is, must every statute be held to cover the whole of the day on which it goes into effect? Is this fiction of law to be enforced in all cases; even when the statute, as in the present instance, itself provides that it shall not apply to acts committed before its taking effect?

It was conceded by the district attorney that the fiction of law in question does not apply to penal statutes. A penal law relating back a half day or a single hour, would be just as positively an ex post facto law as it would be if it related back a whole day, or a month, or a year. A penal law of congress confessedly cannot be enforced against an act committed an hour before the bill making the act penal was signed by the president, though on the same day. It is claimed, however, by the district attorney that the rule is different in respect to remedial laws; which latter the law under consideration is not, it being a law imposing a tax and denouncing penalties for the non-payment of the taxes it imposes.

Such a concession as that mentioned would seem fatal, therefore, to the present defence; for this law of the 3d of March, 1875, must be construed in the same way as to all its features. Otherwise, we are reduced to the alternative of construing its penal provisions as having taken effect at 9 o'clock p. m. of a certain day, and its provisions not penal as having taken effect twenty-one hours beforehand, which construction would be absurd. The law is an entirety. If, as to its penal features, it cannot be held to have gone into effect until 9 p. m. of the day of its enactment, neither can it be held to have gone into effect before that hour as to its other provisions. Independently, however, of this latter consideration, the weight of authority seems to me to greatly preponderate in favor of the proposition that the courts may consider fractions of the same day in enforcing statutes.

In Wrangham v. Hersey, 3 Wils. 274, the court remarked: "It is said there is no fraction of a day, but this is a fiction in law, 'Fictio juris neminem lædere debet'. . . . By fiction of law the whole term, the whole assizes, and the whole session of parliament may be, and sometimes are, considered as one day, yet the matter of fact shall overturn the fiction, in order to do justice between the parties."

In Combe v. Pitt, 3 Burrows, 1433, Lord Mansfield said: "Notwithstanding the general fiction of the whole term being but one day, yet when the priority of action becomes essential and necessary to be ascertained, the particular day must be shown. . . . But though the law does not, in general, allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour may not be so, too, where it is necessary, and can be done, for it is not like a mathematical point which cannot be divided."

Judge Kent says (1 Comm. 455): "It cannot be admitted that a statute shall, by any fiction or relation, have any effect before it was actually passed. A retroactive statute would partake in its character of the mischiefs of an ex post facto law as to all cases of crimes and penalties, and in every other case relating to contracts or property it would be against every sound principle."

In Re Ankrim [Case No. 395], Justice Mc-

Lean, of the supreme court of the United States, said in circuit court: "It is unaccountable that the construction (that every statute begins to have effect, unless a time for its commencement is therein mentioned, from the first day of the session of parliament in which it is made) should have been continued by the English courts down to the year 1772. Nothing could show more forcibly with what pertinacity enlightened judges adhered to an established construction of the statutes. This is not objectionable where no injustice is done to private rights. But where the law was made to have a retrospective effect, even to the forfeiture of life, it is a reproach to the tribunals of justice. In our government such a statute would be ex post facto, and in violation of the constitution of the United States. The injustice of this construction in regard to civil rights is equally clear, except where the provision is of a remedial character. . . . That to notice a fraction of a day would be productive of inconvenience is readily admitted. In most cases, where no rights are impaired by the statute, there could be no ground of complaint. But suppose a legislature should make a certain act a capital offence, and the law should take effect on the day of its date, could an individual be punished under it for an act done on the same day, but before the statute was in fact passed? If in such a case an individual could be punished, it would be in virtue of a fiction of law, and there is no difference in principle in a fiction that shall give the statute a retroactive effect of half a day or half an hour. In the one case, as well as in the other, when the act complained of was done, it was innocent, but a statute subsequently passed makes it penal. And if punishment in the one case be inflicted, it may be in the other. The only difference is in time, not in principle. A rule of construction which leads to such a result, cannot be a sound one. Like many technicalities which have grown out of judicial action, the fiction is sustained neither by justice nor reason. . . . All who are acquainted with the history of legislative action in congress, know that bills passed on the 3d of March in what is called the 'short session,' are signed by the president late in the evening of that day, and are not published until some days afterwards. But the repealing act in question provides that it shall not affect any case or proceeding in bankruptcy commenced before the passage of this act. Now suppose by a fiction the repealing law would take effect so as to include that day, still the saving goes to the passage of the act, and not to the time it took effect." The decision of the court was, that fractions of the day could be considered, and that the statute did not take effect, as to the right of filing a petition in bankruptcy, until the actual time of its approval by the president.

In Re Richardson [Case No. 11,777], Justice Story said in circuit court: "I am aware that it is often laid down that in law there is no fraction of a day. But this is true only sub modo, and in a limited sense, where it will promote the right and justice of the case. It is a mere legal fiction, and, like all mere legal fictions, is never allowed to operate against the right of the case. On the contrary, the very truth and facts in point of time may always be averred and proved in furtherance of justice, and there may be even a priority in an instant of time, or, in other words, it may have a beginning and an end. . . . So that we see that there is no ground of authority, and certainly no reason, to assert that any such rule prevails as that the law does not allow of fractions of a day. On the contrary, common sense and common justice equally sustain the propriety of allowing fractions of a day, whenever it will promote the purpose of substantial justice. Indeed, I know of no case where the doctrine of relation, which is a mere fiction of law, is allowed to prevail, unless it be in furtherance and protection of rights pro bono publico. . . . In every case of a bill which is approved by the president, it takes effect as a law only by such approval, and from the time of such approval. It is the act of approval which makes it a law, and, until that act is done, it is not a law. The approval cannot look backwards and, by relation, make that a law which was not so before the approval, for the general rule is, 'Lex prospicit, non respicit.' The law prescribes a rule for the future, not for the past, or, as it is sometimes expressed, 'Lex dat formam futuris, non preteritis negotiis.' And this, in a republican government, is a doctrine of vital importance to the security and protection of the citizen. It is fully recognized in the constitution itself, which declares that no ex post facto law shall be passed. . . . Surely the constitution is not to be set aside or varied in its intendment by mere legal fiction. On the contrary, it appears to me that, in all cases of public laws, the very time of the approval constitutes, and should constitute, the guide as to the time when the law is to have its effect, and then to have its effect prospectively, and not retrospectively. It may not indeed be easy in all cases to ascertain the very punctum temporis, but that ought not to deprive citizens of any rights, created by antecedent laws, vesting rights in them. In cases of doubt, the time should be construed favorably for the citizens. The legislature have it in their power to prescribe the very moment in futuro after its approval when a law shall have effect, and if it does not choose to do so, I can perceive no ground why a court of justice should be called upon to supply the defect. But when the time can be accurately ascertained, I confess that I am not bold enough to say that it became by relation a law at any antecedent period of the same day. I cannot but view such an interpretation as at war with the true character and objects of the constitution."

In Pearpoint v. Graham [Case No. 10,877], Justice Washington said in circuit court: "There is in contemplation of law no fraction of a day, unless when an inquiry, as to a priority of acts done on the same day becomes necessary."

In Re Wynne [Case No. 18,117], Chief Justice Chase said in circuit court at Richmond: "Much was said in argument concerning the effect of the record of this deed upon the 2d of March, 1867, and it was strenuously urged that the deed was avoided by the effect of the (bankruptcy) act, which purports to have been approved on that day. But we entirely concur with Mr. Justice Story in thinking that, where the question is as to the effect of a proceeding instituted on the same day on which an act affecting the validity of such proceeding was passed, the precise time at which the act became a law may be properly inquired into. Gardner v. Collector, 6 Wall. [73 U. S.] 499. And in this we think ourselves warranted by the reasoning of the supreme court."

I find no decision of the supreme court of the United States directly in point on this question of the fraction of a day. But that court held, in the case cited by Chief Justice Chase, of Gardner v. Collector, 6 Wall. [73 U. S.] 511, "On principle as well as on authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question, always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." Here is at least an assertion of the right of the court to take judicial cognizance of the very time when a statute was passed.

The district attorney cited an opinion of the attorney-general of the United States, published in 21 Int. Rev. Rec. 90, to the effect that every act of congress relating to revenue must be construed to embrace the whole of the day on which it becomes a law. I think the opinion of a preceding attorney-general, published in 3 Op. Attys. Gen. 82, is more in accordance with authority and reason. The treasury department was there advised: "That a law of congress which contains no provision as to the time when it shall take effect, commences and takes effect, as a law, from the moment it receives the approbation of the president, and that, as a general rule, it is not competent to go into the division of a day. But this rule is not universal, and when questions of right growing out of deeds, judgments, and other instruments bearing the same date are concerned, the precise time is allowed to be established. If it be true, in point of fact, that the act of the 3d March, 1835, did not receive the president's signature until after office hours on that day, then a right had been acquired by Major Hunt, which ought to be protected, and for that purpose I am of opinion, in analogy to the excepted cases just alluded to, that the precise time may be inquired into. This is also necessary, in order to prevent the law from operating retrospectively for a part of the day on which it commenced."

The only cases which have been cited in support of the proposition that fractions of a day cannot be considered by the court, and that every act of congress not penal must be construed to relate back to the beginning of the day on which it was signed by the president, are those of In re Welman [Case No. 17,407]; In re Howes [Case No. 6,788]; U. S. v. Williams [Case No. 16,723]. The first two cases were decided by District Judge Prentiss, who sustained his view by a very able opinion, chiefly based on the grounds of convenience and necessity. The other case was decided by Justice Livingston sitting in circuit court. The weight of authority so greatly preponderates against these decisions, and, I must add, the weight of argument also, that I feel constrained to be governed by the decisions of Judges Mansfield, McLean, and Story, which I had previously cited. The fiction of law must give way in this case to the facts of the record, and I must hold that the amendatory act of 3d March, 1875, increasing the tax on tobacco, did not relate back and cover any part of that day anterior to the hour when it received the signature of the president. The demurrer must be overruled.

[Judgment was given for plaintiffs, and was affirmed by the supreme court, where it was carried on writ of error. 97 U. S. 381.]

Case No. 12,263.

SALMON FALLS MANUF'G CO. v. GODDARD.

[26 Hunt, Mer. Mag. 588; 25 Hunt, Mer. Mag. 715.]

Circuit Court, D. Massachusetts. 1852.[1]

STATUTE OF FRAUDS—MEMORANDUM OF SALE—DELIVERY OF GOODS SOLD.

[1. A memorandum of sale, as follows: "19th Sept.—W. W. Goddard, 12 mo. 500 bales S. F. Drills, 7¼. 100 cases blue do., 8¾. Cr. to commence when ship sails, not later than 1st December. Delivered free of charge for truckage. The blues if satisfactory to purchaser. W. W. G. R. M. M.,"—is not a sufficient memorandum to satisfy the statute of frauds; nor can a bill of parcels, made out by a clerk of the seller, and sent to the purchaser, who made no objection or reply thereto, be taken, in connection with such memorandum, for the purpose of forming together a sufficient writing to satisfy the statute.]

[2. Under a contract binding the seller to deliver goods to the purchaser free of truckage, it is not a delivery to have them sent by rail, and left at the station, and to notify the purchaser of their arrival; followed, upon his

[1] [Reversed in 14 How. (55 U. S.) 446.]

failure to take them away, with a notice that they are thereafter at the purchaser's risk.]

[This was an action by the Salmon Falls Manufacturing Company against William W. Goddard to recover damages for his refusal to give notes pursuant to an alleged contract for the sale of goods, and also to recover the price of the goods.]

C. G. Loring and C. B. Goodrich, for plaintiffs.

R. Choate and F. O. Watts, for defendant.

BY THE COURT. This action was brought to recover some $19,000 for damage sustained by the plaintiffs from the refusal of defendant to make and deliver to them his note of that amount, for goods bargained for and sold; and also to recover a similar sum for goods sold and delivered. The defendant resisted the demand upon the ground that the plaintiffs could not produce any written note or memorandum of the contract, as by statute is required; also that the plaintiffs were bound to deliver the goods to him prior to any right of recovery, which he averred they had not done. It was in proof that Mason & Lawrence, commission merchants, were the factors, in Boston, of the plaintiffs; that Goddard, on the 19th September, 1850, had a negotiation with Mason for the purchase of some goods, which he intended to ship. A memorandum was written and signed, in the following words, viz:

"19th Sept.—W. W. Goddard, 12 mo.

300 bales S. F. Drills, 7¼

100 cases blue Drills, 8¾

"Cr. to commence when ship sails, not later than 1st December. Delivered free of charge for truckage. W. W. G.

"R. M. M."

"The blues if color satisfactory to purchaser."

At the time of this negotiation the 300 bales were in the storehouse of plaintiffs, in New Hampshire, and Mason so informed the defendant, and requested that he would give notice when he desired the goods, that they might be sent for. On the 11th of October, at which time the 100 cases of blue had been received at the store of Mason & Lawrence, a clerk in their store made a bill of parcels, dated September 30, 1850, which stated that W. W. Goddard had bought of Mason & Lawrence 300 bales of S. F. Drills, at 7¼c., and 100 cases blue at 8¾c., carrying out the sums total; and underneath this general bill was written the marks, numbers, and yards of each bale, and of each case. The terms were also stated to be, "Note at 12 mo., to the treasurer of the Salmon Falls Manufacturing Company." This bill of parcels, on the same day it was made, was sent through the post-office to the defendant, to which he made no reply.

On the 22d October defendant said to Mason he wished him to send for the goods at Salmon Falls, so that he might receive them by the middle of the then next week (which would be the 30th). On the same day Mason & Lawrence communicated to the plaintiffs the request of the defendant. On the 25th October the defendant requested Mason & Lawrence to substitute other goods for those which he had purchased, with which request they would not comply, and declined. The 300 bales arrived at the Boston and Maine depot, in Boston, on and before the 30th of October, on which day the defendant was notified that the goods were at the depot, and were ready for delivery to him. He replied, "Don't send them." On the next day, Mason & Lawrence, by letter delivered to the defendant, notified him that the goods which had been forwarded from Salmon Falls by his direction were at the depot of the Boston and Maine Railroad, subject to his risk and charge for storage, stating the numbers, and marks of the bales; to which letter he made no reply. On the 2d November, Mason called at the counting room of defendant, and, not finding him, inquired of his clerk why Goddard did not remove his goods, and the clerk answered that his ship was full. The 300 bales were destroyed by fire at the depot during the night of November 4th. On the morning of the 5th the defendant called upon Mason & Lawrence, and, during the conversation with them, admitted he had his invoice, had been notified, and spoke of the goods as his. On the 30th of September, Mason & Lawrence notified the plaintiffs, at Salmon Falls, that 300 bales had been sold, stating the numbers, which corresponded with those upon the bill of parcels subsequently sent to the defendant, upon which notice the plaintiffs counted and set them apart, and the overseer who had charge of the goods was informed that these 300 bales had been sold, and were not to be forwarded till specially ordered. On the morning of the 4th of November the railroad company were notified by Mason & Lawrence that the 300 bales which were pointed out had been sold to Goddard. The defendant was owner of a ship called the Crusader, which on the 19th of September was at sea, which arrived at Boston, October 15th, cleared on the 2d November, and sailed on the 6th upon a new voyage. It was in proof that it was the usage of Mason & Lawrence, upon their sales, to require the note of the purchaser; that the defendant was aware of such usage, having purchased of the plaintiffs, through Mason & Lawrence, goods on six occasions prior to the 19th of September, for which purchases he had given his notes. On the 14th of November, plaintiffs demanded a note of defendant, which he refused. Some other things were in evidence, not changing the general aspect of the case. The plaintiffs submitted that the contract between the parties was one which the law regards as a bargain and sale; that the title passed from them, and vested in the defendant, on the 19th of September, notwithstanding the plaintiffs agreed to pay the cost of transportation; that this provision was collateral, and had no such

force or effect as would defeat the vesting of the title in the defendant, that if the title did not so pass to the defendant, inasmuch as he had directed the transportation which had, in pursuance of such direction, been commenced, and had declined to direct the place to which it should be trucked from the depot, a delivery at Salmon Falls to the carrier must be regarded as a delivery to Goddard; that having directed the transportation to commence, he could not, by neglect to designate the place to which it should be completed, or by refusal to receive the goods, interrupt such transportation, and thereupon avoid the responsibility of ownership; that such interruption at the depot was an exercise of ownership, and was in law to be regarded as a delivery. The plaintiffs requested the court to instruct the jury that the paper of 19th of September was a sufficient writing to bind the defendant. They also requested an instruction that the bill of parcels, which represented the defendant as purchaser, by reason of his alleged recognition of, and action under it, must be regarded as a sufficient signature on his part to bind him to the contract therein stated. Also, that the two papers, taken together, constituted one contract, and, so regarded, were sufficient to answer the purpose of the statute, which requires a note of the contract to be in writing. The plaintiffs also submitted that the acts of the parties constituted a delivery to, and acceptance of, the property by the defendant, so as thereby to render a written memorandum unnecessary. If not so as matter of law, these acts were competent to go to the jury, and were sufficient to authorize them to find such delivery and acceptance. They also requested the court to instruct the jury that the defendant, by his conduct, was estopped to say that the property had not been delivered to and accepted by him; that he was estopped to say that the property was not at his risk. There was no proof that the defendant ever requested a delivery of the 100 cases which were offered to him by letter on 16th November; no proof that he ever said to the plaintiffs or their agents in what ship he intended to send his goods, or at which place he wished a delivery. The defendant resisted all these grounds upon which the plaintiffs sought to recover. The court directed the jury to return a verdict for the defendant, giving the reasons at length. In substance, the court considered the paper of 19th September as insufficient, because it did not disclose who was vendor or vendee, what the price or the terms; that the bill of parcels was made by a clerk of Mason & Lawrence, and not by the agent of the defendant; that he did not profess to act for the defendant; that the defendant had not by any writing recognized the paper; that the acts and declarations of the defendant in relation thereto did not amount to a legal recognition of the paper, to an extent sufficient to bind him; that a paper not signed by a party, or by his agent, must be adopted by some writing, to make it available; that the two papers were not to be regarded as a compliance with the statute, although it was assumed they related to the same transaction, because they did not refer to each other; they did not call one for the other.

THE COURT also held that the acts in proof did not, in law, constitute a delivery and acceptance of the goods; that it was not competent for the jury, from the facts in proof, to infer such delivery and acceptance; that the defendant was not estopped by his conduct to say the goods did not belong to him, and were not at his risk at the time they were destroyed. To all these rulings of the court the plaintiffs excepted. Under the direction of the court, the jury returned a pro forma verdict for the defendant that "he did not promise, in manner and form as set forth in the plaintiffs' writ and declaration."

The counsel for the plaintiffs gave notice that they should file exceptions, for the purpose of bringing the case before the U. S. supreme court at Washington.

[NOTE. The cause was therefore taken to the supreme court, where the judgment of this court was reversed, and the proceedings remitted, with directions to award a venire de novo. 14 How. (55 U. S.) 446.]

Case No. 12,264.

SALMON FALLS MANUF'G CO. v. GODDARD.

[See Case No. 12,263.]

Case No. 12,265.

SALMON FALLS MANUF'G CO. v. The TANGIER.

[21 Law Rep. 6; 6 Am. Law Reg. 504; 42 Hunt, Mer. Mag. 453.]

Circuit Court, D. Massachusetts. May Term, 1857.

SHIPPING—CARRIERS OF GOODS—DELIVERY—FAST DAY—NOTICE—FIRE—DAMAGE OF SEAS.

1. To constitute a delivery by the master, of goods brought in a vessel from a port in another state to the port of Boston, under the ordinary bill of lading, mere unlivery of the goods and landing them on the wharf is not sufficient; there must also be reasonable notice to the consignee, allowing him time to make the usual and necessary preparations to receive the goods. And it is no delivery to unlade the goods at an unusual time. Thus, where, by the usage of a port, consignees are not in the habit of receiving goods on the day of the annual fast, a notice by the master to the consignee that he shall unload the goods on that day, will not bind the consignee to receive them; and where goods were so unladen, and not accepted or received by the consignee, and were, on the same day, destroyed by fire on the wharf: *Held*, that the loss must fall upon the carrier.

[Cited in The E. H. Fittler, Case No. 4,311; The Edwin, Id. 4,300; The Boston, Id. 1,671; One Thousand Two Hundred and Sixty-five Vitrified Pipes, Id. 10,536; The Williams, Id. 17,710. Cited in dissenting opinion in Constable v. National Steamship Co., 154 U. S. 92, 14 Sup. Ct. 1078.]

2. Fire, occurring on the wharf, after goods are landed, is not within the exception of dangers of the seas, in the ordinary bill of lading.

3. Nor is such a fire within the act of congress of March 3d, 1851 [9 Stat. 635], relieving ship owners from liability for damage by fire to goods on board of vessels, in certain cases.

[Cited in The Edwin, Case No. 4,300. Cited in dissenting opinion in Constable v. National Steamship Co., 154 U. S. 80, 14 Sup. Ct. 1073.]

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

In admiralty.

CURTIS, Circuit Justice. This is an appeal from a decree of the district court, in a suit in rem founded on a bill of lading in the usual form, signed by the master of the Tangier, at Apalachicola, on the 3d day of March, 1856, for one hundred bales of cotton, to be delivered at the port of Boston, (the dangers of the seas only excepted,) unto John Aiken, the treasurer of the Salmon Falls Company, to which corporation the cotton belonged. The district court decreed in favor of the claimants [Case No. 12,267], and the libellants appealed.

The material facts, which are not in dispute, are, that the bark arrived in the port of Boston on Sunday, the 6th day of April, 1856. On Monday, at the request of Goddard & Pritchard, who were the consignees of the larger part of the cargo, the bark was hauled to Lewis Wharf, and the unlading was begun. At some time between the hours of ten, a. m., and three, p. m., notice was given to Aiken's clerk, at his counting room, that the Tangier had hauled to the north side of Lewis Wharf, and had commenced discharging. The work of discharging was begun between two and three o'clock, p. m., and continued about two hours. On Tuesday, it was further continued until one o'clock, p. m., when it ceased, because there was not room on the wharf to receive more cargo. It was not resumed on Wednesday for the same reason. On Thursday, which was the day fixed by the proclamation of the governor of Massachusetts for the annual fast-day, the work was resumed at seven o'clock, a. m., and prosecuted till one o'clock; at which time the cotton belonging to the different consignees was all out of the vessel, and such of it as had not previously been removed by the consignees, had been separated into lots, according to the various marks, and was ready for delivery. Immediately afterwards, an accidental fire broke out on the wharf, and the cotton was burned. Pursuant to the notice received by the libellants on Monday afternoon, they sent men and teams to the wharf on Tuesday morning, and by one o'clock had removed thirty-five bales, which was all that could be found on the wharf belonging to the libellants. On Wednesday morning, the same men and teams were again sent to the wharf, but only one bale of the libellant's cotton could then be found, and the person in charge of the teams was informed by the mate of the bark that no cotton had been discharged since one o'clock, the previous day, for want of room on the wharf, and he did not know when they should recommence discharging. So that, down to Thursday, there was no want of diligence on the part of the libellants, in acting on the notice given them, and being in readiness to receive all that was in readiness to be delivered. Sixty-five of their bales of cotton were burned, and the question is, whether it was at their risk, or that of the bark, at the time of the fire.

The bill of lading in this case imports an obligation to carry and to deliver the goods, qualified only by the exception of danger of the seas. Fire, occurring on the wharf, after the goods are landed, is not within the exception. Garrison v. Memphis Ins. Co., 19 How. [60 U. S.] 312; Airey v. Merrill [Case No. 115]. So that, for the purposes of this case, there was one entire and absolute contract to carry and deliver; and the question is whether it had been performed when the goods were destroyed. Actual delivery can be made by a carrier only to the consignee, or some one representing him, and who assents to and does receive the goods. But, inasmuch as the liability of the carrier, as such, cannot be protracted by the neglect or refusal of the consignee to receive the goods, an offer to deliver them at such a time and place, and in such a manner, as is required by the contract, accompanied by a present ability so to deliver them, is so far equivalent to an actual delivery, that it terminates the liability of the carrier, as carrier, though a duty of custody and care may, under some circumstances, then arise. The questions, at what time and place, and in what manner, the delivery may be offered, and how the offer may be made, depend on the usage of the business in which the particular transaction occurs. Stated generally, it may be said to be the usage of the business in which this transaction occurred, for the vessel to be placed at some suitable wharf, and notice given to the consignees of the cargo, of the place where the vessel lies, and that the cargo is about to be discharged. It is then landed and made ready for delivery. The consignees, after receiving such notice, are expected to take notice of the fact that their consignments are made ready for delivery; and as soon as they are so, they are, in judgment of law, delivered, and the carrier's peculiar liability is ended. Such is the usage in point of fact, and like many other settled usages of commerce, it is recognized by the law, and has become a rule which courts of justice take notice of and enforce. But this rule has several important qualifications. In the first place, it is necessary that the notice to the consignee should be a reasonable notice. By which I understand that it must not so long precede the readiness to deliver, as to impose on the consignee an unusual and unnecessary bur-

den of keeping in readiness to receive and transport his goods; nor, on the other hand, that it should fail to allow the consignee reasonably sufficient time to make usual and necessary preparations to receive and transport them. In the next place, the goods must not only be placed on the wharf—they must be made ready for delivery. The mere discharge of a cargo is not equivalent to a delivery of the cargo. On the contrary, important rights and interests, both of the shipowner and the consignees of the cargo, depend upon the preservation of the distinction between unlading and delivery. This is well illustrated by the case of Certain Logs of Mahogany [Case No. 2,559]. In that case, the cargo was libeled for freight due under a charter-party, which made the freight payable "in five days after the brig's return to and discharge in Boston." It was insisted that this displaced the lien; because it showed that a credit was to be given after the cargo should be delivered. Mr. Justice Story held otherwise. He considered that not only were discharge and delivery distinct from each other, but that the consignee had a right to have his goods landed, and so placed that he could ascertain their condition before he made himself liable for the freight; and that the master had the right to unliver the cargo, and still retain it in his own possession, until the freight should be paid. Such is the maritime law of England and France, as well as of this country. See also Ostrander v. Brown, 15 Johns. 39, where it is expressly laid down that landing on a wharf is not delivery. If we consider the grounds upon which the law terminates the liability of the carrier without an actual delivery, it will be apparent that mere unlivery is not sufficient. Those grounds are, readiness to deliver, accompanied by such an offer to deliver as the consignee is bound to act upon. If the carrier is not ready to deliver, it is of no importance from what cause such want of readiness proceeds. Whether it be because the goods are still in the vessel, or because they are so mixed with others on the wharf that they are not accessible, or because the master intends to insist on his lien for freight, or for an average bond, is immaterial. If he is not ready to deliver, the law does not deem the delivery made, and he must be ready to deliver at such a time as the consignee is bound to receive his goods. The law does not allow the carrier's liability to be protracted by the neglect or refusal of the consignee to receive his goods. But until there is some neglect the principle does not apply. All will agree that if the master be ready to deliver on Sunday, or in the night time, such readiness cannot avail; for there is no duty incumbent on the consignee to receive goods at such times, and consequently no neglect on his part. These principles, when applied to the facts shown in evidence, are sufficient to determine this case.

The sixty-five bales of cotton belonging to the libellants, which were destroyed, were made ready for delivery on Thursday, the tenth of April. That was the day of the annual fast. The evidence is decisive that it was not usual for consignees to receive goods on that day. A large number of merchants, custom-house officers, wharfingers, and portwardens have been examined; their testimony covers a period of more than twenty years, and embraces an ample amount of knowledge of the business in which this transaction occurred. And it clearly shows that the annual fast, during the entire period, has been a day when merchants do not receive consignments of goods. It is also proved that in frequent instances, when the discharge of a vessel has been left incomplete, it has been completed on the fast-day; though this practice seems to be limited to goods not perishable; and the reason assigned for not landing perishable goods on that day is that consignees do not take away their goods on that day. There is no inconsistency in these courses of business, nor any conflict of rights growing out of them. The time when the cargo is discharged is at the will of the master. He may unlade it and make it ready for delivery on the Fourth of July, or in the night-time, if he chooses so to do. And he may unlade it without notice to the consignee. But such an unlading and preparation to deliver, are not equivalent to a delivery, because there is not such reasonable opportunity for the consignee to receive his goods, and such neglect of that opportunity, as the law puts in place of an actual delivery. The practice to complete the discharge of vessels on the fast-day, may satisfactorily show that it is a reasonable and proper act. It may justify the master as between him and the owners of the vessel. And so, many emergencies might justify him in discharging in the night-time, or even on Sunday. In the absence of all other evidence, proof of a usage to complete discharge on the fast-day, might also be sufficient to show that it was a usual and reasonable time to make delivery; because the reception of goods usually takes place on the day when they are discharged. But the proof is direct and clear that the fast-day is not a usual time for the delivery of the goods. Taking the entire evidence into view, it comes to this: The master, may, if he please, discharge on the fast-day; but he does so with the knowledge that there will be no delivery of them till the next day; because a discharge and readiness to deliver are not a delivery, and do not become so, until some usual time arrives for the consignee to attend for the purpose of receiving his goods.

It was strongly urged that the observance of the fast-day is purely voluntary; that there is no legal obligation to observe it; and that to deprive the master of the power to offer a delivery on that day, would compel him to observe the day, and thus trench on his legal right to work on that day, if he

choose to do so. But the same argument would apply to the Fourth of July, which I believe is universally kept as a holiday. And the answer to it in that case, as well as in the case at bar would be, that all who engage in a particular business must conform to the reasonable and lawful usages of that business; that what is usual in respect to times and places and modes of doing business, in the absence of any rule of law to the contrary, becomes a rule which all concerned are understood to assent to when they engage in that business; and that, for a master to insist that a consignee should not observe a particular day, usually observed by consignees, would deprive the consignee of a right of choice, secured to him by the usage, and by the implied consent of the master himself.

After the fullest consideration, I am of opinion that these goods were destroyed before the time had arrived for the consignee to receive them; that consequently there was no delivery in point of law, and the vessel is liable for their value, unless relieved by the first section of the act of congress, of March 3d, 1851 (9 Stat. 635). This section is copied from the second section of the act of 26 Geo. III. c. 86, which received a judicial interpretation by the court of queen's bench in Morewood v. Pollok, 18 Eng. Law & Eq. 341. It was there held that the act did not extend to the case of a fire occurring on board a lighter, in which cotton was being conveyed from the vessel to the shore. This decision is in conformity with the language of the act, which limits its operation to fire happening to or on board of the vessel. Without a departure from the plain meaning of the words of the act, I cannot extend it to a fire happening on shore. The result is, that the decree of the district court must be reversed, and a decree entered in favor of the libellants for the value of the cotton and costs.

[NOTE. The decree in this case was, in effect, reversed by the supreme court in Richardson v. Goddard, 23 How. (64 U. S.) 28. After the rendering of this last decision the circuit court granted a new hearing in this case, at which it reversed the decree, as rendered above, and entered a decree affirming the decree of the district court, the last opinion being delivered by Circuit Justice Clifford. Case No. 12,266.]

Case No. 12,266.

SALMON FALLS MANUF'G CO. v. The TANGIER.

[1 Cliff. 396.] [1]

Circuit Court, D. Massachusetts. May Term, 1860.

SHIPPING — CARRIERS OF GOODS — DELIVERY — NOTICE—DISCHARGE—NOTICE AFTER DISCHARGE —INTERRUPTED WORK—NEW NOTICE.

1. When a carrier by water, acting pursuant to a full and reasonable notice to the consignee of the arrival of the vessel and of his readiness to deliver the cargo, unlades the same on a suitable wharf at a suitable time, and makes it ready for delivery, as by separating each consignment from the others, and placing them where they are conveniently accessible for the purpose of removal, such acts, if performed in good faith, have the effect to discharge the carrier from further liability as carrier, and entitle him to freight.

[Cited in Richmond v. Union Steamboat Co., 87 N. Y. 247. Cited in brief in Hamburg-American Packet Co. v. Gattman, 127 Ill. 606, 20 N. E. 662.

2. Notice of the arrival of the vessel, and readiness to deliver, need not be delayed till the cargo is unladed and all the acts performed which are requisite to discharge the carrier; it is more usual to give the notice when discharging is commenced; and when so given, it is not in general necessary that it should be repeated, if unloading is prosecuted without unnecessary or unusual delay.

3. When no notice is given to the consignee until the cargo is discharged, it seems the responsibility of the carrier continues until a reasonable time in which to remove the goods, has elapsed; but such is certainly not the rule where notice is given prior to the unlading.

[Cited in The Boskenna Bay, 22 Fed. 665.]

[Cited in Faulkner v. Hart, 82 N. Y. 417; McAndrew v. Whitlock, 52 N. Y. 48; McNeal v. Braun, 53 N. J. Law, 624, 23 Atl. 687.]

4. If the unlading be temporarily interrupted by the crowded state of the wharf, on account of other consignees not removing their goods, no new notice need be given on resumption of the work.

5. Where prior notice is given, it is the duty of the consignee and carrier to co-operate, and the one who fails so to do must abide the consequences.

This was an appeal in admiralty in a case of contract. It appeared from the testimony, that, on the 3d of March, 1856, the Tangier took on board as part of her cargo of cotton one hundred bales, consigned to John Aiken, treasurer of the libellants, and sailed for Boston. She arrived April 6th. The next day, at the request of the principal consignee, she hauled up to Lewis Wharf, and the master gave to the principal consignees the usual notice of arrival and readiness to deliver cargo. The agent of the libellants, on receipt of this notice, instructed the truckman who usually did such work for them to take their cotton from the wharf and deliver it to the railroad company, to be carried to their mills, and furnished him with receipts to be signed by the agent of the railroad company, as the cotton came into their hands. On the 7th, the master began to discharge the cotton upon the wharf, causing the lots of the several consignees to be separated and so placed as to be easily accessible. This unloading continued till one o'clock on the 8th, when the wharf became so crowed that the work had to be suspended. At that time thirty-seven bales of the libellants' cotton had been discharged, and thirty-five bales had been received by their truckman. On the morning of the 9th the truckman of the libellants went to the wharf, and, finding none of libellants' cotton, did not return on that day, or on the 10th,

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

which was fast-day. The wharf having been sufficiently cleared on the morning of the 10th for the master of the vessel to resume work, he accordingly proceeded with the unloading, without giving any new notice of the time of recommencing to unlade. At one o'clock p. m. of that day the remainder of the cargo, including the sixty-five bales of the libellants, was on the wharf, properly sorted, and so placed that each consignee's portion was easily accessible. At two o'clock an accidental fire consumed all the cotton on the wharf. In the district court a decree was entered dismissing the libel [Case No. 12,267], whereupon the libellants appealed to the circuit court [see note, Id. 12,267].

C. B. Goodrich, for appellants.

As the claimants [Charles Richardson and others] rely upon a constructive delivery, the burden of proof is on them to show it. To do this they must show that an actual delivery was prevented by some neglect or default of the party entitled to receive the goods. Pars. Mar. Law, 202. An unlading and putting of the cotton on a wharf at a proper time and place is not eo instanti a delivery to the consignee; he is entitled to a reasonable time to examine and to receive his goods. Fland. Shipp. §§ 276, 279; Syeds v. Hay, 4 Term R. 260; Gatliffe v. Bourne, 4 Bing. (N. C.) 314; Bourne v. Gatliffe, 3 Man. & G. 687; Goold v. Chapin, 10 Barb. 613; Clendaniel v. Tuckerman, 17 Barb. 189; Brittan v. Barnaby, 21 How. [62 U. S.] 529. The inability and neglect of the master to deliver on the 8th, and again on the 9th, was a refusal to deliver. Notice of intention to deliver is of no avail, unless followed by an actual readiness to deliver at the time appointed. After delivery had been stopped, a readiness to resume delivery is unavailing, without a new notice. 1 Leigh, N. P. 515; The Grafton [Case No. 5,655]; Stevens v. Boston & M. R. R., 1 Gray, 277; Bradstreet v. Baldwin, 11 Mass. 232; Dobson v. Droop, 1 Moody & M. 441; Abb. Shipp. 421. One o'clock p. m. was the dinner-hour of the truckmen employed to move the goods. An unloading of the goods at that hour, without notice, and after an inability and refusal on two prior days, was not a delivery. The destruction by fire does not discharge the carrier, for the fire was not on board the vessel, and the bill of lading contains no exception on account of fire. 9 Stat. 635; Morewood v. Pollok, 18 Eng. Law & Eq. 341; Atkinson v. Ritchie, 10 East, 533.

Shepley & Dana, for claimants.

The unloading of goods on a suitable wharf at a usual time for unlading after reasonable notice to the consignee, accompanied with a readiness and present ability to deliver, is such a tender of delivery as discharges the ship-owner from his liability as a carrier. Norway Plains Co. v. Boston & M. R. Co., 1 Gray, 271; Cope v. Cordova, 1 Rawle, 203; Hyde v. Trent & M. Nav. Co., 5 Term R. 389; Goold v. Chapin, 10 Barb. 613; Fisk v. Newton, 1 Denio, 45; Ang. Carr. § 313. This rule of law is founded on the excellent reason that the liability of the carrier ceases when and where the duty to carry ceases, and the ship-owner never carries beyond the wharf. The only question, then, is the question of fact,—was there a landing on the wharf, usual or assented to, of the libellants' cotton, separately or accessibly placed, under notice, before it was burned? The evidence places the answer to this question beyond dispute. As for the new notice, which it is said ought to have been given on resumption of work, on the 10th, no authority can be cited which requires it, and no custom which demands it. The last objection, that the time when the unloading was finished was the dinner-hour of the truckmen, can apply only to the few bales last unloaded, if to any. In fact, this cargo was discharged in the daytime at the usual hours, and this is sufficient.

CLIFFORD, Circuit Justice. Beyond question, the decision of the supreme court in Richardson v. Goddard, 23 How. [64 U. S.] 28, has established the rule that a vessel lying in an American port, if she has commenced to discharge her cargo prior to the occurrence of the annual fast of the state in whose port she is at the time moored, may properly continue the work on that day, or in case the work of discharging the vessel had been suspended because the wharf was temporarily blocked up by the merchandise previously unladen she may, if the obstacles are removed, resume and complete the work on that day as an ordinary working-day. Assuming that the day when the unlading was completed must now be considered, under the circumstances of this case, as an ordinary working-day, the counsel of the respondents insists that the evidence disclosed in the record fully establishes their defence. That proposition is denied by the libellants, and they insist that the present case is distinguishable from that decided by the supreme court in two particulars. First, they contend that there should have been a new notice to them prior to the resumption of the unlading on fast-day, after it had been suspended by reason of the blocking up of the wharf, and that no such new notice was given. Second, it is insisted by the libellants, that as the work of unlading was not completed until one o'clock, and, as that was the usual dinner-hour of the truckmen, the unlading was not at a proper time so as to discharge the carrier from further liability, even if the notice was sufficient, and although all the other acts to constitute a legal substitute for an actual delivery were duly performed.

That due notice was given of the arrival of the bark, and that the master was ready to deliver the consignment, has already appeared, and the evidence upon that point need not be repeated. No authority is cited

to show that a second notice is ever required in a case like the present, and it is believed that none can be found to countenance such a requirement, where it appears, as in this case, that all of the officers of the vessel remained on board, and that the suspension of the work was only a temporary one, occasioned by the ordinary impediments and obstructions universally known to be incident to the nature of the business. Small wharves are liable to become blocked up upon the discharge of large cargoes, and when that is the case the obstruction itself furnishes to the experienced truckman or drayman the reason for the suspension of the work. Had the master truckman of the libellants gone to the wharf on Wednesday and found the vessel abandoned by her officers, and no one on the wharf engaged in removing the cotton, there would be much greater reason to support the views of the libellants; but it was not so. When the teamster went there, all of the officers were on board, and the truckmen of the delinquent consignees were employed in removing the cotton from the wharf, and some two hundred bales were removed during that day. Under these circumstances, the teamster could hardly fail to understand that the work of unlading would be resumed as soon as the obstacles which had caused it to be suspended were removed. Besides, while he was there he was told by the mate that want of room had occasioned the work to be suspended; and not a doubt is entertained from the evidence that he well understood that it would be resumed as soon as a sufficient number of bales were taken away to afford room to discharge the residue. Carriers by water, acting under the usual bill of lading, are not required to transport their cargoes from the wharf to the storehouses of the merchant or consignee, but may lawfully unlade the same at the usual wharf; and all the decided cases, if rightly understood, admit that if the carrier, acting pursuant to a full and reasonable notice to the consignee of the arrival of the vessel, and of his readiness to deliver the cargo, unlade the same on a suitable wharf, at a suitable time, and make it ready for delivery, as by separating each consignment from the others and placing it on the wharf, where it is conveniently accessible for the purposes of removal, that such acts if performed in good faith are equivalent to an actual delivery of the merchandise, and have the effect to discharge the carrier from all further liability in his capacity as carrier, and fully entitle him to the stipulated freight. Ships trading from one port to another have not the means of carrying the goods on land, and, according to the established course of trade, a delivery on a suitable wharf, at a suitable time, after due notice of the arrival of the vessel, and of the master's readiness to deliver the goods, is equivalent to such a delivery as will discharge the carrier from his liability as such, provided the consignment in question is properly separated from others, and the goods so placed on the wharf as to be conveniently accessible for the purpose of removal. Hyde v. Trent & M. Nav. Co., 5 Term R. 389; Story, Bailm. § 445; 2 Kent, Comm. (9th Ed.) 816; Cope v. Cordova, 1 Rawle, 203; Kohn v. Packard, 3 La. 225; Harman v. Mant, 4 Camp. 161; Goold v. Chapin, 10 Barb. 612; Ang. Carr. § 313; Norway Plains Co. v. Boston & M. R. Co., 1 Gray, 271; Fisk v. Newton, 1 Denio, 45; Thomas v. Boston & P. R. Co., 10 Metc. [Mass.] 472; Carside v. Proprietors of Trent & M. Nav. Co., 4 Term R. 581; Richardson v. Goddard, 23 How. [64 U. S.] 28. Mr. Chitty says, where goods arrive by ship from a foreign country, they must be delivered by the master to the consignee or his assigns according to the bill of lading, or at the usual wharf, according to the usages of the port of delivery with respect to such a voyage. Chit. & T. Carr. (Ed. 1857) 154; Golden v. Manning, 3 Wils. 429, 2 W. Bl. 916. He cannot, however, at once discharge himself from all responsibility by immediately landing the goods, without any notice of the arrival of the vessel or of his readiness to make the delivery. But he must give such reasonable notice of those facts to the merchant or consignee as will enable him, in the usual course of business, to receive and take away the goods. Add. Cont. (2d Am. Ed.) 480; Gatliffe v. Bourne, 4 Bing. N. C. 314; Bourne v. Gatliff, 11 Clark & F. 45; Price v. Powell, 3 Comst. [3 N. Y.] 326. It is a mistake, however, to suppose that such notice cannot be given till after the unlading is completed and all the acts performed which are required to discharge the carrier. On the contrary, it is more usual and equally effectual to give the notice at the time the work of discharging the vessel is commenced; and when so given it is not in general necessary that it should be repeated, provided the unlading is prosecuted without unnecessary or unusual delay. Casual interruptions in the prosecution of the work for brief periods, by such impediments and obstructions as are necessarily incident to the nature of the business,—as by the blocking up of a small wharf by the vessel's own cargo,—are not unusual, and do not create any necessity whatever for a second notice. Such impediments are so common that they may be said to furnish their own explanations, and being such as every truckman fit to be employed readily comprehends, the interruptions in the work of lading occasioned thereby create no necessity to repeat the notice, because the interruptions are not of a character to mislead those who are usually employed to remove the goods from the wharf.

Unlivery at a proper time as well as at a proper place is a part of the duty of the carrier, and is one of the necessary acts to be performed by him in order to discharge himself from liability in a case like the present. Where no actual delivery to the consignee had been made to free himself from responsibility

as a carrier, he must show that he gave due and reasonable notice of the arrival of the vessel and of his readiness to deliver the goods; that pursuant to that notice he discharged the consignment in question on a suitable wharf, at a suitable time, and that the goods were properly separated and so placed on the wharf as to be conveniently accessible for the purpose of removal. All this was done in this case, unless it be held, as is contended by the libellants, that the time was unsuitable, because the work was completed at one o'clock, which it is said is the usual dinner-hour at this port for the truckmen. Masters of vessels employed in the transportation of merchandise necessarily have to deliver goods to persons of different habits, and to those engaged in different pursuits; and to hold that they must suspend the work of discharging their vessels during the several hours when it is usual for those to whom the goods are to be delivered to go to their meals, would be to subject them to great inconvenience and embarrassment. Such restriction upon the hours of labor would prove to be very inconvenient to those usually employed to discharge the cargo, and still more so to those belonging to the vessel. Meal-time, as usually understood by different persons in a commercial port, is exceedingly variable. Dinner-hour varies from twelve o'clock at noon to six o'clock in the afternoon and breakfast-hour from sunrise to ten o'clock in the forenoon, or later. Take the case of a large cargo consigned to various consignees, and if indiscriminately stowed, it would be difficult to discharge it at all within the business hours of the day, without violating this supposed rule. Truckmen, it is said, usually dine in this port at one o'clock, but the case shows that some of them dine at twelve, and, what is more, the case also shows that other persons besides regular truckmen were employed in taking away some portion of the cotton. Consignees are not obliged to employ truckmen to remove their goods from the wharf, but may go there in person if they choose, and receive their own consignments; and if the rule has any foundation in law, it is very clear that its benefits may be claimed by all who have any such dealings with the vessel. But the objections to the proposition as applied to this case do not consist alone in the uncertainty of the restriction as to the hours of labor, nor even in the fact that the rule would occasion great inconvenience and embarrassment. Still graver objections exist to it, arising from the assumed theory of law on which it is based. It assumes, in the first place, that the notice given by the master of the arrival of the vessel, and of his readiness to deliver the goods, imposed no duty upon the consignees until all the acts required of the master to discharge himself from his responsibility as a carrier had been performed; and then it also assumes, in the second place, that, after all those acts had been performed, he still continued to be the insurer of the goods for such a length of time as was reasonably necessary to enable the consignee to go to the wharf and take the cotton away. Suppose no notice had been given of the arrival of the vessel, and of the master's readiness to deliver the goods, as in the case of Gatliffe v. Bourne, 4 Bing. N. C. 314, then the theory of law assumed by the libellants, that the mere unlading of the goods on a suitable wharf, at a suitable time, is not equivalent to an actual delivery would be correct. When the only notice given of the arrival of the vessel, and of the master's readiness to deliver the goods, is subsequent to the performance of those acts, then it may be true that the consignee is entitled to a reasonable time thereafter in which to go or send to the wharf, receive the goods, and take them away. But where he is duly notified in advance of the unlading, or at the time when it was commenced, he has no right to remain passive and indifferent until the unlading is completed, and all the other acts required of the master are fully performed, and then claim that the liability of the carrier shall continue for such an additional length of time as will enable him to do what he ought to have done while the cargo was being discharged and those other acts were being performed. Consignees and masters of vessels are expected to co-operate in the delivery of consignments; and if they do so, it will seldom happen that any controversy will arise, and when they do not do so, the delinquent party must abide the consequences. The Grafton [Case No. 5,655]; Brittan v. Barnaby, 21 How. [62 U. S.] 529. Such co-operation is for the interest of both parties, and it is for that reason that it is required. Masters need the co-operation of consignees to prevent the wharf from becoming blocked up, and the interest of consignees is promoted by such co-operation, because without it some of the acts otherwise required of the master cannot be performed. A new hearing was granted in this case at the last term, so that the case now stands the same as in an ordinary appeal. For the reasons already given the decree of the district court is affirmed.

Case No. 12,267.

SALMON FALLS MANUF'G CO. v. The TANGIER.

GODDARD et al. v. SAME.

PEARSON v. SAME.

[3 Ware, 110.] [1]

District Court, D. Massachusetts. Oct., 1856.[2]

SHIPPING—CARRIERS OF GOODS—DELIVERY—NOTICE—WHEN TO BE GIVEN—DEPOSIT ON WHARF—BAILMENT—FAST DAY—SUSPENDED WORK PLEADING—JOINDER.

1. When a vessel arrives from a foreign port, and the master has safely moored his vessel at a suitable wharf, it is his duty to give early notice to the consignees of the cargo of his arrival, where his vessel lies, and that he is ready to deliver their goods. And the same rule applies to long coasting voyages.

2. The notice ought regularly to be given before the unlading is begun.

3. After such notice, and a permit is obtained, he may ordinarily, at a proper time and in the working hours of the day, proceed to discharge the cargo.

4. It is the duty of the consignees, on receiving such notice, promptly to be on the wharf to receive their goods as they are discharged from the vessel.

5. When the master, with such notice, has transferred the goods from the vessel and safely deposited them on the wharf, where and at a time when they can with reasonable convenience be received by the consignees, he has completed his contract as a carrier.

6. But this does not amount to a delivery until the consignee receives them.

7. A delivery, in the sense in which the word is used in a bill of lading, includes a transfer of the possession, actual or constructive, and with it the right and liabilities incident to the possession.

8. If the consignee is not present to receive the goods, or for any cause declines to do it, the placing the goods on the wharf is a tender of delivery that discharges the master as a carrier, but the goods remain in his custody with the responsibilities of an ordinary bailee for hire.

9. If after the unlading is begun and before it is completed, a fast day intervenes, the master, by the custom of the port of Boston, is authorized to continue the work as on an ordinary working day, at least in the forenoon.

10. Or if the work has been suspended by the wharf being crowded, and it is then cleared, he may recommence the unlading without any new notice; and when the goods are placed on the wharf, he will be discharged as a carrier.

11. When several persons have causes of action of a like nature, and involving one or more questions common to all against a vessel, all may join in one libel.

12. In such case of joinder, the evidence touching the questions common to all is taken but once, and when these questions are decided, the cases become separate and independent, and each is litigated on its own merits.

[Cited in brief in The Pathfinder, Case No. 10,797.]

[These were libels founded upon bills of lading by the Salmon Falls Manufacturing Company, Goddard & Pritchard, and John H. Pearson against the bark Tangier.]

Mr. Goodrich, for Salmon Falls Manuf'g Co.

Mr. Goodrich, for Goddard & Pritchard.

C. P. Curtis & C. P. Curtis, Jr., for Pearson.

Choate & Bell, for respondent.

WARE, District Judge. Before proceeding to examine these cases on their merits, it may not be improper to observe that some time and some expense would have been saved, if these three libels had been united in one; or if, before hearing the first, the three had been consolidated and heard together. They all involve one or more questions as to the liability of the vessel for the loss of the cotton under circumstances common to all. Such a joinder of parties, where several persons have causes of action of a like nature, and involving one or more questions common to all, is authorized by the general principles of admiralty practice. It has from time immemorial been the familiar usage in the case of seamen suing for their wages. But it is a right which extends to all parties in analogous cases. The supreme court has held that it extends to several consignees suing for damages sustained by their goods from the unseaworthiness of the vessel or the fault of the master. Rich v. Lambert, 12 How. [53 U. S.] 353. And I have supposed that it embraced suits by material men, where the liability of the vessel is a question involved. Such joinder is not only authorized by the general principles of admiralty practice, but is specially enjoined by the process act of July 22, 1813 (3 Stat. p. 19, § 3). The act, so far as it applies to proceedings in the admiralty, I understand to be merely in affirmance of the pre-existing law of the court. In such cases of joinder or consolidation, all the evidence touching the questions common to all the cases, is taken but once, and when these questions are decided, the cases become separate and distinct, and each party litigates his own on its own peculiar merits.

In this case one of the libels was heard and argued separately, and two were heard together; but in reviewing the evidence offered in all, I have come to the conclusion that they may all well be considered together, so far as the questions common to all are concerned, and I shall proceed to state my opinion on these questions precisely as though there had been a joinder or consolidation, noticing incidentally any matters that may be peculiar to either.

The bark Tangier arrived in Boston on Saturday, April the 6th, 1856, from Apalachicola, with a cargo of 998 bales of cotton, and on Monday a. m. was safely moored at Lewis' wharf. Of this cotton, 558 bales were consigned to Goddard & Pritchard, 100 to Pearson, and 100 to the Salmon Falls Manufacturing Company, and the residue to other

[1] [Reported by George F. Emery, Esq.]

[2] [Reversed in Case No. 5,494. Decree of circuit court reversed by supreme court in 23 How. (64 U. S.) 28.]

consignees. The master on Monday gave notice to the consignees of his arrival, of the place where his vessel lay, and that he was ready to deliver their goods. The unlivery was commenced in the afternoon, and was continued through the next forenoon, when, the cotton not being removed, the wharf became so full that the work was suspended. A new notice was given to Goddard & Pritchard, and to Pearson, on Tuesday, and they still neglecting to remove their cotton, were hastened by a third notice on Wednesday morning. But it is, on the evidence, not so certain that a second notice was given to Aiken, the agent of the Salmon Falls Co. Wednesday afternoon, all the cotton which had been unladen Monday and Tuesday was removed, with the exception of 325 bales, which remained on the wharf over night. The wharf was now so far cleared that the unlivery was resumed and completed by about 1 o'clock Thursday. None was removed that day, except four or five bales by Goddard & Pritchard, and between two and three o'clock the cotton remaining on the wharf was consumed or damaged by an accidental fire. Of G. & P.'s cotton, 163 bales had been received and taken away, leaving 425 bales. Of the Salmon Falls Company's cotton, 30 bales had been removed by their agent, and 65 were burnt or damaged, and of Pearson's, 25 had been taken and 75 were left for the fire.

On this state of facts, libels are brought against the vessel, and she is arrested as responsible for the default of the master in not delivering the goods according to the terms of the bills of lading. The whole case, both on the evidence and the law arising on the facts, has been most thoroughly and ably argued on both sides; and it only remains for me to express the best opinion I have been able to form of the result. With respect to the principal matters of fact on which the decision must turn, there is, I think, but little difficulty; but they involve some questions of law, which appear to me of no inconsiderable delicacy, and to be not wholly free from doubt.

The first question, which has been urged, is whether the master is exempted from the loss by fire, by virtue of the act of congress of March 3, 1851 (9 Stat. p. 631, c. 43). The second is, admitting that he is not exempted by the statute whether upon the facts proved in this case he is liable for the loss on the general principles of the maritime law. And thirdly, under this, a considerable portion of the goods having been landed on the tenth day of April, which was appointed by the governor a general fast day, whether this was a day, in which, by the custom of the port, the master was authorized to discharge his cargo.

I shall first consider the second question that has been argued. These libels are all founded on bills of lading, in the common form; shipped in good order and condition on board the barque Tangier, at Apalachicola, and to be delivered in like good order and condition at the port of Boston to the consignees—dangers of the sea only excepted. Loss by fire is not in the sense of the law one of the dangers of the seas excepted in the bill of lading, and the master stands as an insurer against all others. Nothing short of a delivery can relieve him from the obligation of his contract, or some excuse for the non-delivery, which the law will hold to be sufficient, notwithstanding his contract. Has there been, then, a delivery? The contract is not merely to deliver at the port of Boston, but to deliver to the consignees named in the bills of lading. In its terms it requires a delivery to the person. A delivery to a drayman, employed by him, would, in legal intendment, be a delivery to him. But the words of a bill of lading in their natural and ordinary meaning, appear to import a personal delivery; such a delivery as is required in the case of a sale, in those systems of law and in those cases where a delivery is required to consummate the contract and operate a transfer of the property. And in those cases it must include a transfer of the legal possession, so as to exonerate the vender or the person making the delivery from all the responsibilities attached to the possession, and to place the risk on the other party. For this purpose it is true that an actual manucaption of the goods is not necessary. There may be a constructive or a symbolical delivery in its legal effects equivalent to an actual delivery, as the delivery of a raft of lumber lying in a lake or river by the vender pointing it out to the sight of the vendee, or the delivery of goods in a warehouse by the delivery of the key, with a sufficient description of the goods. In these cases, though there is no passing the goods from hand to hand, traditio, there is a legal transfer of the possession and the risk of the goods is shifted to the purchaser, or to the person to whom the delivery is made under any other contract, as much as though they had actually been put into his hands. A delivery in the strict and proper sense of the word seems to me always to imply this transfer of the possession, actual or legal, and with it the rights and responsibilities attached to the possession. One consequence involved in this doctrine is that to complete the legal delivery there must be an acceptance, actual or implied. This, as I think, is the sense in which the word is used in bills of lading, and in the delivery of the goods The argument of the claimant's counsel tacitly admits that there has been no such delivery as transferred the legal possession with the rights and obligations incident to it. His argument is that the discharge of the goods on the wharf with notice was a tender of the goods that completed the whole duty of the master as carrier.

It was the termination, a complete performance of that contract with all its peculiar

responsibilities. But it is conceded that another obligation immediately followed, that of custody, to protect the property from plunderage and other loss; and that this obligation was not merely that of a depositary bound to slight diligence only, but that of a bailee for hire, having his compensation for this service in his freights. The master also considered his obligation in the same light, for he kept guard over the cotton during the whole time it was on the wharf, by his own men in the day time on board his ship, and by a hired watch in the night. If there was no delivery in the strict and technical sense of the word, has the master any excuse for the non-delivery? I agree with the counsel for the libellant that the master's contract, though it consists of two parts, is a legal entirety; it is to carry and deliver. The carriage, the transportation of the goods from port to port, is his own independent act, which he can perform alone, without the aid of any other party. That is accomplished when he has transported them from the port of lading to the port of delivery, and safely deposited the goods on the wharf. Thus far he is a carrier, and here this part of his contract, that is for carriage, is complete. In transportation by water in sea-going vessels the carrier is not bound to carry the goods to the warehouse of the owner or consignee, however it may be in some cases of land transportation. The place of delivery is the wharf. The second obligation, that to deliver, remained to be performed. Now this is an act which the master cannot perform alone. It requires the concurrence of the consignee. All that the master can do alone is to deposit the goods at the place, where the delivery is to be made, and offer them to the owner named in the bill of lading. If he is not there to receive them, then the master is bound, in cases like this, of maritime transportation, by custom, for the care and custody of the goods until the owner comes to receive them. If he does not come at all, then he is bound to have the goods housed in a safe and proper warehouse at the owner's expense. If the owner or consignee does come, and for any cause, declines to receive the goods, it is certain that there is no delivery; it is, I think, equally certain, that there is an offer or tender of delivery. But the master is not thereby discharged from all care of the goods. He is bound to the duty of custody, precisely as though no owner had called for them, and to have them properly warehoused.

This I take to be the universal custom, and sanctioned by law. Then comes up the important question, was he bound for the safe keeping of the goods as a carrier, or only as a bailee for hire. The distinction between the liabilities of the two makes all the difference in these cases. As a carrier he will be liable for their loss, but as a bailee for hire, the loss being purely fortuitous, and he not in fault, he will be exempt from liability. My opinion, both on principle, the reason of the thing, and the authority of judicial decisions, is that he was discharged from his engagement as a carrier, and remained liable only as an ordinary custodian having a compensation for his services. The duties of the parties with respect to the delivery of goods from seagoing vessels, I suppose to be quite clear and well-defined. It is that the master, as soon as his vessel is safely moored at the wharf, give notice to the owners and consignees of his arrival, of the place where his ship lies and that he is ready to deliver their goods. As the delivery is to be on the wharf, it is the duty of the consignees to be present and receive them as they are discharged from the vessel. Goold v. Chapin, 10 Barb. 612. In the business of maritime trade, promptitude and despatch are expected of all parties. Ships, whose employment is on the sea, are obliged to wait the opportunities of wind and weather, and do not willingly brook delay where these are favorable. The master has also a just motive for hastening the discharge of his vessel, in order to relieve the owners from the expense of demurrage, and to get his ship ready for another voyage. He has another motive not less legitimate, to liberate himself and his ship from the onerous liabilities of a carrier. And this, I think he does as soon as with notice he places the goods safely on the wharf. He is not bound to wait the convenience of dilatory consignees. If they are not present, and inconvenience or loss results from their neglect, it is not the master's fault, and every one must bear the burthen of his own faults. The placing the goods on the wharf at a suitable time when they may be received by the consignee, appears to me to be a tender of delivery, that discharges the master as a carrier, whether the consignee is there to receive them or not. There certainly must be sometime when the master may relieve himself from the responsibilities of a carrier without the concurrence of the other party. He may do so by a tender, and if that tender is not a perfected act when the goods are first put on the wharf, how long must they remain there for that purpose? Shall the time be fixed for an hour, or a day, or longer; for such goods as cotton are not unfrequently left on the wharf for several days before they are taken away. If we do not take the time when they are first put on the wharf, I am entirely at a loss in determining when the time shall be fixed.

My opinion is, that placing the goods on the wharf at a suitable time, with proper notice where they may be received, is a tender of delivery that discharges the master as a carrier, as much as an actual delivery. It is a general principle of law resting on broad foundations of natural justice and applicable to a great variety of cases, that where a person is bound to perform a certain act for the purpose of discharging himself from an obligation or acquiring a right, an offer or a

tender of performance, properly made, is equivalent to an actual performance for the purpose of relieving himself from the obligation or of acquiring the right. In the Roman law it is put into the form of a maxim, and is inserted among the regulæ juris. In all cases an act is considered as done, when the delay of the other party has prevented its being done. "In omnibus causis pro facto accipitur id in quo per alium morae sit, quominus fiat." Dig. 50, 17, 39. A person who is ready and willing to perform his contract or obligation shall not be deprived of the benefit of performance by the malice, caprice, or neglect of another party.[3] The usual and proper notice was given of the vessel's arrival, and I think that one notice was sufficient. It was the right of the master, after the unlivery was begun, to continue the work until it was completed, as fast as the goods could conveniently be removed. If it became necessary by the encumbering of the wharf to suspend the work for a time, the fault was not his; for it appears from the testimony that the cotton might have been removed as fast as it could be discharged. In the case of the Salmon Falls Company, an objection is made to the sufficiency of the notice. It is said that it was not until after the unlivery was begun. Without doubt, regularly it should be before. There is some doubt, I think, as to the fact, but admitting it to be as contended, if the fire had happened before the notice, it would deserve very grave consideration. But the fire occurred three days after, and the party suffered nothing from this irregularity. The objection is purely technical in its application to this case. And though in a case of purely fortuitous loss like this, a party is not to be censured for resorting to the subtleties of the law to escape, the objection appears to me to be too high among the apices of the law to be applied to the transactions of merchants and shipmasters. My opinion on principle is that the landing on the wharf, with the notice given, was equivalent to an actual delivery, for the purposes of these actions, supposing the time to be unobjectionable, which will be considered presently.

My opinion also is that the decisions of the courts and the language of elementary writers lead to the same conclusion. The authorities cited by the counsel for the claimant appear to me fairly to support this doctrine. Story, Bailm. § 545; 2 Kent, Comm. 604, and the notes to the 6th Edition; Norway Plains Co. v. Boston & M. R. Co., 1 Gray, 271; Cope v. Cordova, 1 Rawle, 203; Hyde v. Trent & M. Nav. Co., 5 Term R. 389; Goold v. Chapin, 10 Barb. 612. The Boston & M. R. Co., in 1 Gray, is certainly a very strong case and was evidently decided on very deliberate consideration. That, it is true, was a case of land transportation, but the principle of the decision applies to the present case. The principle, as I understand it, is this: when the carrier has transported the goods to the place, where, by custom or agreement, they are to be delivered, and has safely deposited them so that they may be received by the owner, he has completed his engagement as a carrier, and his responsibilities, in that character, are at an end. It was therefore held, that as soon as the goods were transferred from the cars to the platform, the road ceased to be a carrier, and from that moment was liable only as a warehouseman, and the goods during the night having been destroyed by an accidental fire, the loss fell on the owner.

The authorities relied upon by the other side, do not appear to me, when fairly examined, to militate against this doctrine. Price v. Powell, 3 N. Y. 323; Miller v. Steam Nav. Co., 13 Barb. 361; Gatliffe v. Bourne, 4 Bing. N. C. 314; and same case, 3 Man. & G. 643, and in 11 Clark & F. 45. The case of Gatliffe v. Bourne, which was litigated through all the courts and finally decided by the house of lords, was, in its leading facts, very much like the present. The goods were landed on the wharf in London, on the 29th of August, and burnt the following night by an accidental fire, and the carrier was held liable for the loss. The case was argued and decided on the allegations in the pleadings, and in those it differed from the present case in two material particulars. First, it did not appear that the consignees were notified of the arrival of the vessel; and secondly, it did not appear that the goods were landed at a suitable time for the consignees to receive and take them away. One of the judges observed that for anything that appeared in the record, the goods might have been landed in the night time (though from evidence at the trial, it appeared that the unlading was between 11 o'clock a. m. and 2 p. m.). Mr. Angel, after a copious examination of authorities, states in substance, as the true result of the whole, that when goods are to be delivered at a particular place, due and reasonable notice giving the consignees a fair opportunity to receive and take them away, comes in lieu of an actual delivery for the purpose of discharging the party from the obligation of a carrier (Ang. Carr. § 313); that is, though, not a delivery, in fact; it is a tender of delivery that completes his contract as carrier. Having this view of the law, it is, to my mind, quite clear that the master cannot be held liable for the loss of so much of the cotton as was discharged as early as Tuesday noon. Whether he may be for that, which was discharged Thursday depends entirely on the question, whether Thursday was a suitable and proper time for the delivery of the cotton under the circumstances of these cases. If it was, the consignees were bound to be on the wharf and receive it. If it was not, they were not so

[3] If any authority is required for so plain a principle of natural justice, some may be found referred to in The Palo Alto [Case No. 10,700], where it was applied in a case of considerable delicacy.

bound, and the master is no more relieved from his obligations as a carrier, than he would be by discharging it at an unseasonable hour in the day or in the night time.

This brings up the question which I have found the most embarrassing in the whole case, not only as involving legal considerations of delicacy as to the effect of the custom of the port, to which the attention of the courts of the state does not seem to have been called, but because it is pretty apparent from the testimony that the question cannot be decided one way or the other without encountering and doing some violence to the cherished habits and feelings of considerable and highly respectable portions of the community. On the part of the libellant it is contended that fast day has, from the first settlement of the commonwealth, been observed as a day of rest, when the usual secular employments of life are suspended, and is therefore not a suitable and proper time for discharging vessels; that the consignees are not bound to be present with their teams to receive their goods, and consequently, when the master discharged the cargo that day, he did it in his own wrong. To maintain this, the governor's proclamation is put into the case, setting apart that day as a day of fasting, humiliation and prayer, and recommending to the people to assemble in their usual places of public worship and devote the time to religious duties, which manifestly implies a suspension of the ordinary secular labors of life. This custom is attested by a regular series of public acts of the executive, commencing with the earliest history of the commonwealth, and continued to the present time. It is contended that it is a well known historical fact, of which the court will take notice without formal proof, that the day, from the first settlement of the country, and for a long period after, has been observed according to the governor's recommendation as a day of rest. If this be a fact of which the court can judicially take notice, and I am inclined to think it is, then this consequence follows; a particular custom, that is, a particular state of things having been shown to exist at a former time, that is presumed to continue until the contrary is proved. It will follow that fast day, prima facie, cannot be considered as a proper and suitable time to require consignees to receive their goods. But if fast is such a holiday, it is so merely by the force of custom, and not like Sunday, by positive law. And for the purposes of the present hearing it is such no farther than the present custom makes it so. What custom has made custom may change, and the rights of the parties, as they are affected by the custom, are to be determined by the custom as it now is, and not as it was at any former time. So that the only effect of this presumption is to shift the burthen of proof and require the claimant to show that, whatever may have been the historic custom, it has become so changed in the progress of time, that fast day, according to the present usage, is a suitable and proper time for the transaction of the particular business, the consideration of which is involved in these cases. For we are not required to travel out of the case to determine the general character of the day. For this purpose a large number of stevedores were called and examined; a class of persons by whom the discharging of vessels is exclusively performed. Without going into detail, the general result of their testimony may be stated in a few words. They are generally, not perhaps universally, disinclined to commence the discharge of a vessel on fast day; but if they have one on hand begun and a fast day intervenes, they do not suspend the work, but it is invariably continued, and it is continued as a matter of course, whether the draymen are on the wharf to receive the goods or not; and this is done under the general notice. No special notice on account of the fast is given, that the unlivery will be continued. If the cargo consists of goods not liable to be injured by exposure (and cotton is one of those articles), they are put on the wharf and left with no other protection than a common watch. If it consists of goods liable to injury from exposure or wet, and they are not taken away, the work notwithstanding goes on, and the goods are put under cover or housed. Still, it is apparent that the day is not regarded, even by the stevedores, precisely as a common working day. They are generally, if not universally inclined to take part of the day for rest or recreation, and ordinarily break off with the dinner hour unless in cases of urgency. Such is the testimony of a large number of stevedores, who have for many years been engaged largely in this business.

The next most material testimony in relation to the custom comes from the draymen, who receive the goods on the wharf and carry them away. The stevedores are employed by the master, the draymen by the owners and consignees of the goods. Their testimony allowing for some slight difference arising from individual tastes and habits, is pretty uniform. They are disinclined generally to turn out their teams on that day, and ordinarily do not. To the teams it is for the most part a day of rest. But the exceptions are far from being infrequent. And on the day of this fire the draymen employed by one of these consignees had five teams out carting iron through the streets to the distance of three-quarters of a mile. In cases of urgency, and these are pretty frequent where vessels are partly discharged, they generally consent to go out with their teams.

A third source from which the most direct evidence respecting the custom is derived, is the testimony of merchants. A considerable number were examined, who have been for many years largely engaged

in commerce, both as importers and ship owners. Their testimony is invariable and without exception that they know of no custom of receiving goods from vessels fast day, but that the custom as far as their knowledge extends, is the other way. Their stores are not opened for business, and some of them add that in an experience of active business for twenty or thirty years they have never had a consignment of goods delivered that day.

Such is the general complexion of the proof coming from persons whose employment and profession has necessarily led them to be familiar with the custom of the port in this particular. But there is other testimony of a general character, which has a bearing more or less direct on the case. It comes from persons whose business and habits carry them to the wharves, and who have ample opportunities of observing what is going forward. From the whole testimony it is apparent that there is much less stir and activity on that than on any common working day. Many, if not a majority of the stores are closed, but many also are partially open. There is not more than one-half the usual amount of any kind of business done, and not more than one-quarter of the trucking, and this is mostly confined to the forenoon. The railroad depots are not open for receiving freight, and no freight train is run. But the general express office is open, both for receiving and delivering goods. And the day is so far properly a holiday, dies feriatus, that the custom-houses and banks are closed, and the churches are in part open, though thinly attended. Such is the general outline of the evidence as I have gathered it from a minute and critical examination of the witnesses. And the question is whether the discharging of goods fast day under the custom of this port, and the circumstances proved, amounted to a legal tender of delivery, that completed the contract of the master as a carrier, admitting that such would be the effect of a discharge on a common working day.

On the whole evidence it appears to be quite clear that the customary observance of the day has been, perhaps is now, undergoing a change. It has lost much but not the whole of its ancient sanctity as a day of religious quiet and abstraction from secular cares and employments, without having yet acquired any other distinct and well marked character. Practically, it is in part a working day; at least, in relation to this particular branch of business; partly it continues a day of religious rest, and perhaps more largely than either, it is a day of general relaxation and amusement. While the day is in this undefined state, a state of transition, and parties in their business transactions claim the rights and immunities belonging to either phase of the day, it is not easy to determine what rule ought to be applied. As the day was formerly regarded and observed, there need be little hesitation in saying that it was not a suitable and proper time for requiring merchants to receive their goods on the wharves; and in the manner in which our great national festival is now observed, I think there would be as little difficulty. But in the equivocal position, which the day now holds between a working day, a day of general relaxation and amusement, and a day of religious rest, it may be questionable whether it is entitled to the full privileges of either. After some reflection, it appears to me that there is one way of extrication from the embarrassment so far as it is involved in these cases.

The consideration of the character of the day, for the present purpose, is narrowed down to the particular business of discharging vessels. Now it is proved by a weight of evidence entirely irresistible, that, by the custom of this port, if the unlivery has been begun, and a fast intervenes before it is finished, the work is continued that day. Especially when the discharge has been interrupted by the neglect of the consignee to take away the goods, the practice is universal; and this custom either was or might have been known by the consignees. When the obstruction on the wharf was removed, the master was justified in recommencing the discharge without any new notice to the consignees. This custom is so universal in this port, that I think merchants must be held bound to know it. If for any reason a consignee is unable or unwilling to receive his goods, he is, in my opinion, bound to give the master notice; and if he does not, the master may well conclude that he has no objection; and a discharge on that day will relieve him as a carrier, as it would on any working day.

What would have been the effect if such notice had been given, need not be considered in these cases. What the decision should have been if the unlivery had not been begun before the fast, is another question equally out of these cases, and I have no desire to make this decision broader than is required to cover the facts. At the first view, it may seem that a distinction might be made between the case of the Salmon Falls factory and the others. Their cotton was to be delivered at the railroad depot, which was closed, and the agents of the company could not receive and store it. But as he must be held cognizant of the custom, he might have given the master notice and had whatever benefit would be derived from that; and I think there is no sound principle upon which this case can be distinguished from the others. The conclusion is, that the libels must all be dismissed with cost. Having come to this conclusion on the general principles of the law, it becomes unnecessary to express any opinion as to the effect of the statutes.

The decision of the district court was reversed by the circuit court [Cases Nos. 5,494 and

12,265], but on appeal to the supreme court the decision of the circuit court [Case No. 5,494] was reversed and that of the district court affirmed. [Richardson v. Goddard] 23 How. [64 U. S.] 28.

[NOTE. The decision above in the case of Salmon Falls Manuf'g Co. v. The Tangier was reversed by the circuit court in Case No. 12,265. In the case of Goddard v. The Tangier this decision was reversed in a separate opinion. Case No. 5,494. From the decision of the circuit court in this last case an appeal was taken to the supreme court, which reversed in turn the circuit court as above noted. Meanwhile, in the case of Salmon Falls Manuf'g Co. v. The Tangier, the circuit court, after the decision of the Goddard Case in the supreme court, granted a rehearing. At the new hearing the court reversed its opinion rendered in Case No. 12,265, and entered a decree affirming the decree of the district court. Case No. 12,266.]

Case No. 12,268.

In re SALMONS.

[2 N. B. R. 56 (Quarto, 19);[1] 15 Pittsb. Leg J. (O. S.) 541.]

District Court, N. D. Georgia. Jan. 28, 1868.

BANKRUPTCY—ENCUMBERED PROPERTY—RIGHTS OF PURCHASER.

1. A court of bankruptcy has power to dispose of the encumbered property of bankrupt in any manner deemed best for the interest of all concerned.

[Cited in Re Brinkman, Case No. 1,884; Sutherland v. Lake Superior Ship Canal Railroad & Iron Co., Id. 13,643.]

2. Where property encumbered by lien is sold, the purchaser takes it unencumbered, the lien being transferred from the property to the fund.

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

In bankruptcy.

By LAWSON BLACK, Register: In this case the following question of law on the jurisdiction of this court, arose before me, pertinent to the proceedings in the above case, viz: Has the court the power to order the sale of the estate of a bankrupt encumbered by lien, and the money arising from the sale brought in court to be distributed among the creditors holding the securities? By the first section of the bankrupt act this court has complete original jurisdiction of all the assets of the bankrupt, and has power to do all matters and things in virtue of the bankruptcy, up to the final distribution of the estate. Under this grant of power, the court has the right to pass any order or decree it thinks proper for the purpose of doing equity to all parties at interest, and to collect all the assets of a bankrupt, that which is encumbered, and that which is not encumbered. All the assets of a bankrupt include all the property of a bankrupt in which the assignee or the creditors of a bankrupt have an interest. This section gives the court full power to collect all the assets of a bankrupt, and sections fourteen and twenty, point out to the court the manner in which all the assets of a bankrupt may be collected without delay, and at the same time do complete justice to all parties at interest in the case. And first, under the fourteenth section, if the property secured by lien is worth more than the debt for which it is secured, the court has power at its discretion to order the assignee to pay the money and redeem the property, and if the assignee has no money to redeem it, the court will order the equity of redemption to be sold subject to the encumbrance, and the purchaser gets a complete title to the property when he satisfies the secured debt in this manner. The court serves the interest of both parties in a summary way, and, by section twenty, if the property secured by lien is of less value than the debt, the order of sale has to be reversed, because no person will bid for the property in that condition; for this reason this section gives the court power to pass an order to sell the property in any manner it thinks proper, and as the property is of less value than the secured debt, the only manner in which the several parties can be served, is to order the property to be sold, and the money arising from the sale brought into court, there to be distributed in the same manner as if the property had been sold in a court of law to satisfy the liens. This mode of sale is selling the property free from encumbrances, whether it is so expressed or not; the same thing exists where the property is mortgaged for more than its value, and the homestead of the bankrupt is included in the property. How can this property be disposed of subject to the encumbrance? and how can the interests of the parties be served except by a sale of the property free from encumbrances, as above stated? And under the same section the mortgagee has the right to take the mortgaged property at its value, by an agreement between him and the assignee, and the assignee then makes a deed to the mortgagee for the property. But suppose the assignee and mortgagee make a fraudulent agreement as to the value of the property, or fail or refuse to agree upon the value of the property? In either case this court has power to pass any order it thinks proper for the purpose of ascertaining the value of the property, and if the court should be of opinion that a sale of the property in market overt is the best way to ascertain the value of the property, who can be injured thereby? It is, therefore, the judgment of the register that the court has full discretionary power to sell and dispose of encumbered property of the bankrupt in any manner it thinks proper; and that the title of such purchaser at such sale is or can be made perfect by act of the purchaser. All of which is hereby submitted to his honor, the judge of the district court, for his approval or disapproval, at the request of Mr. Hoyt, attorney at law.

ERSKINE, District Judge. After a careful consideration of the bankrupt law, I think it was the intention of congress to confer on the court the power to dispose of the encum-

[1] [Reprinted from 2 N. B. R. 56 (Quarto, 19), by permission.]

bered property of the bankrupt in any manner it might, in its discretion, deem best for the interest of all concerned. It is also my opinion, that in the case before me the purchasers will take the property, when sold, free from all encumbrances, the lien being transferred from the property to the fund. The judgment of the register is approved.

Case No. 12,269.

SALT CO. OF ONONDAGA v. WILKINSON.

[8 Blatchf. 30.] [1]

Circuit Court, N. D. New York. Oct. 11, 1870.

REMOVAL OF CAUSES — INTERNAL REVENUE — LICENSE—PLACE OF MANUFACTURE.

1. Where an action against a collector of internal revenue, to recover back a license fee paid to him under protest, was commenced in a state court, before July, 1866, and was removed to this court by virtue of the 50th section of the act of June 30th, 1864 (13 Stat. 241), and the action was one which, if commenced in a state court after the passage of the act of July 13th, 1866 (14 Stat. 98), would have been removable to this court under the 67th section (page 171) of that act: *Held*, that, notwithstanding the repeal of the 50th section of the act of 1864, by the 68th section of the act of 1866, this court continued to have, by virtue of the proviso to such 68th section, jurisdiction of the action.

2. The meaning of the word "place," in the internal revenue acts, as applied to the place where the business of a manufacturer authorized by a license under those acts to carry on his business at a place designated in such license, may be carried on, as a single place, discussed.

3. The mere fact that a manufacturer of salt uses more than one set of boilers or evaporating pans, or more than one smoke-flue or chimney, does not make him liable to pay more than one license fee, as being a manufacturer at more than one place.

[This was an action by the Salt Company of Onondaga against Alfred Wilkinson, collector of internal revenue, to recover moneys paid to defendant under protest.]

George F. Comstock, for plaintiff.

William Dorsheimer, Dist. Atty., for defendant.

WOODRUFF, Circuit Judge. The defendant is a collector of United States internal revenue, and this action is brought to recover back license fees, penalties and costs paid under protest by the plaintiff, and by other persons who have assigned to the plaintiff.

The action was commenced in the supreme court of the state, and was removed therefrom to this court, by virtue of the 50th section of the act of congress to provide internal revenue, &c., passed June 30th, 1864 (13 Stat. 241), which applied to cases arising under the internal revenue laws, the provisions of the act of March 2d, 1833 (4 Stat. 632), whereby cases arising under the revenue laws, (then relating to duties on imports only), were declared to be cognizable in the circuit courts of the United States, and, when commenced in the state courts, might be removed to the said circuit courts. By this legislation, a large class or classes of cases were authorized to be brought in the United States' court, and to be removed to that court, if begun in the state court.

By the act of July 13th, 1866 (14 Stat. 98), a change on this subject was made. By section 68 of that act (page 172), the 50th section of the act of 1864 was repealed; and, by section 67, a class of cases, to which class this action belongs, were authorized, when commenced in the state court, to be removed to this court. The effect of this repeal, and of the provisions of such 67th section, was, as distinctly decided by the supreme court of the United States in The Assessor v. Osbornes, 9 Wall. [76 U. S.] 567, to withdraw from this court jurisdiction, through process of its own, of cases arising under the internal revenue laws to recover back duties illegally assessed, where the plaintiff and defendant are both citizens of the state in which the suit is brought, and to confine its jurisdiction to cases removed from the state courts by virtue of the said 67th section; and, as many cases were already pending in the courts of the United States, which had been removed from the state courts under the broader authority of the 50th section of the act of 1864, the repeal declared in the 68th section of the act of 1866 was accompanied by a proviso, "that any case which may have been removed from the courts of any state, under said 50th section, to the courts of the United States, shall be remanded to the state court from which it was so removed, * * * unless the justice of the circuit court of the United States in which such suit * * is pending shall be of opinion that said case would be removable from the court of the state to the circuit court under and by virtue of the 67th section of this act."

This case being now brought to trial, the defendant insists that this court has no authority to proceed to judgment; that the repeal of the before-mentioned 50th section (by virtue of which alone it was removed and came within the jurisdiction of this tribunal), has wholly defeated the jurisdiction; and that, although there is provision for remanding certain cases to the state courts, there is none continuing the jurisdiction of this court in any case. I do not understand the counsel for the defendant to deny that if this case had been commenced in the state court after the passage of the act of 1866, it would be removable to this court under the said 67th section. It is quite plain that it would be so removable, for, that section provides, that any suit commenced in a state court against any officer of the United States acting under the internal revenue laws, on account of any act done under color of his office, may be removed in the manner therein described. As it would be so removable, it is certain that the proviso above cited does

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

not authorize a remand thereof to the state court. The argument of the defendant would, therefore, result in this state of things, namely, that the suit was originally lawfully and properly removed to this court and withdrawn from the jurisdiction of the state court and is lawfully pending here; that there is no power to remand it to the state court and restore it to that jurisdiction; and yet that there is no jurisdiction here to hear and determine it. Such a result would not be admitted unless the construction of the act clearly required it; and an act which could have that operation, namely, to take away, by defeating, the right of a plaintiff to a trial and judgment, would be liable to serious criticism.

Construing the 67th and 68th sections together with the proviso, if no other language were contained therein than that above cited, I should not hesitate to hold that the repeal, as modified by the proviso, had, by implication, another qualification, namely, that such cases as would be removable under section 67, were not to be affected by the repeal. And, that this was in fact the design of congress, and is the import of the entire proviso, appears from its concluding sentence: "And, in all cases which may have been removed from any court of any state under and by virtue of said fiftieth section of said act of June 30th, 1864, all attachments made, and all bail or other security given upon such suit * * shall be and continue in full force and effect until final judgment and execution, whether such suit shall be prosecuted to final judgment in the circuit court of the United States, or remanded to the state court from which it was removed." The plain import of the whole proviso is, that some suits should be remanded and others should be prosecuted to final judgment in the circuit court, notwithstanding the repeal of the said 50th section. There is, therefore, no want of jurisdiction or of authority to hear and determine this case upon the pleadings and proofs before me.

I shall not enter upon an extended discussion of the merits. The opinion of the commissioner of internal revenue was laid before me on the hearing, in pursuance of which the assessor assessed, and the defendant collected, the license fees from the plaintiff and the various assignors of the plaintiff mentioned in the declaration. I concur in that opinion in respect to the persons who were respectively bound to take out a license and pay the license fee, and am of the opinion there expressed, that each of such persons is a manufacturer, within the meaning of the law prescribing the duty to take a license and pay such fee. With the reasoning of the opinion of the commissioner in respect to the effect of a license, and that it authorizes the manufacturer to exercise or carry on his business at the place registered and designated therein, and that one license does not authorize the carrying on of business at two separate places, as the term "place" is used in the act, I also concur; and, of consequence, I agree that the word "place" is not used as an equivalent for town, city, county, or state. But, in the application of the reasoning to the peculiar business carried on by the plaintiff and its assignors, I think the construction given to the act is too rigid. The term should be construed in reference to the nature of the business.

A manufacturer of woolen or cotton cloths, for example, receiving wool or raw cotton and producing cloth, has a location for his manufactory. It may consist of one or several buildings. His washing, his picking, his carding, his spinning, his weaving, his dyeing, his fulling, his finishing, or other processes, may each be carried on in separate buildings. These buildings may be within one enclosure or in separate enclosures. Some processes may be conducted by the aid of steam power, and others at a distance, by water power, at a stream. So, there may be, instead of one large building, in which all the processes are carried on on a large scale, several smaller buildings, in each of which the entire process may be applied to different portions of raw material, and a distinct, entire product be produced in each; and yet the whole may be, according to the common and proper understanding of mankind, but one place of business. On the other hand, it is entirely possible for a manufacturer to carry on two separate factories, at two places. The term must be regarded in reference to its common acceptation; and, although the statute, at times, uses "house or premises," as its equivalent, this gives but little aid to the interpretation, except when business is ordinarily carried on in a house or store, for, "premises" is not more restricted in its meaning than the word "place" itself.

Suppose, for further example, a manufacturer of maple sugar, having the privilege of drawing sap from a large tract of land, gathers the sap and brings it to a single kettle for boiling, it would be said that the place of boiling was his place of business. Suppose, then, that his supply of sap was so great that he required two kettles or four—he would not be required to take out a separate license in order to use each additional kettle. Nor would it be required, if such additional kettles were used in different parts of a grove of maples from which the sap was gathered. It may be suggested, that, in such case, the grove or tract of land is the premises, that is, the place, where he carries on the business. Very true; and no less true if that same grove or tract were divided by fences, enclosing several fields owned by different persons, from each of whom the manufacturer had obtained the privilege of drawing sap and manufacturing sugar thereon. It would still be, in substance, and according to the common acceptation of the term, one place of manufacture.

So, the manufacturer of bricks from clay is not required to have a new license if he does

not build his second or third kiln on precisely the same square feet of ground as the first; or if he builds and burns two kilns at a time, even though the clay for each may have been taken from a different pit or excavation.

The division of the salt field appears to be wholly artificial. From the agreed statement of facts, it appears not unlike a division of ground in or near a city into city lots. A trade or business may be carried on upon one or many of such lots; and, in either case, may be a single business, and be carried on at one place. One manufacturer becomes the owner of one salt block; another, of two. So, in a city, one trader hires or buys for his business a store built upon a single lot; another, for whose larger business such a store is of insufficient dimensions, buys or hires two such stores, and opens communications between them for the purposes of his business. Certainly, the question whether a manufacturer requires more than one license does not depend on the number of boilers or evaporating pans he uses; and it is difficult to see how the question can depend upon the number of flues or chimneys which carry away the smoke of his fires.

It is difficult to say that reasoning makes the subject any clearer; and it may be difficult to employ language which will certainly define, in all cases, one manufactory distinguished from two. But, the mere fact that the manufacturer of salt includes in his business more than one set of boilers, or more than one chimney, does not, satisfactorily to my mind, determine that he is a manufacturer at two places, within the proper meaning of the act. He manufactures on a larger scale than his neighbor. His license fee will form a less percentage of his expenses, and, to that extent, give him an advantage over his neighbor. But it is, in that view, a very slight difference; and this difference must exist under any definition of the meaning of "place," for, one manufacturer, with a large factory and with large capital, will produce more than his neighbor in his smaller shop or factory. Congress did all that it deemed necessary in view of this difference, by providing, in its definition of a manufacturer, that, unless one produced goods, &c., of a value exceeding one thousand dollars annually, he should not be deemed a manufacturer within the act, nor be charged with any license fee.

My conviction is, that, upon the agreed statement of facts, which merely shows that some of the parties, in their manufacture of salt, use two sets of boilers and one chimney, and some use two or more sets of boilers and as many chimneys, and that these are called blocks and double blocks, they were not chargeable with more than one license fee.

The plaintiff should, therefore, have judgment for the excess paid according to this view. The amount may be ascertained by a reference, or otherwise, as no doubt the parties will agree before the entry of final judgment.

SALTER (BURTON v.). See Case No. 2,218.

SALTER (SAMPAYO v.). See Case No. 12,277.

Case No. 12,270.

SALT MANUF'G CO. v. THOMAS.

[The case reported under above title in 3 Leg. Gaz. 316, and 1 Leg. Gaz. Rep. 275, is the same as Case No. 10,956.]

Case No. 12,271.

SALTONSTALL et ux. v. STOCKTON et al.

[Taney, 11.] [1]

Circuit Court, D. Maryland. Nov. Term, 1838.[2]

CARRIERS—INJURY TO PASSENGERS—STAGE-COACH—MISCONDUCT OF DRIVER—EX DELICTO—PROVINCE OF JURY.

1. Where plaintiff sued the proprietors of a line of stage-coaches for damages sustained by his wife, through the upsetting of one of their coaches: *held*, that the plaintiff having proved that the carriage was upset and his wife injured, it was then incumbent on the defendants to show that proper skill and care were exercised on their part, and that the injury was not produced by the negligence of their driver.

2. Every one that undertakes the business of a carrier of persons is bound to know all the hazards to which it is exposed, and that by the exercise of reasonable skill and proper care, the traveller can be carried in safety; when, therefore, a passenger is injured, the presumption is that it has been occasioned by negligence.

3. Justice, as well as the principles of evidence adopted in analogous cases, require, that any disaster by which a passenger suffers, should be prima facie evidence of negligence in the carrier, and make it necessary for him, in order to exonerate himself from damages, to show the contrary.

4. Questions as to negligence, and reasonable skill and care, in every description of business, are necessarily questions of fact, and belong to the jury; the court can do nothing more than give the rule by which they are to be tried.

5. Where the plaintiff imputes the accident to the misconduct of the driver, it is incumbent upon the defendant to prove that the driver possessed and exercised that degree of skill which competent drivers, employed in like business, usually possess, and ought to possess, in order to convey the passenger with safety and comfort, and that he exercised, at the time of the accident, the utmost prudence and caution.

6. The law requires of him a high degree of caution and prudence, and the least negligence on his part, which produces bodily injury to the passenger, will render the carrier liable. Unless the jury find that such skill and such care were used, the plaintiff is entitled to recover; provided, nothing was done by the plaintiff or his wife, which absolves the defendant from this liability.

7. Injuries received in cases of this description are not violations of a contract between the parties, but are breaches of the duty imposed by law on the carrier. They are torts. But the plaintiff may waive the tort and sue in assumpsit.

[Cited in Pouilin v. Canadian Pac. Ry. Co., 47 Fed. 860.]

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

[2] [Affirmed in 13 Pet. (38 U. S.) 181.]

8. Those who undertake the business of carrying persons are regarded by law as if they were in the public service, and the carrier cannot refuse to take any one of good character, who conducts himself properly and pays the usual fare—provided he have room for him—and if he refuse, he is liable to an action.

9. Neglect of duty on the part of a carrier of persons, is a tort; and if an individual be injured by it, his rights, and the liability of the defendant, must depend upon the principles which govern in cases of tort, where a breach of a legal duty has been committed, and an individual suffers from it.

10. Although a man commit an unlawful act by digging a ditch or placing any other obstruction in a public highway, or by driving at a dangerous speed through a crowded street, and an individual be injured by it, the injured party cannot maintain an action, if it appear that he heedlessly and negligently came within reach of the danger, and did not use reasonable care to avoid it.

11. But if a man unlawfully place another in a situation which compels him to undergo one of two hazards, and force him to choose, upon the instant, between them, he necessarily gives him the right of selection, and must be responsible for the consequences, although it may turn out that the most fortunate alternative was not adopted.

[Cited in The Sunnyside, Case No. 13,620.]

12. If there be the slightest evidence conducing to prove the fact, the question must be left to the jury; and even if there be some doubt whether there be any competent and legal evidence of the fact, the court would be unwilling to withdraw the question altogether from the jury, because it is to that tribunal that the law commits the decision upon controverted facts; and the court have no right to suppose that the jury would find a verdict upon slight and insufficient testimony, or without any testimony to warrant it.

[This was an action by Saltonstall against Stockton & Stokes to recover damages for personal injury sustained by plaintiff's wife.]

R. Johnson and J. V. L. McMahon, for plaintiff, cited 2 Camp. 80; Story, Bailm. § 601; 11 Pick. 106; 12 Pick. 477; 1 Camp. 179; 2 E. C. L. 482; 5 Car. & P. 409, 410; 23 E. C. L. 331; 2 Esp. 533; 3 Eng. C. L. 233.

Wm. Schley and John Glenn, for defendants, cited 1 Starkie, 493; 2 Taunt. 314; 11 East, 61; 2 Starkie, 377; 5 Car. & P. 375, 421; 6 Car. & P. 23; 8 Car. & P. 104, 373; 6 Cow. 191; 2 Pick. 621; 12 Pick. 477; 1 Camp. 169.

TANEY, Circuit Justice. This is an action on the case brought by Saltonstall against the defendants, to recover damages for an injury sustained by his wife, by the upsetting of a stage-coach, of which the defendants were the owners. This suit is brought in the name of Saltonstall alone, but there is a written agreement filed, by which any evidence may be offered that would be admissible in an action by the plaintiff and his wife, or the plaintiff alone, and any damages recovered that could be recovered in either form of action. It appears, that the defendants were the owners of a line of stages running from Baltimore to Wheeling in which the plaintiff and his wife were passengers, in December, 1835; that the coach was upset, between Hancock and Cumberland, and the plaintiff's wife severely injured and rendered a cripple for life.

On the part of the plaintiff, evidence was offered to show that the driver was drunk; that some time before the disaster happened, his conduct gave just cause of alarm to the passengers; that Mrs. Saltonstall had several times asked her husband to get on the box and take the reins; that at the top of a hill, where there was a gentle slope in the direction they were going, and the road perfectly safe, and the horses in a walk, they suddenly turned out from the road and wheeled round, until their heads were in the opposite direction to that in which they had been going; that as soon as it was discovered by the passengers, that the horses had turned out of the road, Saltonstall opened the door at the side of the carriage and sprang out, apparently to stop them; that his wife immediately followed, but fell as she touched the ground, and before she could recover, the carriage overturned and fell upon her; that the horses were docile and manageable, and that the carriage was upset by the misconduct of the driver in turning the horses short round, or suffering them to turn from his inability to manage them.

The defendant offered evidence to show that the driver was not drunk; that there was smooth ice in the road, and that his horses were slipping on it, and that he turned out as the best means of safety; that the stage would not have fallen over if the plaintiff and his wife had remained in it; but that standing, as it did, on a declivity, their weight thrown on the lower side, and the impulse given by springing from it caused it to fall over on that side; (it was suggested by one of the witnesses that the driver was overcome by extreme cold, and physically unable to manage his horses;) that there were four passengers besides the plaintiff and his wife; that these four remained in the coach, and that none of them were materially injured; and that the plaintiff and his wife would probably have suffered little or no injury, if they had remained in the carriage.

Many prayers have been offered to the court upon this testimony, praying hypothetical instructions to the jury. We do not mean to express a separate opinion on each of them, because in a case like this, the prayers necessarily contain an hypothetical assumption of many facts to be found by the jury, some of which are not disputed, and others strongly controverted, and it is difficult for jurors who are not familiar with this mode of proceeding, to understand clearly the instructions of the court when given in this complicated form. We therefore reject all the instructions prayed for, and proceed to give the directions of the court to the jury,

upon the law of the case, in that form in which we suppose the jury will be best able to comprehend them. It is proper, however, in the first place, to state the principles on which the opinion of the court is founded.

It is admitted on all hands that this action cannot be maintained, unless the injury complained of was caused by the want of skill or care on the part of the defendants or their agents; but after the plaintiff has proved that the carriage was upset and his wife injured, it is incumbent upon the defendants to show that proper skill and care were exercised on their part, and that the injury was not produced by the negligence of their driver. It is true, that the cases in the books do not altogether agree on this point, nor does it appear to be of much importance in the case before us; but as the point has been made, the court must decide it.

It is a general rule of evidence, that the burden of proof lies upon the party who has peculiar means of knowledge not within the reach of his adversary; and the exception to this rule is the class of cases, where the existence of the fact in controversy would make the party who is presumed to have the knowledge liable to a criminal proceeding; in such cases, the law, presuming his innocence, does not require him to prove it. The exception, of course, does not apply to the case before the court, and it clearly falls within the general rule; for the passengers, for the most part, are unacquainted with the condition of the carriage, the harness, and the horses; have no knowledge of the state of the road, and no skill in driving a coach; upon all of these points, they must seek information from the defendants or their agents, and without their permission, the injured party cannot even have access to the way-bill, to learn the names of his fellow-passengers, to whom he is often an entire stranger. The owners, on the contrary, have a perfect knowledge of every material circumstance, and if a disaster occurs, and was not produced by negligence or want of skill, it is always in their power to prove it. It is not a negative that they are required to prove, but an affirmative proposition, that is to say, that proper skill and care were employed; and to show how the accident happened without any fault on their part.

Moreover, every one who undertakes the business of a carrier of persons is bound to know all the hazards to which it is exposed, and that by the exercise of reasonable skill and proper care, the traveller can be carried in safety. When, therefore, a passenger is injured, the presumption is, that it has been occasioned by negligence; and this presumption is the necessary consequence of the admission which the carrier makes, by undertaking the business and inviting the public to use the conveyance he provides; if the rule were otherwise, the right of action which the law gives would in most instances be rendered nugatory by the rule of evidence. How, for example, could a passenger in a steamboat or railroad car, point out the imperfection of the complicated machinery by which it is propelled: yet the same rule of evidence as to negligence must prevail in relation to every carrier of passengers, whether by stage-coaches conducted by horse power, or in steamboats or railroad cars driven by steam. Justice, as well as the principles of evidence adopted in analogous cases, require that any disaster by which a passenger suffers should be prima facie evidence of negligence in the carrier, and make it necessary for him, in order to exonerate himself from damages, to show the contrary.

The burden of proof, therefore, being upon the defendants, the question arises, what is the degree of skill and care which they are bound to exercise? The counsel on both sides have asked the court for instructions to the jury, which imply that it is the province of the court to decide, as a matter of law, that certain acts amount to negligence. Questions as to negligence and reasonable skill and care in every description of business, are necessarily questions of fact, and belong to the jury; and the court can do nothing more than give the rule by which they are to be tried. In this case, the plaintiff does not allege that there was any defect in the carriage, or harness, or horses; he imputes the accident altogether to the misconduct of the driver. It is incumbent, therefore, upon the defendant to prove that the driver possessed and exercised that degree of skill which competent drivers, in like business, usually possess, and ought to possess, in order to convey the passengers with safety and comfort; and that he exercised, at the time of the accident, the utmost prudence and caution; for in performing a duty of this kind, where the lives and health of so many citizens are intrusted to his care, the law requires of him a high degree of caution and prudence, and the least negligence on his part, which produces bodily injury to the passenger, will render the carrier liable. Unless, therefore, the jury find that such skill and such care were used, the plaintiff is entitled to recover, provided nothing was done by the plaintiff, or his wife, which absolves the defendants from their liability.

And this brings us to the next point in the case, upon which the chief stress of the argument has been laid, and upon which it seems to be supposed that the issue of the case will mainly depend.

The counsel for the defendants insist that the severe injury which the plaintiff's wife received, was caused by her leaping from the stage; that if she had not done so, the carriage would not have upset; and even if it had been overturned, she would have been less injured: that although the driver may have been guilty of negligence, yet, as she contributed to produce the injury she suffered, by her own act, the plaintiff is not entitled to recover, because her own imprudence was the proximate cause of the injury, and not the

misconduct of the driver. And in support of this position, they have referred the court to the cases where it has been held that, if a man drive heedlessly and negligently on the wrong side of the road; or at a dangerous speed, in a public street; or place an unlawful obstruction in a highway; and an individual is injured in consequence of any of these unlawful acts, he is not entitled to recover, if he contributed, in any degree, to produce the injury, by his own improvidence or want of care.

On the other hand, the plaintiff contends that the present case is distinguishable from those relied on, inasmuch as the action, although an action on the case, is yet founded on a contract between the parties, and the rights and duties of each are dependent on the stipulations in the agreement; that the defendants by their contract undertook and promised that the plaintiff and his wife should be carried with proper skill and care; that the contract was broken by the misconduct of the driver, and the plaintiff therefore is entitled to recover, even although they may have contributed to increase the danger and add to the injury by leaping from the stage.

The court think the case before them is distinguishable from the cases relied on by the counsel for the defendants; but we are not prepared to say that the distinction taken by the plaintiff can be maintained, and doubt whether his case would be strengthened by placing it on that footing.

It is not suggested that there was any special agreement between the parties; but the plaintiff refers to the contract implied by law. Now this implied contract of the defendants must have reasonable limitations, and there must be correlative obligations implied on the part of the passenger. The undertaking of the carrier that the passenger shall not suffer from negligence, would seem naturally to be confined to the time that the passenger remains in the vehicle in which he is to be carried, and when he is entering or departing from it with the assent of the carrier, and according to the usage on the route; and corresponding stipulations on the part of the passenger for his conduct must also be implied. Upon such an agreement, it might, perhaps, be held that the plaintiff's wife committed a breach of the agreement, by leaving the carriage in an imprudent manner, and at a time when it was dangerous to do so; and thereby made her election to rely for safety on her own exertions and not on the contract of the defendants. The negligence of the defendants would give no right of action, unless it caused injury to the plaintiff or his wife; and if it was the immediate consequence of her own breach of contract, and would not have happened without it, it would be difficult, upon principles which regulate the construction of contracts, to say that the defendants must answer for the damage, because of their previous breach of contract, although that breach had produced no injury.

But injuries received in cases of this description are not violations of a contract between the parties, but are breaches of the duty imposed by law upon the carrier; they are torts. The plaintiff might, without doubt, have sued in assumpsit; but there are many cases where the law implies a contract, where there was, in fact, no agreement between the parties; this is done in order to give the plaintiff a more convenient remedy for his right, by enabling him to sue in assumpsit. And there are cases where an individual who has sustained an injury from the breach of a legal duty, may waive the tort and sue as upon a contract; this is the case with innkeepers and their guests, where property entrusted to the care of the innkeeper has been lost by his breach of duty; yet the obligations of innkeepers in that respect are prescribed by law, and their neglect is not a violation of contract, but a breach of the duty which the law imposes, and it is always so described in the ancient writs. Calye's Case, 8 Coke, 32; Fitzh. Nat. Brev. 94; Reg. Brev. "Trespass," 105. And if the relation in which the carrier and passenger stand to one another—to wit, that of bailor and bailee—can be said to be created by contract, yet, as soon as that relation subsists, the law interposes and prescribes the rights and duties, and liabilities of both parties; it regulates the degree of skill and care with which the passenger is to be carried, and any negligence on the part of the carrier, is an unlawful act, is a breach of legal duty. Story, Bailm. § 601. Indeed, even the relation of bailor and bailee is not created by contract; for those who undertake the business of carrying persons are regarded by law as if they were in the public service, and the carrier cannot refuse to take any one of good character who conducts himself properly and pays the usual fare (provided he has room for him), and if he refuses, he is liable to an action; so that the passenger takes his seat upon paying the usual fare, not by force of a right acquired by contract with the carrier, but in the exercise of a right secured to him by law; a right which the carrier cannot resist without committing a breach of a legal duty. In some instances, as in the case of railroads, even the amount of fare is prescribed by law, and the carrier is bound to take the passenger that offers it, if he has accommodation for him; and cases can hardly be said to be cases of contract, in which one of the parties has no option, and is compelled by law to carry the passenger, if the passenger requires it. Neglect of duty, therefore, on the part of a carrier of persons, is a tort; and if an individual is injured by it, his rights and the liability of the defendants must depend upon the principles which govern in cases of tort, where a breach of a legal duty has been committed and an individual suffers from it.

Considering the case before us in this point of view, it is certainly well settled by the

cases referred to by the defendants, that although a man commits an unlawful act by digging a ditch, or placing any other obstruction in a public highway, or by driving at a dangerous speed through a crowded street, and an individual is injured by it, the injured party cannot maintain an action, if it appears that he heedlessly and negligently came within the reach of danger, and did not use reasonable care to avoid it. In these cases, however, the unlawful act of the defendant was not the immediate and proximate cause of the injury; the cases all turn upon the fact that the plaintiff brought the danger immediately upon himself, and placed himself within its grasp, by his own want of reasonable care, and that if he had exercised ordinary caution it would not have reached him; as the immediate cause of the injury, therefore, was his own negligence, and not the negligence of the defendant, he cannot recover.

But the case before us is a very different one; the misconduct of the driver placed the plaintiff and his wife in immediate peril; for, according to the hypothesis of fact assumed and conceded, so far as concerns this point, the carriage was in danger of upsetting every moment; the driver, from intoxication, had become incapable of managing his horses, and they had left the road and were turning the carriage in an opposite direction to that in which they were before going. If the jury find these to be the facts in the case, then the negligence of the driver had placed every passenger in immediate danger; the peril which his negligence occasioned did not find them in a place of safety, from which they carelessly and improvidently rushed into danger, but the peril was brought upon them without any fault or want of care on their side, and it was impossible, at that moment, to foresee whether it would be safer to remain in the carriage or to spring from it; they had nothing left to them but a choice of perils, and one of them must be encountered. Now, if a man unlawfully places another in a situation which compels him to undergo one of two hazards, and forces him to choose, upon the instant, between them, he necessarily gives him the right of selection, and must be responsible for the consequences, although it may turn out that the most fortunate alternative was not adopted. There was, unquestionably, imminent danger in this case either way; sometimes, those who spring from the coach escape without injury, while the passengers who remain in it suffer severely; at other times, the result is different, and it proved to be so on this occasion; but this could not be foreseen at the moment, and the injury suffered by the plaintiff's wife was the immediate consequence of one of the two perils which the negligence of the defendants placed before her, and between which they compelled her to choose. If, therefore, the facts assumed on this point are found by the jury to be true, the defendants are responsible for the injury she sustained.

The last point made in the argument may be disposed of in a few words. It is very clear, that if the driver, without any fault on his part, or on that of the defendants, was so overcome by the extreme and unusual coldness of the weather, that he was unable to manage his horses, and perform his duty as driver, then the plaintiff is not entitled to recover; if there was no negligence, there can be no cause of action. The only doubt we feel on this part of the case is, whether there is evidence enough to authorize the defendants to ask for this instruction; but if there is the slightest evidence, conducing to prove the fact, the question must be left to the jury; and even if there be some doubt whether there is any competent and legal evidence of the fact, the court would be unwilling to withdraw the question altogether from the jury, because it is to that tribunal that the law commits the decision upon controverted facts, and the court have no right to suppose that the jury would find a verdict upon slight and insufficient testimony, or without any testimony to warrant it.

Upon the whole case, therefore, as presented by the prayers made to the court, we give the following instructions to the jury:—

1. The defendants are not liable to this action, unless the jury find that the injury of which the plaintiff complains, was occasioned by the negligence, or want of proper skill and care in the driver of the carriage, in which she was a passenger; but the fact that the carriage was upset, and the plaintiff's wife injured, is primâ facie evidence that there was carelessness or want of skill on the part of the driver, and throws upon the defendants, the burden of proving that the accident was not occasioned by his fault.

2. It being admitted that the carriage was upset, and the plaintiff's wife injured, it is incumbent on the defendants to prove that the driver was a person of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which he was engaged; and that he acted on this occasion, with reasonable skill, and the utmost caution and prudence; and if the disaster in question was occasioned by the least negligence, or want of skill or prudence on his part, then the defendants are liable to this action.

3. If the jury find from the evidence, that there was no want of skill or care, or caution on the part of the driver, and that the coach was upset by the act of the plaintiff, or his wife, in rashly and imprudently springing from it, then the defendants are not liable to this action. But if the want of skill or care in the driver placed the passengers in a state of peril, and they, at that time, had reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses, then the plaintiff is entitled to recover, although the

jury may believe, that from the position in which the negligence of the driver had placed the carriage, the attempt of the plaintiff, or his wife, to escape, may have increased the peril, or even caused the carriage to upset; and although the jury may also find that the plaintiff and his wife would probably have sustained little or no injury, if they had remained in the stage.

4. If the driver was a person of competent skill, of good habits, and in every respect qualified, and suitably prepared for the business in which he was engaged, and the accident was occasioned by no fault, or want of skill or care on his part, or that of the defendants, but by physical disability in the driver, produced by exposure to extreme and unusual cold, which rendered him for the time incapable of doing his duty, then the defendants are not liable to this action.

Affirmed by the supreme court in [Stokes v. Saltonstall] 13 Pet. [38 U. S.] 181.

SALUDA, The (The WASHINGTON v.). See Case No. 17,232.

Case No. 12,272.

The SALVOR.

[18 Leg. Int. 357;[1] 4 Phila. 409.]

District Court, E. D. Pennsylvania. Nov. 1, 1861.

PRIZE — CUSTODY OF PRISONER AND WITNESSES.

[1. Prisoners and persons brought in with the prize for examination in the prize court do not pass into the care and custody of the court along with the prize. Their custody, unless they are surrendered under some criminal charge cognizable by the judicial authority, continues to be military in its character, and cannot be interfered with by the prize court, either before or after their examination, except for the purpose of securing such examination. Whether they should be discharged after examination or continued in custody is a question for the prize master or the superior naval officer of the station to determine.]

[2. The duty of providing for the support of such persons while in custody devolves upon the government, but not upon the judicial department; and the court can make no allowance for them, except, perhaps, in case they were discharged before completing their examination, an allowance of witnesses' fees might be made for the time of their actual detention for the completion of their examination.]

[3. Quære: As to how far the military duty of protecting a prize in the port of adjudication continues to rest upon the prize master and crew, after she is in the marshal's official custody for civil purposes.]

In admiralty.

CADWALADER, District Judge. In this case I have received a letter from the commandant of the navy yard at this station, on the subject of the persons on board of this vessel, whom he designates as prisoners and passengers. Though epistolary communications to courts of justice are always inconvenient, and in most cases, irregular,[2] an occasional exception must be allowed in transacting the peculiar business of prize courts. I have therefore directed that this letter be filed. The commandant asks me for some directions as to his disposal of these persons. I can, of course, give no direction as to the mode in which officers of the naval service are to follow its rules concerning the custody and treatment of their prisoners, though, in the case of a prize, I might entertain a complaint of irregularities of certain kinds in these respects.

In prize cases, the duty of the naval captors who send a vessel into port for adjudication, requires them to send in a sufficient number of the persons taken in her, including, in ordinary cases, the master and mate, as witnesses for examination. In some cases, actual or nominal passengers are the most important examinants. Few really contestable cases occur in which the examinants are too numerous. They are not unfrequently too few; and they have, in some cases, been persons of too inferior grade to satisfy the requirements of the judicial investigation. A neglect of the fulfillment of this duty, not less than improper treatment of captured persons, may be the subject of judicial consideration, affecting questions of prize money, and of costs, and sometimes involving questions more serious. Officers of the naval service have occasionally fallen into the mistake of supposing that when captured vessels are brought into port and pass into judicial custody, the care and custody of the prisoners or persons brought in for examination becomes judicial. This impression is, in a general sense, erroneous. The custody, unless they are surrendered under some criminal charge cognizable by the judicial authority of the district, continues to be military, and cannot be interfered with by the prize court except for the purpose of securing the examination of the witnesses. So, after their examination has been completed, their custody, if it continues, is still military, and not civil, unless they are charged with a criminal offence, and surrendered under it. Whether persons not thus charged should be detained in military custody after they have been examined, is often a question of great public interest, and may be attended with serious difficulty. But this question does not concern the prize courts. It is for the consideration of the prize master, or of the superior naval officer of the station.

On a former occasion I made some remarks, of which the substance was written out, and formed the basis of a subsequent communication from the assistant attorney of the United States for this district to the attorney general. What I then said I now repeat, as fol-

[1] [Reprinted from 18 Leg. Int. 357, by permission.]

[2] See 1 Addams, Ecc. 305-307; 1 Macn. & G. 121, 122, 125-128; 1 Hall & T. 290, 291, 294, 295, 298, 299; 13 Jur. 860.

lows: "When a captured vessel is brought into port for adjudication, and passes into judicial custody, the prize master or other naval commander retains the custody of the prisoners until, according to the rules of the naval service, they are discharged, or transferred into close custody, as the public interest may require. Sometimes the prisoners are merely persons detained for examination as witnesses. That they are brought in and are detained for this purpose alone, does not prevent them from continuing in naval custody. Sometimes these persons cannot be discharged with humanity, because they might starve for want of means of present support in a strange place. In other cases, they are so far dangerous from possible hostile relations, that, though perhaps not liable to detention as close prisoners, their premature liberation would be imprudent. The duty devolves upon the government, but not upon its judicial department, to provide for their support while in port. If the expenses of their comfortable subsistence are not defrayed by the local disbursing agent of the naval department of the government, and they are consequently discharged, their discharge cannot be prevented by the prize court. This court might, if they were thus discharged before the completion of their examinations, direct an allowance to them of one dollar and a-half per day each, as witness money. But this allowance would only be made for the time, seldom exceeding a single day, of their actual detention for examination after their discharge from naval custody, and would not absolve the naval custodian from responsibility for their premature or improper discharge, or for want of proper care of them before and afterwards. An incidental subject of less importance, though not unimportant, is that the prize master and his crew usually incur incidental charges which cannot be repaid by the marshal or other officer of the judicial department until after the condemnation and sale of the captured property. Such expenses ought to be promptly reimbursed as other current local expenses of the naval station to which the prize may be brought. The officer defraying them can, in proper cases for a reimbursement, obtain it after condemnation out of the proceeds. This, if a condemnation ensues, can, on behalf of this officer, be attended to by the attorney of the United States, who, in proper cases, is always ready to render such incidental services on request. Pilotage, towage and canal charges, are examples of such expenditures as may be thus incurred by persons entrusted with the safe delivery of a prize vessel into the hands of the judicial officers of the government. Such charges are not, like the wharfage, &c., incurred after delivery into judicial custody, payable by the marshal. I have been told that in some judicial districts of the United States, the marshals are in the habit of paying such prior charges. This may be very proper where they may choose to act for the purpose as disbursing agents of the proper executive department of the government, and are employed for the purpose. But it is not a part of their official duty as marshals, or a subject within any direct cognizance of the prize court before condemnation."

The question how far the military duty of protecting a prize in the port of adjudication, continues to rest upon the prize master and his crew, after she is in the marshal's official custody for civil purposes, arose in a case in which some of the prize crew had deserted in this port. The case was that of a recaptured vessel. The question was whether the deserters had forfeited their shares of salvage decreed. If no such duty of protection continued, their shares were not forfeited by such subsequent misconduct. The case was argued on the question whether the duty did not continue so long as they remained in the port of adjudication, and had been assigned to no other incompatible naval duty. The case remains under consideration. A similar question as to prize money might arise in the case of a captured vessel. The distinction between cases which thus concern the vessel, and the case of prisoners, is, that prisoners do not pass, as the vessel does, into the custody of the prize court. However therefore the case to which I have referred, of the deserters, may be decided, the case of prisoners is free from doubt. It would be easy to state cases in which their military custody might be required for the safety of the country. The rule must be uniform in all cases.

The clerk of the court will send a copy of this to the naval commandant. The district attorney informs me that he has no criminal charge to prefer against any of the prisoners. The prize commissioner has not, as yet, made his report. But he informs me that he has completed his examinations of the witnesses who were brought in the vessel. The libel was filed and allowed yesterday, when the vessel passed into the legal custody of the marshal. The business of the court, therefore, does not seem to require the longer detention of any of the persons in question. Their discharge or detention rests with the officers of the naval service, according to its rules.

SALVOR WRECKING, ETC., CO. (LEATHERS v.). See Case No. 8,164.

Case No. 12,273.

SALVOR WRECKING CO. v. SECTIONAL DOCK CO.

[3 Cent. Law J. 640; [1] 12 Pac. Law Rep. 74.]

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

SALVAGE — ADMIRALTY JURISDICTION — MARITIME CONTRACTS AND SERVICES.

Services rendered in raising the sectional floating docks of the respondent are not the

[1] [Reprinted from 3 Cent. Law J. 640, by permission.]

subject of salvage compensation, nor are they maritime, so as to give the admiralty jurisdiction of a suit to recover the value of such services.

[Cited in Cope v. Vallette Dry-Dock Co., 10 Fed. 145, 16 Fed. 925; s. c. on appeal, 119 U. S. 630, 7 Sup. Ct. 338.]

This is a libel suit in personam for salvage, or for services claimed to be in the nature of salvage services, by the Salvor Wrecking and Transportation Company, against a corporation called the Sectional Dock Company, and against the individual members of that company. The services for which compensation is claimed consisted in work and labor by the libellant's boats and servants, in raising a structure known as "Sectional Docks." These docks were constructed about twelve or thirteen years ago. They consist of sections or compartments joined together, each section being a huge water-tight crib or box, so constructed as that they may be sunk, by the admission of water therein, so deep in the river that a boat or vessel needing repairs may stand over them, and on the water being pumped out by means of an engine and pumps (which constitute part of the apparatus), the docks will rise to the surface of the river or a little above it, bearing the boat or vessel to be repaired with them, and sustaining it while the repairs are being made. When the repairs are completed the structure is submerged in the same way, and the vessel thus enabled to leave the docks, which, on being pumped out, rise to the surface of the river. They are intended solely for the repair of vessels, and to prevent the necessity of hauling them upon ways or dry-docks for repairs. They have no motive power of their own, and are not intended for navigation or to be moved about, except to secure a more convenient locality. They are fastened to the shore securely by large iron cables or chains, and have been in this position in the Mississippi river at St. Louis for many years. These docks were originally owned by a partnership known as the Sectional Dock Company, of which some of the individual respondents were members. One of the co-partners died, and under the peculiar provisions of the Missouri statute, administration was granted by the probate court of St. Louis county to one Daniel G. Taylor on the partnership property, and the docks passed into the possession of that administrator. While in his possession a portion of the docks, without breaking away from the shore or parting the cables, sunk so deep that they could not be raised by their own pumps, and extraneous aid was needed. The administrator called on the libellants to render such aid. No fixed compensation was agreed upon between the administrator and the libellants, for the reason, as stated by the former, that if when the work was done the libellants should charge too much, the probate court would not allow it. Libellants commenced work about September 27, 1873. On October 29, the work of raising the docks being still in progress, the docks were sold by order of the probate court on the express condition that the purchaser should take the docks in their then condition, and be at any future expense for raising them. The respondent, Thomas, purchased the docks for himself and the other individual respondents, with the exception of Adkins. Shortly afterwards he demanded possession of the docks of the libellants, which he did not obtain, and they continued their work thereon (whether with or against the consent of Thomas is a disputed question) until the 22d day of November, when the docks were raised and delivered to the dock company, the libellants reserving, in a letter accompanying the delivery, their lien thereon for their work and labor. The libellants have been paid about $5,000 by the order of the probate court, which is in full for all services up to the day of the sale by the administrator on the 29th day of October. The respondent dock company is a corporation which was formed about November 10, 1873, and which organized November 20th, being about the time when the libellants completed their work. This suit is to recover for the services rendered after the sale on October 29, and the libel and monition show that it was intended to recover for salvage services, or services in the nature of salvage services. The district court dismissed the libel as to the individual respondents, and adopting the report of the commissioner as to the amount of the compensation, rendered a decree against the corporation known as the Sectional Dock Company, formed and organized as above stated, for the sum of $4,940. There are cross-appeals. One by the appellant from that part of the decree dismissing the libel as to the individual respondents; the other by the Sectional Dock Company, from the decree against it for the above mentioned sum.

Given Campbell and T. K. Skinker, for libellants.

D. T. Jewett, for respondents.

DILLON, Circuit Judge. The respondents make the question in this court that the case, as stated in the libel and made by the proofs, is not one of admiralty or maritime cognizance, and this, whether the libel be regarded as one for salvage or to recover as upon a maritime contract. The libel and monition show that the pleader intended a case for salvage compensation; but the facts are stated, and if the case is not one for salvage compensation, but is one upon a maritime contract to recover for maritime services, the liberal practice of the court of admiralty would probably allow it to be viewed in the latter aspect—more particularly as the objection was not taken until the hearing, if indeed at any time before the case reached the appellate court. The proctors in the cause have referred me to the decisions bearing up-

on the jurisdiction of the admiralty in cases supposed to be more or less analogous to this one, but it is conceded that none of them are exactly in point; and some of them are conflicting. The law of salvage grows out of navigation, and is intended to promote the interests of those engaged in navigating vessels which are the instruments of commerce and trade, and of those whose property is exposed to the perils of the sea, by awarding liberal compensation to the persons by whose assistance such property is rescued from impending peril or saved after actual loss. Abb. Shipp. 554. And because such services are connected with navigation and commerce or trade, the court of admiralty has jurisdiction to fix the amount of compensation and to enforce a maritime lien therefor; and such jurisdiction and lien are necessary because the owners of the property saved may be unknown or distant or irresponsible. No such reason or necessity exists in respect to fixed structures, such as these docks. In denying salvage compensation for taking up and securing rafts afloat in public navigable waters, Chief Justice Taney uses language which applies here. He says rafts "are not vehicles intended for the navigation of the sea, or the arms of the sea; they are not recognized as instruments of commerce or navigation by any act of congress; they are piles of lumber and nothing more, fastened together and placed upon the water until suitable vehicles are ready to receive and to support them to their destined port. And any assistance rendered to these rafts, even when in danger of being broken up or swept down the river, is not a salvage service, in the sense in which that word is used in the courts of admiralty." Tome v. Four Cribs of Lumber [Case No. 14,083].

Assuming that the allegations of the libel are broad enough to justify the court in treating the libel as one to enforce a contract, or to recover compensation upon general principles for the services rendered in raising the docks, I am of opinion that the contract or services do not relate to the navigation, business or commerce of the sea or public navigable waters, in such a sense as to make the contract or services maritime. The admiralty jurisdiction and the peculiar liens, rights and remedies which the admiralty recognizes and enforces, spring out of the movable character of the vessels and vehicles which are the instruments of navigation, commerce and trade. None of the reasons upon which this jurisdiction is founded, and these rights and remedies are given, apply to the stationary docks here in question; and my best judgment is that the controversy between these parties belongs to the courts of common law, and not to the court of admiralty.

The decree below against the dock company is reversed, and the libel dismissed as to all the respondents; but as the question of jurisdiction was not raised until after the proofs were taken, each party must bear the costs he has incurred, except that the costs in this court must be paid by the libellants. Decree accordingly.

NOTE. By the general admiralty law, maritime contracts include maritime services in building, repairing, supplying and navigating ships, and the admiralty jurisdiction in the United States extends to all maritime contracts, i. e., contracts which relate to the navigation, business or commerce of the sea. De Lovio v. Boit [Case No. 3,776]. The settled doctrine in this country is, that the admiralty jurisdiction extends to all maritime contracts, and "whether a contract be maritime or not depends not on the place where the contract was made, but on the subject-matter of the contract; * * * the true criterion is the nature and subject-matter of the contract, as to whether it is a maritime contract, having reference to maritime service or maritime transactions." Insurance Co. v. Dunham, 11 Wall. [78 U. S.] 26, 29. A Contract for building a vessel was held to be not a maritime contract, because made on land and to be performed on land. Ferry Co. v. Beers, 20 How. [61 U. S.] 393, 401. But this decision is not to be extended by implication. Insurance Co. v. Dunham, 11 Wall. [78 U. S.] 28. Locality of the place where made, as a test of the maritime nature of contracts, is rejected in this country. A ferry boat on the Ohio river may be the subject of a salvage service. The Cheeseman v. Two Ferry Boats [Case No. 2,633]. The learned Judge Leavitt in that case expressed the opinion that salvage service could not be restricted to a service rendered to a vessel or the cargo of a vessel, but extended to all cases where valuable property is adrift or afloat, and is rescued from peril on any water over which the admiralty jurisdiction extends. Id. This view he considered to find support in the decisions in which steamboats have been libelled in admiralty for injuries to flat-boats and their cargoes, of which Fritz v. Bull, 12 How. [53 U. S.] 466, Culbertson v. Shaw, 18 How. [59 U. S.] 585, and Nelson v. Leland, 22 How. [63 U. S.] 48, are mentioned as examples. And he adds: "If, in collision cases, jurisdiction in admiralty can be maintained, when the injury is not to a vessel or the cargo of a vessel (not required to be enrolled or licensed), it results inevitably that it may be maintained for a salvage service in saving property not within either of those categories." And he supports his conclusions by pointing out the inadequacy of the drift laws of the states. Judge Nelson was inclined to regard a canal boat as not being a boat or vessel, though upon navigable waters, in such a sense as to subject it to a maritime lien for breach of a contract of affreightment. The Ann Arbor [Case No. 408], 1858. See similar view, Buckley v. Brown, 3 Wall. [70 U. S.] 199, 1856, per Grier, J.; Jones v. Coal Barges [Case No. 7,458]. But a lighter was held to be subject to the admiralty jurisdiction. The General Cass [Case No. 5,307]. So ferry boat. The Cheeseman v. Two Ferry Boats [supra].

The claim of the owner of a ship-yard in hauling up a vessel on his ways, and for the use of the ways, is a claim of a maritime nature, enforceable in admiralty. Wortman v. Griffith [Case No. 18,057], 1856, Nelson J. But see previous case of Ransom v. Mayo [Id. 11,571], 1853, where the admiralty was held not to have jurisdiction of a claim by the owner of the vessel against the owner of the ways, for the negligence of the latter in hauling the vessel up on the ways. A dismantled steamboat fitted up for a saloon, not subject of admiralty jurisdiction. The Hendrick Hudson [Id. 6,355]. Barge adrift is subject of salvage service. Seven Coal Barges [Id. 12,677]. So of a box of bullion. Williams v. Box of Bullion [Id. 17,717]. A maritime lien can not exist upon a

bridge; and the opinion was expressed in a libel in rem against a bridge for a maritime tort, that a lien "could only exist upon movable things engaged in navigation, or upon things which are the subject of commerce on the high seas or navigable waters," such as vessels, steamers and rafts, and upon goods and merchandise carried by them, but not upon anything fixed and immovable, like a wharf, a bridge, or real estate of any kind. The Rock Island Bridge, 6 Wall. [73 U. S.] 213. But a vessel injured by any obstruction in navigable waters may sue in personam in the admiralty,—locality giving the jurisdiction in cases of maritime torts. Atlee v. Northwestern Union Packet Co., 21 Wall. [88 U. S.] 389. In Tome v. Four Cribs of Lumber [supra] it was held by Ch. J. Taney that taking up and securing rafts afloat in public navigable waters was not a salvage service, but rather in the nature of a mere finding, citing Nicholson v. Chapman, 2 H. Bl. 254, relating to a quantity of lumber, and in which salvage was denied, and The Upnor (a flat boat) 2 Hagg. Adm. 3. One ground of the decision of Ch. J. Taney was, that rafts "are not vehicles intended for the navigation of the sea, or the arms of the sea; they are not recognized as instruments of commerce or navigation by any act of congress; they are piles of lumber, and nothing more, fastened together and placed upon the water until suitable vehicles are ready to receive and transport it to its destined port. And any assistance rendered to these rafts, even when in danger of being broken up or swept down the river, is not a salvage service, in the sense in which that word is used in the courts of admiralty." As to rafts, see A Raft of Spars [Case No. 11,529]; 2 W. Rob. Adm. 251.

The jurisdiction of the district court over a case of salvage service on the Mississippi river is not questioned by counsel, and does not admit of question. Seven Coal Barges [supra], citing The Genesee Chief, 12 How. [53 U. S.] 443; The Hine v. Trevor, 4 Wall. [71 U. S.] 555; The Tug Eagle, 8 Wall. [75 U. S.] 15. Coal barges adrift on the Ohio may be the subject of salvage service. Seven Coal Barges [supra], Drummond, J. (Davis J., concurring). "The object of the law of salvage is to promote commerce and trade, and the general interests of the country, by preventing the destruction of property, and to accomplish this by appealing to the personal interest of the individual as a motive of action, with the assurance that he will not depend upon the owner of the property he saves for the measure of his compensation, but to a court of admiralty, governed by principles of equity." Per Drummond, J., Seven Coal Barges [supra].

Case No. 12,274.

SALZOBEL et al. v. The ROLLING WAVE.

[N. Y. Times, Nov. 13, 1863.]

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

CHARTER PARTY — ACTION IN REM — GOODS IN POSSESSION—IN PERSONAM.

In admiralty. This action [by Vincenzio Salzobel and others against the brig Rolling Wave, and W. W. Collins, her master] was brought to recover damages for breach of a charter party. The libel alleged that the charter was made at Philadelphia, May 22, 1862, between Collins and Rubira & Co., agent of the libellants, who live in Cuba, for a voyage from Cienfuegos to the United States, and that the charter was wholly uncomplied with by the vessel. The answer denied that allegations of the libel constitute any cause for action against the vessel, and set up other matters, which, not being supported by proofs, cannot be considered by the court. The case was submitted to the court on the libel and answer.

Eaton, Davis & Tailler, for libellants.

Beebe, Dean & Donohue, for claimant.

HELD BY THE COURT (BETTS, District Judge): That the contract is of a maritime character, and comes within the scope of a court of admiralty. But that the authority of the court cannot be exercised in rem against the ship to compel the performance by her of agreements in relation to the cargo to be transported in her, unless the cargo is actually or constructively in her possession. [Hickox v. Buckingham] 18 How. [59 U. S.] 182; [Dynes v. Hoover] 19 How. [60 U. S.] 82. That the action in rem cannot be maintained on the averment of the libel. That the libellants, however, may possess a right to seek relief under the other form of the action by charging the master personally for the damages.

Libel dismissed as to the vessel.

Case No. 12,275.

SAM v. GREEN.

[2 Cranch, C. C. 165.] [1]

Circuit Court, District of Columbia. April Term, 1819.

SLAVERY—IMPORTATION INTO DISTRICT OF COLUMBIA—HELD UNDER DIFFERENT MASTERS.

A slave does not acquire freedom by an importation and continuance a year in Alexandria, unless he continue there one year under the same master or owner.

[This was an action by Negro Sam against James Green. Petition for freedom.]

Mr. Taylor, for plaintiff.

Hewitt & Stone, for defendant.

THE COURT (THRUSTON, Circuit Judge, absent), at the prayer of the defendant's counsel, instructed the jury that the plaintiff did not acquire a right to freedom by being brought into Alexandria, and continuing there one year, unless he was continued there a year by one and the same master. For the loss of the property in the slave was in the nature of a penalty; that no freedom can be acquired under the second section of the act, but in a case in which the penalty of $200 also is incurred, under the third section of the act of 17th of December, 1792.

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

Case No. 12,276.

The SAM GATY.

[5 Biss. 190.] [1]

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

COLLISION—RULE OF DAMAGES—ABANDONMENT BY OWNER—ESTIMATED DAMAGES.

1. To a libel for collision, it is not a sufficient defense to set up that a sound boat would not have sustained any damage from the collision. Such allegation is mere conjecture.

2. The proper rule of damages is to allow the expense of raising the vessel and putting her in repair, with a reasonable allowance for loss of time and freight, and damage to the cargo.

3. Where the owner had, after collision, allowed the boat to lie until she became worthless, he can only recover under the above rule. He has no right to abandon the vessel and claim a total loss.

4. Where, in such case, the only evidence introduced was as to the total value of the boat, the court may either allow nominal damages, or estimate them from the court's knowledge of such cases and the general facts proven.

In admiralty. Libel by Bohan S. Sheppard, owner of the canal-boat E. R. Hooper, for damages caused by a collision.

Rae & Mitchell, for libellant.

George Willard, for respondent.

BLODGETT, District Judge. It appears from the pleadings and proofs in this case, that in March, 1868, the canal-boat E. R. Hooper was lying at the landing at Beardstown, on the Illinois river, next to a barge fastened to the shore, and that the steam-packet Sam Gaty, then engaged in the business of navigating on that river, while making a landing at Beardstown, struck against the canal-boat E. R. Hooper and crowded it against the barge so as to spring off some of the planks or siding of the canal-boat on the land side of it, causing a leak whereof it sunk that night in four or five feet of water. The witnesses differ as to the degree of care and skill used by those in charge of the Sam Gaty in making the landing, those for the libellant showing that she struck hard against the canal-boat, while those for the respondent insist she did not, and that the crushing in of the side of the canal-boat was wholly due to the rottenness of its timbers, and that a sound boat would not have sustained any damage from such a collision.

Whether a sound boat would have sustained any damage or not under the circumstances, is mere conjecture, and as all the witnesses agree that the steamer did strike so hard against the canal-boat as to cause it to leak at once and shortly after to sink, and it does not appear that there was any fault on the part of those in charge of the canal-boat, I am disposed to hold the steamer responsible for the damage done to the canal-boat by the collision.

It is difficult for me to determine, from the evidence, the amount of that damage.

The witnesses for the libellant swear it was worth from twelve hundred to fifteen hundred dollars, but, under the circumstances, I do not think its value at the time is the fair rule of damages. The Baltimore, 8 Wall. [75 U. S.] 377.

The boat had been lying at Beardstown during the preceding winter and until the time of the collision, waiting, unsuccessfully, for business after the opening of navigation, because, it is stated by the witnesses, no insurance could be effected on cargoes shipped upon it. Whether that testimony, which seems to be hearsay, is true or not, it is clear from the evidence that no effort was made to raise or repair the canal-boat until the water in the river had so far subsided in the spring or early summer as to leave the boat high and dry on the shore, and there is before me no evidence that any effort was ever made to repair or use the boat again. The rule of damages in such a case of collision, is to allow the injured and innocent vessel "the expenses of raising the vessel and putting her in repair, with a proper allowance for loss of freight and for damage to the cargo and for the detention of the vessel for the time necessary to make the repairs and fit the vessel to resume her voyage." The Baltimore, 8 Wall. [75 U. S.] 387.

In this case, the item of damages seems to be the cost of raising the boat, the cost of repairing it, and proper compensation for the detention of the boat during the necessary time of raising and repairing it. The rule, and the reason for it, are stated and considered with great fullness in the case cited above, but there is no evidence before me tending to show what is the amount of damages proper to allow the libellant. Under such circumstances, the court can do one of two things—either allow the libellant but nominal damages, because he has not proved the amount of his damages, or to make a conjecture and find, merely on the court's knowledge of such matters, as to what ought to be allowed the libellant.

In view of the fact that this case has been pending a long time, and that it will be difficult for the libellant to prove the damages to which he is entitled, I have decided to allow him one hundred dollars for the expense of raising the boat and the loss of time consequent upon the collision, and fifty dollars for the cost of repairing and injury done to its sides by the collision and to its hold by the water let into it—or $150 in all. I do this, because I think the libellant is entitled to some damages, but he has not proved how much, and the only rule to be applied in such a case is that stated by Judge Grier in The Harriet Rogers [nowhere reported], thus: "The amount it would cost to repair the damage, with some allowance for demurrage;" but the doctrine of abandonment of the injured vessel to the party causing the injury has no application in such a case, but the injured party must use all reasonable measures

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

to stop the progress of the damage caused by the collision.

Let there be a decree for libellant for $150.

SAM KIRKMAN. The (McALLISTER v.). See Case No. 8,658.

Case No. 12,277.

SAMPAYO v. SALTER.

[1 Mason, 43.] [1]

Circuit Court, D. New Hampshire. May, 1816.

PRIZE — CAPTURE OF VESSEL — RESTORATION AND SALE OF CARGO—FREIGHT.

Where a vessel has been captured on her voyage, and condemned at an intermediate port, and a part of the cargo has been restored and sold at the same port, no freight is due for the cargo so restored.

[Cited in Bork v. Norton, Case No. 1,659; Weston v. Minot, Id. 17,453.]

Assumpsit for money had and received. The cause was tried upon the general issue, when it appeared that the plaintiff [H. T. Sampayo], in 1812, after the declaration of war, shipped on board of the American vessel called the Dolphin, commanded by the defendant [John Salter] fifteen hundred barrels of flour, to be carried from Baltimore, where the vessel then was, to Lisbon. On the voyage, the vessel was captured by the British, carried into Bermuda, and there, together with all the cargo, except that shipped by the plaintiff, condemned as enemy's property. The plaintiff being a neutral subject, resident at Lisbon, obtained a restoration of his shipment, which was thereupon sold by the defendant at Bermuda; and the present action was brought to recover the sum of $4,478.72, the balance of the proceeds of the sale, which the defendant held in his hands, claiming a right to deduct therefrom the stipulated freight for the voyage to Lisbon, or at all events a pro ratâ freight.

E. Cutts, for plaintiff.

W. M. Richardson, for defendant.

STORY, Circuit Justice. There is no pretence for the claim of freight in this case. The freight for the whole voyage cannot be due, for it was never performed, and was defeated by the capture. As to a pro ratâ freight, the claim is as little supported. The doctrine upon this subject in Luke v. Lyde, 2 Burrows, S, 82, and other subsequent cases, rests upon the ground, that there is a voluntary receipt of the goods at an intermediate port of the voyage, and an agreement to dispense with the party's transporting them farther. But it never has been supposed, that a pro ratâ freight was due, when by a capture the party has been incapable of performing the voyage, and the shipper has been compelled to receive his goods at the hands of the admiralty. The plaintiff is, therefore, entitled to a verdict for the whole sum in controversy.

Verdict for the plaintiff.

Same point in Caze v. Baltimore Ins. Co., 7 Cranch [11 U. S.] 358.

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

Case No. 12,278.

SAMPLES v. BANK.

[1 Woods, 523.] [1]

Circuit Court, S. D. Georgia. Nov., 1873.

PLEADING IN EQUITY—SUFFICIENCY OF ANSWER—LIMITATION OF ACTIONS—NOTES OF SUSPENDED BANK—EFFECT OF DECREE.

1. Under the 39th equity rule, when a defendant sets up in his answer the bar of the statute of limitations, and the same is well pleaded, he is thereby excused from further answer to such parts of the bill as are covered by it.

2. When a bank has suspended payment and its bills have ceased to circulate as money, the statutes of limitation apply to them as to other contracts.

3. The sixth section of the act of the legislature of Georgia [Laws Ga. 1869, p. 133] approved March 16, 1869, entitled an "act in relation to the statute of limitations and for other purposes," applies to a suit founded on the notes of a suspended bank.

4. A statute which took effect March 16, 1869, and which declares that all actions upon contracts, etc., which accrued prior to June 1, 1865, shall be brought before January 1, 1870, or both the right and right of action shall be barred, does not impair the obligation of contracts and is not unconstitutional.

5. When a creditor's bill is filed in the state court, under the laws of Georgia, to settle a trust, all creditors notified of the bill according to law are parties and bound by the decree.

In equity. Submitted on exceptions to the sufficiency of the answer.

James S. Hook, for complainant.

W. H. Hull, for defendants.

WOODS, Circuit Judge. The bill is filed against the City Bank, a corporation under the laws of Georgia, domiciled in the city of Augusta, Joseph C. Fargo, Charles Baker and others, citizens of Georgia. It alleges, in substance, that complainant is the holder of certain bills and notes, to the amount of five thousand, four hundred and forty-six dollars, issued by the City Bank under a charter granted by the legislature of the state of Georgia, which the complainant acquired in the course of his business and for a valuable consideration. That the bank, soon after the issue of the notes, suspended specie payment, ceased to do business and failed to redeem or pay its notes. That after such failure the bank distributed among its stockholders a large amount of gold and silver coin to the amount of $70,000, and also certain other large sums as dividends amounting to $30,000. That as late as January, 1866, the bank had on hand a reserved fund of $100,000,

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

notes discounted to the amount of $50,000, and bonds and stocks amounting to $200,000 real estate amounting to $30,000, bank notes and coin amounting to $75,000, and other amounts worth $20,000. Nevertheless it has refused to pay any portion of its notes so issued except at a large discount, to the fraud and injury of the billholders. That on January 10, 1868, the bank executed a deed of conveyance for the benefit of its creditors, the schedule of which did not contain a full account of the assets of the bank, which constituted a fund for the payment of its debts. Neither the assets above named, nor the large amount of gold and silver coin divided as aforesaid among the stockholders, are mentioned in the deed, and the officers of the bank being stockholders have received a portion of the surplus fund and coin, and have failed to call in and appropriate any portion of the same to the redemption of the outstanding bills. That defendant Fargo received at the time of the distribution of the coin and surplus fund aforesaid, the sum of $1,834 in coin; defendant Charles Baker, $832; defendant Alfred Baker, $5,600, and other named defendants certain sums specified respectively. That the complainant is unable to state what further sums said defendant stockholders or other stockholders received, and asks that said defendants be required to make discovery. The bill further alleges that the funds so improperly distributed would, taken with the assets in the hands of the assignee, be sufficient to pay all the debts of the bank. That after said deed of assignment, complainant demanded of Joseph C. Fargo, the assignee, that he recall from the stockholders all the funds and coin so improperly divided among them, in order to the payment of the debts of said bank; but said Fargo being a stockholder himself, and having received a part of said coin and other assets, and combining with other stockholders, refused and still refuses so to do. That said Joseph C. Fargo and the other stockholders, defendants, combining with one Miles G. Dobbin and others, have obtained from the supreme court of Richmond county, a decree by consent, to distribute the funds of the bank and discharge said assignee, upon his complying with the terms of said decree. That under said decree a final distribution of assets was made to the stockholders at the rate of $4.50 for each share of stock. Said decree was made on March 14, 1870, without notice to complainant, who was not a party to the suit, and was obtained in order to defraud complainant, and other billholders and creditors of the bank, who were not parties to said decree, and complainant had no notice of said decree until after final distribution was made. That said distribution of gold and silver coin to the stockholders, while the outstanding bills were unredeemed, was a fraud upon the billholders of said bank, and that complainant knew nothing of said distribution until after January 1, 1870. That said deed of assignment, while purporting to be a conveyance of all the assets of said bank, was not in fact so, and did not give a correct schedule of all the assets of the bank, and this fact was first discovered by complainant since the first day of January, 1870. The bill prays for an account of the assets of the bank, owned by it on January 9, 1866, and for the application of the same to the payment of complainant's debt, for an account of the amount due complainant, and that each of defendants may be required to account for the coin and surplus funds received by him from the assets of said bank, and that they may be decreed to pay the complainant, on his said debt, what shall appear to be just and due and owing to him.

To this bill defendants, under the 39th equity rule, which provides that "the defendant shall be entitled in all cases, by answer, to insist upon all matters of defense in bar of or to the merits of the bill of which he may be entitled to avail himself by a plea in bar," have filed an answer in which they set up in bar of the complainant's claim, the statute of limitation passed by the legislature of Georgia, approved March 16, 1869, entitled "an act in relation to the statute of limitations, and for other purposes" (Laws Ga. 1869, p. 133), and also the general statute of limitations. The complainant has excepted to the answer as evasive, imperfect and insufficient in refusing to answer a part of the interrogatories and in not fully answering others. These exceptions present the question, whether the statute of limitations, pleaded by defendants, is a bar to the relief claimed; for if it is a bar, it excuses the defendants from further answer.

That part of the answer which sets up the limitation is in these words: "To all the charges in said bill, touching dividends of any kind declared by said City Bank, or the disposal of its assets by said bank, save the said assignment, defendants decline to answer, because they say that none of said dividends were declared, nor any payments or transfer of money or assets, made by said bank to its stockholders, at any time after the 31st day of May, 1865. And all the bills held by complainant were issued before said last named date, and none since that time, and that at said last named date, and continuously since that time, said bank has been notoriously insolvent, and had and ever since has ceased to transact business or to keep any banking office or place of business, and all said bills have since that time ceased to circulate as money. Wherefore, defendants claim the benefit of the act of limitation aforesaid."

The provisions of the statute on which this answer is founded, are as follows:

"Sec. 3. And be it further enacted, that all actions on bonds or other instruments under seal, and all suits for the enforcement of rights accruing to individuals or corporations under the statutes or acts of incorporation,

or in any way by operation of law which accrued prior to June 1, 1865, not now barred, shall be brought by January 1, 1870, or the right of the party plaintiff or claimant and all right of action for its enforcement shall be forever barred."

"Sec. 6. And be it further enacted, that all other actions upon contracts express or implied, or upon any debt or liability whatsoever, due the public, or a corporation or a private individual or individuals, which accrued prior to the first day of June, 1865, and are not now barred, shall be brought by January 1, 1870, or both the right and the right of action to enforce it shall be forever barred. All limitations hereinbefore expressed shall apply as well to courts of equity as courts of law, and the limitations shall take effect in all cases mentioned in this act, whether the right of action had actually accrued prior to the 1st of June, 1865, or was then only inchoate and imperfect if the contract or liability was then in existence."

The terms of these sections are very broad, but it is claimed by the complainant that they do not apply to bank bills. A recent decision of the supreme court of Georgia, to which our attention has been called, is adverse to this position. In Kimbro v. Bank of Fulton [49 Ga. 419], of which only the head note is furnished, and which is not yet reported in full, it was held as follows: "The general rule is, that statutes of limitation do not apply to bank bills, because they are, by the consent of mankind and course of business, considered as money, and that their date is no evidence of the time when they were issued. If bills have ceased to circulate as currency, and have ceased to be taken in and reissued by the banks, they no longer have that distinctive character from other contracts, which excepts them from the operation of the statute of limitations. If the bills of the Bank of Fulton had thus lost their distinctive character prior to the 1st of June, 1865, they come within the provisions of the act of March 16, 1869, entitled 'An act in relation to the statute of limitations, and for other purposes.'"

The averments of the defendant's plea bring this case within the rule thus laid down. In Leffingwell v. Warren, 2 Black [67 U. S.] 603, it was held by the United States supreme court that the construction given to a statute of limitations by the supreme court of a state will be followed by the federal courts. We are therefore constrained to hold upon this point with the decision of the supreme court of Georgia. And we may add, that decision has our full concurrence.

It is insisted further, by the complainant, that the bill charges fraud, and the statute does not apply to frauds. Under the general statute of limitations of this state (Irwin's Code, § 2880), it is provided that if the defendant, or those under whom he claims, has been guilty of fraud by which the plaintiff had been debarred or deterred from his action, the period of limitation shall run only from the time of the discovery of the fraud. There is no such provision in the act under consideration, and the most the complainant can fairly claim is that the general provision applies. Conceding, as we do, this to be the fact, the complainant fails entirely to bring his case within the exception by the averments of his bill. There is no charge that by the fraud of defendants he has been debarred or deterred from his action. We think that, by the 6th section of the act, an action on the bills is barred against the bank itself. The terms of this section are as broad as language can make them: "All actions upon contracts, express or implied, or upon any debt or liability whatsoever, due the public, or a corporation or a private individual or individuals, which accrued prior to June 1, 1865, and are not now barred, shall be brought by the 1st of January, 1870, or both the right and the right of action to enforce it shall be forever barred." This language leaves no loop hole of escape. A fortiori, if the action on its bills against the bank itself is barred, an action against the stockholders on the bills, based on the averments made in the bill of complaint, must also be barred.

The complainant assails the statute for unconstitutionality, and criticises its provisions. We think that the details of a statute of limitations are wholly within the discretion of the legislative power, with a single limitation only, that no such act can impair the obligation of contracts. The act under consideration provides, that upon all contracts or liabilities which existed prior to June 1, 1865, an action should be brought within nine months and fifteen days from the passage of the act, or be forever barred. Does this impair the obligation of contracts, or is it only a change of the remedy? If the latter, it is not forbidden by the constitution. It is well established that the legislature may shorten the time for the running of the statute of limitations without impairing the obligation of the contract; that such legislation affects the remedy only. The only restraint upon this power is, that reasonable time must be allowed, after the passage of the law, to allow the bringing of actions. A limitation, so short as to practically cut off all actions, would affect the contract as well as the remedy, and be void. Here is a statute which applies to contracts and liabilities which had existed nearly four years, and which allowed over nine months in which to bring suit. This appeared to the legislature a reasonable time, and, in regard to the class of contracts to which it applies, it seems reasonable to us. It may be fairly held to change the remedy merely, and not to impair the obligation of the contract.

We are of opinion, then, that the statute pleaded is constitutional; that it bars the claim of complainant, and that the answer setting it up in response to certain parts of

the bill of complaint, excuses the defendants from further answer to those portions of the bill.

To that part of the bill which alleges an assignment of the assets of the bank, and calls upon the assignee to account for the trust funds, the defendants set up in their answer the decree of the superior court of Richmond county, which is also mentioned in the bill, distributing the funds of the bank and discharging the assignee. There are no sufficient averments of fraud or collusion, in the bill, to render the decree void; and, as it was a creditor's bill to settle a trust, all creditors are parties, if they were brought in by publication, according to the laws of Georgia. Story, Eq. Pl. §§ 103, 106.

There is no averment that complainants were not notified, according to law, of the pendency of the bill, nor is a copy of the record attached to the bill. Without other and further averments, we must hold the decree binding on complainants. The setting up of the decree in the answer excuses defendants from further answer to that part of the bill to which the averments relative to the decree apply.

The answer appears to us to be a complete defense to the case made by the bill, and that it is in all respects sufficient. The exceptions must, therefore, be overruled.

Case No. 12,279.

The SAMPSON.

The IOLA.

[4 Blatchf. 28.] [1]

Circuit Court, S. D. New York. April 7, 1857.[2]

COLLISION—CONFLICTING TESTIMONY ON APPEAL—DAMAGES—EXAGGERATED BILLS—FRAUD—SALVAGE.

1. Where the proofs in a collision case were contradictory and irreconcilable, seven witnesses having been examined on each side, who were present at the collision, and the case was one depending altogether on the credibility of witnesses, this court affirmed the decree below, which was in favor of the libellant.

[Cited in The Maggie P., 25 Fed. 206; The Rockaway, Id. 776; Assante v. Charleston Bridge Co., 40 Fed. 767; The Parthian, 48 Fed. 564; The Albany, Id. 565; Re Hawkins, 13 Sup. Ct. 527.]

2. Where, in a collision case, it appeared that several of the bills for repairs to the injured vessel were exaggerated, with the knowledge and connivance of the master, if not by his procurement, with a view to impose upon the underwriters, and the district court reduced the items to the lowest estimate: *Held*, that such reduction was proper.

[Cited in Williams v. The Olive Baker, 36 Fed. 717.]

3. If it had appeared that the owner of the vessel had been privy to or concerned in the fraud, it would have been proper to reject the entire amount of the exaggerated bills.

4. As a general rule, in order to put an end to impositions of this description, the owner must be held responsible for the acts of the master.

5. If, in this case, the court below had rejected the entire amount of the bills tainted with the fraud, this court would have upheld such decision.

6. Any ship-master or material man conniving with the master, or with the agent of the owner, in any such fraud, will be disabled from collecting any portion of his demand.

7. A vessel which is condemned in damages, in a collision case, will not be allowed salvage for rescuing the other vessel from sinking, by towing her to a place of safety.

[Cited in The Clara, Case No. 2,788; The Clara Clarita, 23 Wall. (90 U. S.) 18; Southwestern Transp. Co. v. Pittsburg Coal Co., 42 Fed. 920.]

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

This was a libel in rem, filed in the district court, by the owners of the brig Iola against the steamboat Sampson, to recover damages for a collision which occurred a short distance outside of Sandy Hook, on the south shore of Long Island. The district court decreed for the libellants. [Case No. 7,057.] The commissioner reported in their favor $2,150, which was reduced, on exceptions to his report, to $1,121.20. They claimed $4,585.73. Both parties appealed from the decree.

William M. Evarts and Edward H. Owen, for libellants.

Welcome R. Beebe and Charles Donohue, for claimants.

NELSON, Circuit Justice. The bow of the steamer came in contact with the brig upon her starboard side, cutting her down to the water's edge. The Sampson was lying at a usual place for steamers waiting for employment to tow up vessels coming from sea into the harbor of New York. The break in the side of the brig was stopped with canvas, so as to enable the steamer to tow her to the Atlantic docks to be repaired. The libellants claim that the Sampson was seen by them some three or four miles ahead, after the Iola had taken her course eastward, her destination being to St. Johns, in the Province of New Brunswick, where she belonged; that the steamer was then lying still, and not in motion upon the water; that the course taken by the brig would have caused her to pass the Sampson's bows, giving a wide berth; but that, as she neared the steamer, and when within some half a mile, the latter suddenly started her engine, and ran across the track of the brig, and thereby produced the collision.

The steamer claims that she was lying still upon the water; that she made no movement forward; that the only movement made by her was to back, with a view to avoid the brig, which was coming directly against her bows; but that, notwithstanding every effort to back, the collision could not be avoided. The whole case turns upon these two

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

[2] [Affirming Case No. 7,057.]

allegations. The proofs are contradictory and irreconcilable, all the witnesses examined on board of the brig sustaining the view taken by the libellants, and all on board of the steamer the view presented by her in the defence. Some seven witnesses have been examined on each side, who were present at the collision.

The court below decreed in favor of the libellants. In a case so nicely balanced, and depending altogether upon the credibility of witnesses, I am not inclined to interfere with the decision below.

The libellants, notwithstanding they obtained the decree, have also appealed from it, on the ground that the damages awarded do not cover their loss. The Iola was insured—at least it was so stated by the master; and there is some evidence in the case, that several of the bills made out by the material men, and the workmen engaged in repairing the vessel, were exaggerated, with the knowledge and connivance, if not by the procurement of the master, with a view to impose upon the underwriters. This fact, doubtless, influenced the court below to reduce the items to the lowest estimate. It is due to the ship-masters and others at this port, to say, that this is the first instance of a fraud of this description which has come under my notice. It has been properly rebuked, and any advantage to be derived from it prevented, by the decision of the court below. I do not doubt, that if it had appeared that an owner had been privy to or concerned in the fraud, the entire amount of the exaggerated bills claimed in the expenses of repairs would have been rejected. As a general rule, however, in order to put an end to impositions of this description, the owner must be held responsible for the acts of the master. These impositions can be reached and properly dealt with in no other way. If, in this case, the court below had rejected the entire amount of the bills tainted with the fraud, I should have upheld its decision. Moreover, it should be understood, that any ship-master or material man conniving with the master, or with the agent or the owner, in any such fraud, will, should the fact appear, be disabled, upon established principles of law, as well as of morals, from collecting any portion of his demand.

The idea seems to have influenced the parties, founded upon the principle of allowing one-third of the new repairs to the underwriters—in other words, a deduction to that amount in the charge—that, in order to save the owner from any expense, the bills should be exaggerated so as to cover this one-third. To carry into effect the scheme, the master is to pay simply the fair price for the materials or work. For this purpose, two sets of bills are made out—one to contain the actual bona fide value of the materials and cost of the labor, and the other the enhanced value, to be furnished to and claimed from the underwriters.

It is a matter of gratification that the scheme has been exposed and defeated; and I trust that its publicity will have the effect to induce all persons concerned in settling and adjusting damages in cases of collision, to scrutinize the bills of repairs, and see to it that impositions of the character here developed do not escape their notice. They will be sustained in the application of the most rigorous rules, in determining the expense of repairs, with a view to prevent abuses, so far as their rulings may come under revision by this court.

The decree of the court below is affirmed; and, as both parties have appealed, the affirmance is without costs to either side.

The owners of the Sampson also filed a libel in rem, in the district court, against the Iola, to recover salvage for towing her, after the collision, to the Atlantic docks, for repairs. The district court dismissed that libel, and the libellants appealed to this court. That appeal was heard at the same time with the appeals in the suit against the Sampson, and was argued by the same counsel. This court affirmed the decree below, with costs, holding that the Sampson could have no just claim for salvage for doing what was in her power towards saving the Iola; that the Sampson herself was the most deeply interested in that service; that, if it had not been rendered, the Iola would probably have sunk, resulting in a total loss of vessel and cargo; that the salvage service was, therefore, rendered by the steamer for her own benefit; and that there was, of course, no pretext for charging it on the brig.

Case No. 12,280.

The SAMPSON.

[3 Wall. Jr. 14;[1] 3 Am. Law Reg. 337.]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1854.

COLLISION—STEAM TUGS—MASTER AND SERVANT—RESPONSIBILITY OF STEAMERS.

1. The court, confirming its decision in the case of Smith v. The Creole [Case No. 13,033], applies more strongly the doctrines of that case; and holds that when even small vessels, as coal heavers, are in tow, the towing boat is the servant of the vessel towed, and that the tug, being thus bound to obey the orders of the other vessel, is not responsible, though, in point of fact, giving orders to her, for damages in the proper course of its employment.

[Cited in Boyer v. The Wisconsin & The Hector, Case No. 1,756; The Belknap, Id. 1,244; Albina Ferry Co. v. The Imperial, 38 Fed. 617.]

2. Though the rule of porting the helm is obligatory, when, in ordinary cases, vessels meet in the same line, it is not one always to be observed when they are in parallel lines. Circumstances control the rule; and, when a boat is

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

moving against the tide, slowly and with difficulty (as when tugging a heavy vessel), and is out of the centre of the channel, which is left free to the other, the rule can have no application.

3. Steamers, especially large steamers, are held to the strictest care possible when in ports or in the neighborhood of sailing and smaller vessels; and must move slowly and with extreme circumspection. And if, from violation of this duty, small or sailing vessels are put suddenly into confusion and jeopardy, the court will not inquire whether the rules applicable to ordinary cases of meeting, have been strictly observed by the weaker vessel, or not; but will hold the steamer responsible, as reckless, for all injury happening to or committed through the act of the weaker vessel, from mistake caused by the embarrassment natural to the condition into which the steamer has put this weaker vessel.

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

A large steamer was coming, on a moonlight and pretty clear night, up the Delaware and opposite the city of Philadelphia, at her ordinary speed of eleven miles an hour; the tide being full in her favor, and she having come up the middle of the channel (here about nine hundred and sixty feet wide), that she might have the whole benefit of the current. A small tow steam tug, the Sampson, of sixty-five horse power, was towing, at the same time, in an opposite direction, a heavily ladened coal schooner of one hundred and forty-five tons, which was attached to it by a hawser, fifteen to twenty fathoms long. The tug and schooner were working along at the rate of two and a half miles an hour, against the tide, and were hugging the shore (being within from ninety to one hundred and sixty feet of it) of an island opposite the city; as well that they might avoid the strength of the current against them, as that they might be out of the way of ferry-boats emerging suddenly from the city docks opposite. They could go no nearer to the shore of the island, with safety, than they were. The steamer being near her place of landing, ported her helm and sheered towards the island for the purpose of rounding to at the city wharf. She had not seen the tug; and the schooner—in consequence of her spars being without sails, her motion being scarcely apparent, and her position being close upon the island where vessels often anchor to await a change of tide—was mistaken by the steamer for a vessel at anchor. The tug seeing the movement of the steamer in rounding to, and clearly foreseeing a collision if she, herself, went on her own course, starboarded her helm to get still closer to the island. The schooner, who had been directed by the tug's pilot to follow in the wake of the tug, did the same. The tug escaped, but the schooner was brought directly into the line of the steamer, and notwithstanding all the steamer's efforts at this moment, by porting her helm, to get between the schooner and the island, a serious collision took place. Had the schooner ported her helm and cut the tow-line, she would probably have escaped.

Libels being filed by the steamer against the tug and schooner, and by the schooner against the tug and steamer, the district court was of opinion, on this case, that the collision was directly attributable to the act of the tug in starboarding her helm and so taking the schooner nearer to the island, instead of doing the reverse manœuvre, of porting, which would have taken both the tug and her tow out into the channel. The tug was accordingly condemned by that court to answer the damages which both steamer and schooner had suffered.

Mr. Serrill, for the schooner.
Ludlow & Cadwalader, for the steamer.
Gerhard & Williams, for the tug.

GRIER, Circuit Justice. By the decision of this court in the case of Smith v. The Creole [Case No. 13,033], the remedy of the steamboat is to be sought against the schooner, and not against the tug employed to tow her. The tug was the servant of the schooner, and bound to obey the orders of her master, and if the master choose to follow the directions of the pilot or steersman of the tug, and trust to his skill instead of his own, the acts of the pilot may be justly considered as his own, and adopted by him. The remedy of the owners of the steamboat (if entitled to any) is therefore against the schooner, and not against its servant, the tug. Nor have we any evidence of any disobedience of orders by the tug that should render it liable to the schooner. For if the master of the schooner gave no directions to the pilot or steersman of the tug, but submitted his own will to the pilot's skill, he has adopted his acts, and has no right to charge the owners of the tug for his own negligence. The tug Sampson and owners are therefore entitled to a decree in both cases.

Assuming the schooner to be liable for the acts of her servant, the contest between her and the steamboat remains to be considered.

The tug and schooner were hugging the shore. It was, under the circumstances, their proper place. When the tug saw the steamboat coming up the river she was bound by no rule of navigation, or common sense, to cross the channel to avoid a steamboat coming up the middle of the river. She had left eight hundred of nine hundred and sixty feet of the channel free to the steamboat. Knowing her own position at one side of the channel, the tug could not anticipate the gross mistake made by the steamboat with regard to her position, or that she would needlessly cross the channel, and run under the bows of the tug and schooner. Both were carefully keeping out of harm's way, when the steamer suddenly comes down upon them by sheering out of her proper course, and the tug escapes destruction the

best way she can, in the sudden emergency produced by the mistake and reckless haste of the steamboat. Whether the tug turned to the right or left to save herself from destruction, is of no importance. It was the mistake or carelessness of the steamboat to put her to the necessity of turning either way. The rule of porting the helm where vessels are meeting in a line, should invariably be observed; but where vessels are in parallel lines, when one boat is working against tide, and with difficulty tugging a heavy vessel, keeps near the shore, and leaves a free channel to the other who is coming up in the middle of it, the rule of porting the helm can have no application.

If the tug had ported her helm on seeing the steamer, she would have thrown her long tow obliquely across the middle of the channel, up which the steamboat was coming. The steamboat by turning out of her course to run under the bows of a vessel hugging the shore, when a wide channel was left open before her wholly unobstructed, cannot now be heard to complain of the comparatively helpless and slow moving vessels for not exercising more skill in getting out of her way. It was the duty of the steamboat, moving with great power and momentum, with a tide in her favor, to keep out of the way of small and slow vessels, one of which was helpless, and the other slowly and painfully dragging behind her. The officer of the steamboat should have slackened her pace in order to have time to observe the difficulties of his position and to ascertain the correct situation of vessels, whether moving or stationary, in the harbor. With her huge mass and great momentum the steamboat cannot be allowed to dash as a triton or leviathan among minnows into the midst of smaller vessels in a port, calling upon them to take care and keep out of the way, or to learn at their cost the rule of "Port your helm."

Every one knows the deception as to the relative position of bodies to which those on board a vessel, moving into port, after night are subject. Moonlight may extend the range of vision, but it will nevertheless subject the most sharp-sighted to great mistakes in a port where some objects may be moving swiftly, others slowly, and others be at rest. The headway or momentum of a large steamboat, moving at a velocity of ten or eleven miles an hour, cannot be so suddenly checked, on the discovery of an error, as to hinder disastrous collisions, and there cannot be a better rule of navigation, than that which will subject steamboats to all the damage occasioned by such reckless conduct in a crowded and narrow port after night. The steamboat must therefore bear its own injury, and must also answer for the damage done to the schooner.

Decree reversed.

SAMPSON, The. See Case No. 7,057.

Case No. 12,281.

SAMPSON v. JOHNSON.

[2 Cranch, C. C. 107.] [3]

Circuit Court, District of Columbia. Dec. Term, 1814.

TRIAL—PRODUCTION OF PAPERS—NOTICE—PROOF OF HANDWRITING.

1. The court will not, at the trial, compel the plaintiff to produce a charter-party, without previous notice, of which charter-party the defendant has a counterpart; nor permit the defendant to give it in evidence without proof by the subscribing witness.

2. The captain's protest may be given in evidence to corroborate his testimony.

Assumpsit for freight. The defendant proved that there was a written charter-party signed by Carnes and Johnson, and that the defendant had one part, and the plaintiff the other. The defendant required the plaintiff to produce his part.

But THE COURT refused to compel him.

The defendant then produced his part, which had a subscribing witness (Thomas L. Griffin,) and offered to prove by another witness, (not a subscribing witness,) the handwriting of the parties. That the subscribing witness lives in Richmond, Virginia, one hundred and twenty miles from Washington. No measures having been taken to obtain his testimony, THE COURT refused to suffer the charter-party to be given in evidence.

THE COURT permitted the captain's protest to be given in evidence, to corroborate his testimony.

SAMPSON (FOSTER v.). See Case No. 4,982.

SAMPSON, The (WINSOR v.). See Case No. 17,888.

Case No. 12,282.

The SAM SLICK.

[2 Curt. 480.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1855.[2]

MARITIME LIENS—UNDER STATE STATUTE—STRICT CONSTRUCTION.

1. Where a local law, conferring a lien, declared: "And in all cases such lien shall cease, immediately after such vessel shall have arrived in any port out of this commonwealth," it was held that the lien was lost when the vessel bound from Newburyport to Boston put into Portsmouth on account of a fog, and to get provisions.

[Cited in The Richard Busteed, Case No. 11,764.]

2. Privileged liens are stricti juris, and are not to be extended argumentatively to cases not within the law which confers them.

[Cited in De Moss v. Newton, 31 Ind. 222; Levy v. Newman, 130 N. Y. 14, 28 N. E. 660.]

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

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

[2] [Reversing Case No. 12,283.]

3. Though the court may think the legislature would have excepted a case out of a statute of limitations, if it had been foreseen, the court cannot except it.

[Cited in Morgan v. Des Moines, 54 Fed. 460.]

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

This was an appeal from a decree of the district court, pronouncing for a lien on a domestic vessel, for the price of materials used in its construction, under a statute of the state of Massachusetts. St. 1848, c. 290. [Case No. 12,283.] The parties have agreed on a statement of facts, the substance of which is as follows: "The respective libellants, at the dates mentioned in the schedules annexed to their libels, supplied the materials therein mentioned, (or a portion of the same, to be determined thereafter in case the court should decide that the libellants can recover any thing,) at the prices therein specified; and the said materials were used in the construction of the said bark Sam Slick, at the port of Newburyport, in the state of Massachusetts, the said bark being a ship or vessel within the commonwealth of Massachusetts. The said materials were furnished by the libellants to said Manson & Fernald, and charged to them on their books, the libellants knowing that they were to go into this vessel, and supposing that they had a lien on it for them, and were suitable and necessary and proper for the purpose of building the same, and were delivered to Manson & Fernald, the carpenters who built the said bark, and a debt was contracted therefor which still remains unpaid, except for the part stated in the said libels, although demanded by the libellants of the said Manson & Fernald. The said bark was built at Newburyport under and by virtue of the contract set forth in, and annexed to, the answer in these cases; and the said David E. Mayo paid the said Manson & Fernald for furnishing the materials, as set forth in said answers, and building the said bark, but the libellants did not know at the time of furnishing the said materials, that there was such a contract. The said vessel was completed on or about May 19, 1854, and on the 20th of said May, the said bark first sailed from the port of Newburyport for the port of Boston in said district, it being the intention of the master to proceed directly to Boston; but soon after leaving the harbor of Newburyport, and on the same day, in consequence of head winds, an approaching dense fog, and being short of provisions, the said bark was obliged to put back for a harbor and provisions, and the port of Newburyport not being a port of easy access for so large a vessel, the harbor of Portsmouth, in the state of New Hampshire, was deemed the most suitable port to go into, and the said vessel the same day put into and anchored in the harbor of Portsmouth. And on the next day, and after taking on board a sufficient supply of provisions, the said bark sailed for the port of Boston, where she arrived on the following day, and there remained until she was libelled in these suits. The said contract, payments, and schedules may be referred to, but are to be taken as true no further than their statements are particularly admitted herein. If upon the foregoing statement of facts, the court is of opinion that the libellants are entitled to recover, a decree shall be entered for them for an amount to be agreed upon by the parties, or determined by the court, with costs, otherwise a decree for the claimant for costs. Nothing herein contained shall be deemed a waiver of the right of either party to an appeal to the circuit court of the United States, should he feel aggrieved by the decision of the district court."

Mr. Andros, for complainant.

P. W. Chandler, contra.

CURTIS, Circuit Justice. The question is, whether the lien given by the local law was terminated by going into the harbor of Portsmouth, New Hampshire, remaining there over one night and part of two days, and taking on board some needed provisions. The second section of the act in question is as follows: "When the ship or vessel shall depart from the port at which she was when such debt was contracted, to some other port within this commonwealth, every such debt shall cease to be a lien at the expiration of twenty days, after the day of such departure; and in all cases such lien shall cease, immediately after such vessel shall have arrived in any port out of this commonwealth." This case is within the words of the last clause of this section. The vessel went into a port out of the commonwealth, to procure provisions; and this was an arrival in that port within the usual meaning of the word arrival. Mr. Chief Justice Marshall in the case of The Patriot [Thomson v. U. S., Case No. 13,985], interpreting the meaning of this word used in one of the non-intercourse acts, says: "To arrive, is a neuter verb, which, when applied to an object moving from place to place, designates the fact of coming to or reaching a place. If the place be designated, then the object which reaches that place, has arrived at it. A person coming to Richmond, has arrived when he enters the city. But it is not necessary to the correctness of this term, that the place at which the traveller arrives should be his ultimate destination or the end of his journey." So here, the vessel having gone into the port of Portsmouth, arrived there, though she was bound to Boston. But it is argued that the case is within the first clause of the act, because the vessel departed from the place where she was when the debt was contracted, to some other port, namely Boston, and so the lien was not terminated till the expiration of twenty days after such departure.

It is true the case is within the first clause;

but if it is also within the second clause, that must operate on it; and it may be within both. The second clause does not except cases because they are within the first clause. On the contrary, it says expressly that in "all cases such lien shall cease immediately after the vessel shall have arrived in any port out of the commonwealth." Certainly all cases of such arrival must include cases, where the vessel departed from the place where she was when the debt was contracted, and came to another port in the state, after visiting and arriving at a port out of the state.

It is further argued, that the occasion for going to Portsmouth and the purpose for which she put in there, take this case out of the true meaning of the act. I do not think so. She went there for a harbor and to obtain supplies. We may conjecture that one reason which induced the legislature to put an end to these liens, on arrival in a foreign port was, to clear the vessel from all such incumbrances; the possible existence of which might prevent credit from being given to the vessel in a foreign port for necessary supplies. If so, the going in for supplies is exactly the case intended to be provided for, and I cannot say how great these supplies must be, to bring the case within the intention of the legislature. Their intent as manifested by their language, was to include all cases.

Nor do I think that putting in to a harbor, on account of a fog, takes the case out of the act. So far from making any such exception, the act, as we have seen, expressly says it is to include all cases of such arrival, whatever the inducement to it may have been. I do not think I have a right to make an exception which the act not only has not made, but has clearly negatived, and especially when dealing with this particular subject. Liens have sometimes been spoken of, as if they were so beneficial, that any disposition not to enlarge their operation must be a species of severity not consistent with that liberal policy which inspires the maritime law. I confess to grave doubts of the correctness of these views. The civilians, and especially the writers upon the modern laws of the continent of Europe, have had occasion to examine this subject with great care, and it is maxim among them, "Privilegia, cum sint stricti juris nec extendi possunt de re ad rem, nec de persona ad personam," or, as Boulay Paty (1 Cours de Droit Com. 36) states it, "privileged liens are matters of strict right, and it is not permissible to extend them from one case to another. In this matter one should never argue from analogies or consequences; the privilege must be given by the law itself."

Privileged liens, like that now in question, operating as a jus in re, and accompanying the thing into the hands of a bona fide purchaser for value without notice, as this claimant is, are an embarrassment to commerce; and though sufficient reasons exist for allowing them in particular cases, I consider the rule announced by Boulay Paty to be correct, that they are not to be extended by argument. See The Kearsage [Case No. 7,633].

The clause of the act now in question operates as a limitation of the lien. The libellant insists, that even if his case is within the language of the limitation, its peculiar circumstances render it proper for the court to declare, that it ought not to be considered as within the meaning of the legislature. But it is now a settled doctrine, which has been repeatedly announced and applied by the supreme court of the United States, that, however strong the reasons may be, the courts cannot ingraft on a statute of limitations an exception not made on it; nor declare a right not to be barred, if within the fair meaning of the language of the act of limitation, because it seems that the legislature would have excepted it if it had been anticipated and considered. Clementson v. Williams, 8 Cranch [12 U. S.] 72; McIver v. Ragan, 2 Wheat. [15 U. S.] 25; Bank of State of Alabama v. Dalton, 9 How. [50 U. S.] 522. I am by no means prepared to say this case would have been excepted, if foreseen. I think it is not excepted; and that the lien was terminated by the arrival at the foreign port.

The decree of the district court is reversed, and the libel dismissed with costs.

Case No. 12,283.

The SAM SLICK.

[1 Spr. 289;[1] 18 Law Rep. 162.]

District Court, D. Massachusetts. May, 1855.[2]

MARITIME LIENS—UNDER STATE STATUTE—WHEN TITLE TO VESSEL PASSES—WAIVER OF LIEN.

1. Where a new vessel sailed from Newburyport for Boston, and was very soon, by stress of weather and want of provisions, driven into the harbor of Portsmouth, and on the day following, left for Boston: *Held*, that the lien given by the Massachusetts statute of 1848, c. 290, was not lost.

2. A vessel in process of construction, under a contract between a merchant and the builder, does not usually, at least as against third persons, become the property of the merchant, upon his making the first payment.

3. A charge for materials being made against the builder alone, without naming the vessel, does not constitute a waiver of the lien. Nor is it conclusive evidence of an intention to rely exclusively upon the personal responsibility of the builder.

There were two libels in admiralty, against the barque Sam Slick, for materials used in the construction of that vessel, and furnished by the libellants to the builders, Manson & Fernald. The libels were founded upon

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

[2] [Reversed in Case No. 12,282.]

the statute of Massachusetts of 1848, c. 290, which is as follows:

"Section 1. Whenever a debt is contracted for labor performed, or materials used, in the construction or repair of, or for provisions and stores or other articles furnished for, or on account of, any ship or vessel within this commonwealth, such debt shall be a lien upon such ship or vessel, her tackle, apparel, and furniture, and shall be preferred to all other liens thereon, except mariners' wages.

"Sec. 2. When the ship or vessel shall depart from the port at which she was when such debt was contracted to some other port within this commonwealth, every such debt shall cease to be a lien at the expiration of twenty days after the day of such departure; and in all cases such lien shall cease, immediately after the vessel shall have arrived in any port out of this commonwealth; provided, however, that nothing in this act shall alter, or be construed to alter, or in any way affect, the lien as now existing on foreign ships and vessels."

It appeared, by the agreed statement of facts, that the materials in question, were used in the construction of the barque Sam Slick, in the port of Newburyport; that they were furnished by the libellants, to Manson & Fernald, the builders, and charged to them on their books, the libellants knowing that they were to go into that vessel, and supposing that they had a lien on it for them; and that with the exception of a partial payment on one of the accounts, they were still unpaid for. It also appeared, that the barque was built under a contract between Manson & Fernald and the present owner, the claimant in this suit, Captain Mayo, which contract was in writing, and specified particularly the manner of her construction, and also provided that, at a certain stage of the work, a payment of $5,000 was to be made by Captain Mayo, on the builders' furnishing satisfactory security. It also appeared that Captain Mayo paid Manson & Fernald, according to the contract; but the libellants did not know, at the time of furnishing the materials, that there was such a contract. The vessel was completed on or about May 19th, 1854, and sailed from Newburyport for Boston on the 20th, it being the intention of the master to proceed directly to Boston; but soon after leaving Newburyport, and on the same day, in consequence of head winds, and approaching dense fog, and being short of provisions, the barque was obliged to put back for a harbor and provisions; and the port of Newburyport not being of easy access for so large a vessel, the harbor of Portsmouth, in the state of New Hampshire, was deemed the most suitable place to go into, and she put into (and anchored in) the harbor of Portsmouth, the same day; and on the next day, afer taking on board a sufficient supply of provisions, she sailed for the port of Boston, where she arrived on the following day, and there remained, until she was libelled in these suits, on the 23d of the same month. The counsel for the claimant contended that the libellants had no lien upon the vessel, because: 1st. She had arrived at a port out of this commonwealth, before she was libelled. 2d. She was built under a contract with Manson & Fernald, who would have a lien for their pay, and the libellants, being sub-contractors, could not also have a lien, thus subjecting the owner to a double lien; and on this point, he cited Smith v. The Eastern Railroad [Case No. 13,039]. 3d. The libellants charged those materials to Manson & Fernald, instead of the barque and owners, which charge, the counsel contended, was a waiver of the lien. He also claimed, under the second point, that Captain Mayo became the owner of the vessel, and that the property therein passed to him, upon his making the first payment toward her; and to maintain this, he cited Woods v. Russell, 5 Barn. & Adol. 942; and Clarke v. Spence, 4 Adol. & E. 448.

P. W. Chandler and William Rogers, for libellants.

Charles Mayo, for claimant.

SPRAGUE, District Judge, said that the first objection raised by the counsel for the claimant, appeared a formidable one. Liens of this kind did not exist before the passage of the statute, and the libellants must bring themselves within its meaning. The vessel entered the harbor of Portsmouth, before she was libelled. The question is, whether she is to be considered as having arrived at a port out of this commonwealth, within the meaning of the statute. The counsel for the libellants had cited the case of Hancox v. Dunning, 6 Hill, 494, in which it was held by the court, in an opinion delivered by Bronson, J., that after a lien had been acquired, pursuant to the New York statute, it was not lost, although the vessel made a short excursion, beyond the bounds of the state, for the mere purpose of testing her machinery, in the course of which she landed, and made fast to the dock at Perth Amboy, in New Jersey, remained there about two hours, and immediately returned to her former berth in the city of New York. The New York statute is not in precisely the same words with ours, the language being, "such lien shall cease immediately after the vessel shall have left the state;" but the decision is in point. In that case, the court held that the excursion, though within the letter, did not come within the meaning, scope and purpose of the statute. In the present case, the libellants had no reason to expect that the lien would be lost, by the vessel's starting from Newburyport. Neither party could have anticipated her being driven into Portsmouth. Such an entry into that harbor cannot be considered an arrival, within the meaning of the legislature. The policy upon which the law may be supposed to have been

founded, would not be promoted by so rigid a construction. On the strength of the decision in New York, and a view of the purposes of the Massachusetts statute, and the circumstances of this case, the court do not think that the lien was lost by the vessel's being driven into Portsmouth.

The second objection is, that the claimant became the owner of the vessel, upon making the first payment, and that the builders had a lien upon her, and that the libellants, being sub-contractors, could not also have a lien.

This objection cannot prevail. There is nothing in the contract which indicates an intention that this vessel should become the property of the claimant, before she should have been completed and delivered to him.

By the terms of the contract, $5,000 were to be paid, at a certain stage of the work, to the builders, upon their furnishing security. This indicates that the vessel was not to be held by Mayo, the claimant, as his own, or even as security. The contract also provides for a delivery of the vessel by the builders to Mayo, after her completion.

It is not true, as contended, that a vessel in the process of construction, under a contract between a merchant and the builder, becomes as against third persons, the property of the merchant upon his making the first payment. The English decisions cited, use the guarded language, "as between the parties themselves." These libellants had no notice of any contract, or of any ownership by any one, except that of the builders. She was built by Manson & Fernald, at their own ship-yard, in their own name, and to all the world they appeared to be the owners. And so far at least as the rights of the libellants are concerned, they must be deemed to have been so. And the lien of the libellants would not, therefore, subject her to a double lien. This case differs materially from that cited from Curtis' Reports. That was a libel for the repair of an old vessel, known to be owned by parties other than the contractors, for repairing. I have, therefore, no occasion to consider whether a double lien might be sustained under the statute.

The third ground of defence is, that there was a waiver of the lien, and the fact relied upon is, that the materials were charged to Manson & Fernald. This is evidence, but not conclusive evidence, of an intention not to rely upon the vessel. It may be explained and repelled, and I think is so here. This debt was contracted before the vessel had any name. The charge was made as a mere memorandum, and not from an intention to rely upon the builders alone. The agreed statement of facts declares that the libellants believed they had a lien. This is inconsistent with an intention, or agreement, to waive the lien. It is equivalent to saying that they intended to rely upon it. Decree for the libellants.

[On appeal to the circuit court, this decree was reversed. Case No. 12,282.]

Case No. 12,284.

SAMSON v. BLAKE et al.

[6 N. B. R. 401.] [1]

Circuit Court, D. Vermont. 1873.

BANKRUPTCY—APPEAL—SUMMARY PROCEEDINGS—JURISDICTION.

An assignee obtained an order of the district court, requiring the bankrupt and certain other parties to deliver to him property belonging to said bankrupt. From this order an appeal was taken to the United States circuit court, in form and manner prescribed by the eighth section of the bankrupt act. The assignee moved to dismiss the appeal on the ground that the proceedings in the district court were summary, and could only be reviewed by summary petition, and, therefore, not a case for an appeal under the eighth section of the bankrupt act. *Held*, that although the appeal might be irregular, the district court had jurisdiction, and from the evidence was justified in making the decree appealed from. Decree affirmed with costs.

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

In bankruptcy.

WOODRUFF, Circuit Judge. This proceeding was commenced by a petition of the assignee that the respondents deliver to the assignee certain property alleged to be of the bankrupt, and which it was alleged had been subjected by him, through the form of a sale under executions against him, to an apparent transfer to the respondents or some of them, not only in fraud of the bankrupt law, but in part also to cover and conceal the property to defraud his creditors; and praying that the respondents show cause why the property mentioned should not be delivered to the assignee. The respondents severally showed cause by answers to the petition, denying most of the allegations tending to show fraud, and issue was joined by the assignee upon those answers, and the questions in dispute were tried before the Hon. W. D. Shipman, district judge for Connecticut, holding the district court temporarily in the place of the resident judge. He made an order or decree, requiring the bankrupt and Lester M. Clark and Blake, to deliver the property in question to the assignee. The parties last named have appealed to this court, in the form and manner prescribed by the eighth section of the bankrupt law. The assignee moved to dismiss the appeal, on the ground that the proceeding in the district court was summary and could only be reviewed by summary petition to this court for a review of the proceedings, and that it was not a case for an appeal under the eighth section. The appellants insist that, although not formally commenced by process of subpœna as a suit, yet the defendants could and did appear and answer without such process, and the petition and the proceedings on showing cause and on the trial and order thereupon were in all material characteristics a suit in equity, and that the proper mode of bringing the

[1] [Reprinted by permission.]

matter before circuit court was by appeal under the said eighth section. The motion was argued and reserved, and the case was heard upon the merits, reserving the question raised by the motion.

Upon examination of the case upon the allegations and proofs, I am so fully satisfied that the conclusions of the judge of the district court were correct, that I deem it quite unnecessary to say anything upon the point of form raised by the motion to dismiss. Nor do I deem it necessary to discuss the subject at length. The opinion delivered by Shipman, J., presents it with great fullness and particularity, and I should do little more than repeat his views, if I were to state more fully my own. Giving to the appellants the full benefit of their claim on this appeal that the proceeding in the district court should be regarded as a bill in equity, proceeding upon pleadings and proof to final decree, the transfer to the defendant, Blake, was in both the aspects presented by the district judge void as against the assignee. The appellants are, therefore, in this court in this dilemma: if the proceedings below be regarded as summary and in professed exercise of the summary power conferred by the first section of the act, then they have not brought the matter into this court for review as a summary proceeding; and whether the order of the district court was in that form of proceeding a legal and proper order is not before me. If, on the other hand, the proceeding below was, as the appellants insist it was, a suit in equity under the second section, then their appeal is regular, but in that view of the proceeding the jurisdiction and power of the district court in the premises is unquestionable, and, as above stated, the proofs in my judgment warranted the decree.

The decree should, therefore, be affirmed with costs.

SAMSON v. BLAKE. See Case No. 2,802.

Case No. 12,285.

SAMSON v. BURTON.

[5 Ben. 325; [1] 4 N. B. R. 1 (Quarto, 1).]

District Court, D. Vermont. June, 1870.[2]

FRAUD—COLLUSION—ENJOINING PROCEEDINGS IN STATE COURTS.

1. B. & C., who were brothers-in-law, had been friendly till 1860. In that year disputes arose between them. B. sued C. in assumpsit, and attached C.'s property to the value of $10,000. C. also sued B. in assumpsit, demanding $75,000. In this suit B. filed a declaration in offset in 1861, claiming $70,000. In 1867, B. sued C. in an action on book account, and attached C.'s property to the amount of $150,000, this attachment being subject to B.'s previous attachments, and to two other attachments by other parties. In 1868, the suit of C. against B. was tried, and resulted in a verdict of about $46,000 in favor of the defendant B. on his declaration of set-off; but this judgment was, in January, 1871, on consent of B., reversed, and a new trial ordered. In 1868 and 1869, attachments in favor of other parties were levied on the property of C. to the amount of over $100,000, and on February 19th, 1870, a petition in involuntary bankruptcy was filed against C., under which he was adjudged a bankrupt, and an assignee was appointed. On February 18th, 1870, B. and C. made a collusive agreement in writing that the suit by C. against B. should be nonsuited, that two other suits between them should be discontinued, and that the claims involved in them should be transferred to B.'s action of book account against C. The assignee in bankruptcy filed a bill, praying for an injunction against B., to prevent him from proceeding with his suits against C., and praying that this court would order that the controversies in those suits be heard and determined in this court. *Held*, that this court had no authority to withdraw those suits from the state court.

[Cited in Hewett v. Norton, Case No. 6,441. Claflin v. Houseman, 93 U. S. 134.]

[Cited in brief in Brandon Manuf'g Co. v. Frazer, 47 Vt. 89.]

2. The assignee was entitled to be admitted as a party to those suits, in place of C., and C. must also be enjoined from interfering with those suits.

3. The agreement between B. and C., the effect of which was to transfer to the action of book account all B.'s claims which had been litigated in the action of assumpsit, for the purpose of sheltering any sum that B. might recover under the lien of his attachment, was an agreement which was in fraud of the bankruptcy act.

[Cited in Re Jacobs, Case No. 7,159.]

4. Although this court would not restrain the prosecution of the suits in the state court, it would restrain B. from using in any manner the agreement in question.

5. Any creditor of C. could be prohibited from taking out execution in the state court, and levying it on the property attached, until the assignee should have time to discharge the attachment liens, if he saw fit.

[Cited in Doe v. Childress, 21 Wall. (88 U. S.) 646.]

[This was a bill in equity by Amos J. Samson, assignee of Alanson M. Clark, against Oscar A. Burton, the Franklin County Bank, and Carlos C. Burton.]

SHIPMAN, District Judge. This is a suit in equity, praying, for reasons set forth in the bill, this court to restrain the defendants from proceeding with certain suits now pending in the state courts of Vermont, in which the defendants are severally parties on the one side, and Clark, the bankrupt, is a party on the other, and also praying that this court direct that the controversies involved in the suits thus pending in the state courts be heard and determined in this court under such issues as this court shall order. For a clear understanding of the questions now to be decided, it will be necessary to give a brief history of the litigation pending in the state tribunals, which this court is now asked to arrest.

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

[2] [Affirmed by circuit court. Case unreported.]

The bankrupt, Alanson M. Clark, and the defendant, Oscar A. Burton, are brothers-in-law, and prior to the year 1860 were on friendly terms, and had business transactions together; but during that year disputes arose between them, and they both resorted to the state courts. Among the suits instituted by the parties that year, was one by Oscar A. Burton against Clark, in which his property was attached to the value of ten thousand dollars, one by the Franklin County Bank, a corporation in which it is said that Oscar A. Burton owned a controlling interest, against Clark, in which his property was attached to the value of five thousand dollars, and one by Clark against Oscar A. Burton, demanding seventy-five thousand dollars. These were all actions of assumpsit.

In 1862, the controversies between Clark and Burton were, by mutual agreement submitted to three arbitrators, the suits still remaining in court without any action being taken in them by either party. The claims of the parties were contested before the arbitrators from time to time, down to the year 1867, when one of the arbitrators died before a conclusion was reached, thus terminating the submission. The litigations were then reopened in the courts, and though Burton had, as early as 1861, in the action of assumpsit which Clark had brought against him in 1860, filed a declaration in offset containing the common counts, setting up a claim of seventy thousand dollars, yet, on the 26th of August, 1867, he commenced a suit known in Vermont as an action of book account, in which he demanded one hundred and fifty thousand dollars as justly due him from Clark to balance book account between them. The direction in the writ was to attach to the value of one hundred and fifty thousand dollars, and an attachment was actually levied upon all Clark's property, amounting to a hundred thousand dollars, more or less. This attachment was of course subject to the preceding ones in favor of Burton and the Franklin County Bank, and also to one by Carlos C. Burton, in a suit brought by him against Clark, in March of the same year. It was also subject to one or more prior mortgage liens. In the mean time Clark proceeded with his action of assumpsit against Oscar A. Burton, and the same was brought to trial at the April term of the Franklin county court in 1868, and resulted in a verdict of about forty-six thousand dollars in favor of the defendant on his plea or declaration of set-off. This cause was then carried to the supreme court on a bill of exceptions, where it remained until the January term of the latter in 1870. At that term a motion was made by Clark's counsel to continue the cause till the next following term, in January 1871.

It is unnecessary to detail the reasons set forth on behalf of Clark in support of this motion for a continuance, but it was strenuously insisted by both Clark and his counsel in their affidavits, that the judgment in favor of Burton ought not to stand, and that the same would be reversed by the supreme court if the case could be fully presented by the plaintiff. Thereupon Burton entered his consent, that the same should be reversed, and it was reversed and a new trial ordered. The case was of course remanded to the county court, where it now stands.

To the action of book account brought by Burton against Clark, in August, 1867, demanding one hundred and fifty thousand dollars, the latter filed a plea in abatement, alleging as grounds of abatement that the matters intended by Burton to be determined in that suit, had been set up by him as defendant in the action of assumpsit brought by Clark against him, and were therefore then pending in that suit. This plea in abatement was overruled, to which ruling the defendant excepted and auditors were appointed to adjust the accounts between the parties, and report to the court, as is customary in actions of this character, which, it may be remarked here, are peculiar forms of suits in use in Vermont and Connecticut and nowhere else. The parties appeared before the auditors on the 18th of May, 1869, when the hearing was adjourned, on motion (of which party does not appear), to the 12th of July, 1869, when the parties appeared again, and on motion of the plaintiff the hearing was further postponed to the 19th of July, 1869. The parties appeared on the last named day, and the plaintiff then moved to postpone the hearing till after the then next term of the supreme court for Franklin county. This motion was supported by a long affidavit of the plaintiff, detailing certain alleged facts which need not be recited here. The auditors overruled this motion, and refused to further postpone the hearing, directing that the same should then be proceeded with. Neither party presented any account for adjudication. The auditors made their report to the court at its next term, on the second Tuesday of September following. In their report they recited their action in postponing the hearing to the 19th of July, their denial of the plaintiff's motion to postpone made on that day, and the fact that the parties declined to present any accounts. They then report nothing due either party to balance book accounts, and leave the matter for such action as the court might deem proper for the protection of the rights of the parties. To this report the auditors annexed a copy of the plaintiff's affidavit, presented to them in support of his last motion for a further postponement.

At the same time, and on presentation of this report, the plaintiff moved "for reasons apparent on said report, and the papers thereto annexed and referred to," that the cause be recommitted to the auditors. This motion was granted by the court, to which ruling the defendant excepted. In this condition that cause now stands.

There were also two suits in chancery, one

brought by Oscar A. Burton against Clark and Bradley Barlow, and one by Clark against O. A. Burton. The one against Clark and Barlow was to restrain the transfer or collection of five seven-thousand-dollar notes, amounting in all to thirty-five thousand dollars, and dated February 1st, 1860, which were originally given by Oscar A. Burton to Clark, and by him indorsed before due to Barlow, Burton claiming that they were accommodation notes without consideration, and that Barlow took them with knowledge of that fact. The other chancery suit was one brought by Clark against Burton, and had reference to the same subject-matter.

It is conceded that the claims respectively set up by the parties in these suits were, from their commencement, the subject of a protracted, bitter and severely contested litigation, each insisting that the demands of the other were unfounded and fraudulent. This hostile and uncompromising attitude of Clark and Burton toward each other apparently continued down to January, 1870.

But though Clark was, during all this time the owner of a large and valuable real estate, and considerable personal property, suits from other quarters accumulated against him. During the years 1868 and 1869, actions to the number of nearly twenty were commenced against him in the courts of the state, upon which his property was attached to the amount of over one hundred thousand dollars. The last attachment levied, which the evidence discloses, was on the 7th December, 1869. On the 19th February, 1870, a petition was filed in this court against Clark in involuntary bankruptcy, and after a trial by jury, he was, on the 9th March, adjudicated a bankrupt, from which an appeal was taken and is now pending in the circuit court. The assignee was duly appointed, who has instituted this suit.

On the 18th February, 1870, the day before the petition in bankruptcy was filed, Clark and Burton executed the following agreement: "This agreement, made this 18th day of February, 1870, between Oscar A. Burton, of Burlington, in the county of Chittenden, and Alanson M. Clark, of St. Albans, in the county of Franklin witnesseth: 1. The suit now pending in the Franklin county court in favor of said Clark against said Burton is to be nonsuit, without costs, at the next term of said court. 2. The suit in chancery now pending in Chittenden county, in favor of said Burton against said Clark and Bradley Barlow, is hereby discontinued without costs. 3. The suit in chancery now pending in Franklin county, in favor of said Clark against said Burton is hereby discontinued without costs. 4. In the action of book account now pending in Franklin county court in favor of said Burton against said Clark, wherein Timothy P. Redfield, Homer W. Heaton, and Silas P. Carpenter are auditors, the said parties may file all the claims, included in their specifications in the suit in favor of said Clark above named, and which is hereby agreed to be entered nonsuit. And the said Clark may also file in said action his five promissory notes, each dated February 1st, 1860, and no objection shall be made by either party, to the determination of any of said claims by said auditors. And it is further agreed, that the statute of limitations shall not be a bar or defence to said claims, or any of them, on either side, but that the auditors in said case, shall hear and determine said claims upon their merits, under the proofs to be submitted to them. (Signed,) A. M. Clark. O. A. Burton."

This agreement is charged in the bill to be collusive and fraudulent, and it is averred that in any respect in which it can be viewed, it is in fraud of the bankruptcy act, intended to give an illegal preference to Burton over the creditors of Clark, and that if carried out, such will be its inevitable effect. The answer of Burton denies the alleged fraud and collusion, and insists that the agreement confers no right or advantage upon him, Burton, which was not legally his by virtue of the proceedings taken in the state courts, prior to the making of the agreement. There are other allegations in the bill and answer, which need not here be recited. In brief, the theory of the plaintiff, who represents the general creditors of the bankrupt is, that the agreement is part of a scheme concocted by Burton and Clark, by which the former, under cover of the action of book account, and the attachment therein pending in his favor against Clark, intends to appropriate all Clark's property, and thus secure a fraudulent preference over the rest of the creditors of the bankrupt. The defendant, Oscar A. Burton, insists that the agreement does not enlarge his legal rights, as they were fixed, and stood long prior to the four months next preceding the date of the filing of the petition in bankruptcy, and that the only purpose was, and is, to secure a speedy and economical determination of the litigation between him and Clark in conformity to law.

Now without stopping to analyze the motives of the parties to this agreement, or consider the possible advantage, if any, which might accrue to any one else except Oscar A. Burton, by the waiver of the statute of limitations, their intentions are to be judged by the legal effect of their act. This is a familiar legal test, and has recently been applied by Judge Woodruff of this circuit in New York, in the case of Clark v. Bininger. When read in the light of the undeniable facts touching the condition of these parties, and especially the situation of Clark, on the eve of bankruptcy, with every dollar of his estate buried under repeated attachments, the object of this agreement is quite obvious. Burton had consented to a reversal of his judgment of forty-six thousand dollars, recovered by way of offset in the action of assumpsit brought by Clark against him, though I see no just grounds of complaint by Clark's creditors on this score. The reversal of that judg-

ment was insisted on by Clark's counsel, who are amongst his creditors, and by Clark himself, when he was, as the assignee now avers, resisting in good faith the alleged fraudulent claims of Burton, one of which was the demand upon which this judgment in offset was founded. Still that judgment had just been reversed, while the action of book account, with the attachment of one hundred and fifty thousand dollars, was still pending. As Burton was defendant in the action of assumpsit, and made his claims therein by way of offset, whatever he might recover in that suit, would be unsecured by any attachment. On the other hand, whatever he might legitimately recover as plaintiff in the action of book account, was already secured by his attachment in the latter suit, assuming that that attachment was a lien upon Clark's property, which the adjudication of the latter, as a bankrupt, could not dissolve. This agreement therefore was entered into, by which the assumpsit was to be abandoned, and all the claims which had been litigated therein, transferred to the action of book account, for the purpose of sheltering any sum that Burton might recover under the lien of that attachment. I have no hesitation in holding that such an agreement, entered into under the circumstances which undeniably existed, so far as it could, if carried out, change the relations of these parties, and control the litigation in its subsequent stages, is in fraud of the bankruptcy act, and an attempted invasion of the rights of the general creditors, of whom the assignee is the representative. I have no doubt on the proofs before me, that both Clark and Burton entered into this arrangement with a view to Clark's bankruptcy, and with the design of materially directing the future course of the litigation by placing certain features of it, at least, beyond the control of the assignee. It was consummated, not incautiously or ignorantly, but by Burton under the advice of counsel, and by Clark against the repeated and earnest protest of his legal advisers. In this view of the matter it is, I think, obvious that it is the duty of this court to grant some effectual relief against the use of this agreeement, and secure to the assignee the free and untrammelled exercise of all the rights which the bankruptcy act confers upon him, with reference to this litigation, whether in the prosecution or defence of suits, in which he has a clear right under the law to be substituted as a party in place of this bankrupt.

This brings me to the consideration of the prayer of the bill, and of the specific form and extent of the relief which can be granted. The prayer of the bill is simple and comprehensive. It asks, in effect, this court to restrain Oscar A. Burton from proceeding in any manner in the state courts, at least till after the question of the bankrupt's discharge is settled, and then that this court, by an issue to a jury or some other mode of trial, proceed to settle and adjust the claims of Clark and Burton upon each other. If this course were authorized by law and practicable, it might prove an easy solution to some of the difficulties which present themselves in the case now before us. Passing now the question as to the power of the court to enjoin the defendant against proceeding at all (which will be considered hereafter), I apprehend that it has no authority to withdraw these cases from the state courts and proceed to their trial here. Congress could no doubt have made an adjudication in bankruptcy operate, proprio vigore, to withdraw all cases, in which the bankrupt should be a party, pending in the state courts in the district, at the time of filing the petition, from those tribunals, and transfer them into the district court. It has not, however, done so. It not only has not deprived the state courts of jurisdiction over such causes, but it has provided for their prosecution and defence in those courts by the assignee. The fourteenth section of the bankruptcy act [of 1867 (14 Stat. 517)] declares that the assignee "may sue for and recover said estate, debts and effects, and may prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy, in which such bankrupt is a party, in his own name, in the same manner and with like effect as they might have been prosecuted or defended by such bankrupt." The sixteenth section also provides for the substitution of the assignee as plaintiff, in place of the bankrupt. It is true that by the twenty-first section, proving a debt or claim by the creditor operates as an abandonment by him of right to maintain a suit against the bankrupt, or obtain satisfaction for a judgment already rendered. The same section also provides that no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor, against the bankrupt, until the question of the debtor's discharge shall have been determined. These two provisions of the twenty-first section are addressed as much to the state as to the United States courts. In re Rosenberg [Case No. 12,054]. There is a further provision in the same section addressed more particularly to the bankrupt court, providing for a stay of proceedings in suits upon the application of the bankrupt, until the question of his discharge is settled; provided there is no unreasonable delay on his part. But even here it is provided that by leave of the court in bankruptcy, the creditor may proceed to judgment for the purpose of ascertaining the amount due, but execution shall be stayed, as aforesaid. The power of the state courts to proceed with pending suits in cases where creditors have provable debts, but which they do not prove under the bankruptcy proceedings, under certain prescribed limitations is thus recognized by the bankruptcy act itself. The jurisdiction of the state courts is not extinguished, except in those cases where the

creditor proves his debt or claim. This very bill proceeds upon this view, and describes the suits of Clark and the Burtons and the Franklin County Bank, as now pending in the state courts. Congress has not provided that they shall be transferred to the district court, much less has it provided that the latter tribunal may proceed to determine the subject-matter of the suits pending in the state courts, by issues framed here to be tried by jury or in any other manner. That part of the prayer of the bill which invokes this mode of relief is therefore denied.

But it by no means follows that the bankrupt and a creditor are to be allowed, on the very eve of the debtor's bankruptcy, to enter into any arrangement by which they can control the course of litigation in the state courts, in suits there pending, to which the bankrupt is a party. The assignee has the right to be substituted as a party in place of the bankrupt, and he may, and in these cases should, exercise that right, and with the aid of counsel enforce and defend the rights of the creditors who have, through him as their representative, succeeded to whatever rights the bankrupt had prior to any truce or agreement which the latter may have entered into with Oscar A. Burton. To this end an injunction must issue against Oscar A. Burton, restraining him from using in any manner the agreement of 18th February, 1870, and, if necessary, an order will be placed on Clark, requiring him to execute such papers as will enable the assignee to appear in the cases in the state courts. I think, however, that the state courts are bound to admit him as a party in all the suits, in place of Clark, on production by him of his appointment as assignee, properly authenticated. Clark may also be enjoined from any further interference with the suits, beyond furnishing the assignee all the information in his possession which may be serviceable in the prosecution or defence of the claims in favor of or against the estate. This relief the court has the power, and it is its duty to grant.

The object of this agreement between Clark and Burton was to conclude the action of the assignee on material matters touching this litigation, and was thus in fraud of the bankruptcy act. By suppressing its use the assignee will be left free, and with the same means of attack or defence which he would have had, had the agreement never been concluded. The litigation in the state courts will stand where it did before the truce between Clark and Burton, except the discontinuance of the equity suit against Clark and Barlow, and the one of Clark v. Burton, and the reversal of the judgment of forty-six thousand dollars in favor of Burton against Clark. These acts have already been consummated, and this court has no power to reverse them. But if it had, I do not see what object the creditors could gain by a restoration of these chancery suits to the docket of the state courts, or what loss can accrue to the estate by their discontinuance beyond possibly a bill of costs. As to the reversal of the judgment of forty-six thousand dollars in favor of Burton, I do not, as I have already intimated, see any just ground of complaint by the assignee on that account, for the bill alleges in effect that that judgment was founded upon a fictitious and fraudulent claim.

But it is insisted that the great object of Oscar A. Burton is to bring his claims against Clark to judgment under the action of book account, and thus shelter them under the attachment lien in that suit, which covers all of Clark's property, and that this will allow him to thus obtain a preference over the rest of the creditors, and enable him to appropriate all the bankrupt's estate to the payment of his own claims, to the exclusion of all others. It is suggested that he will withdraw his plea or specification in offset from the action of assumpsit, wherein he has no security, and transfer them to his accounts on book, for adjustment in the book account action in which his heavy attachment was levied, and that the suppression of his unlawful agreement with Clark will not prevent this result. But the success of this scheme, as it is termed, must depend upon questions of law over which this court has no control, so far as those suits are concerned. Those actions are under the authority of the state court, which has jurisdiction of the parties and subject-matters, and it must determine the questions as they arise, according to law, subject to the final judgment of the supreme court of the United States, in case any right or claim is set up under any statute of the United States, and such right or claim is denied by the state tribunals. In no other way can its decision be reversed or revised.

If a clause of the bankruptcy act is drawn in question and a right or claim set up under it in the state court, it is bound by its authority, and if it disregards it, its judgment can be reversed. If the rules of law prevailing in Vermont forbid the transfer by Burton of the items once filed by way of offset in the suit in assumpsit to the book account action, the supreme court of the state will so decide when the plea in abatement already filed reaches them. If such a transfer is in fraud of the bankruptcy act, though not in conflict with the practice hitherto prevailing in the courts of the state, the bankruptcy act must prevail as the paramount law, and prevent the transfer. This being a matter which has arisen puis darrein continuance, it can still be set up by the assignee in the state court, and if the judgment of the latter be against the rights of the creditors under it, it can be subject to a writ of error taking the case from the supreme court of the state to the supreme court of the United States, the only court which has the power of reversing the final decision of the highest court of the state.

As to the exception taken to the ruling of the state court recommitting the book account suit to the auditors for further hearing, this court has nothing to do with that. If that ruling is subject to revision at all, it must be revised by the supreme court of the state.

The bill avers that Burton threatens to call out the auditors in the action of book account, and proceed to trial, and that it is necessary that the assignee have more time in order to properly prepare to defend that suit. This is a consideration proper to be addressed to the tribunal, before which that cause is pending. The assignee being substituted as a party in place of Clark, free from any of the odium which it is conceded attaches to him, will, as the representative of these innocent creditors, receive such protection and justice as the tribunals of the state of Vermont mete out to all its honest citizens, who resort to them for the enforcement or defence of their rights. That the state court will give this assignee full opportunity to prepare this and the other cases before he is required to proceed to trial, I cannot doubt, especially as he holds this large estate for the benefit of numerous bona fide creditors, an estate which is involved in a complicated litigation, and in this condition has just passed out of the hands of a man whom both parties denounce as a walking embodiment of fraud and villany, known and read of all men. But it is said that a stay of proceedings can be granted until the question of the debtor's discharge is determined. This claim rests upon the second and third clauses of the twenty-first section of the bankruptcy act. The second clause, as already stated, is addressed as much to the state courts as to those of bankruptcy. It prohibits them from allowing a creditor who holds a provable debt from prosecuting to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the latter's discharge shall have been determined. The third clause is addressed more particularly to the courts of bankruptcy. It provides that the latter shall, upon the application of the bankrupt, stay any such suit until the determination of the question of discharge, provided the debtor does not unreasonably delay in endeavoring to obtain his discharge. This court may also, in its discretion, permit the creditor to proceed to judgment for the purpose of ascertaining the amount due, though execution must be stayed, as aforesaid. These provisions were intended for the protection of debtors. Here the debtor has made no application for a stay of proceedings. Still it is obvious, from these clauses of this section of the act, that this court has the power to stay the creditors from proceeding at all in the state court, until the question of discharge is determined. At least this power to stay is conferred by the act in terms. But the question arises whether its exercise is practicable in this case. Under the law as it now stands, the assets of the estate must pay fifty cents on the dollar, before the general question as to the debtor's right to a discharge can arise, unless a majority in number and value of his creditors proving their debts assent in writing. Whether the assets will reach this point cannot be determined until the amount due in the suits now pending against him is ascertained. It is true, that the debtor's estate is large, amounting to a hundred thousand dollars or more. But it is in proof, that in addition to some prior mortgages, the attachments on this property amount to two hundred and ninety-five thousand one hundred and fifty dollars, and it is a singular fact that the whole amount of these attachments, except sixteen hundred and fifty dollars, was levied on the property more than four months prior to the filing of the petition in bankruptcy. Some of these attaching creditors have proved their claims, and therefore surrendered their attachments. To what amount this has been done does not appear in the proofs. The claims under the attachments, if valid, appear to be provable debts, but so long as they are not proved, and the attachments thus abandoned, I assume them to be valid liens on the property attached, to the amount justly and legally due.

The amount due on these claims, upon which these existing suits are founded, cannot be ascertained, except by proof and adjustment in this court, or hearing in the state court. The extent of these debts must be ascertained somewhere, before the question of discharge can be passed upon by this court. This court cannot assume the validity or invalidity of these claims, or their extent. To stay the creditors, or any one of them having a large claim, from proceeding to ascertain the amount due till the question of discharge should be reached, might, and probably would, block the proceedings indefinitely, or until the stay were taken off. But, inasmuch as this court has no power to withdraw the litigation from the state court, to prohibit these defendants from proceding there to ascertain the amount due, until the question of the debtor's discharge could be reached and passed upon, would not, even if the embarrassments to which I have just referred did not exist, remove the main difficulty which the other creditors are seeking to avoid. In this aspect of the case their object is not merely to delay Burton's proceedings in the state court to ascertain the amount due, until the question of Clark's discharge is settled, but to prevent him from transferring to the action of book account the items which he has once litigated in the actions of assumpsit. The same difficulty would remain after the question of discharge was disposed of. This question of his right to transfer his account from one action to another, a mere question of law arising on indisputable facts, would still remain to be determined in that court where the actions are pending, and over

the parties and subject-matters of which that court has jurisdiction so long as Burton refrains from proving his debt here. The only course left for the other creditors to pursue in order to protect their rights in this particular, is for the assignee to appear in those suits, interpose the objection that the transfer would be in fraud of the bankruptcy act, have the objection made a part of the record, and if the decision is against him, remove the case to the supreme court of the United States for revision.

Of course, Burton or any other creditor can at any time be prohibited from taking out execution in the state court, and levying it upon the property attached. The assignee will have the right to free the estate from the attachment lien or liens, if that course becomes advisable, and this court can protect him in the exercise of that right, and interpose its authority at such time as may be most expedient or proper. It can be done now or hereafter.

I have assumed throughout that the attachments on this bankrupt property, which were levied more than four months prior to the filing of the petition in bankruptcy, were not dissolved by the adjudication, and except as to those that have been surrendered, are valid liens to the extent of the debts justly due the attaching creditors, and embraced in their suits. Though I do not intend now to formally decide this point, it is difficult for me to see how such a conclusion is to be avoided, in view of the first clause of the fourteenth section of the bankruptcy act (Park v. Jenness, 7 How. [48 U. S.] 612), especially as the latter contained the settled constructions of the act of 1841, when the present one was enacted.

As to the suits of the Franklin County Bank and Carlos C. Burton, and the suit of Oscar A. Burton for ten thousand dollars, I see nothing, either in the allegations of the bill or in the proofs adduced on the hearing, calling now for the interference of this court beyond restraining the plaintiffs therein from proceeding to take out execution in any cause for the amount that may be found due, until the assignee can have reasonable time to discharge the attachment liens, if he shall desire so to do. An injunction against each to that effect can issue now or at some future time, as may be most expedient.

But I do not fail to appreciate the gravity and importance of the questions involved in this case, both on account of the large interests at stake and the peculiar embarrassments under which the assignee may labor. And as one or both parties may, and doubtless will, seek a revision of this case in the circuit court, I will, in addition to a permanent injunction against the use of the agreement between Clark and Oscar A. Burton of the 18th of February, 1870, grant a stay of proceedings in all the cases referred to in the bill, until the questions involved can be determined in that court.

[On appeal to the circuit court, the decree of this court was affirmed. Case unreported. For subsequent proceedings in this litigation, see Cases Nos. 12,286, 2,801, and 2,802.]

Case No. 12,286.

SAMSON v. BURTON et al.

[5 Ben. 343; 5 N. B. R. 459.] [1]

District Court, D. Vermont. Sept., 1871.[2]

BANKRUPTCY — ENJOINING PROCEEDINGS IN STATE COURT.

A new petition being filed by the assignee in bankruptcy, to enjoin B. from proceeding in the action of book account referred to in the previous decision, and it appearing that the reversal of the judgment in the action of assumpsit between B. and C. was collusive, and that under the agreement between them, that action of assumpsit had been put out of court: *Held*, that a perpetual injunction must issue against B. and C. enjoining them from proceeding farther in the action of book account between them in the state court.

[This was an action by Amos J. Samson, assignee in bankruptcy of Alanson M. Clark, against Oscar A. Burton and Alanson M. Clark.]

SHIPMAN, District Judge. This is a summary petition in equity brought by the assignee to prevent the consummation of the alleged fraudulent agreement entered into by the bankrupt, Alanson M. Clark, and Oscar A. Burton, his brother-in-law, who claims to have a very large debt against the bankrupt. The alleged corrupt agreement so far as it is in writing, was entered into on the 18th of February, 1870, the day before the petition to put Clark into bankruptcy was filed. (See [Case No. 12,285]).

[From eighteen hundred and sixty down to the latter part of eighteen hundred and seventy, Clark and Burton had been exceedingly hostile, and had been engaged in a bitter and protracted litigation in the state courts of Vermont.

[In eighteen hundred and sixty Clark brought an action of assumpsit against Burton in the Franklin county court, demanding seventy-five thousand dollars.

[To this demand Burton filed a heavy claim in offset, and under a statute of Vermont which allows a defendant to recover in such cases when he proves a balance in his favor, Burton, at the April term of that court, in eighteen hundred and sixty-eight, recovered a judgment of about forty-six thousand dollars. Clark had, during the whole litigation, strenuously insisted that Burton's alleged claims against him were utterly false and fraudulent. He filed exceptions to various rulings on the trial, carried the case to the supreme court, and sought to have the judgment reversed and a new trial ordered. The case was, for reasons not necessary to state

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

[2] [Affirmed in Case No. 2,801.]

here, never argued in the supreme court. It was still pending therein at the January term, eighteen hundred and seventy, when Clark's counsel not being ready, filed affidavits and moved that it be continued to the next term of that court; whereupon Burton consented to a reversal of the judgment, and the same was reversed and a new trial ordered.

[In August, eighteen hundred and sixty-seven, while the above suit was pending, Burton brought an action of book account (a form of remedy peculiar to Vermont and one other state) and attached Clark's property to the amount of one hundred thousand dollars more or less. The suit and attachment is now pending in the state court.

[In an opinion upon a former hearing [Id. 12,285] of this controversy, a history of this and other litigations between Clark and Burton is given, and need not be repeated here.

[The following is the alleged fraudulent agreement entered into between Clark and Burton in February, eighteen hundred and seventy:

["This agreement, made this eighteenth day of February, eighteen hundred and seventy, between Oscar A. Burton, of Burlington, in the county of Chittenden, and Alanson M. Clark of St. Albans, in the county of Franklin, witnesseth,

["1. The suit now pending in the Franklin county court in favor of said Clark against said Burton is to be non-suit without costs at the next term of said court.

["2. The suit in chancery now pending in Chittenden county in favor of said Burton against said Clark and Bradley Barlow is hereby discontinued without costs.

["3. The suit in chancery now pending in Franklin county in favor of said Clark against said Burton is hereby discontinued without costs.

["4. In the action of book account now pending in Franklin county court, in favor of said Burton against said Clark, wherein Timothy P. Redfield, Homer W. Heaton and Silas P. Carpenter are auditors, the said parties may file all claims included in their specifications in the suit in favor of said Clark above named and which is hereby agreed to be entered non-suit.

["And the said Clark may also file in said action his five promissory notes, each dated February first, eighteen hundred and sixty, and no objection shall be made by either party to the determination on any of said claims by said auditors.

["And it is further agreed that the statute of limitation shall not be a bar or defense to said claims, or any of them, on either side, but that the auditors in said case shall hear and determine said claims upon their merits, under the proofs to be submitted to them.

"(Signed) A. M. Clark.

"O. A. Burton."][3]

[3] [From 5 N. B. R. 459.]

Upon the former hearing before this court, Burton was perpetually enjoined from using this agreement in any manner, for reasons then fully given. The object of that injunction was to prevent Clark and Burton from controlling the litigation in the state court, in their joint interest, or in the exclusive interest of the latter, and to the detriment of the other creditors of Clark. It was insisted by the assignee that Burton had no right, by law, to transfer the claim which he had set up against Clark, in his plea of offset in the action of assumpsit, brought by Clark against him, to the action of book account, and thus shelter it under his attachment in the latter suit, thereby gaining a preference over other creditors, as provided for in their agreement.

But while this court, as the case then stood before it, arrested, or intended to arrest the use of this agreement, it left the question of law as it stood before any agreement was entered into, to the determination of the state tribunal. If, under the laws of Vermont, Burton had the right to transfer from his plea of offset, in the pending assumpsit suit, the items there set up, to his pending book action, the state court would so decide, and if the decision was not satisfactory to the assignee, the latter could carry the case to the supreme court of the United States; if Burton had no such right, it was presumed that the state court would so decide.

But during the whole of the proceedings before this court, it was assumed, upon the evidence, that the action of assumpsit was still pending in the state court. It now turns out that Burton had caused this agreement to be filed in the state court as early as the 2d of April, 1870, and, in pursuance thereof, the clerk of that court dropped the case, under a standing order of the court, from the docket. Afterwards, and after this court had issued its injunction against the use of the agreement in question, the assignee went into the state court and moved to have the case reinstated on the docket, which Burton successfully resisted. The result is that that action of assumpsit is out of court, and the question whether, under the law of Vermont, Burton has the right to transfer his claim from a pending assumpsit to the book action no longer remains. It has been swept out of existence by the operation of this unlawful agreement, which this court has already decided was entered into by Clark and Burton, with the knowledge of both, that the former was on the eve of bankruptcy. Thus Clark and Burton, by a fraudulent agreement between themselves, have disposed of this question. Whether Burton can now set up claims in a suit, in which he has attached nearly all the property of this bankrupt, which he has once attempted to enforce under a plea of set-off, when he had no attachment, and thus secure what was before an unsecured debt, depends not upon the law, and practice of Vermont courts, but upon the bankrupt law

as administered by this court. To leave Burton now to pursue his book action, and cover all his alleged claims against Clark by his attachment in that action, is to secure to him and Clark the enjoyment of the fruit of their fraudulent agreement.

Upon the former hearing before this court, there was no very cogent evidence, that the reversal of the judgment of $46,000 in Burton's favor, was the result of collusion between Clark and him. It is true that the circumstances were peculiar and suspicious, but the fact of collusion was not satisfactorily proved. The proof adduced by the assignee at this trial, on this point, is ample. That before the reversal of the judgment, Clark and Burton had an understanding between them, that this judgment should be reversed, and the suit discontinued, for the very purpose of allowing Burton to transfer his claim to the book action, and thus secure what was before an unsecured debt, or pretended debt, no unprejudiced mind, on reading the evidence now before this court, can have a doubt. Clark, in order to protect this arrangement, which was evidently part of a comprehensive scheme to cheat his creditors, in November, 1868, retained, evidently with Burton's knowledge, two of Burton's counsel in all his (Clark's) matters, "except the Burton cases." I make no imputation upon the counsel thus retained, but the fact of their being retained by Clark, and still remaining counsel for Burton, in the view of the former attitude of Clark and Burton, and in the light of the facts developed in this case, was, to say the least, a very extraordinary course on the part of Clark and Burton, and inconsistent with any other inference than that these two men, who for ten years had denounced each other as villains, and who had each resisted the claims of the other as false and fraudulent, had, in view of Clark's impending bankruptcy, come to an agreement which, they both knew, would in due time be assailed by Clark's other creditors. I cannot here detail all the evidence in support of this conclusion. One item of it, however, should be mentioned. A document in Clark's hand writing, and which was written as early as the last part of January, 1870, has been produced on this hearing, addressed to Burton. It conclusively shows that Clark desired and expected to enlist Burton in a scheme to deceive and defraud at least one of his other creditors. This paper was evidently not the first step toward an arrangement for their joint benefit. This document was delivered by Clark to one of Burton's counsel, who declined to state what he did with it, on the ground that to do so would violate professional confidence between him and Burton. It is true Burton swears that he never knew anything about this document, and had no connection with it directly or indirectly. It is equally true that he insists that his counsel shall be protected from disclosing what he did with it. A court of equity would be poorly employed in shutting its eyes to such a state of facts, and leaving these parties to dispose of a large part of this bankrupt estate in their own interest. I have not forgotten that Clark, after having admitted this document to be in his handwriting, subsequently on discovering its purport, swore that it was not his. The fact, however, has been conclusively proved, both by competent witnesses, and by specimens of his handwriting, admitted by himself to be genuine.

In view of all the facts proved on this trial, there can be no doubt, but that Clark and Burton are collusively engaged in a scheme by which the book action in the state court is to be used for the purpose of absorbing a large share of the bankrupt's estate, which would otherwise have gone to the general creditors. For this purpose the judgment in the state court was reversed by consent in January, 1870. For this purpose the agreement of the 18th of February, 1870, was made. For this purpose that agreement was filed with the clerk of the state court, and thus the action of assumpsit was nonsuited. To prevent the defeat of this purpose, Burton successfully resisted the efforts of the assignee to have that nonsuit taken off, and the case reinstated. To effectually accomplish this purpose, Burton claims the right to recover a judgment in the book action in the state court, to the amount of not far from one hundred thousand dollars, secured under cover of his old attachment of all, or nearly all Clark's property. If this court has any authority to prevent the success of this scheme, it is bound to exercise it. If it has no such authority, the assignee might as well surrender Clark's large estate to him and Burton, and let them divide it between themselves at once.

In the opinion delivered in a former stage of this controversy, and to which reference has already been made, I declined to enjoin Burton from proceeding in the state court, although his claim which he was there prosecuting, constituted a provable debt against the bankrupt. But in doing so, I assumed upon the proof then before me, that the action of assumpsit of Clark against Burton, was still pending, and that the reversal of the judgment in that suit was not procured by collusion. I enjoined the use of the agreement of the 18th of February, 1870, thus leaving as I supposed the litigation in the state court, to be prosecuted and defended by Burton, and the assignee, upon the grounds of law and fact as the cases would have stood, had the judgment in assumpsit been reversed bona fide. Upon the facts now in proof, I find that that judgment was reversed by collusion between Burton and Clark, and that notwithstanding the injunction against the use of the agreement of February 18, 1870, the latter had in fact been so used, as to give Burton the principal advantage which it was the object of that agreement to con-

fer. To allow him now to proceed with his book action in the state court, is to stand by, and see him reap the fruit of a fraudulent agreement with the bankrupt, under cover of that action. It is possible that the assignee could successfully resort to the equity side of the state court, and thus prevent the consummation of this fraud, but as this is a question peculiarly within the jurisdiction of this court of bankruptcy, I see no propriety in remitting the assignee to another tribunal. A perpetual injunction will therefore be granted against Burton and Clark, enjoining them to proceed no further in the book account action, commenced by Burton against the bankrupt, in August, 1867, and now pending in the state court.

[NOTE. On appeal to the circuit court the decree of this court was affirmed. Case No. 2,801. For subsequent proceedings in this litigation, see Id. 2,802.]

SAMSON v. CLARK. See Case No. 2,802.

Case No. 12,287.

SAMUEL v. CHILDS et al.

[4 Cranch, C. C. 189.] [1]

Circuit Court, District of Columbia. Dec. Term, 1831.

SLAVERY — MANUMISSION — WITNESSES TO DEED — STATUS OF CHILDREN BORN.

1. Two witnesses are necessary to a deed of manumission under the Maryland act of 1796, c. 67, § 29.

2. If a female slave, manumitted by last will of the owner, to be free at the age of twenty-five years, has a child born after the death of the testator and before she arrives at the age of twenty-five, such child is a slave.

The petitioner [Negro Sam] was included in a deed of manumission made in Maryland, February 17, 1797, which was witnessed by only one witness. The Maryland act of December 31, 1796, c. 67, § 29, required two witnesses. The master afterwards carried them to Virginia, where he died, having by his will left them free at the age of twenty-five. The petitioner's mother, one of those slaves, was living in Virginia at the death of the testator; after whose death, and before the petitioner's mother had attained the age of twenty-five, that is, before she was actually free, the petitioner was born, in Virginia.

Mr. Key, for defendant, contended that the petitioner, under those circumstances, was born a slave, and cited the case of Maria v. Surbaugh, 2 Rand. (Va.) 228; in which the court of appeals of Virginia unanimously decided, that where a testator bequeathes a female slave on condition that she shall be free at a certain age, and before that period arrives she has issue, such issue are slaves; and

This COURT (THRUSTON, Circuit Judge, contra), decided accordingly. Judgment for the defendants.

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

Case No. 12,288.

SAMUEL v. HOLLADAY.

[Woolw. 400; McCahon, 214; 1 Kan. 612.] [1]

Circuit Court, D. Kansas. Oct. Term, 1869.

CORPORATIONS — BY-LAWS — CORPORATE PROPERTY — SUIT TO PROTECT — SHAREHOLDERS — MORTGAGES — FORECLOSURE — KANSAS STATUTE.

1. A bye-law adopted by a board of directors of a corporation, providing how special meetings of the board shall be called, does not affect third parties dealing with the corporation.

2. Proceedings of the board of directors at a special meeting not called in the manner prescribed by the bye-law, may be subsequently ratified by the corporation.

3. A contract of a corporation relative to personal property will be governed by the law of that state in which it is incorporated, and has its principal place of business, and within which the property is situated and the contract was made.

[Cited in Wheeler v. Sexton, 34 Fed. 155.]

[Cited in brief in People v. Ingersoll, 58 N. Y. 1.]

4. The act of Kansas relative to the foreclosure of mortgages construed. It was the intention of the legislature to provide in this act —(1) That mortgages of real estate should be foreclosed by proceedings in the court of the county in which the premises are situated. (2) That all deeds of trust, whether of real or personal property, should be foreclosed in the same manner as mortgages. (3) That all foreclosures, whether of mortgages or deeds of trust, and whether of real or personal property, should be by action in the courts under the Code of Civil Procedure.

5. A corporation which has conveyed its property in trust to secure a debt, retains the real ownership, although the legal title and right of possession is in the trustee. It is a necessary party to a suit to vindicate its rights in respect of such property as against a wrong-doer.

6. No decree will be rendered against a wrong-doer which will leave him exposed to a subsequent suit for the same matter.

7. The corporation is the only party which can settle a matter touching the corporate property. Through it the interests of its creditors must be worked out. It also represents the shareholders, who are only entitled to the surplus assets remaining after the payment of its debts.

8. A suit brought by two shareholders on behalf of all similarly situated who may come in to prosecute, which has been pending six years, without any other shareholder coming forward, when their interests are trifling compared with the whole number, will not be directed to stand over to add parties.

9. A bill is not entitled to the favorable consideration of the court which is filed and prosecuted by stockholders who do not show affirmatively that they have paid for their stock, in order, without the concurrence of the company, to recover corporate property, which has been sold after a notice of four months, during which time neither they nor the directors

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission. McCahon, 214, and 1 Kan. 612, contain only partial reports.]

nor the company endeavored to pay the debt on account of which the sale was made, or otherwise prevent its taking place.

10. Dodge v. Woolsey, 18 How. [59 U. S.] 331, considered. The following propositions are established by this case:

(1) In the case of an incorporated company, with capital stock divided into shares, which are held by individuals, the corporation and the shareholders are distinct legal persons, and can sue and be sued by each other.

(2) When the directors of such corporation have misapplied a portion of its funds, to which a shareholder has a distinct right—e. g., a dividend—he may recover the amount, so misapplied, and if this has not been effected, but only threatened, he may enjoin it.

[Cited in Hawes v. Contra Costa Water Co., 104 U. S. 457.]

[Cited in Steiner v. Parsons (Ala.) 13 South. 774.]

(3) When a corporation, or its rights of property, are threatened with an injury, such as a court of equity will enjoin, but refuses to take legal steps to protect its rights, a stockholder may maintain a bill against the party threatening the mischief and the corporation, to restrain the commission of the act, in order to protect his interest from immediate damage.

[Cited in Heath v. Erie Railway Co., Case No. 6,306.]

(4) No dictum, in this opinion, goes the length of asserting that when a corporation has a cause of action against a party, an individual stockholder may prosecute it simply because the corporation refuses to do so.

The Central Overland California & Pike's Peak Express Company was incorporated by the legislature of the territory of Kansas, with an authorized capital stock of $1,000,000, represented by shares of $100 each. It was, among other things, authorized to, and it did, establish, maintain, and operate a line of stages, running from Leavenworth and Atchison, in Kansas, to certain towns in Colorado, and thence to Great Salt Lake City, in Utah. By the charter, the management of its business was intrusted to a board of directors, not less than three, nor more than nine, in number; and by one section, the directors were empowered "to make and prescribe such bye-laws, rules, and regulations as they shall deem proper respecting the management and disposition of the stock, property, and estate of the company."

A set of bye-laws were accordingly adopted by the directors, among which were the following: "Special meetings may be called by the president. . . . The purpose and object of such meetings shall be stated in writing by the parties calling the same, and filed with the secretary of the company. Written or printed notice, either by personal service, or by mailing the same directed to his usual or reputed place of business, paying the postage on the same, of all special meetings of the board of directors, shall be given to each director. At no special meeting shall any other business be introduced except that referred to in such notice, unless with a consent of a majority of the whole board expressed by their votes at said meeting."

These provisions of the charter and of the bye-laws being in force, and when the whole number of directors was seven,—that is, on the 5th day of July, 1861,—a special meeting of the board, attended by five of its members, was held at the company's office in Leavenworth. The meeting was called verbally about twenty-four hours before it convened. At this time the corporate property, consisting of animals and vehicles, stations and buildings scattered along its stage route, and used in the course of its business, was of the value of about $500,000; and it had a contract for carrying the United States mail over its route, from which it was to receive annually $475,000 in quarterly payments. But its affairs had become seriously embarrassed, and Holladay had advanced to it considerable sums of money, and had become liable as indorser and acceptor of its paper for considerable sums further, in all amounting to about $200,000. At this special meeting, by the unanimous vote of all the directors present, the president was authorized to execute to Holladay a bond and deed of trust upon all the corporate property, to secure him on account of the said advances and liabilities, and for such further sums as he should thereafter advance, and such further liabilities as he should thereafter assume. Accordingly, on the 22d day of November, 1861, the president made to Holladay a bond of the company for the payment of all sums which he had become or should become liable for, and of all sums which he had paid or should pay on its account, and also made to Theodore F. Warner and Robert L. Pease a deed of trust in the name of the company, conveying all its property, including the contract for carrying the mail. In this deed of trust it was provided, that if the company should make default in the performance of the condition of the bond, the trustees, Warner and Pease, upon Holladay's request, should take possession of all the property conveyed, thereafter continue the business, and, upon a notice of twenty days, to be advertised in a newspaper published at Atchison, sell all the property, and out of the proceeds pay what was going to Holladay, and render the surplus to the company. There were a number of stringent provisions in the deed of trust not necessary here to state. Holladay claiming that default had been made in the condition of the bond, on the 6th of December the trustees took possession of the line, business, and property of the company, and advertised a sale for the 31st of December. The sale was adjourned from time to time, and at length took place on the 22d of March, 1862, when Holladay was the purchaser for $100,000. He thereupon took possession of the line, business and property, and continued to run the stages and to perform the mail service, and receive the amount coming therefor, until long after this suit was brought. The bill charges, and the plaintiffs claimed, that the proofs supported

the charges against him, the trustees, and the president, of many acts of fraud and oppression; but in the view taken of the case by the court, they were not material.

After the property thus came into Holladay's possession, the directors of the company, being advised of the proceedings, continued to treat with him as if what had been done was regular, and tacitly, and by some affirmative acts, recognized his rights and claims under the deed of trust. These plaintiffs were stockholders in the company, Samuel holding 381 shares, the number held by Street not appearing. Nor did it appear that either of them ever paid up the assessments on their shares, or otherwise had a pecuniary interest thereunder; while, on the other hand, it appeared that the company's debts, including some $200,000 due to Holladay, exceeded the value of the property sold to him. On the 1st of April, 1862, these plaintiffs applied to the board of directors, at a regular meeting held on that day, to institute legal proceedings to protect the company's rights and interests in the property, and to recover the possession of it, which request was refused; for which reason these plaintiffs, as stockholders of the company, bring this suit on their own behalf, and on behalf of all others similarly situated, who shall come in and contribute to the expenses of the suit.

The bill was filed July 7, 1862. It prays an injunction restraining the said Holladay from disposing of the property, and a decree declaring the deed of trust and the sale thereunder to be void, and restoring the property to the corporation. The company was named as a defendant in the bill, but was never served with process, and never appeared. No injunction was ever applied for; and pending the suit, Holladay disposed of the property to third parties. The cause was heard on pleadings and proofs.

Mr. Crozier, for plaintiffs.
Mr. Stringfellow, for defendants.

MILLER, Circuit Justice. This is a bill in chancery, brought by the plaintiffs, as shareholders in the express company, against the corporation and others, and especially against Ben Holladay. The ground of the complaint is this: That the express company made a deed of trust to Pease and Warner, nominally to secure to Holladay certain sums of money which he had advanced to it; that a sale of the property thereby conveyed was made by the trustees to said Holladay; that the deed was illegal, because, as is alleged, it was not authorized by the company; that even if the deed were valid, the sale under it is void, because no sufficient notice of it was given, and because it violated a statute of the state of Kansas, and because property of the value of over $500,000 was sold for $100,000. There are also specific charges of fraud against Holladay, made to avoid both the deed and the sale. The plaintiffs claim that they, as stockholders, have a right to ask relief for these grievances in a court of chancery, because the corporation has refused, although requested by them, to take any steps in that direction. The relief prayed for is: That the deed of trust, which is called a mortgage, be decreed null, and the sale fraudulent and void; that the property be restored to the express company; and that the defendants, except the express company, be restrained from proceeding to sell or dispose of the property under the mortgage, and from using or in any way interfering with it; and that the complainants have such other and further relief as the nature of their case may require.

It is very obvious that much of the specific relief here asked is now impossible. It appears that the sale of the property under the deed of trust was made on the 22d day of March, 1862, and the bill was not filed until the 7th of July following. The property was delivered to Holladay on the day of sale. No injunction or other order has been made concerning its custody up to the present time, a period of six years. It consisted of horses, coaches, and other personal property, appropriate to carrying the mail, and to the carrying business generally, over the route indicated by the name of the corporation. A decree to enjoin the use of that property, or for its restoration to the company, or to prevent interference with it, would be nugatory, because no such property can now be found.

But if the deed of trust should be declared void, or the sale under it invalid or fraudulent, a liability may, under some circumstances, be found to exist on the part of Holladay, or of the trustees, to account for the property or its proceeds. We therefore proceed to inquire whether this, the only relief in the power of the court to grant, is sustained by the case made by the plaintiffs, and by the rules of equity jurisprudence. It is charged that the deed of trust is void, because the meeting of the board of directors at which the president of the company was authorized to execute such an instrument was held without the notice prescribed for such meetings by the bye-laws of the company. This point has been much urged in argument, but it cannot prevail.

1. Such a bye-law, when made by the board of directors for their government, cannot be extended to affect contracts with third persons. There are many cases in which it has been held that notice of special meetings must be given as required by the bye-laws, or the meetings would be wholly without authority, and all business attempted to be then done would be of no binding force upon the corporation. Kynaston v. Mayor of Shrewsbury, 2 Strange, 1051; King v. Theodorick, 8 East, 543; Stow v. Wyse, 7 Conn. 214; Warner v. Mower, 11 Vt. 385; State v. Ancker, 2 Rich. Law, 245. But in all these cases, and in the others in which the same

rule is laid down, the bye-laws were made by the stockholders at the annual or stated meeting, under the authority and direction of a provision of the charter. In such case the stockholders may be supposed to retain a control over the management of their affairs, and intend to put a restraint on their agents. Their will, expressed in the bye-law, becomes a rule to the directors. Brick Presbyterian Church v. Mayor, etc., of New York, 5 Cow. 538. It cannot be disregarded any more than a provision in the charter.

But the reason for the rule fails when the bye-law is made by the directors for the government of themselves in the management of the business of the corporation. The same power which enacts can repeal the law. It is merely a guide for their own convenience, and for the orderly conduct of their business. It cannot be extended to affect the validity of their acts done in disregard of it, especially when third parties are concerned. Mechanics' & Farmers' Bank v. Smith, 19 Johns. 115; Seneca County Bank v. Lamb, 26 Barb. 595; Com. Dig. "Bye-Law," c. 2; Dodwell v. University of Oxford, 2 Vent. 33; In re Vandine, 6 Pick. 187; Sargent v. Essex Marine Ry. Corp., 9 Pick. 201; Com. v. Mayor of Lancaster, 5 Watts, 152.

2. The notice given of the meeting was a substantial compliance with the bye-law. The fact that a fair notice of the meeting, and of the object for which it was called, was given to each director who was within reach, is conceded. It is quite immaterial how that notice was given, whether verbally or by a formal written notice. Rex v. Grimes, 5 Burrows, 2601; Rex v. Major, etc., of Carlisle, 1 Strange, 386; Savings Bank v. Davis, 8 Conn. 191.

3. There is ample evidence of the ratification of the proceedings of the meeting by subsequent acts of the board of directors. The rule is very well settled, and is supported by abundant reasons, that where, at a meeting of a board of directors of a corporation formed for purposes of pecuniary profit, an act is ordered to be done without objection either then or subsequently made to the regularity of the meeting by any director or stockholder, and the act thus authorized is afterwards performed, its legality cannot afterwards be questioned in a suit in equity on the ground of irregularity. Thus, in Leavitt v. Yates, 4 Edw. Ch. 134, it was held that a deed of a corporation executed pursuant to the direction of a quorum of the directors, no objection being taken at the time nor afterwards by any member of the board, must be considered as the corporate act, whether the meeting was duly convened or not. Bank of State of Alabama v. Comegys, 12 Ala. (N. S.) 772; Williams v. Christian Female College, 29 Mo. 250; Port of London Assur. Co.'s Case, 35 Eng. Law & Eq. 178; Hoyt v. Thompson, 19 N. Y. 207. There are some objections taken in the bill to the terms of the deed of trust, but these were properly abandoned on the argument. We are therefore of opinion that the deed of trust is a valid instrument, and that the acts of the trustees, in taking possession of the property and conducting the operations of the express company according to its terms, were legal and proper.

But to the sale and its validity, objections of a more formidable character are urged. The company was incorporated by the legislature of the territory of Kansas. The property affected by this deed of trust was personalty, and the most of it was located in this state. The principal place at which its business was conducted was in this state. The deed of trust was executed, acknowledged, and recorded, and the sale under it was made, in this state. The instrument, the powers which it confers, and the acts done under it, must be governed by the laws of this state.

A statute of the territory in force when this instrument was made contained the following sections:

"Section 1. That mortgages upon real estate given to secure the payment of money, shall be foreclosed by petition in the district court of the county in which the real estate is situated, or of the county to which the county in which the real estate is situated is attached for judicial purposes.

"Sec. 2. All deeds of real estate given to secure the payment of money shall be deemed mortgages within the meaning of this act, and shall be foreclosed in the same manner as mortgages on real estate are foreclosed.

"Sec. 3. All proceedings to foreclose mortgages shall be conducted in conformity to the provisions of an act entitled 'An act to establish a Code of Civil Procedure,' passed at the present session of the legislative assembly."

It is insisted on the part of the plaintiffs, that the power of sale contained in the deed of trust here in question was inoperative, because the statute cited forbade a sale under it. It is conceded that until the passage of the statute the equity of redemption might be cut off by the exercise of such power, and that since its passage a foreclosure can be effected only by a decree of the proper court. The contention is, that the provisions of the statute do not apply to mortgages or deeds of trust of personal property.

This construction is based upon the idea that, as the first section refers exclusively to mortgages of real estate and the manner of foreclosing them, and as the two succeeding sections have reference to the former one, they also are to be limited in their application to the same species of property. If the language of the statute, fairly construed, will support this view, the court will not be inclined to hold that the innovation introduced by the legislature was designed to extend further.

A close examination of the three sections of the act shows that the main purpose of the first was not to prohibit the foreclosure of mortgages according to their provisions, when

they contained a power of sale, but merely to designate in what county the suit should be brought when judicial process was resorted to. If this section stood alone, I should think that this was its only purpose.

The second section has two purposes: First, to place deeds of trust on the same footing as mortgages; and, secondly, to require that they should be foreclosed in the same manner as mortgages. The construction contended for by the plaintiffs requires us not only to disregard the word "all" as affecting its meaning, but to interpolate the words "real estate" after the words "deeds of trust"; so that, instead of reading, as it does, "All deeds of trust given to secure the payment of money," we shall read, "Deeds of trust upon real estate given to secure the payment of money." The difference is clear. When the legislature, which in the previous section had made a provision which, by its terms, was limited to real estate, drops the limiting words and makes a provision which includes all deeds of trust, it would be carrying judicial construction quite too far to say that by the latter phrase they meant no more than by the former.

But we are asked, inasmuch as the foreclosure of mortgages by the exercise of the power of sale contained in them is not prohibited by the first section, why deeds of trust may not be foreclosed by that process when the second section provides that they shall be foreclosed in the same manner as mortgages of real estate. The answer is that the third section requires all mortgage foreclosures to be according to the Code of Civil Procedure, that is by action and by judgment and sale.

Taking the act altogether, it seems reasonably clear that the intention of the legislature was to provide: (1) That mortgages of real estate should be foreclosed by proceedings in the district court of the county where the land was situated. (2) That all deeds of trust, whether of real or personal property, should, in respect of foreclosing the equity of redemption, be placed on the same footing as mortgages of real estate. (3) That all foreclosures, whether of mortgages or deeds of trust, and whether covering real or personal property, should be by proceedings in court under the Code of Civil Procedure. I regret that the courts of the state have not placed a construction upon this act. Had they done so I should gladly have followed their ruling.

The sale of the property of the express company to Holladay, without judicial proceedings under the authority of the power of sale contained in the deed of trust, violated the statute in force at the time when the instrument was made. It was therefore without authority, and in making it the trustees violated their trust. It follows that they and Holladay, the purchaser, are answerable for the proceeds of the property thus disposed of in the court of chancery, which has special jurisdiction of trusts. As the property has passed out of their hands and cannot be restored, they may be held to account for its value to the party entitled to it.

Who is this party? Obviously the express company. The wrong done by the unauthorized sale was suffered by it; although the legal title and right of possession was in the trustees, yet the equitable interest, the real ownership, was in the corporation. With it, and with it alone, an effective settlement could be made. It represents the creditors whose claims upon the fund to be recovered from Holladay and from the trustees are to be worked out through it. It represents the stockholders, including these plaintiffs, who seek relief here by reason of an injury inflicted upon it.

But this indispensable party is not before us. It is named in the bill as a defendant, but it has not been served with process nor appeared to the suit. I have before me now two subpœnas in chancery, issued at different times, both of which the marshal was directed to serve upon the company, but to each of them he returns that that defendant is not found in his district. It is not a party to, and cannot be affected by, the decree, whatever its terms, which we may render. Were we today to render a decree according to the prayer of the bill, or according to the modified relief now sought, it could to-morrow bring and maintain its bill against the same defendants, complaining of the same injuries, and seeking the same remedies; and yet our determination afford them no protection to the second inquiry into their conduct. It needs no words to explain that this cannot be. Holladay and the trustees have each a right to claim that the decree, if one be rendered against them, shall be in such terms and have such effect that it shall conclude all parties interested, and not leave them liable to be again called in question on account of the same matters.

There is good reason to believe, from certain testimony in the case, that the corporation might be served with process; and it is within the discretion of the court to order the cause to stand over in order that it may be brought in. There are, however, reasons why this course should not be pursued here.

1. This suit is brought by two stockholders on their own behalf, and on behalf of all others similarly situated who might come in and take part in the litigation. During the six years of the pendency of this bill, no other stockholder has come forward. The corporation is shown to be involved in debt. Holladay himself holds against it demands amounting to $200,000, with which he is entitled to be credited upon the sum which may be recovered from him. The other debts exceed the value of the property which he wrongfully converted, and these must first be paid out of the fund to be recovered before anything could be distributed among the stockholders. The number of shares is 10,000, of which these plaintiffs only hold 381. They have not shown that they have paid the assessments even upon them. It is evident that their in-

terest is merely nominal, that they have no pecuniary interest whatever.

2. The plaintiffs' conduct does not commend them to a court of equity. The trustees held possession of the property four months before the sale. During all this time the sale was advertised, and during a part of it one of the plaintiffs was a director in the company. Both of them knew that the possession of the property was in the trustees, that the business had been taken out of the hands of the officers of the company, and that the sale was impending. Payment to Holladay of what was due him, at any time during those four months, would have prevented the catastrophe which in effect extinguished not only its business, but its existence. And yet neither of the plaintiffs made any efforts, or called upon the directors to make any efforts, to save it by raising the money and tendering payment of what was due. To the present hour no effort to redeem has been made. By this course of conduct they have acquiesced in the proceedings taken by or on behalf of Holladay, and are concluded thereby. If a stockholder intends to treat an act of the corporation, or of its officers or agents, as illegal, he must insist upon his objections before the act is committed. He cannot stand by and see it done, and then hold the persons responsible who have been involved in it. Hodges v. New England Screw Co., 3 R. I. 9; Peabody v. Flint, 6 Allen, 52; Graham v. Birkenhead, L. & C. Ry. Co., 12 Beav. 460; 2 Macn. & G. 146; 2 Hall & T. 450; 20 Law J. Ch. (N. S.) 445; 14 Jur. 494; Hodgson v. Earl of Powis, 1 De Gex, M. & G. 6; 21 Law J. Ch. (N. S.) 17; 15 Jur. 1022; Ffooks v. London & S. W. Ry. Co., 17 Jur. 365.

We thus see that these plaintiffs are without real pecuniary interest in the matter, and have acquiesced in the commission of the acts of which they now complain; and being in this situation, have stirred up a serious and bitter litigation, which the real party in interest declines when called upon to commence, or to participate in when commenced by others. They are not entitled to the favor of having the cause stand over in order to compel the appearance of the corporation.

3. Nor do they hold such a relation to the only relief which the court can give as to enable them to prosecute this suit as plaintiffs. This objection is fatal in any aspect which the case can be made to assume. The claim of a shareholder to come into a court of equity and ask that the rights of the corporation which it declines to assert be protected against injuries inflicted, or threatened by third parties, has received of late years much consideration. There is also some conflict of authority on the subject; but the supreme court of the United States, whose opinion is conclusive here, has gone as far as any other court in permitting shareholders to interfere in such matters, and if it has laid down principles which exclude these plaintiffs from the relief sought by them, it is useless to look further for authority on the subject.

The case of Dodge v. Woolsey, 18 How. [59 U. S.] 331, is, in some respects, analogous to the present, and is the sole authority relied on by the counsel for the plaintiffs to sustain their right to maintain this suit. In that case, the plaintiff was a stockholder in a bank incorporated and doing business in the state of Ohio. The defendant, Dodge, was about to collect by distress certain taxes, which were illegal, from the bank. The plaintiff requested the bank to take legal steps to prevent this, but it declined to do so. The supreme court held that he could maintain his suit against the collector for an injunction, making the bank also a party. In coming to this conclusion, the court examine fully the considerations on which the right of the plaintiff to maintain the suit rests, and cite numerous authorities on the question.

I think I am correct in stating that the propositions supposed by the court to be established by this examination may be stated thus:

1. That in case of an incorporated company with a capital stock divided into shares, and held by individuals, the corporation and the shareholders are distinct legal persons, and can sue and be sued by each other.

2. When the directors of a corporation have misapplied a portion of its funds to which a shareholder has a distinct right, as, for instance, a dividend, he may, in an action, recover the amount misapplied; and when such misapplication has not been effected, but is threatened, he may, by bill in equity for an injunction, prevent it.

3. When a corporation or its rights of property are threatened with an injury of such a nature as the court will enjoin, but it refuses to take any legal steps to protect itself, a stockholder may maintain a bill in equity against the party threatening the mischief and the corporation, to restrain by injunction the commission of the act, in order thereby to protect his interest from immediate damage.

But no case is cited, nor does any dictum in the opinion of the court go to the length of asserting, that when a corporation has been injured by a tort or a breach of a contract, or has any right of action, legal or equitable, against a party, an individual shareholder can come into court and prosecute that cause of action, because the corporation fails or refuses to do so. The court cites with approbation the following language from Ang. & A. Corp. § 393: "Although the result of the authorities clearly is, that in a corporation, acting within the scope of, and in obedience to, the provisions of its constitution, the will of the majority, duly expressed at a legally constituted meeting, must govern, yet, beyond the limits of the act of incorporation, the will of the majority cannot make an act valid; and the powers

of a court of equity may be put in motion, at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. Yet, it is to be observed, that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension, or simple negligence on the part of the directors." And the court says that we have here the rule and its limitations. In the case before us, we have not attempted to transcend the powers of the corporation, nor any breach of trust on the part of the directors, but simply a neglect to bring a suit which one of the stockholders thinks should be brought.

Again, the court says, that the jurisdiction at the instance of a shareholder is to apply preventive remedies, by injunction, to restrain those who administer the affairs of the corporation from doing acts which would amount to a violation of the charter, etc. It also extends to inquiring concerning, and enjoining, as the case may require, individuals, in whatever character they may assume to act, from prosecuting any course of conduct which is in violation of a corporate franchise, or in denial of a right growing out of it, when, for the injury which will result, there is no adequate remedy at law. We see here, that where other parties are concerned, the jurisdiction is limited to cases in which preventive remedies are efficient for the protection of rights endangered by the neglect of the directors and the threatened aggressions of others. It would be a doctrine attended with very serious consequences if every individual shareholder, assuming the place of the corporation, could decide for it when actions should be brought to vindicate its supposed right. Each one of the shareholders might elect to claim a remedy, and resort to a tribunal different from those chosen by every other, and use the court of equity to enforce his views, regardless of its duly constituted officers and of all other parties having interests, rights, and powers equal to his own. In such a struggle, the real interests of the corporation might be entirely sacrificed. If such a doctrine should obtain, it would be dangerous to deal with a corporation, for whatever the understanding had with its lawful representatives, no one could be protected from the individual shareholders.

If a stockholder is aggrieved by the refusal of the board of directors to accept his views, his remedy is to unite with other stockholders and change those directors. But if irreparable mischief to his interests may ensue in the meantime, equity will administer preventive justice until such time as the will of the body of stockholders can be ascertained.

The express company not being a party to this proceeding, will be at liberty to assert any claim it may think proper, growing out of these transactions, and is manifestly the proper party to do so, if it is to be done at all. The plaintiffs' bill is dismissed with costs. Bill dismissed with costs.

SAMUEL ROTAN, The. See Case No. 11,226.

Case No. 12,289.

SAMUELS et al. v. EVANS.

[1 McLean, 473.] [1]

Circuit Court, D. Illinois. June Term, 1839.

NOTES—PAYEES—CONSTRUCTION.

A note payable to A, B, C, or D, is payable to the promissees individually, and not to the three first jointly, or the fourth.

Mr. Cowles, for plaintiffs.

Mr. Logan, for defendant.

OPINION OF THE COURT. This is an action of assumpsit, brought on the following note: "Chicago, June 24th, 1836. Twelve months after date I promise to pay Jamison Samuels, H. N. Davis, Elias T. Langham or Durham Spaulding, five hundred dollars, for seven lots in Bellfontaine; value received. John Evans." The declaration stated that defendant made a certain note in writing, commonly called a "promissory note," bearing date the day and year aforesaid, and then and there delivered the said note to the plaintiffs and one Durham Spaulding, by which the defendant promised to pay the plaintiffs, by the name and description of Jamison Samuels, H. N. Davis and Elias T. Langham, or to Durham Spaulding, &c. And the breach alleged that the defendant had failed to pay to the plaintiffs or to Durham Spaulding, &c. The defendant filed a demurrer; and it is contended that the action should have been brought by all the promissees or by one of them; but the court overruled the demurrer and held that from the face of the declaration the action seems to be well brought. The demurrer being withdrawn, the general issue was filed and on the trial, an objection was made to the note, when offered in evidence, on the ground that it varied from the declaration. On the part of the plaintiffs it is contended that the promise was made to the three plaintiffs or to Durham Spaulding in the alternative, and that the action may be brought in the name of either. If such be the construction of the instrument, it is well described in the declaration, and there is no variance. The promise is in the disjunctive, and if it be not to the plaintiffs or to Spaulding, as contended for by the counsel for the plaintiffs, it must be to the promissees individually. The grammatical construction of the note would interpose the disjunctive or, after each of the

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

names of the promissees. The maker of the note promises to pay Jamison Samuels, H. N. Davis, Elias T. Langham or Durham Spaulding, that is, he promises to pay Jamison Samuels or H. N. Davis or Elias T. Langham or Durham Spaulding.

It is admitted that this is a question of intention rather than of grammatical arrangement; but there is nothing on the face of the note, which goes to show that the intention of the parties was different, from the grammatical import of the language used; and when this is the case, the court can give only that construction to the instrument, which the words used require. A promise to pay A, B, C, or D, is undoubtedly a promise to each individually, and not a joint promise to the three persons first named or the last. And this is the case under consideration. We think, therefore, that the note is not described in the declaration, either according to its tenor or legal effect. That the action must be brought in the name of some one of the promissees, and not in the names jointly of the plaintiffs.

A judgment of non-suit was entered.

[NOTE. Durham Spaulding subsequently brought an action in his own name. There was judgment for plaintiff. Case No. 13,216.]

SAMUELS v. HOLLIDAY. See Case No. 12,288.

SAMUEL STRONG, The (WICK v.). See Case No. 17,607.

Case No. 12,290.

The SAM WELLER.

[5 Ben. 293.] [1]

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

COLLISION IN THE SOUND—LOOKOUT AND LIGHT—EVIDENCE.

1. Two schooners, the S. A. and the S. W., came in collision in a dark night in the Sound, off Black Rock, the S. A. being sunk. A careful lookout was kept on the S. W., and her witnesses all testified that while lights on other vessels were seen, and they were avoided, there were no lights on the S. A., and she could not be seen till the collision was inevitable. The witnesses from the S. A. testified that her lights were set and burning, and that they were both taken down burning after the collision, and put into the boats and brought away still burning, although the vessel sunk so rapidly that they did not have time to save all their clothes. *Held*, that the evidence of a careful lookout, that no light could be seen on a vessel approaching him, is affirmative evidence that no light was burning on her.

[Cited in The Monmouthshire, 44 Fed. 698.]

2. The evidence of the saving of the lights of the S. A., under the circumstances, cast suspicion on her case.

3. On all the evidence, the S. A. did not have her lights properly set and burning, and was responsible for the collision.

[Cited in The Amboy, 22 Fed. 556; The Drew, 35 Fed. 791.]

This was a libel by the owners of the schooner Sophy Ann to recover for the loss of the schooner, which was sunk in the Sound, off Black Rock, in a collision with the schooner Sam Weller. The night was dark. There was controversy as to the wind, and as to the courses of the respective vessels, and as to whether the Sophy Ann had her lights properly burning.

Beebe, Donohue & Cooke, for libellants.
Benedict & Benedict, for respondents.

BENEDICT, District Judge. This cause is by no means free from doubt. The evidence is very conflicting. I have in vain sought for some ground on which it could be reconciled, and I find difficulty in adopting any of the theories put forward by the advocates.

I now rest my decision upon a single point, upon which the impression formed at the hearing is rather confirmed than diminished by an examination of the evidence. This point is the absence of lights on the Sophy Ann. The men on the Sam Weller, who were watchful and saw lights of other vessels, declare very positively that the Sophy Ann was close upon them before they saw her, and that she had no lights displayed. The men from the Sophy Ann declare that the lights were set and burning; and in confirmation of their assertion they say that after the collision both the signal lanterns were taken down lighted, and placed in the boat and carried with them when they abandoned their sinking vessel.

Now, while it is possible that some good reason existed for securing both the signal lanterns, above all other things, and taking them in the boat, none has been suggested which satisfies my mind, and I frankly confess that an unfavorable impression of the libellants' case was produced by this circumstance, which I have been unable to shake off. The collision was sudden, the injury to the Sophy Ann severe, and she was filling rapidly. The men say they did not have time to pick up their clothes, and they saved only a part of them, yet they took both lanterns and placed them in their boat and carried them with them, and say they were taken from the rigging burning. The witness Kelly, to strengthen his statement that the lanterns were not lighted after the collision, says they had no matches in the boat to light them with. But the master appears to have provided himself with matches for some purpose, which had been accomplished when he reached a schooner at anchor in Black Rock harbor, for he there produced from his pocket an ordinary gross package of matches nearly

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

three-quarters full, which he gave to the master of that schooner. I must also say that the appearance of the witness Kelly on the stand tended to convey the impression that something about the lights was kept back, and after being positive that they were lit when placed in the boat, he finally says, "I don't remember about them lanterns. I didn't take much notice. I didn't pay much attention to them." There is, besides, considerable conflict between the libellant's witnesses in regard to the lights, and further, the lanterns were not produced in court, and their size is not thus shown. It is this feature of the case which leads me to adopt the evidence of the three witnesses of the Sam Weller, who say the lights of the Sophy Ann were not burning when she approached the Sam Weller.

That the rule requiring signal lights to be displayed is not always observed, is well known. The neglect in this respect has been made the subject of remark in public discussion (see pages 84 and 85 of "Rule of the Road at Sea," issued by Bureau of Navigation, Navy Department, 1868). I myself have seen instances of it, and yet in cases of collision before the courts, where an absence of lights is charged, witnesses almost invariably appear who swear that the lanterns were duly set and burning at the collision; and the rule is invoked that affirmative evidence of the position of affairs on their own vessel is better than negative evidence from the other vessel.

But the question is not whether the lights were set burning, but whether they were kept burning. Lights will go out sometimes, and the occurrence pass unnoticed for a while by those whose whole attention is directed ahead; and clear evidence that a careful lookout, watching for lights, could not see a vessel approaching till upon him, and that then he saw her without lights, is certainly strong affirmative evidence to show that no light was then burning on the approaching vessel. Such is the proof here. There was such lookout on the Sam Weller. Other vessels with lights were seen and avoided. This vessel was not seen till close at hand, and when seen no lights were to be discovered.

I am satisfied that no collision would have occurred if the Sophy Ann had been seen as soon as proper lights on her ought to have been seen by a careful lookout, and consider the failure sooner to see the Sophy Ann to have been the real cause of the disaster. This arose either from a want of proper lookout on the Sam Weller or the absence of proper lights on the Sophy Ann.

My opinion, upon the whole, is that the latter is the true conclusion to be drawn from the evidence as it stands, and I must, therefore, dismiss the libel.

SANBORN (CHASE v.). See Case No. 2,628.

Case No. 12,291.

SANBORN et al. v. STETSON.

[2 Story, 481.] [1]

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

ACTION ON CASE — CONTRACT—FRAUDULENT MISREPRESENTATIONS—STALENESS OF CLAIM.

1. The plaintiffs brought an action against the defendant for fraudulent misrepresentations in a sale of lands by the defendant to the plaintiffs. It appeared, that, between the time of the sale in 1835 and the time when this suit was brought in 1841, the plaintiffs had paid the purchase-money, without objection; that they had sold great quantities of the land, and that the value of the lands had greatly diminished. The defendant did not pretend to be well acquainted with the township, or to have explored it, but expressly told the plaintiff's agent, Chamberlain, to examine for himself. Chamberlain did make an examination, and gave his estimate to the plaintiffs, being 51,000,000 of feet of timber. At the request of the plaintiffs, another exploration was made in 1836 of the whole lands, by Messrs. Farnham, who estimated the pine timber at 18,480,000 feet, and the hemlock at 27,704,000 feet. But the plaintiffs did not apply to rescind the contract before this suit. The first count charged a misrepresentation, that the defendant had not cut, nor permitted any one to cut, any pine timber from the land; but it was held, that this representation was not proved to be fraudulent, or material under the circumstances. The second count charged, that the defendant showed tracts, as samples of the whole land, which were of superior value, and had more timber on them than the rest. But this count was not sustained by the evidence. The third count charged a fraudulent exhibition of a dotted map as a true plan of the pine timber on the land. But it appeared that the map only represented the position of the timber on the lot, and not its quantity; and as the quantity was the only material inquiry, and no fraudulent intent was proved, this count was not sustained. The fourth count charged a fraudulent representation, that the lots contained 50,000,000 of feet of timber, whereas they only contained about 20,000,000; but it appeared, that this representation was made by Chamberlain, the plaintiff's agent, and was merely his estimate, and no fraudulent intent was proved. The fifth count charged false representations as to the quantity of timber on certain lots. But it appeared, that these representations were made by the agents of the plaintiff, and were his estimate. On the whole case, it was *held*, that the plaintiffs were not entitled to recover.

[Cited in Mason v. Crosby, Case No. 9,234; Tufts v. Tufts, Id. 14,233.]

[Cited in Port v. Williams, 6 Ind. 222. Cited in brief in Watts v. Cummins, 59 Pa. St. 88.]

2. This action was brought only two days before the statute of limitations would have barred the suit; but it was *held*, that although in a bill in equity for relief, or to rescind the contract, the staleness of the claim, and the want of diligence of the plaintiffs, and the lapse of time, would have rendered the claim unmaintainable; yet that, at law, the plaintiffs were not barred thereby.

[Cited in Warner v. Daniels, Case No. 17,181; Hough v. Richardson, Id. 6,722.]

This was an action on the case [by Moses Sanborn, Joseph L. Cilley, and James Bell

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

against Amasa Stetson] for fraudulent misrepresentations, alleged to be made by the defendant to the plaintiffs upon the sale of certain lots of land in the town of Carmel, in Maine, owned by the defendant, and sold for the sum of $61,903.37. The cause came on to be tried by a jury at the October term of the circuit court, 1842; but, in consequence of the illness of Mr. Justice Story, it was taken from the jury before the trial was finished. It was afterwards, by the agreement of the parties, argued at this term to the court, without any jury, and the court were to render such a judgment as it should deem right upon all the proofs in the cause, and the law arising thereon.

Charles Sumner and Joseph Bell, for plaintiffs.

J. Rogers and R. Choate, for defendant.

STORY, Circuit Justice (orally). This is an action on the case for fraudulent representations in the sale of lands by the defendant to the plaintiffs. The sale was made on 3d July, 1835, of lots 3, 5, 8, 11, 13, 15; of gores of lots 27, 17, 18, 21, 22, 37, 38; of the west half of lots 42, 47, 48, 54, 58 (excepting 10 acres); of lots 59, 60, (excepting 100 acres,) 62, 65, 66, 68, and 70, in the township of Carmel, containing in whole, 7,282¾ acres. The lots were sold for $61,903.37, paid and secured to be paid to the defendant.

There are various counts in the declaration: (1) For a false representation, that defendant had not cut any pine timber from said lands, nor given permission that any should be cut therefrom. (2) For a fraudulent showing by the defendant, on the sale of the tracts, of some of superior value and more timber, as samples of the whole, and thereby affirming, that all were of equal value and had an equal quantity of timber. (3) For a fraudulent exhibition of a map on sale as a true plan, and as a representation of the pine timber thereon, and thereby affirming, that the tracts were covered with pine timber on the parts and to the extent covered by the plan. (4) For a fraudulent representation, that the pine timber on the lots was about 50 millions of feet, whereas the quantity did not exceed 20 millions of feet. (5) For a false representation, that there were on lots 58, 59, 60, 47 and 48, about 12 millions of feet of pine timber; on 11, about 3 millions of feet; on 62, about 2 millions of feet; on 70, about 2 millions of feet; whereas there was not on 58, 59, 60, 47 and 48, over 4 millions of feet; on 62, not over 1 million of feet; on 70, not over 800,000 feet. (6) The sixth count embodies the four first, and contains no new charges.

The whole case, therefore, turns upon allegations of positive fraud, and positive misrepresentation, with a fraudulent intent. The deed of the land was made to the plaintiffs on 3d of July, 1835. The suit was brought on July 1st, 1841, two days only before the statute of limitations would operate upon the case. This is not, per se, an objection to the suit. But it must operate in point of evidence upon the case; for lapse of time necessarily renders all testimony more obscure, and less easy of precise ascertainment, from the frailness of memory, from subsequent changes of opinion, or from other circumstances. In the intermediate time between the time of the sale and that of the suit, the plaintiffs, without objection, paid large amounts of the purchase-money, and took up their notes at maturity. Indeed, the whole purchase-money, amounting to $61,903.37, has been paid, and the last payment and discharge of the mortgage were on the 18th of June, 1839. The plaintiffs, between the 1st of July, 1836, and the 1st of July, 1841, sold large quantities of the land, and of timber on the land, to different purchasers. And according to their own statement, on the 1st of July, 1841 (the day of the commencement of the suit,) they had sold all the land except 4,387¼ acres, on which they estimate, that there was pine timber to the amount of 1,742,000 feet. These facts are exceedingly important. The plaintiffs had, during these five years, ample opportunity to explore the lands, to ascertain the amount of the timber thereon, and to obtain a full knowledge of all the facts, relative to the asserted fraud, upon the land. They might have refused to pay the purchase-money upon the ground of fraud; and if there was any fraud, they might in equity, if not at law, have rescinded the contract. Why did they pay the purchase-money without objection? Why did they continue to sell parcels of the land from July, 1836, to July, 1841, if the fraud was either known or suspected by them? Are not these facts strong evidence of their acquiescence in the bona fides of the sale, if not of their satisfaction with the bargain?

It is also material to consider certain other facts. The value of the lands has been greatly diminished, and the price has greatly fallen, between 1835 and 1841. The price in 1835 may have been, and probably was, at an inflated and exorbitant rate. It may now be greatly below its true value, from general causes of depression, as it probably was at some of the intermediate periods between 1835 and 1841. If this were a bill in equity to rescind the contract, or for relief, it would clearly be unmaintainable, upon the ground of the lapse of time, and staleness of the claim, and the want of diligence in the plaintiffs, with the means of knowledge of all the facts in their power, recentis factis. Upon this point, it is fit to refer to the case of Vigers v. Pike, 8 Clark & F. 650. But at law the case is different. The plaintiffs have a right to stand upon their legal rights, and are not barred if a case of fraud be made out. But then the onus probandi is on the

plaintiffs. Fraud is not presumed. It must at law be clearly and fully established. Suspicion is not enough. Doubtful circumstances are not enough. The balance of the testimony is not to be nicely weighed.

In order, then, to establish the plaintiffs' case, it is necessary to show: (1) That fraud was intended by the defendant. (2) That it was consummated. (3) The purchase must be shown to have been upon the faith of representations of the defendant, and not solely upon statements of their agent, Chamberlain, or of other persons. If the defendant attempted a fraud, and the plaintiffs purchased, relying upon their own judgment, or that of Chamberlain, the suit is not maintainable. Some things are clear. (1) The defendant did not pretend to be well acquainted with the township, or to have explored it. (2) He expressly told the plaintiffs' agent (Chamberlain), to examine and explore for himself. That agent intended to be a copurchaser, as he himself has stated. (3) The plaintiffs' agent (Chamberlain), did explore and examine the lands for himself. (4) It is admitted, that the plaintiffs' agent did communicate his estimate to the plaintiffs (at 51 millions of feet of timber), and that he was then perfectly satisfied with his own exploration, and with the purchase, as a good bargain. His letter of the 24th of June, 1835, shows this. Nay, the plaintiffs' agent continued to express a favorable opinion of the purchase for years afterwards, upon fuller examination; and, as some of the testimony states, even down to 1841. Another important fact is, that an exploration of the whole lands was made by the Messrs. Farnham, in March and April, 1836, for and at the request of the plaintiffs. Their estimate made to the plaintiffs gave the pine timber at 18,480,000 feet only. They also estimated the hemlock at 27,704,000 feet. Now, this estimate must be taken to have been adopted by the plaintiffs as a true and fair one in 1836. Indeed, the fourth count of the declaration seems to proceed upon the estimate of pine timber on the land as not exceeding 20 millions of feet. Why, then, did not the plaintiffs, in 1836, apply to rescind the contract, or repudiate the purchase, or refuse to pay their notes, or give notice to the defendant? They knew the full exigency of their case at that time. There is no pretence of any new information, or of any new facts brought to their knowledge, as to the original statements of the defendant, since that period. If any fraud existed, it was then known to them. They were put upon inquiry. They did not then choose to act upon the ground of fraud. Is not this very strong evidence to show, that they did not then believe in any fraud? Or, that there had been any misrepresentation by the defendant? Does it not prove, that they purchased upon the exploration of their own agent, and not upon the supposed statements of the defendant? Or, that they meant to waive all future inquiries into the subject, because they had sustained no damages? These are general preliminary considerations, applicable in a great measure to the whole case, in all its various aspects.

Let us now proceed to consider the particular counts in the declaration. 1. The count is in effect that, upon the sale, the defendant falsely and fraudulently represented, that he had not cut any pine timber upon any of the lands, and had not given any permits to do so. This representation of the defendant certainly was not true; and it is admitted not to be true as to lot No. 58, of the twenty-four lots sold. But I am not satisfied from the evidence, that the defendant ever allowed any timber to be cut upon any other of the lots sold to the plaintiffs. It is said, that permits had been given to cut timber on lots 27 and No. 70. But I am not satisfied, that there is any sufficient proof thereof; and the weight of the evidence appears to me the other way. As to lot 58, it appears, that in 1822 the defendant gave two permits to cut timber on that lot: one permit for $458, and another for $125, amounting in all to the sum of $583. As to lot No. 70, Isaac Boynton, in his second deposition, says, that the trees, which were down, were cut down (he supposed) by trespassers. The other evidence does not, I think, overcome the presumption, that this was the actual state of the facts. As to lot No. 27, it was burned over 20 years before 1842; and the defendant had purchased of the commonwealth, and had owned all the lots sold about 30 years. Now, two considerations are, upon this posture of the evidence, as to this count, material: (1) Did the defendant fraudulently misrepresent the fact, that he had never given permits to cut pine timber on any of the lots, knowing the statement to be false? (See Foster v. Charles, 6 Bing. 396, 7 Bing. 105.) Or, had he simply forgotten the single instance on a single lot (lot No. 58), where permits had been granted 30 years before the sale to the plaintiffs, and the representation made by himself? My opinion is, that, taking all the circumstances together, there is no reason to believe, that the defendant actually meant to misrepresent the real facts; but that he, after such a lapse of time, had totally forgotten the whole transaction. (2) Had the representation, whether it was true or false, any influence on the purchase of the plaintiffs of the 24 lots for $61,903.37, the value of the timber actually cut not exceeding $600? My opinion is, that it had no influence on the bargain, and that the purchase would not have been given up, or varied, if the facts had been fully made known. Besides is it not a fair presumption, taking all the evidence in the case, that the statement made by the defendant was, as to his general practice only; and that this was all that he intended to represent? If so, it was substantially true, and it could in no manner affect

the bona fides, or the validity of the sale. Under all the circumstances, I think that the first count is not supported.

As to the second count, it depends entirely upon the fact: (1) Whether Messrs. A. Stetson, jr., and Garland, or either of them, were the general agents of the defendant in this transaction, so that their declarations should and ought to bind him; for there is no proof that the defendant personally made any such declarations as this count supposes. (2) Whether, if they were the general agents of the defendant, they did in fact make any such declarations, as the count supposes. (3) Whether, if the declarations were made, they were fraudulently made. Both Stetson, jr., and Garland deny that they were general agents, or any agents at all, except to show the location and boundaries of the lots; or that they had any instructions. They assert, that they made no false or fraudulent declarations, and that they never professed to act as general agents. They also swear, that the exploration made by them was fair. This count, therefore, upon the evidence, involves various considerations. (1) The fairness of the exploration. (2) The statements of Stetson and Garland, as to the unexplored lots. (3) The matters of opinion expressed by them. A. Stetson and Garland both state, that they acted fairly, and gave their real opinions; that they made no attempts to mislead; that Chamberlain voluntarily discontinued the exploration; that the exploration, as far as made, was entirely fair. There is now evidence both ways as to the timber on the unexplored lots. The plaintiffs say, that it is less than that of the explored lots. The defendant says, that it is more, or, at least, equal to that of the explored lots. There is a conflict of evidence on the point, and under such circumstances the onus probandi is on the plaintiffs. The case is not made out on their part; and, therefore, this second count is not sustained. The direct evidence of Chamberlain is not sufficient to overturn the counter statements of the other witnesses.

As to the 3d count. This count relies on the allegation, that the map or plan was shown to the plaintiffs "as a true map or plan of the said lots, and as a true representation of the pine timber standing on the same; and that a large quantity of timber was marked and indicated thereupon as pine timber standing upon the said tracts, and that the defendant falsely and fraudulently represented and affirmed, that the said tracts of land were covered with pine timber in the parts and to the extent indicated in the said map or plan;" all of which representations were false. The original map shown by the defendant to the plaintiffs is now before us. There are dotted places, as for timber, on it. The map is small, and not an original plan by a surveyor. There is no pretence, that the map indicates the quantity of pine timber on the lots. But it is said, that it does indicate the location or position of the pine timber on the lots. Be it so. But in the present suit, the quantity of timber is the material inquiry, and not the location of the timber. It must have been so understood by both parties, when the map was shown, and the sale made. Suppose the location was not correct, yet if a full proportion in quantity was found on the lot, there would be no pretence to say, that the mistake in the representation on the map would avoid the sale. But it is clear, that the defendant did not know much personally about the lands. He said, at the time, that he had not personal knowledge of the lands, and that he had not explored the lands. He told Bell, and Chamberlain also, that they must examine for themselves. Chamberlain did examine for himself. (Here the judge commented on the testimony in the case of Chamberlain and Messrs. Stetson, jr., and Ewer on this point.) Now, under all the circumstances, what effect ought such a map necessarily to produce upon the mind of any purchaser? What effect did it, in fact, produce on these purchasers? Were these purchasers governed by the map, or by Chamberlain's exploration? Chamberlain says, that the defendant did not make any representations of the quantity of pine or other timber on the Carmel lands. It must be proved, that the defendant knew that the map was false, as to the location of the pine timber on the lots; for the allegation is, that he falsely represented it to be true. The map is too vague and indefinite, as evidence, to establish any fraud as to the quantity, or as to the location of the pine timber. The map was in the plaintiffs' possession at all times. Why did they not, for six years after the purchase, ascertain its exactness, and whether it was false; or if false, whether it was fraudulently false?

As to the 4th count. The fourth count alleges as its foundation, that the defendant made a false affirmation that there were fifty millions of feet of pine timber on the lots. Now, the material part of the evidence to support this count is Chamberlain's testimony, that on his return to Bangor, he showed the defendant his estimates of the pine timber on the lots, and the defendant said "that, as far as he had knowledge, they were correct; but he had gone over but a few of his lands. Persons seldom estimate timber lands too high." Chamberlain's own estimate made the amount over fifty millions of feet of pine timber. How does this statement of the defendant, as testified to by Chamberlain, even if his testimony be true, support this count? It is one thing for the party to affirm a thing to be positively so, and quite another thing to assert, that, as far as the party has knowledge, it is so. Chamberlain, at that time, relied upon his own personal exploration, and affirmed, that there was as much pine timber, as his own estimate stated, and that the statement was made bona fide. Yet, now, it is said to be a fraud in the defendant, that he came to the same conclusion. Which had the best means of knowledge, Chamberlain or

the defendant? Chamberlain says, that he does not recollect, that he told the plaintiffs of the defendant's estimate of the lands, or what he said as to that; but he only communicated the map, and his own estimate, and the terms of sale of the defendant. What influence, then, could the defendant's remarks have had upon the purchase by the plaintiffs? If they never knew, that they were made, the plaintiffs could not be deceived by them. There seems to me, no ground, therefore, to sustain the fourth count.

As to the 5th count. The fifth count relies upon the false representation of the defendant, as to the quantity of timber on certain lots. This is endeavored to be maintained solely upon the supposed statement of the defendant's agents, or upon the conversation with Chamberlain, when his estimate was shown to the defendant. The same considerations apply here as apply to the second count, and with the same force and stress.

The 6th count merely embodies the others; and therefore requires no distinct consideration.

I have thus finished this brief review of the several counts, and have no difficulty in saying, that none of them are, in my judgment, sustained by the evidence. Hitherto nothing has been said by me as to the comparative credibility of the witnesses. The plaintiffs' case stanos wholly, or mainly, upon the credibility of Chamberlain and Coffin. Chamberlain stands in a peculiar situation. He was a co-purchaser in effect. He was the agent, who made the bargain. His testimony is given after several years have elapsed, and it is of mere oral conversations and statements made by the other parties, after great changes of opinion on the part of the plaintiffs as to the value of the property, and great changes in its market value. Chamberlain, until a recent period, constantly affirmed, that the bargain was a good one. He is contradicted in many things stated by him, by Garland and Stetson, jr. Under all the circumstances, —the great lapse of time, the intermediate acts and acquiescence of the plaintiffs, the difficulty of giving entire credit to witnesses, testifying to conversations and occurrences several years ago, and the conflict and opposition of the evidence on many important particulars, I should not feel myself justified in saying, that there was a sufficient ground, on which the court ought to pronounce a judgment for the plaintiffs. I am well satisfied, that it is my duty to declare, that the plaintiffs have not made out their case, and that judgment ought to pass for the defendant.

Judgment for the defendant.

SANBORN (SWANN v.). See Case No. 13,675.

SANCHEZ (UNITED STATES v.). See Cases Nos. 16,217 and 16,218.

Case No. 12,291a.

SANCHO v. ATWOOD.[1]

District Court, D. New York. Dec. 28, 1848.

COSTS—IN ADMIRALTY—TO PROCTOR—TO CLERK—TO COMMISSIONERS.

[This was an action by John C. Sancho against James N. Atwood. Appeal from taxation of costs.]

BETTS, District Judge. The appeal from the taxation of costs presents three topics for the consideration of the court.

First. Whether the advocate and proctor can charge $1.25 in each of several sequent motions before the court, when necessarily in attendance to make one of them. The taxing officer allowed $1.25 for attendance on return of the monition, and disallowed the charges for attendance on the motion that the marshal return the monition and that the respondent be called. These motions are distinct, and require several and independent proceedings. The libellant cannot proceed in his cause without application to the court, and for its specific order in these particulars, and accordingly I think the charges for the motions designated, fall plainly within the tariff of fees established for this court. By that the proctor is allowed 62½-100 for every necessary motion made in court, on every necessary proceeding in a cause. The taxation is therefore so far over-ruled, and $3.75 for such extra attendances allowed in the bill, must be stricken out.

Second. The next point on appeal is, that the failing party is not to be charged clerk's costs for orders actually entered on behalf of the succeeding party in the progress of the cause. These orders, it is shown, are entered necessarily in the progress of the cause, and are spread in extenso upon the minutes. I perceive no ground for absolving the defendant from payment of these costs. They are incurred by the libellant, and are indispensable to his pursuing his action. The appeal on this head is over-ruled.

Third. The last question relates to the limitation of the fees of commissioners for taking testimony, supposed to be made by the act of congress of August 12, 1848 (Sep. Laws [Richie & Heiss Ed.] 149 [9 Stat. 284]). The commissioner's fees in this case were taxed at $6.75, and it is contended that they are now limited by statute to $2. I shall not discuss the point on this appeal. The same question was raised in the circuit court at the last term before both judges, and it was held that the provision of the act referred to applied only to suits of the United States, and to fees to be paid out of the treasury of the United States.

Under that construction of the statute, it does not affect the compensation of commissioners in individual suits, and accordingly the allowance in the present instance was properly made.

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[1] [Not previously reported.]

Case No. 12,291b.

The S. & B. SMALL.

[8 Ben. 523.] [1]

District Court, E. D. New York. Oct., 1876.

PILOTAGE—IN THE SOUND—LIMIT OF DISTANCE—COSTS.

1. P., a pilot, offered his services to a schooner bound through Hell Gate, at a point as far east as a line S. S. E. from Block Island, and was refused; and afterwards B., another pilot, offered his services to the same vessel off Oak Neck, and was also refused, and thereupon B. libelled the schooner to recover half-pilotage under the statute; and it was alleged in defence that, after arriving at New York, the schooner settled the claim of P. by paying him a sum less than half-pilotage, and that B. was not the first pilot to tender his services and could not recover: *Held*, that it is not reasonable that Hell Gate pilots may make legal tender of service as far east as Block Island, where their services cannot possibly be needed.

[Cited in The Glaramara, 10 Fed. 680.]

2. The tender of service by P. was not valid, and therefore the tender by B. was the first one legally made.

3. The controversy being forced upon the vessel by two pilots to settle their conflicting claims, no costs would be given to the libellant.

In admiralty.

Beebe, Wilcox & Hobbs, for libellant.

A. J. Heath, for claimants.

BENEDICT, District Judge. This is an action by Alexander Banta, a Hell Gate pilot, to recover half-pilotage. The libel avers a tender of services in Long Island Sound, off Oak Neck, to the schooner S. & B. Small, a vessel then bound through Hell Gate, drawing 10 feet of water. It is also averred that the libellant was the first to tender his services, and that they were refused.

The answer admits that the schooner was bound through Hell Gate, as alleged, and that the libellant is a duly licensed Hell Gate pilot. It denies the other allegations of the libel and specially that the libellant was the first pilot to tender his services for the voyage in question, and avers that the first tender was made by a pilot named Charles H. Palmer, who demanded and was paid half-pilotage by reason of such tender and refusal. The evidence on the part of libellant proves the tender of services by the libellant on the 28th of July, off Oak Neck, and refusal thereof, as averred in the libel.

The evidence on the part of the claimants proves that on the 26th day of July, this vessel, when about south-south-east of Block Island, bound to the Sound, was boarded by the Hell Gate pilot, named Palmer, and a tender of services to pilot her through the Gate was then made and refused; that such a tender and refusal had been made the basis of a demand for half-pilotage by Palmer, and that, after the vessel had passed through the Gate and arrived in New York, and after notice of the libellant's demand, the master of the vessel had compromised the demand of Palmer by paying a sum less than half-pilotage.

Upon the facts, the question of law arises, whether a Hell Gate pilot can make a legal tender of his services, to pilot a vessel through Hell Gate, to a vessel at the time not in the Sound although destined thereto.

I have on former occasions adverted to the difficulty in fixing a limit to the distance from port at which a pilot may tender his services, and I have also had occasion to refer to cases showing the policy of the pilot laws to be in general to encourage early tender of pilot services. I do not, however, think that the principle can be carried so far as to support the tender set up in this case by way of defence.

It seems reasonable to say that the master of a vessel cannot be required to determine whether he will or will not accept the services of a pilot, when his vessel is so far distant from the channel, as to which the pilot is supposed to be informed and for which his services are needed, that the presence of a pilot on board for the purpose of navigating those channels would, under all possible circumstances, be absurd. A pilot may well be taken when those channels are shortly to be navigated, and it would not be unreasonable to take a pilot in time to enable him to ascertain the capacity of the vessel and her ability to work before reaching those channels. But to take a pilot near Block Island for the purpose of navigating Hell Gate in safety would be no proper precaution, but a foolish act under all circumstances.

In this case the evidence is, that while some few pilots have made tenders not far from Block Island, rather, as I apprehend, for the sake of being refused than with the intention of piloting the vessel, it is not usual for vessels to take pilots there, and no sort of necessity exists for the presence there of a Hell Gate pilot. The result of upholding a tender there made would therefore be to induce the Hell Gate pilots to withdraw themselves from the locality where the law supposes there is need of pilots' services, in order to betake themselves to Block Island for the purpose of intercepting the ships with a tender of services there, where by no possibility can their services be required. It therefore seems more reasonable to conclude that the master of this vessel was under no obligation to determine whether he would or would not have a pilot through Hell Gate, when his vessel was as far east as a line south-south-east of Block Island; and that he did not become liable to pay half-pilotage by reason of his refusing to accept the services tendered at that place by Palmer.

It follows that the libellant was the first pilot to tender his services within the meaning of the law, and he is consequently entitled to his half-pilotage. I shall not, however, give him costs, for I consider that the

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

controversy is one forced upon the vessel by a difference of opinion between two Hell Gate pilots as to their respective rights.

Let a decree be entered for the half-pilotage demanded, but without costs.

SANDER (UNITED STATES v.). See Case No. 16,219.

Case No. 12,292.

Ex parte SANDERS.

[3 App. Com'r Pat. 438.]

Circuit Court, District of Columbia. Feb. 20, 1861.

PATENTS—IMPROVEMENT IN CONSTRUCTING POWDER MILLS—OBJECT TO BE ATTAINED—MISLEADING.

[1. Where it does not appear that an alleged improvement in constructing powder mills, so as to prevent loss of life and property from explosions, would have that effect, a patent is properly refused on the ground that it would mislead the public.]

[2. The court, on appeal from the commissioner of patents, is limited to the papers and evidence which were before the commissioner, and has no power to receive proofs of experts as to the utility of an invention; nor has it power to send the case back to take such proofs.]

Appeal [by D. G. Sanders] from the decision of the commissioner of patents, refusing him a patent for alleged improvement in constructing powder mills.

DUNLOP, Chief Judge. I have carefully read the papers in this case and the argument of the appellant's counsel. There is no doubt, a powder explosion in the granulating chambers of the appellant's proposed structure, being of weak and fragile materials, would first throw down these chambers, which are capable of making the least resistance, but there is no certainty that the inner and stronger built tower, the depository of the manufactured powder, would successfully resist the explosion. That would depend upon the quantity of combustible material in the granulating and pounding chambers when the accident occurs. The appellant's proposed inner strong built tower would be of no patentability, unless it was shown to be a protection to life and property in the usual and ordinary manufacture of gun powder. No such proof is given, and in the absence of it, as the examiner properly argues, the grant of a patent would mislead the public, and tend to engender a false security in manufactures and workmen, producing, perhaps, greater risk of life and property than now exists, in this dangerous manufacture. I think the commissioner was right in sustaining the examiner board of appeals, and refusing the appellant a patent.

I have no power, as is intimated in the fourth reason of appeal, to send the case back to the office, to prove, by competent experts, the alleged utility of the structure or to receive or hear such proof on this appeal. I am limited by law to the papers and evidence which were before the commissioner. I overrule all the reasons of appeal, and do, this 20th of February, 1861, affirm the judgment of the commissioner of date the 15th of October, 1859. I return herewith all the papers, drawings, and model, with this, my opinion and judgment, this 20th February, 1861.

Case No. 12,293.

SANDERS v. The ELLEN HARDY.

[1 Leg. Gay. 22; 1 Chi. Leg. News, 285.]

District Court, D. Minnesota. 1869.

MARITIME LIEN — LOSS OR DAMAGE TO GOODS — AFFREIGHTMENT.

[This was a libel by J. H. Sanders against the steamboat Ellen Hardy.]

NELSON, District Judge. 1. If a person is engaged in transporting merchandise on vessels navigating our inland waters, the service is maritime, and the admiralty court will enforce the contract. If the conveyance is by land, the service is not maritime, and the remedy is at common law.

2. The contract in this case was for maritime service, and the failure to comply with any part of it gave the libellant his remedy in admiralty. The maritime law gives a lien upon the vessel for the safe conveyance and delivery of the goods according to the contract, and the freighter a lien upon the goods to secure the payment of the freight; and the fact that a charter party existed, of which the shipper had no knowledge, cannot change the liability or relieve the boat from the lien which the contract establishes.

Case No. 12,294.

SANDERS v. HAMILTON.

[Brunner, Col. Cas. 20;[1] 2 Hayw. N. C. 226, 282.]

Circuit Court, D. North Carolina. Dec., 1802.

INDEMNITY — MEASURE OF DAMAGES — EVIDENCE —EFFECT OF JUDGMENT.

1. A. sold to B. a negro, and agreed that if B. would defend a suit brought against him for the negro, he, A., would make good the damages sustained. Upon the negro's being recovered from B. it was held that he was entitled to recover from A. in damages the value of the negro at the time of the recovery, and not the present value.

2. In this case it was held further that the record of the recovery against B. by a third person was not evidence against A. of such third person's title; but was evidence to show the fact of B.'s eviction, and the amount of the damages.

At law.

MARSHALL, Circuit Justice. It is said Hamilton warranted the wench from whom descended the slaves afterwards recovered by Streeter from Sanders. The record of that

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

recovery is now offered to be read to prove Streeter's title. I am of opinion that as Hamilton was no party to that suit, nor privy, it cannot be read to prove Streeter's title; it may, however, to show that Sanders was evicted.

And it was accordingly read for that purpose only.

The declaration stated that Hamilton's agent had sold a negro for Hamilton to Sanders, who was sued for the increase; in consideration whereof, and that Sanders had promised he would defend the suit. Hamilton promised that if judgment should be obtained against Sanders, he, Hamilton, would make good the damages; that Sanders did defend the suit, and had judgment against him. One question upon the trial was, how the damages should be assessed; whether according to the present value of the negroes, or of the value when recovered.

MARSHALL, Circuit Justice. The jury should assess damages according to the value at the time of recovery; for supposing he was to have the present value, he should bear the loss in case of the death of the negroes, or other loss since the judgment; and besides, the plaintiff's demand arises immediately upon the recovery, and is not to be influenced by after circumstances.

In the progress of this cause it was moved that the record of the recovery between Streeter and Sanders should be read.

PER CURIAM. It may be read to prove that there was a recovery and the amount of damages, but not to prove that Streeter had title, because Hamilton was not a party or privy.

A juror was withdrawn, and the plaintiff's counsel moved for leave to add a count, which the court said was necessary, to arrive at the merits, but would not admit the amendment except upon the condition of paying all the costs to this time. He accepted of these terms, and made the amendment.

Case No. 12,295.

SANDERS v. LOGAN et al.

[2 Fish. Pat. Cas. 167;[1] 9 Am. Law Reg. 475; 2 Pittsb. Rep. 241; 8 Pittsb. Leg. J. 361.]

Circuit Court, W. D. Pennsylvania. May 13, 1861.

PATENTS — INFRINGEMENT — EQUITABLE RELIEF — MEASURE OF DAMAGES — LICENSE FEE — PROFITS — WINNOWING MACHINE — NOVELTY — ABANDONMENT.

1. The circuit courts of the United States, having jurisdiction in equity of controversies arising under the United States patent laws, do not act as ancillary to a court of law, and, therefore, do not require the patentee first to establish his legal right in a court of law and by the verdict of a jury.

[Cited in Hoffheins v. Brandt, Case No. 6,575; McMullin v. Barclay, Id. 8,902.]

2. Where the injury done to a patentee by infringement of his patent is not in the use of his invention, but in making use of it without compensating the patentee therefor, it being the interest of the patentee that his invention should be used and adopted by all, the measure of "actual damage" is the price or value of a license to use it.

3. In such cases, the measure of damage being a certain sum, an account of profits is not required, and the jurisdiction of a chancellor need not be invoked.

[Cited in Knox v. Great Western Quicksilver Min. Co., Case No. 7,906; Vaughan v. Central Pac. R. Co., Id. 16,897; Vaughan v. East Tennessee, V. & G. R. Co., Id. 16,898; Brown v. Deere, 6 Fed. 490; Atwood v. Portland Co., 10 Fed. 285; Hoe v. Boston Daily Advertising Corp., 14 Fed. 916; Smith v. Sands, 24 Fed. 472; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 804; Campbell Printing-Press & Manuf'g Co. v. Manhattan R. Co., 49 Fed. 934.]

4. Injunction is not the proper remedy in such cases: it is a remedy used only for prevention and protection, and not to enforce the payment of money, nor for extortion.

[Cited in New York Grape Sugar Co. v. American Grape Sugar Co., 10 Fed. 837; Whitcomb v. Girard Coal Co., 47 Fed. 318.]

5. A court of law may treble a verdict for "actual damage" in a patent suit, where the defendant has acted wantonly or vexatiously, but a court of equity can inflict no exemplary or punitive damages.

[Cited in Livingston v. Jones, Case No. 8,414.]

6. In Sanders' patent for improvement in winnowing machines, issued June 19, 1849, reissued April 10, 1855, the claim in the original patent is a correct description of the whole invention. The third claim of the reissued patent is too broad. The use of a vertical blast spout, so arranged that grain is cleaned from impurities within said spout, was not new.

7. The use of several machines in public, for more than two years prior to applying for a patent, although slightly varying in form and arrangement, yet substantially the same as afterward patented, can not be alleged to be experimental, so as to avoid the legal consequences of such prior use.

[Cited in American Hide & Leather S. & D. Mach. Co. v. American Tool & Mach. Co., Case No. 302; Andrews v. Hovey, 124 U. S. 709, 8 Sup. Ct. 681.]

8. The obvious construction of section 7 of the act of 1839 [5 Stat. 354] is that a purchase, sale, or prior use, within two years before applying for a patent, shall not invalidate, unless it amounts to an abandonment to the public.

9. Abandonment may take place within the two years prior to the application for a patent.

[Bill filed by Benjamin D. Sanders against John T. Logan, William Bagley, and others for infringement of letters patent No. 6,545, granted to complainant for improvement in winnowing machines, issued the 19th June, 1849, reissued April 10, 1855 (No. 306), praying for injunction to restrain the defendants from further use of said improvement, and for an account, &c.] [2]

The claim of the original patent was as follows: "What I claim as my invention is the trunk F gradually enlarged from below up-

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

[2] [From 9 Am. Law Reg. 475.]

ward, and communicating with the atmospheric current through the screen H in communication with hopper E; and the fan placed at the end of the opposite vertical trunk D to separate the chaff and other impurities from the grain, in the manner substantially as herein described." The invention is more fully and clearly described in the extract from the reissued patent, which, including the claims, is given below: "A represents the frame of the machine, of rectangular form, and provided with a step at the lower end, in which the lower end of a vertical shaft B is inserted. On the shaft B a fan C is attached, inclosed by a fan box, the center of which communicates with a vertical spout D of any proper form. The upper end of the spout D is connected with a horizontal spout E having a stopper E at its lowest part or side. The opposite end of the horizontal spout E is connected to a vertical spout F, that a requisite quantity of air may be admitted into the spout. At about twelve inches from the lower end of the spout F, and within it, there is placed a screen H, constructed of about No. 9 wire. The grain passes over this screen into the hopper G, which is fixed under it, a space (a) being left for this purpose. The fan C is put in motion, by any power, by a band passing around a pulley on the shaft B. A partial vacuum is formed in the trunk by the motion of the fan C, and the air rushes into the lower end of the spout F, and passes in a current through the screen H, lifting up the chaff and everything specifically lighter than the sound grain, which passes into the hopper G, while the more heavy matter of the refuse is carried over the top of the spout F and into the horizontal spout E and falls into the hopper E1. The chaff and other light impurities are carried along through the fan box, and conducted out by the spout (d). The trunk F, being gradually enlarged in area, from its lower end upward, prevents any good or sound grain passing into the horizontal spout E, as the strength of the blast, of course, diminishes with the increased area, and consequently the sound grain can not be carried over the top of the spout F. Having thus described my invention, what I claim as new, and desire to secure by letters patent, is: 1st. The employment or use of a vertical blast spout F, gradually enlarged from its lower to its upper end, so that the strength of the blast is decreased in the upper portion of the spout, owing to the increased space or area of the spout, for the purpose of preventing any sound or perfect grain being carried, with the light foreign matter, over the upper edge of the spout, the blast being formed or generated in said spout in any proper manner. 2nd. I claim the blast spout F, either gradually enlarged from below upward, or of the same dimensions throughout, and communicating with the atmospheric current through the screen H in combination with the hopper E1, and the fan placed at the end of the opposite vertical spout D to separate the chaff and other impurities from the grain, in the manner substantially as herein described. 3rd. I claim the employment or use of a vertical blast spout, either gradually enlarged from below upward, or of the same dimensions throughout, when said blast spout is so arranged that the grain is cleaned or separated from impurities within said vertical spout."

[The respondents' answer alleges that the patent is void—First, for the want of novelty; second, by reason of public use by patentee and others for more than two years prior to the application for a patent; third, by reason of abandonment prior to the application; fourth, prior description of the alleged invention in public printed works; fifth, that the patentee was not the inventor. The answer also denies the infringement. The nature of the invention and the claims are set forth in the opinion of the court. On the plea denying the infringement, the respondents showed that in their machines the vertical blast-spout, in which the grain is cleaned, is of the same dimensions throughout, and that the blast-spout in their machines does not communicate with the atmospheric current through a screen; and, therefore, they claimed that they did not use the combination set forth in the complainant's patent. In proof that the subject-matter of the third claim of complainant's reissued patent was not new at the time of his alleged invention, they offer in evidence the following patents, viz.: Orrin Lull's smut machine, patented 6th April, 1843. James Coppuck's grain-cleaning machine, patented 24th April, 1841. Phillips & Jackson's winnowing machine, patented 4th May, 1841. Joseph Johnson's smut machine, patented September 4, 1842.] [2]

T. A. Lowrie and E. M. Stanton, for complainant.

George Shiras and W. Bakewell, for defendants.

Before GRIER, Circuit Justice, and McCANDLESS, District Judge.

GRIER, Circuit Justice. The complainant alleges, in his bill, that he is the original and first inventor and patentee of "a machine for winnowing and cleaning grain of chaff, smut, and other impurities." His original patent was dated June 19, 1849. It was afterward surrendered and a new patent granted, with an amended specification, on April 10, 1855. The bill prays for an injunction and an account; and yet admitting the validity of the patent and its infringement by respondents, it is clear that, as a proper remedy for the injury complained of, neither an injunction nor an account is necessary or proper. The invention claimed is for an improvement in the machinery of grist mills, and the only injury to plaintiff's rights exists not in using his invention, for it is his interest that all mills should adopt and use it, provided he is paid

[2] [From 9 Am. Law Reg. 475.]

the price of a license. Such price or value of a license is the true measure of the "actual damage" suffered, and of the remedy which the patentee can obtain, or has a right to claim in equity. A court of law may treble such a verdict where the defendant has acted wantonly or vexatiously. Where the measure of damage is a certain sum, and does not require an account of profits, the peculiar jurisdiction of a chancellor is not needed for that purpose. The remedy by injunction is neither necessary nor proper to enforce the payment of money. It is true that injunctions are now more liberally granted than in former times, yet the granting or refusal of them rests in the sound discretion of the court. A rash or indiscreet exercise of this power may be very oppressive, of no use to the complainant and ruinous to the defendant. As a remedy, it should be administered only for prevention or protection. Where it is not necessary for these purposes, it is merely vindictive, injuring one party without benefit to the other. There are many cases of patents where it is the only efficient remedy to protect the patentee, and prevent continuing trespasses on his rights. But there are others in which it answers neither purpose, and is only used for extortion or vengeance. A chancellor who would issue an injunction to stop a mill or manufactory, locomotive or steam engine, because in its construction some patented device or machine has been used, would act with more than doubtful discretion. Stopping the mill or steam engine might inflict irreparable injury, but could not benefit the inventor. The compensation to him for this trespass on his rights is the price of a license. The wrong done him is not the use of his invention, but the non-payment of a given sum of money. To issue an injunction in such a case, where neither prevention nor protection is sought or required, but only compensation, would be an abuse of power. An injunction is not to be used as an execution or for extortion.

The circuit courts of the United States have jurisdiction of controversies arising under the patent laws by direct grant from congress. They do not merely act as ancillary to a court of law, and therefore do not require the patentee to establish his legal right in a court of law and by the verdict of a jury. There has been no objection interposed to the jurisdiction of the court in this case, nor do I wish to be considered as deciding that the court has no jurisdiction, but rather as suggesting to counsel whether they have chosen the proper tribunal, when the bill exhibits a case where neither account nor injunction is a proper remedy, but only a decree for a certain sum of money, with interest, as fixed actual damage. A court of equity can inflict no exemplary or punitive damages as a court of law may. Hence the party may have better remedy in a suit at law.

The complainant's patent gives the following general description of the nature of his invention: "The nature of my invention consists, first, in separating the chaff, smut, and other impurities from grain, by subjecting the same to a blast within a vertical spout, as will be hereafter shown, whereby the sound grain, by its superior gravity, is prevented from being carried upward by the blast or current of air, and, at the same time, the impurities, which are light, follow the current, and are drawn through the fan-box and discharged through the longitudinal trunk of the same, the light or imperfect grain being carried upward and lodged within a hopper at the lowest part of the horizontal trunk. My invention also consists in the combination of vertical blast spouts, screen, hopper, and fan, arranged and operated, as will be hereafter shown and described."

The claim set forth in the original patent of 1849 is a correct description of the whole invention. The amended patent of 1855 describes the same invention, with immaterial variations, or more minute directions as to size and shape. The chief difference is, that the claim of the last is made broader than that of the original, whether better may be doubted.

The answer of respondents alleges: 1. That complainant was not the original and first inventor of the machine, or combination of devices, claimed as his invention. 2. But admitting him to be so, he had abandoned his invention to the public prior to the application for a patent. 3. The invention was in public use, with knowledge and consent of complainant, more than two years previous to his application for a patent. 4. That the machine used by the defendant does not infringe the rights of complainant. If any one of these allegations be established by the evidence, the respondents are entitled to a decree.

I see no reason to doubt that the plaintiff is the original inventor of the device in the first claim, and, also, of the combination claimed in the second, notwithstanding the valuable suggestions and assistance rendered to him by his partner, Justus, in perfecting his machine.

The third claim is too broad. The vertical spout had previously been used, in the same way, in other machines invented and patented for the purpose of cleaning grain from its impurities. It is to be found in Lull's smut machine, patented in 1843, and in some others.

Sanders made his first machine in 1844. It embodied the ideas of his subsequent patent as to the combination of devices to be used, though differing somewhat in arrangement and form. He had put it in operation in Hugh Ryland's mill in Virginia. Afterward, in September, 1855, when he was in the employment of Justus, with whom he had first learned his trade of millwright, and assisting him in his erecting the machinery of Davis' mill, he informed him of the machine he had put in operation in Virginia. Justus seized upon the ideas suggested by Sanders, made plans and a model, improving upon them, and erected the machine, substantially as it was afterward patented, in Davis' mill. This was in December, 1845. In July, 1846, Justus

erected one of these machines for Crawford. In September, Justus and Sanders entered into partnership as millwrights. Sanders suggested that they should take out a joint patent for the invention. Justus said he thought it did not deserve a patent; there was too little to be patented. They then proceeded to put these machines in every mill which they were employed to erect during their partnership, which was dissolved in 1848. They considered the machine as completed by their joint invention, and freely gave it to the public till November 30, 1848, when Sanders entered his claim for a patent.

It is clear, therefore, that assuming that Sanders was the sole inventor of the machine, as perfected in 1845, with Justus' assistance, yet that he was not entitled to a patent for the same. The evidence established a clear case of abandonment, and, moreover, that the invention was publicly used, with the knowledge, consent, and approbation of the complainant more than two years previous to his application for a patent. The allegation that these machines were made and incorporated into so many mills all over the country for the purposes of experiment, is too absurd to be entertained for a moment.

By the act of July 4, 1836 [5 Stat. 117], a use of an invention by a single person, or a sale of the thing invented to a single person, might amount to such a public use, without consent and allowance of the patentee, as would forfeit his right to a patent.

Section 7 of the act of 1839 [5 Stat. 354], provides a remedy for cases where the conduct of the party does not show an actual abandonment. It secures the rights of those who may have purchased or constructed any newly-invented machine prior to the application for a patent. It provides that "no patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application for a patent, except on proof of abandonment of such invention to the public; or that such purchase, sale, or prior use, has been for more than two years prior to such application for a patent." The obvious construction of this section of the act is, that a purchase, sale, or prior use, shall not invalidate, unless it amounts to an abandonment to the public. Although I am of opinion that the evidence exhibits a clear case of abandonment, as distinguished from the "purchase, sale, or prior use," which it tolerated for two years, it is not necessary to rest our decision on that point alone, or to attempt to draw a line of distinction which might be applicable to other cases. The prior use has been proved to have existed more than two years before application for a patent.

As I think the respondents have supported this plea, they are entitled to a decree; I need not, therefore, enlarge upon the plea denying the infringement, further than to say, I think the respondents would have been entitled to a decree in their favor on that point also.

The bill must be dismissed, with costs.

Case No. 12,296.

SANDERS v. PARSONS.

[3 App. Com'rs Pat. 230.]

Circuit Court, District of Columbia. Nov. 2, 1859.

WITNESS—BIAS—UNCORROBORATED.

[Where the relation in which a witness stands to the cause makes it reasonable to suppose that he must labor under a strong bias to testify in favor of one of the parties, inconsistencies in his testimony may be taken into consideration to dispute his entire testimony as unworthy of credit, especially where it is not corroborated.]

Appeal from the decision of the commissioner of patents refusing to grant to him, said Henry Sanders, letters patent for improvement in cultivator teeth, and awarding priority of invention to said Thomas E. Parsons.

MORSELL, Circuit Judge. The appellant states his claim thus: "Having thus described my invention in cultivator teeth and the manner of constructing them, what I claim as new, and desire to secure by letters patent, is the flanches, a, a, and semicircular projection, B, on the tooth, and the flanches, c, c, and pinion, e, on the chair when constructed and arranged in relation to each other in the manner substantially as described and for the purposes set forth." The acting commissioner adopts for his opinion the report of the examiner, in which report it is stated: "In the matter of interference declared on the 17th day of November, 1858, between the applications of Henry Sanders and T. E. Parsons, for a patent for improvement in cultivator teeth, I have the honor of making to you the following report: Parsons' witness, D. S. Maynard, whose testimony is unimpeached, states that he was first shown by Parsons a model of his tooth, complete, on the 28th day of January, 1857, which model he knows was made by Parsons, and that he also made a duplicate model of the same for the said Parsons in September, 1857. Witnesses Thomas Maynard, Deboe, and Grimes also testify to the getting up of the said second tooth by Maynard in the fall of 1857. Witness Remington testifies to the construction of the second model by Maynard from November 1st to December 20th, but does not say in what year. Sanders' witnesses, Patridge and Sayer, whose testimony is also unimpeached, testify that a model of Sanders' tooth was first exhibited to one of them about the last of February, 1857, and to both on the 5th of March, 1857. I would therefore respectfully report that, in my opinion, priority of invention should be decided in favor of T. E. Parsons." The commissioner, immediately following, on the same paper, confirms the same, and adjudges priority of invention in favor of said Parsons, etc., dated March 25, 1859.

The appellant filed 12 reasons of appeal. The substance is that he has proved circumstances by his witnesses which show that the witness on the part of the appellee was utterly unworthy of credit, and that

therefore his testimony ought to have been ruled out by the commissioner, and that the testimony so offered by him fully established his claim to priority of invention. The report of the acting commissioner takes a general notice of the reasons of appeal, and, in substance, adds nothing to the reasons given in the opinion. The principle seems to be, to use his own language, that "admitting that D. S. Maynard (the appellee's witness) did so claim the improvement as his own property, it was not considered proper because of that fact to reject his contradictory statement when made under the solemnity of an oath, especially in the absence of any attempt to impeach him by the introduction of witnesses who would not believe him under oath. The office, therefore, felt bound to accept his sworn statement as true; and inasmuch as that statement clearly fixes the date of T. E. Parsons' invention a month prior to the time at which Sanders is shown to have invented the same thing, there seemed no alternative but to award priority to T. E. Parsons, as was done by the acting commissioner upon the recommendation of the assistant examiner."

Due notice of the time and place of the hearing of this appeal being given, the commissioner laid before me all the original papers, documents, and evidence, accordingly; and the said parties failing to appear and answer, according to the rules provided in such cases, the said case is taken up for consideration as submitted. The reason, as above stated, appears to be the principal ground upon which the decision rests. If the witness in other respects stood fair and free from suspicion, and only chargeable with such inconsistencies, as by the rules of law might and ought to be reconciled, then the principles as laid down by the acting commissioner would certainly be correct; but where the relation in which he has stood to the cause necessarily and naturally makes it reasonable to suppose he must labor under a strong bias to testify in favor of one of the parties, then the rule is entirely different,—more especially, when he testifies of facts taking place, in a place and at a time when, he says, no one else was present. Under such circumstances, the only means of detecting falsehood, and security of the party against the injurious consequences thereof, is to allow him to show inconsistencies and improbabilities in the testimony of the witness, to show him entirely unworthy of credit, proceeding from corrupt motives. And this brings me to the consideration of the circumstances urged by the appellant to show error in the decision.

As to the relation, he was joint in interest with the appellant until very shortly before taking the testimony under the authority given by the commissioner, at which time he says he sold out his interest to his partner for the paltry consideration of five dollars and some balance on account of expenses in the application for the patent. It is stated that the evidence of the sale of Maynard's interest was in writing. There is no such evidence among the papers laid before me.

The commissioner supposes that the model, etc., which the witness made, as he says, for Parsons was a duplicate of the one shown to him by Parsons in January, 1857. The witness does not say so. He says that he had not the model before him that Parsons showed him; that he did not know where it was at the time; that the tooth he made for Parsons was a complete tooth; that it was made from an old tooth of Sayer & Klimch's patent. This, without doubt, was the same which was presented with the petition on application of the appellee for a patent, and in which witness says he was one-half interested, and for which he was joint in the expenses. He says he could not tell exactly when he made it, but it was before he left Sayer, Remington & Co.'s shop (the time produced was about August or September), and that he claimed it as his invention, and that Parsons, in his various expressions, admitted the fact and thought it would supersede the tooth of Sayer & Remington.

Let what the witnesses have testified to be examined. The first witness was William H. Thomas. He says he had a conversation with Parsons in November, 1857, and at several other times, in which Parsons said that Maynard was getting up a tooth that would beat Sayer & Remington's. About the 20th of November, after Maynard showed him the tooth (Exhibit 1 was the one so shown. Figures and drawings 1, 2, 3, is the same). Maynard said so also,—that it would beat Remington's. It is also the same that Parsons called Maynard's tooth, and Maynard told him he was going to apply for a patent of this tooth. Maynard claimed it as his invention. Parsons said Maynard's tooth would beat Sayer & Remington's. Remington is the next witness. He says that, from conversations with Parsons, his understanding was that Maynard had got up, invented or projected a new cultivator tooth. On his cross-examination witness says he does not know whether he said "project," "originate," or "invent." Gardner Maynard, the next witness, says that he assisted Dolphus in getting up a cultivator tooth; thinks it was in August, 1857; that Exhibit 1 is a correct drawing, the only exception being that the one he helped to make had but one bolt, while the one in the drawing has two; that it was in Sayer & Remington's shop. Grimes is the next witness. He says that in the fall of 1857, the same tooth was shown by Maynard to witness; that he believes Maynard told him he invented the tooth; that he said he was getting up a cultivator tooth that would beat Sayer & Remington's tooth all to pieces; that he showed him a cultivator tooth afterwards that he said was his and Parsons' getting up together. Witness asked him who got it up. He said: "It was Parsons and I." He thinks that was the language. At one time Maynard told

him that he invented the tooth; at another time, that he and Parsons did. Do not these witnesses prove palpable inconsistencies between what the witness Dolphus S. Maynard said at one time as to who was the inventor, and at other times different persons, and show most clearly that the tooth made in August or September was not a mere duplicate of the one which he says was shown to him by Parsons in January, 1857, and further show that this was the only one that was made by either Maynard or Parsons? That the invention for which the appellee is now applying for a patent is not the same which the witness says he saw a model of in January, 1857, is, I think, pretty clear. The one in 1857 is said to have been made and invented by Parsons alone. The other is said (in a joint letter by Parsons & Maynard, among the files of the office, dated August 2, 1858, in various parts of it) to be the joint invention of the two. Sanders proves his invention to have been about March 3, 1857. This, I think, upon the whole of the testimony, taken together, proves him to be the prior inventor.

MORSELL, Circuit Judge. I, JAMES S. MORSELL, assistant judge of the circuit court of the District of Columbia, do certify to the honorable the commissioner of patents that, after notice duly given of the time and place appointed for the hearing of the above-mentioned appeal, all the papers and evidence were laid before me by the commissioner, and the parties thereto having failed to appear, according to the rules established in such cases, the said case was taken up and fully considered, and it is hereby adjudged and determined that there is error in said decision, and the same is therefore hereby annulled and set aside, and a patent is directed to be issued to said Henry Sanders as prayed.

Case No. 12,296a.

SANDERS v. The SEA FOWL.

[N. Y. Times, Fed. 15, 1863.]

District Court, S. D. New York. Feb. 10, 1863.

PRACTICE IN ADMIRALTY—SUIT FOR WAGES—DEFAULT—CONDEMNATION AND SALE—AT WHAT STAGE ALLOWED.

The libel was filed in this case [by Nathan B. Sanders against the schooner Sea Fowl] to recover seaman's wages. On the return of the process, no one appearing for the vessel, the libellant moved for a default and reference, and for condemnation and sale of the vessel, as has been the practice in the court. But the attention of the court being called to the matter, the question arose whether it was proper at this stage of the proceedings to move for a condemnation and sale of the property, and the question was submitted to the court.

HELD BY THE COURT. That the court is unaware that any such usage has grown up in the practice of the court, or has been sanctioned in any instance by express order of the court, unless it was under intimation that the condemnation was assented to by the parties in interest. That the fundamental principle regulating every branch of judicature, in law, equity or admiralty, exacts a final positive judgment or decree determining the sum so paid, antecedent to the sale of property to satisfy it. That the true reading of the rules of this court is in accordance with this principle. That the decree proposed to be entered in this cause must be modified so as to rescind the order to issue execution upon the condemnation of the vessel. Such decree can only be allowed after the amount due is legally ascertained or assented to by the party charged by it.

SANDERS (SEYMOUR v.). See Case No. 12,690.

SANDERS (UNITED STATES v.). See Case No. 16,220.

Case No. 12,297.

SANDERSON'S CASE.

[3 Cranch, C. C. 638.]

Circuit Court, District of Columbia. May Term, 1829.

WITNESS—ANSWER TENDING TO CRIMINATE—WHO TO DECIDE.

A witness is not bound to answer, before the grand jury, to a question, the answer to which might implicate himself; and he is the sole judge whether it will. The court is to decide whether the answer could implicate the witness.

Memorandum. August 6, 1829. The foreman of the grand jury came down, and stated that a Mr. Sanderson had refused to answer who was the author of a certain publication in "The Baltimore Republican," supposed to reflect upon the court and jury, in the trial of the cases of U. S. v. Watkins [Cases Nos. 16,649 and 16,650], although he said it was "confessedly" written in this District; and that he said he could not answer the question without implicating himself.

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

THE COURT (THRUSTON, Circuit Judge, absent) said, that it seemed to the court that he might be implicated by answering the question, and he was the sole judge whether it would; and, if it would, he was not bound to answer the question.

MORSELL, Circuit Judge, was not clear that it could implicate him.

CRANCH, Chief Judge, thought that it might form a link in the chain of circumstances, leading to a prosecution against himself, as the publisher of the paper; for, al-

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

though the paper was printed in Baltimore, it might have been published here. At least it is questionable, whether sending a paper here would not be a publication here; and, as the witness was now here, he might possibly be prosecuted here.

He was not compelled to answer.

Case No. 12,297a.

SANDERSON et al. v. The ANN JOHNSON.

[3 Adm. Rec. 159; 4 Adm. Rec. 527.]

Superior Court, S. D. Florida. May 20, 1843.

SALVAGE—UNNECESSARY LABOR—COMPENSATION—HOW DETERMINED—ESTOPPEL.

[1. Salvors should not have their compensation for services actually necessary reduced because they performed additional unnecessary labor.]

[2. The total amount of salvage compensation is determined by the value of the services to the property saved; not by the number of salvors.]

[See, contra, The D. M. Hall v. The John Land, Case No. 3,939.]

[3. The employment of an unnecessary number of salvors, by the person to whom the salvage service is entrusted, is not censurable, but should not increase the total award.]

[4. The master of a vessel in a dangerous situation, after summoning wreckers to his assistance, will not be heard to object to the payment of salvage on the ground that such assistance was unnecessary.]

[This was a libel for salvage by Samuel Sanderson and others against the British brig Ann Johnson and cargo.]

Wm. R. Hackley, for libellants.

S. R. Mallory, for respondent.

MARVIN, J. The material facts in this case, as set forth in the libel, are verified by the proof. It appears that the brig ran ashore at nearly high water on the night of the 16th, and on the next morning, when boarded by Sanderson and his associates, she was very much careened over and lay in much less water than she drew. Sanderson was employed to render his assistance in geting the brig off, and he lightened her by discharging a part of her cargo, carried out her bower anchor, and at high water, about twelve o'clock that day, hove the brig off, and brought her to this port. The principal points relied upon by the master of the brig to diminish the amount of compensation to Sanderson and his associates for the services rendered are: First. That Sanderson discharged cargo unnecessarily, and against his advice and judgment, and thereby increased the expenses of the brig and cargo. Second. That he, the master of the brig, employed Sanderson and his crew only to render him the necessary services, and the other vessels and crews were of no use. Third. That the brig was not in a dangerous situation, and he would have gotten her off at the same high water without assistance.

As to the first point, that Sanderson discharged cargo unnecessarily: It appears in proof that the brig ran ashore near high water, and that the bottom, though smooth, was hard and rocky, and when boarded by Sanderson the brig was very much careened; that the master desired and advised Sanderson to carry out the bower anchor before he commenced lightening the brig, but Sanderson hauled his vessel alongside the brig at once, and then employed a part of the force at command in lightening the brig and a part in carrying out and planting the anchor; that the business of carrying out the anchor and lightening the brig was going on at the same time, and as the tide rose to its height, the anchor being planted, and the brig lightened, she was easily hove off. Now, it appears to me difficult to conceive of a more judicious mode, under the circumstances, to relieve this brig, uninjured, and in the shortest possible time, than that adopted by Sanderson. It was important and highly desirable that the brig should be gotten off as soon as possible, to save her from being injured by chafing, thumping, or being strained upon the rocks. Sanderson had force enough at command to carry out the anchor and lighten the brig at the same time. The appearances at the time evidently indicated that it would be necessary to lighten the brig. Now, suppose that the whole morning had been consumed in carrying out the anchor, and the brig had retained her whole cargo on board, and it had been found by experience, when it became high water, that she must be lightened before she could be gotten off, the opportunity afforded by that high water would have been lost, and she must have remained on the reef until the next high water, or a much larger portion of her cargo must have been removed. It is conceded, that it was proved afterwards by the ease with which the brig was hove off, that the removal of the cargo was unnecessary. But at the time the cargo was removed the circumstances strongly indicated the necessity; and the actors are not to suffer a diminution of their just compensation for their services which were actually necessary, as proved by the event, because they performed other labor not necessary.

As to the second point, that the master employed Sanderson and his crew only, and the other vessels and crews were unnecessary: The compensation to be given to Sanderson and his associates is to be measured by the value of the services to the brig and cargo, and not by the number of men employed in rendering the services. It appears to me that Sanderson and his crew alone could have rendered all the service necessary to this brig, or, in other words, could have gotten her off in about the same length of time in which she was gotten off. The employment of the others was therefore unnecessary. But it is often difficult to determine what amount of force may be neces-

sary to relieve a vessel and cargo in the shortest time, and the employment of a supernumerary force is not censurable, but the vessel and cargo must not be charged with an increased salvage on account of such supernumerary force.

As to the third point, that the vessel was not in a dangerous situation, and that the master could have gotten her off at the same high water without assistance: The vessel was on a smooth but hard and rocky bottom, exposed on the windward side to the sea from the Gulf, and on the leeward side to the shoaler water, and more dangerous rocks. Now, if the weather had remained good, if the brig had stood upright on her keel, and not careened over on her bilge, if the master could have carried out his stream anchor with a sufficient scope of chain or hawser to have hove her off by, if these and other contingencies had all happened, then the brig would not have been in a dangerous situation. But these contingencies were at the time doubtful and untried events. The master of the brig deemed her in a dangerous situation, or he would not have taken the assistance offered him. In my opinion he judged rightly. Several vessels have been lost on the same reef, and this vessel would have been in imminent peril upon a slight increase of the wind from the Gulf, unless she had been hauled off at the first high water. The master says he could have hauled the brig off at the same high water without assistance. This is possible, and indeed, since the event has proved the facility with which it was done, it is probable that the master could have carried out his stream anchor, and have hauled the brig off. But would he, in proper time, have carried out his anchor? Could he, without mishap or mistake, have carried it out with a sufficient scope of chain or cable to have hauled her off? Could he, without a pilot, have gotten her under way safely on a lee shore? All this is possible, and perhaps probable.

The true state of this case is this: This brig was ashore on a dangerous reef of rocks, and the master, in view of all the circumstances, and in the exercise of his best judgment, deemed it necessary to employ the wreckers to get her off. They went to work, and in a short time got her off in the manner related in their libel. They are to be compensated according to their merits and the value of their services. Their chief merit consists in the promptness with which they came to the vessel's relief and carrying out her heavy anchor. The lightening the brig I pretty much lay out of the question, for this, although deemed necessary and prudent at the time proved, in my opinion, to be unnecessary. In Walter v. The Montgomery [Case No. 17,120], the court said: "A prominent feature in the merit of the salvors is the promptness with which their services were rendered. This is a quality highly commended in this court, upon grounds of policy. A single anchor opportunely carried out, the assistance of a single wrecking vessel for half an hour, will often save a large amount of property from total loss. 'Bis dat qui cito dat.'" This remark is justly applicable to this case. The carrying out of this anchor before the tide rose to its height saved the brig from injury. Had it not been carried out, the brig and cargo might have been lost. The value of the brig and cargo are not exactly known, and their appraisement would be attended with considerable expense and delay. I suppose, however, that fourteen thousand dollars is not too high an estimate of their value. Under all these circumstances, and considering that these wrecking vessels are regularly employed in cruising and rendering assistance to vessels situated as this brig was, that they are manned and supported at a large annual expense, I do not think that two thousand dollars is too large a compensation to be given the wreckers for their services to this brig and cargo. It is therefore ordered, adjudged, and decreed that the libellants in this case are entitled to the sum of two thousand dollars for their services to the brig Ann Johnson and her cargo, rendered as set forth in their libel, and that upon payment thereof to the marshal, and the costs and expenses of this suit, he restore the said brig and cargo to the master thereof, for and on account of whom it may concern.

Case No. 12,298.

SANDERSON v. COLUMBIAN INS. CO.

[2 Cranch, C. C. 218.] [1]

Circuit Court, District of Columbia. Nov. Term, 1820.

MARINE INSURANCE—REPAIRS—METHOD OF DETERMINING—CUSTOM.

1. In ascertaining whether the loss upon a policy of marine insurance amounts to five per cent., a deduction must be made of one-third of the costs of the repairs, as an allowance for the difference of value between the new and the old materials.

2. A general usage among shipowners and underwriters in relation to the settlement of average losses, if known to the parties, becomes part of the contract, and binds the parties.

This was an action upon a policy of insurance, to recover for damage exceeding five per cent. on 6,000 dollars insured on the ship Thomas. By terms of the policy, the underwriters were not liable for any loss or damage under five per cent. upon the amount insured. The repairs amounted to 372 dollars, which was more than five per cent.; but if one-third should be deducted for the difference of value between the new and the old materials, the loss or damage would be less than five per cent.

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

The plaintiff's counsel, Mr. Hewitt and Mr. Swann, contended that there should be no such deduction, or, if any, not one-third.

Mr. Jones, for defendants, cited "The Shipmaster's Assistant and Owner's Manual," pp. 130. 136.

THE COURT (THRUSTON, Circuit Judge, absent) decided that on settlement of a partial average the difference in value between the new and the old materials ought to be deducted, whether the deduction reduced the sum below the five per cent. or not.

Mr. Nichols, a witness sworn on the part of the defendants, testified, that he has been an insurance broker twenty-three years; that the universal practice, as far as he knows and believes, is to deduct one-third for the difference in value between the new and the old materials, whether they were half worn, or three-fourths worn, or quite new; that sometimes the insured gains, and sometimes loses, by the rule.

THE COURT further instructed the jury that if they should be satisfied by the evidence, that the practice, as stated by Mr. Nichols, was the general usage, in settlement of average losses, among shipowners and underwriters, and that the usage was known to the plaintiff at the time of the contract, it was to be considered a part of the contract, and the plaintiff was bound by it.

Mr. Swann asked whether the opinion was the same, whether the materials, used in the repair, were new or old.

THE COURT said it would be time enough to answer that question when a case should occur.

Case No. 12,299.

SANDERSON v. The COLUMBUS.

[3 Am. Law J. (N. S.) 268; 4 Pa. Law J. Rep. 493; 8 Leg. Int. 31.]

District Court, E. D. Pennsylvania. Nov., 1850.

COLLISION BETWEEN STEAMER AND SAIL — DUTY OF STEAMER TO CHANGE COURSE — INSUFFICIENT LOOKOUT.

[1. A steamer is always to be regarded as a vessel going free, and must, consequently, give way to a sailing vessel going closehauled; and this implies that a sailing vessel going closehauled shall not be at liberty to change her course when meeting a steamer.]

[2. Where a steamer going at nine knots, and meeting a sailing vessel going closehauled, merely reversed her propeller without changing her helm, and it was claimed in her defense that there was not sufficient time for her to change her course, *held*, that this defense was founded upon a mistaken theory; for it is manifest that a steamer going at that speed can more easily change her course than entirely arrest her progress.]

[3. Where a steamer meeting a schooner on a clear, starlit night failed to perceive her until within about 300 yards, although her sails presented a surface of 30 feet at right angles to the line of vision, *held*, that the steamer was in fault for not maintaining a vigilant lookout.]

In admiralty.

J. Muray Rush and H. J. Williams, for libellant.

Ed. Waln, for respondent.

Before KANE, District Judge. The leading facts upon which my decree in this case will rest are these: The steam propeller Columbus left Philadelphia on the 30th of November, 1848, for Charleston, S. C., and at half past two o'clock in the morning of the 3d December, (civil time,) she was in the neighborhood of Cape Lookout Shoals, heading south-west, on her starboard tack, going about nine knots an hour. The schooner Mission, a new vessel of 112 tons, was returning to Edenton, N. C., with a cargo of salt from Rum Key. She was on her larboard tack, steering north-east, going at the rate of five knots, or something less. The wind was fresh from the north-west; the sea was rough from the action of the south-east wind that had prevailed for some days before; it was a starlight night. It is said that the two vessels were about three hundred yards from each other, perhaps less, perhaps a little more, when the look out man of the steamer saw the schooner approaching bearing about a point, or a point and a half, on the steamer's larboard bow. The engine was stopped at once and reversed; but there was no hail on either side, and neither vessel varied her course. The consequence was a collision of the steamer's bow and the starboard quarter of the schooner, and the schooner sank immediately.

Whatever of controversy there may be as to other supposed or asserted facts, I believe that there is nothing in this succinct recital I have made which does not consist with the proofs exhibited in the case, and relied on by the respondents; and, if my views are just, it is not necessary to go beyond it. The question, whether the captain of the schooner was or was not improperly below at the time of collision, or whether the lookout man of the schooner was asleep, it might, perhaps, be difficult to decide; since the two persons whose evidence upon it would be of most interest were lost with the vessel. But the present issue connects itself no further with the conduct of the parties than as that conduct may have contributed to bring about the collision.

I am to decide the simple question: Was the collision occasioned by the fault of one, or of the other vessel, or was it unavoidable? And this question, though perhaps at first glance an embarrassing one to a person unfamiliar with those usages of navigation that form part of the law of the sea, admits of an easy solution with reference to them. I have been a little surprised to learn from some of the skillful seamen who have been examined in this case how little is known of those usages on shipboard. It is a rule, founded altogether in reason, and long and thoroughly recognized in the admiralty, that, on the open seas, vessels going free shall

give way to those that are going closehauled; and the correlative is equally well established, that a vessel going closehauled, when meeting a vessel going free, shall hold her course. These are absolute rules; and the vessel that violates either of them becomes answerable for any collision which may be the consequence. The reason of them is plain. The vessel going free has the command of her movements much more fully than the one that is closehauled. She can pass in either direction by a simple inclination of her helm, and without considerable loss of way; while the closehauled vessel can turn only in one direction, unless she goes into stays, and loses her course by the manœuvre,—hence the duty of the vessel going free. And as the vessel going closehauled might, by changing her course, place herself in the way of the other vessel, while that was conforming to the rule for the purpose of avoiding her, the duty enjoined on the closehauled vessel is equally reasonable. The same considerations which at first suggested these rules for sailing vessels, have, since steam has begun to be extensively applied as a motive power in navigation, grafted on them a rule applicable to steamers; viz. that a steamer shall be regarded always as a vessel going free, and must give way in consequence to a sailing vessel going closehauled. And this extension of the first rule implies a similar extension of the second; viz. that a vessel going closehauled, and meeting a steamer, shall not be at liberty to change her course. I have not indeed met a reported case which called for the enunciation of the rule thus modified; but I cannot doubt that as the argument which led to the original rule would apply with equal force to its modification also, the courts of admiralty would enforce both alike.

The application of these rules to the few facts I have recited may decide the present case. It was the duty of the Mission to hold her course; and it is conceded that she did so. The steamer, on the other hand, was bound to give way,—not merely to check her progress, but to change her course; in a word, to prevent the collision. It is conceded that she did not do so.

To relieve herself from the liability which should follow from this state of facts, two excuses are offered on behalf of the steamer: (1) That when the schooner was first descried, the distance between the two vessels was not sufficient to permit the steamer to give way in time; (2) that from the courses the two vessels were steering, heading nearly towards each other, with but three points of the compass or about thirty-four degrees of divergence between them, the steamer could not know in time which way the schooner was steering, and could not decide therefore in which direction she, the steamer, ought to pass in order to avoid her. The first of these excuses is clearly a mistake, if the evidence is correct that the steamer had overcome or nearly overcome her momentum before the collision. For it requires no argument to show that a steamer going nine knots an hour can change her direction by shifting her helm much more promptly than she can bring herself to a state of rest in the water; and this remark is especially true of propellers generally, which answer their helm more readily than other vessels, and is sworn to be true in reference to the Columbus. Besides, it is demonstrable from the allegations of the witnesses themselves, which are in proof, that the accident could not have taken place had the steamer changed her helm in either direction, or had she even kept on her way. The medium rate of the steamer's motion from the moment of seeing the schooner to the moment of the encounter was about 4½ knots, or a little more. I say a little more, because the steamer was going at the rate of nine knots an hour at first, and because I think the manner in which the two vessels struck, and the character of the injury sustained by the schooner, as well as the fact that one of the drowning seamen from the wreck drifted past the steamer, go to show that the steamer's motion had not been entirely arrested when they came together. The schooner's rate of motion being something less than five knots or about the same as the medium rate of the steamer, the two vessels passed over very nearly equal spaces in the same time, and a simple trigonometrical computation from the elements given in the evidence (viz. their distance, 300 yards, and their bearing, 1½ points) determines for us that each passed over 157 yards before they met. Had the steamer kept up her speed of 9 knots, she would have passed over more than 300 yards instead of 157, and as her length is only 165 feet, and the schooner's only 76, it is clear they would have passed each other in safety. Another result from the same computation is that the vessels were approaching each other for about a minute and an eighth after the schooner was descried, a space of time abundantly sufficient to have allowed the steamer to give way by changing her helm.

The second excuse offered involves two questions: (1) Was there time enough, after the schooner was seen, to determine the direction of her course from on board the steamer? (2) If there was not, was it the fault of the steamer that the schooner was not seen sooner?

1. The broad side of the schooner, with her sail, was in fact more than 90 feet long; and, seen obliquely from the steamer's bow in the direction indicated by the evidence, she presented a surface of 30 feet at right angles to the line of view. She was heading northward, across the bow of the steamer, closehauled; and her apparent rate of motion, as seen by the lookout, before the steamer slacked her speed, was less than that of the steamer about 2⅛ feet per second. Had she been heading eastward of the steamer's bow,

she would have been going free, with the wind abeam; and the apparent difference between the rates of motion of the two vessels, as seen by the lookout, would then have been 6⅝ feet a second. Or, in other words, the vessels would in one case have appeared to be nearing each other at the rate of 1½, and in the other of 4½ knots. Now, I am not enough of a seaman to decide whether the practiced eye of a good lookout man would, or would not, have been able so to mark the difference in appearance and rate of motion in the two cases, as to determine at once in which direction the sail he saw was heading.

2. But on the other point I have no difficulty. The evidence is that the night was clear; and it is the opinion of the skilful shipmasters who heard the case with me as assessors, that in such a night a vessel keeping a proper lookout should have seen another approaching her, 1½ points off her bow, at a much more considerable distance. I have myself made the trial; and though not by any means a person of more acute vision than landmen generally, I have no difficulty in discerning objects against the horizon, not larger than the Mission appeared; seen obliquely, at a distance nearly the double of 300 yards. And I agree, therefore, with them in thinking that the fault in which this collision had its origin is imputed to the want of proper lookout on the part of the steamer.

I have thus far discussed the case upon the premises put forward by the respondents. All the evidence indeed, except that of the schooner's helmsman,—the only survivor of her crew,—who saw nothing, and from his position could see nothing, till the steamer was cutting through his deck, all the rest of the evidence is from persons on board the steamer, and of these only the lookout man and the mate saw the schooner before the two vessels were in contact. It could scarcely be expected that the lookout man should attest his own want of vigilance; and it is not to make a serious imputation against him, to admit that he cannot now recall with unbiased accuracy the collateral incidents of a catastrophe, to which he was at least a painfully interested witness, if not a responsible party.

I confess, that after looking carefully through all the testimony, I am not without my doubts whether the schooner was seen at all until she approached nearer than the witnesses represent. There is nothing about which honest men swear so vaguely and contradictorily as the times which mark the progress of an exciting incident; and the distances, at the particular moments of such an incident, between objects that are both of them in motion; especially on the open sea, where there are no fixed objects intervening, and at night, when even the waves cannot be seen. It is often safer, in such a case, to refer back to the action which the circumstances of the moment suggested, in order to determine their character and force, than to seek to recall by a direct exercise of memory the precise circumstances themselves. Our best reasonings will be apt to mislead us, if we undertake to criticise the policy of our past actions, when time has begun to obscure the motives that led to them. On the other hand, what we call impulse is frequently nothing else than rapid deductions from observed facts. Now, the mate of the Columbus is represented, and I have no doubt truly, as an excellent seaman. From the moment the collision took place, nothing could be better than his management of the steamer, and the efforts he made to save the crew of the sinking vessel. How such a seaman, in command for the time of the steamer's deck, should have contented himself with stopping and reversing the engine, without shifting his helm, if there was time to do so, I am altogether unable to understand. If he was nearing the schooner for more than a minute after his attention was called to her, it is incredible to me that he could have omitted to put his wheel to port or to starboard. To have done so would have diminished the force of the collision, if a collision was unavoidable. I can hardly be mistaken in saying that it might have been prevented; it could under no aspect have done harm, and it was the manœuvre enjoined by the rules of navigation. There are other considerations which have the same tendency. I have already adverted to the fact that the steamer had not overcome her headway when the encounter took place. Yet, she had reversed her engine at the moment of the alarm. Can it be that a steamer, whose machinery is capable of impelling her 9 miles an hour with the wind abeam, is unable, by reversing its action, to arrest her course in less time than a minute and an eighth? It has been said, arbitrarily perhaps, that a steamer can bring herself up in her own length. We must assume that the Columbus cannot do so in less than three times that space, or else we must admit that the witnesses have overestimated her distance from the schooner when the schooner was seen first.

Another circumstance still appears to me scarcely reconcilable with the idea of the schooner's having been seen approaching so long; it is that she was not hailed by any one on board the steamer. It is said that the weather was too rough to allow a hail to be heard; and it may be that such was the fact. But it seems strange to me that the trial at least was not made. I can scarcely realize that right-hearted men could be schooled into such confident certainty of the fruitlessness of an effort, and could have their instincts of manly sympathy so well under control, as not to call out when they saw for more than a minute a vessel with her crew moving onward steadily, and with seeming unconsciousness, to inevitable destruction.

The gentlemen who assisted me at the hearing have presented the nautical views of the question so well in the report with which they have favored me while this opinion has been preparing that I do not think it worth while to pursue the subject farther. The report is in these words: "Sanderson v. Steamer Columbus. The undersigned, assessors in the above case, have duly and carefully considered all the facts in evidence before the court of admiralty, relative to the collision of steamship Columbus, of Philadelphia, and schooner Mission, of Edenton, N. C., which occurred December 3d, 1848, near Cape Lookout Shoals, on the coast of North Carolina, and are of opinion that the means of avoiding said collision was possessed exclusively by the Columbus. That the Mission was pursuing her proper course, by the wind, on the larboard tack, heading to the northward, and that any change in her course, for the purpose of giving way to the Columbus, was uncalled for, and ought not to have been expected. That it was a clear starlight morning, and the wind moderate. That a vessel of the size of the Mission could have been seen at the time a sufficient distance to have been safely passed on either side, had a proper lookout been kept on board the Columbus. And that the neglect to do so was, in our judgments, the cause of this most disastrous collision, and to which it is to be entirely attributed. Respectfully submitted, Christian Gulagee. Silas Pedrick. Philadelphia, Nov. 22, 1850."

I decree for the libellant; and refer it to Mr. Commissioner Heazlitt, to ascertain the amount of damages. Costs to follow the decree.

PER CURIAM. Decree and order accordingly.

SANDERSON v. LADD. See Case No. 17,352.

Case No. 12,300.

SANDERSON v. SERAT.

[5 Cranch, C. C. 485.] [1]

Circuit Court, District of Columbia. Nov. Term, 1838.

BAIL IN CIVIL CASE—UNCERTAIN DAMAGES.

In actions on the case for uncertain damages, the court will mitigate the bail, according to circumstances.

Case [by Caroline H. Sanderson against John H. Serat] for breach of promise of marriage; damages laid at $10,000. The plaintiff made affidavit that she had sustained damages to that amount.

THE COURT, after examining into the circumstances of the defendant, required the bail to justify only to the amount of $1,000.

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

SANDERSON (UNITED STATES ANNUNCIATOR, ETC., CO. v.). See Case No. 16,790.

SANDERSON, The JOHN. See Case No. 7,364.

SANDFORD, The MARY. See Case No. 9,225.

SANDFORD (UNITED STATES v.). See Case No. 16,221.

Case No. 12,301.

In re SANDS.

[7 Ben. 19.] [1]

District Court, E. D. New York. Sept., 1873.

BANKRUPTCY—BOND OF ASSIGNEE—REMOVAL AND NEW APPOINTMENT.

Where the register required an assignee to file a bond, but specified no time within which it must be filed, and, no bond having been filed for thirteen days, appointed a new assignee: *Held*, that the assignee was not in default for not filing such bond, and he must be removed before another assignee could be appointed.

[In the matter of George E. Sands, a bankrupt.]

The register certified to the court, upon request, under section 6 of the bankruptcy act [of 1867 (14 Stat. 517)] (see Rev. St. U. S. § 5010), that Charles Savary was chosen assignee at the first meeting of creditors in this case, of whose fitness he had doubts; that, after personal inquiry, he required a satisfactory bond before he would approve the appointment; that no bond was filed for thirteen days after the meeting, and the register thereupon appointed another assignee, following the course laid down in the Case of Haas [Case No. 5,884]; and that, three days after this appointment of another assignee, the assignee chosen at the meeting, Mr. Savary, sent in a bond which would not have been satisfactory to the register, even if sent in before the second appointment.

BLATCHFORD, District Judge. Under the provisions of section 13 of the act, Mr. Savary was not in default until the expiration of a time required to be specified in an order to be made requiring the giving of the bond; and, after such default, Mr. Savary's removal from office was necessary before another assignee could be appointed in his place. It is not stated that any such provision was contained in any order, or that Mr. Savary was removed from office. There must, therefore, be other and further proceedings in the case.

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

Case No. 12,302.

SANDS' CASE.

[1 U. S. Law J. 15.]

District Court, S. D. New York. 1822.

BANKRUPTCY — JURISDICTION OF DISTRICT JUDGE UNDER THE ACT OF 1800 — INVESTIGATION OF ASSIGNEE'S ACCOUNTS — ENGLISH BANKRUPTCY LAWS.

[1. By the provisions of the act of 1800 [2 Stat. 19], and in analogy to the authority exercised by the lord chancellor in England under similar legislative provisions, the district judge has jurisdiction to investigate the condition of the assignee's accounts on the petition of a creditor or the bankrupt, for the purpose of ascertaining whether any, and what, dividends were due, and whether any surplus was payable to the bankrupt; but quære, as to whether the district judge possessed any summary jurisdiction to direct the payment of any dividends or surplus to the parties entitled, or whether they must be remitted to an action at law to recover the same.]

[2. The manner in which the investigation is to be made is entirely under the direction of the district judge. He may do it in person or through the agency of some proper officer designated by him.]

[3. In the course of this investigation, questions might arise which the court might deem proper to refer to a court of equity for a solemn and formal decision; but it would never be deemed necessary, either in this country or in England, to direct a bill to be filed to ascertain whether a sum of money had been received on a certain day by the assignees, and whether they had caused it to be properly credited in their accounts; nor would this method be resorted to to determine whether the assignees could become purchasers of the bankrupt's estate.]

[4. Neither by the bankruptcy act of 1800 nor by the judiciary act of 1789 [1 Stat. 73] did the circuit court have jurisdiction in bankruptcy cases, and it could not enjoin parties to a bankruptcy proceeding from seeking an investigation of the assignee's accounts, in a summary manner, by petition to the district court.]

[5. The origin and extent of the lord chancellor's jurisdiction in England over the commissioners and assignees in bankruptcy, considered, and its development traced under the various statutes by which the English bankrupt system was amended and perfected.]

[This was a petition by Comfort Sands, a bankrupt, for an investigation of the assignee's accounts, to the end that he might be required to pay over to the petitioner any surplus which might be found to be due him. The jurisdiction of the district judge to order any such investigation, or to require the assignees to appear before him, was strenuously contested.]

J. Wells, for bankrupt.

S. Jones and J. A. Hamilton, for assignees.

VAN NESS, District Judge. This case comes before me upon the petition of Comfort Sands, declared a bankrupt under the act of 1800, praying an investigation of the accounts of the assignees, and an order for the payment to him of an alleged surplus. The extent of the power and jurisdiction of the district judges under the bankrupt act of 1800 is an inquiry of acknowledged difficulty. I have felt the full weight of it from the commencement of the discussions in this case, and I must admit that the ingenious arguments of counsel employed on either side, although they may have aided my researches, have not been successful in removing my perplexities, or dissipating the obscurity in which the question is involved. This is a case of magnitude as to amount, and apparently of high interest to the parties. It was entitled, therefore, to due deliberation, and has received all the attention which my other avocations enabled me to give it. It is important, especially so in this case, that what is done should be legally and rightfully done, to the end that the parties may be safe in their future acts, and that the estate may be definitively settled.

The English bankrupt system has been in operation for nearly three centuries, and during the whole period of its existence has been the subject, not only of repeated revision and amendment, but of much animadversion, and of occasional reprobation. As a system, its defects are still numerous; and neither the sagacity of the bench, nor the ingenuity of the bar, nor the wisdom of parliament, have hitherto been able to obviate all the difficulties that oppose its just and faithful execution. Its imperfections are most visible in its inadequate provisions for the general administration of the system, and for the due execution of the various statutes that compose it. 'Tis true, however frail may be its foundation, or however equivocal its legal support, the present practice in England is sufficiently simple in its forms, and effectual in its operation. After years of doubt and controversy, all conflicts of jurisdiction have ceased, and the sole power of directing the execution and controlling the administration of the bankrupt system in all its departments, and in every stage of the proceedings, is now admitted to reside in the lord chancellor. But no man has hitherto successfully developed the sources of this comprehensive jurisdiction. Its existence and its exercise afford an instructive lesson on the imperfection of all human legislation, and on the tendency and disposition of all human institutions to accumulate power, and grasp at authority. It is an impressive illustration of the manner in which, in that country, custom, usage, and precedent are, by an acquiescence, silent in its progress, and imperceptible in its gradations, permitted to take the place of law and legislation. The chancellor's jurisdiction in bankruptcy, like much of the lex non scripta, had its origin, no doubt, in expediency, perhaps necessity, resulting from the absence of legislative regulation. The wisdom and discretion of the courts were sometimes necessarily substituted for higher authority. Successive precedents, unannulled by parliamentary enactments, grew gradually into usages, which, consecrated by time, and recognized as useful, now stand recorded as law in the written

history of judicial proceedings. It has repeatedly been admitted, by high authority, by successive chancellors, and by able men who have attempted to explain its foundations, that the chancellor's jurisdiction in bankruptcy is involved in great obscurity; and Lord Eldon, in a reported case, said, "There is great confusion in the language of every book relating to the subject." If the subject were not understood by the great men whose duty it was to administer this system of law, nor by those who in formal treatises have undertaken to investigate it, it would be worse than presumption in me, or in any of us here, to pretend to comprehend or to elucidate it.

It seems most probable that, by reason of the numerous defects, inseparable perhaps from so complicated a system, and the many difficulties constantly arising in the execution of these statutes, which could not easily be foreseen, nor readily remedied by legislative provisions, it was perceived, at an early day, to be necessary, in order to effectuate the salutary purposes of the law, that an ample authority should somewhere be exercised to direct and control all the proceedings in bankrupt cases. It is obvious, from the reports of early cases, that much practical evil resulted from the ignorance, perverseness or dishonesty of commissioners and assignees; and that creditors and bankrupts were exposed to abuses, which tended to defeat the benign objects of the legislature. It is perceptible, I think, in the imperfect accounts we have of the rise and the growth of the chancellor's jurisdiction, that these evils, manifested by repeated applications to the king's courts for relief, produced not only a general acquiescence in the limited jurisdiction he there exercised, but also a general solicitude on the part of the bench, the bar, and the commercial part of the community, that he would adopt a liberal construction of the statutes, and extend his jurisdiction, so as to repress the evils complained of, and advance the relief and the remedies contemplated by the acts.

Justified by the peculiar expediency of the measure, and supported by public sentiment, the great seal has, in progress of time, erected a splendid superstructure, upon a foundation which to us may seem perhaps unable to sustain it. Extrinsic aid, however, has upheld it; time has cemented the fabric; and all its parts have at length become firmly established. They are established, no doubt, in wisdom, and afford a refuge and a resting place to the victim of adversity; a sanctuary to which the poor in spirit and in fortune may fly from the hardy avarice and disciplined rapacity of relentless creditors.

Without attempting to elucidate further the mysteries in which the subject is confessedly involved, or to develope more at length the rise and gradual progress of this jurisdiction, I shall proceed to examine the provisions in the English bankrupt acts, from which it is supposed to be derived, and the extent in which it is at present maintained, and exercised in practice. It will be necessary, then, to compare the British acts with the acts of congress of 1800, with a view to determine, if possible, what portion of the chancellor's jurisdiction was intended to be vested in the district judge, or what extent of authority, upon the usual principles of construction, may fairly be derived from the express provisions of the statute. Although the statute of 34 and 35 Hen. VIII. is universally considered as the first English bankrupt act, yet the germ of the system is, I think, to be found in a statute so far back as the reign of Edward III. It was confined in its operation to the Lombards, a description of foreigners, who were in the habit of settling temporarily in England, contracting debts, and then absconding. Perhaps, however, the general principle on which it is founded may be traced to a source still more remote and venerable, to the civil law, which, upon the application of creditors, most wisely constituted a guardian to superintend and control both the person and property of a prodigal. It was deemed an offence against the moral rectitude of the government to squander property obtained from others, and to the value of which they were entitled. So the statute of Hen. VIII., considered as criminal offenders "who craftily obtained into their hands great substance of other men's goods, and fled to foreign parts, or kept their houses," and conferred authority upon the high officers of the king's court and council "to take order as well with the bodies of such offenders" as their property. This is certainly the first statute that operated upon British subjects, and was applicable alike to all persons, without regard to their occupations. The lord chancellor, the lord treasurer, and other high functionaries which it enumerates, were themselves required to execute the powers and perform the duties which the lord chancellor has since been authorized to delegate to others. This statute was distinguished by three main features, which have all been established: First, it considered and treated the bankrupt as a criminal; secondly, it was not confined to any particular description of persons, but was applicable to every debtor who had fled the realm, or kept his house; and, thirdly, the lord chancellor, lord treasurer, &c. were themselves constituted what we now call commissioners. From this statute, the chancellor derived no peculiar power or jurisdiction whatever. It remained unmodified for 28 years, when 13 Eliz. c. 7, was passed, which changed the whole system. This obviously considers the bankrupt rather as an unfortunate trader than a criminal offender. Its operation is confined to merchants and traders. The lord chancellor is authorized to delegate by commission under the great seal, to persons of his own selection, the powers previously vested only in the lords. By the ninth section he has authority

to punish for concealing or aiding to conceal the person of the bankrupt. This is all the direct and exclusive authority granted by this act to the chancellor. The power given to appoint commissioners presents, to be sure, an important and interesting modification of the system, as it discloses the early and remote source from which is derived the present ample jurisdiction of the great seal.

It is worthy of remark that the three next statutes, to wit, 1 Jac. I., 21 Jac. I., and 13 & 14 Car. II., passed at intervals that embrace a period of 135 years,—that is, from 1570 to 1705,—never mention the lord chancellor, nor convey to him any additional power. During this period, the jurisdiction in bankruptcy rested entirely on 13 Eliz.; and the right to advise the commissioners in the execution of their duties was exercised in common with all the king's courts; or, at least, the authority of the chancellor, as now supposed to be conveyed by the 2d section of 13 Eliz., was not at that time recognized as exclusive. In cases referred to by Christian we see that in 1583, 1602, and 1619 the assistance and advice of the court of common pleas were asked and given. The first recorded application to the chancellor is stated to have been made in 1676, more than a century after he was invested with the power of appointing the commissioners. It was made to obtain an order to the commissioners to admit a debt which they had disallowed. The chancellor at first expressed a repugnance to interfere, but finally directed its admission; and the right to order a debt to be allowed or expunged is now said to be the most efficient and extensive part of his jurisdiction. But to proceed with the provisions of the statutes, which directly confer jurisdiction upon the chancellor; for that, at the present, is my only object. The 4 & 5 Anne, c. 17, introduced many important changes in the system as it then existed, but conveyed little new power to the chancellor. The 2d section authorizes him to enlarge the time for the bankrupt's surrender, and is the only provision connected with this branch of my inquiry. This was, however, an important statute in other respects. It is expired, but its most material and useful provisions will be found in 5 Geo. II.

5 Anne, c. 2, is worthy of attention for having first authorized and directed the choice of provisional assignees by commissioners, and of general assignees by the creditors. The chancellor derived no direct concession of authority either from this statute, which expired, nor from the 10th of the same reign. 5 Geo. I. c. 24, was the next statute on the subject of bankruptcy. It is expired, but it was an important act. It incorporated all the improvements of antecedent statutes, and introduced much new matter. The 24th section gives the chancellor power to remove the assignees, and vacate the assignment. These are two copious sources of jurisdiction. They were transferred verbatim to 5 Geo. II. 7 Geo. I. contains nothing relevant to this inquiry. We come next to 5 Geo. II. c. 30. This is the most operative and comprehensive of the existing statutes. It comprehends the most useful provisions of the expired statutes of Anne and George I., and in several instances modified the laws then in force. It had become necessary by the expiration of the 5 Geo. I., which threw the system and the proceedings instituted under it into great confusion. It is long and minute in details, and I shall only refer to such parts of it as relate to the power of the chancellor. The third section authorizes him to enlarge the time for the bankrupt to surrender, and is taken from a corresponding provision in 5 Anne, transferred to 5 Geo. I. The 10th requires the chancellor's confirmation of the certificate of the bankrupt's conformity. It is taken from 5 Geo. I. c. 24, §§ 5, 16. By the 23d section the petitioning creditor must give bond to the chancellor to prove his debt and the act of bankruptcy. The 24th section repeats from the 26th section of 5 Geo. I. c. 24, the authority to supersede the commission. The 31st gives authority to remove the assignees, and is taken from the 24th section of 5 Geo. I. c. 24. By the 36th section the chancellor may discharge the bankrupt when committed by the commissioners. The 41st gives him power to direct the proceedings to be recorded, and appoint a secretary. It is taken from the 30th section 5 Geo. I. c. 24. Several other statutes were passed during the reign of Geo. II. and many in that of Geo. III., altering or amending the bankrupt acts of England and Ireland. But I have found nothing in them enlarging the chancellor's power or jurisdiction, except the 12th section of 49 Geo. III. c. 121. This authorizes the chancellor to order the payment of dividends by the assignees, instead of leaving the creditors to their actions against them. This provision is closely connected with the question before me, and will presently be made the subject of more particular remark.

From this analysis of the British bankrupt acts, it will be seen that the direct and express authority of the chancellor in bankruptcy depends upon a few general provisions. They are certainly very comprehensive in their terms. They reach over a wide field of jurisdiction, and, upon common-law rules of construction, convey much incidental power. The authority expressly delegated is—1st. To appoint the commissioners. 2d. To supersede the commission. 3d. To enlarge the time for the bankrupt's surrender. 4th. To punish for concealing him. 5th. To remove the assignees and appoint others. 6th. To order them to pay dividends. In virtue of these enumerated delegations of power, the whole administration of a bankrupt's effects is now said to be vested in the chancellor, although this administration is given immediately by the legislature to the commissioners; yet the chancellor, as is now conceded, in virtue of his power to appoint and to remove, to create and to annihilate these officers, possesses

the authority to control and direct them in all their acts, and thus effectually to exercise the whole jurisdiction. It would be very difficult, and not necessary, to enumerate the very various instances in which his jurisdiction is said to be derived from his superintending authority over the commissioners. No case can now be suggested in which he would not interfere to direct and control the commissioners, and all others through whose agency the commission which he issues is to be executed. An appeal lies to him from all their decisions, and all their proceedings are subject to his revision. 2 Madd. Ch. Prac. p. 452.

The commissioners are said to have only an authority, not a jurisdiction. That is vested in the great seal. Ld. Raym. 580. They are called "assistant judges," given to the chancellor to enable him to execute the bankrupt laws. His control over them is continual. 2 Madd. Ch. Prac. p. 452. I am supported, too, in stating the extent of this jurisdiction by both Cook and Cooper, and especially Christian, on whom I have chiefly relied. This view of the subject is also confirmed by various cases in the two Veseys, Atkyns, &c. Lord Hardwicke has contributed much to the extension and firm establishment of the chancellor's authority in bankrupt cases. He took a very large principle as to the jurisdiction in bankruptcy. He thought that, the legislature having committed that jurisdiction to the lord chancellor, he had, when he exercised it, all the authority he possessed when sitting in the court of chancery. Ex parte Cawkwell, 19 Ves. 233. 1 Rose, 313.

The reasoning by which this construction of the statutes and this jurisdiction is maintained I shall not undertake to examine farther. I have sought only to ascertain the extent of it, and the manner in which it is exercised. The extent of it is, I think, sufficiently apparent. The jurisdiction is not in the court of chancery, but in the individual who holds the great seal. 2 Christ. Bankr. 214, 215; 6 Ves. 781. It is exercised summarily upon petition always, unless the chancellor in his discretion thinks proper to direct a bill to be filed with a view to a more solemn and formal investigation of a difficult question, as where property is sought to be divested, or to ascertain whether a disputed debt is due. 2 Christ. Bankr. 220, 225. There is no appeal from the chancellor's judgment in bankruptcy; and for this reason, too, he sometimes gives the party leave "to bring an action, or to try the question by an issue, that it may be decided by the courts of law and carried up." Or "if it is an equitable question of importance, he gives leave to file a bill, that it may be carried to the house of lords." 2 Christ. Bankr. 232; 2 Ves. & B. 215. But in every case he can give the same relief upon a petition as upon a bill filed. 1 Atk. 76. His order upon a petition in bankruptcy operates as effectually as upon a bill filed. Billon v. Hyde, 1 Ves. Sr. 327; 1 Madd. Ch. Prac. 131.

It is now proper to refer to the act of congress, to ascertain whether its provisions upon the principles of construction adopted in England, convey to the district judge the same jurisdiction, as is exercised by the chancellor over this branch of the bankrupt system. Without looking into the minor details of the act, it will be enough to show that, although it does not contain the provisions in the late acts of parliament, which give to the chancellor direct authority over the assignees, yet it contains those precisely upon which the general jurisdiction in bankruptcy is maintained. By the second section the district judge is authorized to appoint the commissioners. It adopts, with only the necessary and proper variations, the words of 2d section of 13 Eliz. By the third section he is authorized to supersede the commission in cases there specified. Under the 19th, he may enlarge the time for the bankrupt to surrender. The 28th authorizes him to issue a new commission where the bankrupt has given a preference under the first. Under the 36th, he grants the certificate of the bankrupt's discharge. Under the 47th, he establishes the compensation to the commissioners. The 51st directs the proceedings to be filed in the office of the clerk of the district court. The 52d directs the judge in his discretion to grant a trial by jury in certain cases. Among these will readily be recognized all the great provisions of the British acts upon which rests the chancellor's general authority, and the same course of reasoning which confers that upon him must sustain the jurisdiction of the district judge. The jurisdiction is also personal here. It is not in the district court, but in the individual who happens to hold the office of district judge. For this reason there can be no appeal from his decision in bankruptcy. Judge Cooper, in his treatise, presumes there is, but he is obviously mistaken. If the decisions in bankruptcy be not decisions or decrees of the district court, they cannot be the subjects of appeal, under the "Act to establish the judicial courts of the United States." There is no appeal provided for in the act which confers the jurisdiction, nor in any subsequent law. It therefore cannot and does not exist.

From this summary view of the general jurisdiction in bankruptcy, as derived from the comprehensive provisions of both the British and American acts, I shall proceed to examine the authority of the chancellor there and the district judge here over the assignees. In many cases, for many purposes, and to a certain extent, the great seal has always exercised jurisdiction over the assignees, as incident to its general authority, and as necessarily flowing from its right to superintend the acts done in virtue of the commission it issued. Its right in other instances to control and coerce the assignees is expressly conferred by statute. Assignees originally form-

ed no part of the machinery by which this system was put in operation. In the time of the lords, as they are called, as well as for the time subsequent to 13th Eliz., the commissioners themselves collected the estate, and distributed the dividends. The 2d section of 13 Eliz. c. 7, gave the commissioner power to dispose of the bankrupt's lands, goods, and chattels, upon which a great doubt arose whether this embraced debts due or to be due to the bankrupt. This historical fact explains the preamble to the 13th section of the next statute,—that of Jac. I. c. 15,—which gives the commissioners the power to grant and assign, or otherwise to order and dispose all or any of the debts due or to be due, to and for the benefit of the said bankrupt. Under this statute it soon became the practice to assign all the debts as a matter of convenience to one person, in trust for himself and the rest of the creditors; and this assignee was of course chosen by the commissioners alone. This practice continued for a century, and rested solely on the authority of the statute of James. These assignees were styled the "assignees of the commissioners." This mode of managing the estate was found useful and convenient; and in 5 Anne, c. 22. § 4, general assignees of the bankrupt's estate were directed to be chosen by the creditors. The next section (5) authorizes the temporary or provisional assignee of the commissioners.

These provisions have been transferred from one statute to another not materially altered, and now stand in force in 5 Geo. II. and in our act of 1800. It is said in one of the books, Chit. 1, 315) that "there is a particular mystery thrown over the jurisdiction in bankruptcy, which can only be developed by attention to the historical progress of the law." This branch of it,—the authority of the chancellor over the assignees,—is certainly involved in some perplexity; but I have traced with some care the means successively employed to obtain from the assignees the fund they had collected. Before the statute of James, which first authorized assignments, the commissioners who then had the distribution of the estate were liable to an action by each creditor for his dividend. When, in virtue of that statute, assignments in trust for the creditors were introduced, the commissioners took a bond from the assignees with proper covenants, and if they refused to pay over they brought suits on the bond. Thus the practice stood until 51 Anne, which authorized the appointment or choice of general assignees of the bankrupt's estate. Here follows a period of 12 years from 5 Anne, or 1706, to 5 Geo. I., or 1718, during which I have not been able to ascertain with precision the course pursued against assignees who refused to pay over dividends. I had not within my reach the books reporting the cases during that period. It is pretty evident, however, that creditors were still obliged to resort to suits at law or in equity to obtain their dividends, and that the chancellor did not interfere summarily to compel them to pay over the funds in their hands. 5 Geo. I. c. 24, § 24, gives the chancellor much additional power. By that section he is authorized "to vacate the assignment and make such order in the premises as he shall think just and reasonable." This section was transferred to 5 Geo. II. c. 30, § 31.

There is an inaccuracy, even in Christian, in speaking of the introduction of this improvement in the bankrupt system. Christ. Bankr. 1, 316. In a note he states that the chancellor never exercised a summary jurisdiction over assignees, until the 31st section of this statute was passed, whereas it was copied verbatim from Geo. I. c. 24, § 24. In consequence of this new authority, Lord Hardwicke called an assignee "an officer of the court," "an officer of the commission," and held them strictly subject to the direction and control of the great seal. 1 Atk. 90. Upon petition, he ordered assignees to account and to pay dividends, although creditors might still proceed at law, if they preferred that course. But 49 Geo. III. c. 121, § 12, puts the whole subject under the exclusive jurisdiction of the great seal. It declared that no action should be brought by a creditor for his dividend, but that he should petition the lord chancellor, who shall make his order for the payment of the dividend and interest, if the case shall require it. Thus the jurisdiction of the chancellor has been consummated. It now embraces the whole system. It is adequate to every case and every emergency that can rise in the course of its administration. He grants relief and redress to all parties interested in the proceedings, the bankrupt as well as the creditor, and that in a summary way. But these important provisions of Geo. II. and 49 Geo. III. formed no part of our bankrupt act. The last was not enacted in England until after our act was repealed; and the other, although in part transferred to it, received a fatal modification. The 8th section of the act of congress, which was intended as a substitute for the 31st of 5 Geo. II. c. 30, gives the right and the power to remove the assignees, not to the judge, but to the creditors, and thus frustrates its original object and efficacy. The alteration was made, no doubt, without adverting to the important effect it was to produce upon the administration of the system.

The chancellor's summary jurisdiction over the assignees commenced only with his power to remove them. It was never exercised before. 1 Christ. Bankr. § 315. And that power is not possessed by the district judge. He must, of course, abstain from the exercise of a jurisdiction which in England it was supposed to confer. The jurisdiction here, then, over the assignees, stands upon the ground that it did there prior to the year 1718. Before that period, the chancellor did

not proceed against the assignees, in a summary way, to compel them to pay over money either to the creditors or to the bankrupt; but he always held a general inspection over the proceedings had under the commission which he issued. It was not only conceded as his right, but believed to be his duty, to see that those who in any manner derived their authority under it proceeded in conformity to law; that neither the privileges nor powers it conferred were neglected or abused. Thus it is said in one of the cases (1 Burrows, 476), that the bankrupt act gives the management of the estate to persons chosen by the creditors, but under the direction of the commissioners, and the general control of the great seal. The creditor and the bankrupt had at all times a right to petition the chancellor for an investigation of the proceedings under the commission, that the one might ascertain whether any, and what, dividend was due to him; and the other, whether he was entitled to a surplus. These examinations were always instituted and conducted under the direction of the great seal. They were never compelled to invoke the aid of other tribunals to obtain a view of what had been done under its authority. I would not be understood to use these terms in a vague and indefinite sense, but to mean the power only which is necessary to a due and efficacious exercise of that expressly given.

It cannot be supposed that the judge, after having granted the commission, was to cast it to the winds, without regard to what was done under it; without seeing that the officers whom it called into existence and the person who derived authority from it, executed faithfully the statute under which it was issued. This is the inquiry and the only proceeding I propose now to institute. I propose to inquire whether the commission issued in this case has been executed, and how? Whether the estate of the bankrupt has been collected, and how disposed of? If, when the proceedings are fully developed, and the facts fairly stated, there shall appear to be a surplus it will then be time enough to consider how the bankrupt or his representative is to obtain it. With my present view of the subject, I should decline further interference; and it may be that here, though not in England, he would have to resort to his action at law, or his bill in equity. As to the manner in which the inquiry is to be made, I consider that to be entirely under the direction of the judge. He may do it in person, or through the agency of others. It is said by Lord Hardwicke, in a case in 2 Ves. Sr. 388, that the proceedings under commissions of bankruptcy have been framed by way of analogy to the proceedings of the court of chancery; and wherever an account is to be taken the court, by its ancient constitution, is to be aided in taking it by some proper officer. As both jurisdictions are there vested in the same person, it is more convenient to refer the accounts in bankrupt cases to a master. For this reason alone that officer is always selected. Here it may be to the clerk or others, at the direction of the judge.

I have now proceeded in this investigation as far as was rendered necessary by the case before me. It is evident, I think, by reason of omissions and defects in the bankrupt act of 1800, that the jurisdiction of the judge is too limited to administer effectual relief in all cases to the bankrupt and creditors against the assignees. Over the commissioners it appears to be sufficiently ample, and upon them I shall make an order, with a view to obtain the information sought for by the petition of the bankrupt. This, it seems, is the only and the first case in this district in which a proceeding like the present has been instituted, and I am free to admit that it is attended with some difficulties. If the legislature should, at any future period, pass another bankrupt act, it seems to me important that some adequate provisions should be introduced to establish and define the ultimate jurisdiction in cases of this sort. Neither the bankrupt nor the creditors should be left at any stage of the proceedings to tedious and doubtful remedies, in order to arrest and punish abuses, nor compelled to invoke the aid of other tribunals to effectuate the great objects of the act. The district judges, if invested with the jurisdiction in the first instance, should be clothed with ample power to control and direct the conduct and proceedings of all persons directly or indirectly acting under the commission; the assignees should be made accountable to them, in every stage of their proceedings, and, upon the petition of the bankrupt or a creditor, liable to their order for the payment of a surplus or dividend in their hands. Proper modifications of the 31st section of 5 Geo. II. c. 30, and 12th of 49 Geo. III. c. 121, seem indispensable to a prompt and effectual execution of the system. The wise and discreet spirit of all our institutions would naturally suggest an appeal from the district judges to the circuit judges, or still farther, if that should be deemed expedient. This would be compatible with the well-known course, simplicity, and order of our judicial establishments, and would avoid all interference and collision of authority or jurisdiction.

Upon the delivery of the foregoing opinion, the assignees conformed to the order made by the judge, and rendered their accounts to him, in relation to the bankrupt's estate. To these accounts Mr. Sands filed sixteen exceptions, and it was decided by the judge that they were proper exceptions; that a part of them involved simple questions of fact, and a part of them questions of law, proper for the district judge to decide, and they fell within his exclusive jurisdiction; and that, if the errors alleged in the exceptions did exist, he should order them to be corrected; that questions might arise in the progress of such an inves-

tigation as then engaged the attention of the court; which it would be proper, to refer to a court of equity for a solemn and formal decision; and whenever they might arise he should refer the parties to that jurisdiction. But he conceived that the chancellor in England, sitting in bankruptcy, as he himself was then sitting, would never direct a bill to be filed to ascertain whether a sum of money had been received by the assignees on a certain day, and whether they had caused the sum to be credited in their accounts; nor would he inquire in that manner whether the assignees could become purchasers of the bankrupt's estate.

Recently, an application was made to his honour, Judge Livingston, by a bill in equity, to take cognizance of the case in the circuit court of the United States, and for his granting an injunction to enjoin the bankrupt and his attorneys, counsel, and solicitors from proceeding farther in the district court. It was decided by the circuit judge that he had no jurisdiction in the matter, there being no provision made for the exercise of the jurisdiction of the circuit court, either by the bankrupt law of 1800 or by the judiciary act of 1789, or by any other law. The district judge was therefore left to proceed in accordance with his own opinion.

Case No. 12,303.

SANDS v. CHAMPLIN.

[1 Story, 376.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1840.

WILLS—CHARGE ON LAND—CONSTRUCTION.

1. Where a will gave certain legacies and bequests to A, and also devised certain real estate to him, annexing a "condition" or "conditions" thereto, and made certain bequests and legacies to B, directing A, in a subsequent clause, to pay all the just debts of the testator. It was *held*, that under the circumstances, the "condition" or "conditions" referred to the payment of the testator's debts, and were not a mere charge upon A personally, but, together with the legacies and bequests to B, were a charge upon the real estate.

[Cited in Jordan v. Donahue, 12 R. I. 201; Woonsocket Inst. for Sav. v. Ballou, 16 R. I. 354, 16 Atl. 146; Powers v. Powers, 28 Wis. 662; Thayer v. Finnegan, 134 Mass. 65; Amherst College v. Smith, Id. 546.]

2. Where a testator devises an estate to a person, and in respect thereof charges him with the payment of debts and legacies, the charges are always treated as charges in rem, as well as in personam, unless the testator uses some other language, which limits, restrains, or repels the construction.

Bill in equity [by Anna Sands against John E. H. Champlin] to enforce a legacy in the will of Ray T. Sands, deceased, as a supposed charge on certain real estate devised by him to Samuel P. Robinson, under whom the defendants claimed title, as purchasers of the estate. The material clauses in the will were as follows: The testator, in the second clause of his will, says: "I give and bequeath unto my wife Anna, twelve bushels of good Indian corn, five bushels of barley, eight bushels of potatoes, three bushels of garden vegetables, twelve pounds of good sheep's wool, one hundred weight of new milk's cheese, twenty weight of good butter, two hundred weight of good pork, and fifty weight of beef. Also, a loom, with all its necessary apparatus; all my household furniture, except what I shall hereafter dispose of. The above mentioned supplies are to be delivered annually, as long as she remains my widow, and no longer; the other bequestments are to her, her heirs and assigns. I also wish her to have and enjoy, during her widowhood, the occupancy of my south room, and the chamber over the same, the entire use of the chimney closet, one half of the wash-room, and one half of the closet; the entire use of the northwest department of the cellar, and a privilege in the smoke room, and the entire use of the north garret, with the privilege of passing to the above departments, when necessary for herself or family. I further give her the pass-way out of either of the outside doors, and such a privilege as she may wish or desire in the green yard; also a privilege of keeping a reasonable quantity of poultry, not those that might do much injury to the occupier; some is always expected to be done, where poultry is raised." The testator then proceeds in the next clause: "I give and devise unto my nephew, Samuel P. Robinson, my homestead farm, with its buildings and appurtenances thereunto; also my farm on the west side of the island, commonly called the Kentucky Farm. Two rights of Tug swamp; one in the Georgia swamp, the other in the Long Lot swamp, as they are called, with all the privileges and appurtenances to each tract belonging, to him, his heirs and assigns for ever, with such reservations as I shall hereafter make, and one express condition. I give and bequeath to the said Samuel P. Robinson my gray mare and old horse, fifteen sheep, and all my neat stock, except what I shall hereafter dispose of, all my farming utensils, my sideboard, desk, four chairs, kitchen table, and one good bed and bedding. Also, the privilege of carting and securing one half of the sea-weed, that annually comes to my landing on the east side of the island, and carting it therefrom, when convenient. Also the privilege of landing and securing a boat. These bequests are to him, his heirs and assigns for ever, with the conditions that will be hereafter expressed; my clock, being nailed to the house, of course is the property of Samuel." The next clause is: "I give unto my black woman Phillis, her entire liberty; but should she choose to remain with my nephew, Samuel P. Robinson, and work as she did for me, I desire the said Samuel P. Robinson to give her the same fare and usage, and the same privileges she enjoyed, particularly the room she

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

now occupies, and finally such as she received from me; I also give her all such articles as she may claim, the determination of which I submit to my wife, however." The next clause is: "I give unto my black boy John, should he continue in the service of my family, that is, my wife or Samuel P. Robinson, until he arrives at the age of twenty-one, the improvement from that time of the cellar house on the Kentucky farm, the garden south of the house, as it is now fenced, and the lot west of the cellar, as it is now fenced; to him and his family during his natural life; it being one of the reservations I made to Samuel P. Robinson, it is to be understood, that he lives on the premises himself; if he lives in my family until he arrives to the age of twenty-one, I order the annual profits to him from my death. When he goes on the premises to live himself, he is to suffer no other family to live with him, that would be injurious to my other property; then should he occupy the house and land in the manner just mentioned, I then give him four loads of tug annually, during five years, after he shall arrive at the age of twenty-one, to be dug out of the Rodman swamp, so called, in an economical and saving manner, with the privilege of spreading, curing, and carting, where it will be most accommodating to all parties concerned. I also give him the privilege of carting sea-weed, or any other article he may need, on or off said premises, for his own use during the term, where no essential injury will arise." The testator afterwards, in another clause, says: "I order and direct, that one quarter of an acre of land in the northeast corner of my homestead farm, to be set apart and kept sacred as a repository for the dead, for myself, my family, and my heirs, and such of my relatives, that may choose to be buried there. I direct Samuel P. Robinson to have it decently fenced for that purpose; this is a reservation. In consideration of the devises and bequeaths to Samuel P. Robinson, I order and direct as follows: To provide ten loads of good tug, and to have it housed for the use of my wife, at the season such firing is usually secured, to furnish her with a horse, when she wishes to ride, to supply her with all the articles I have bequeathed, and eight dollars in money; the articles and money on or before every Christmas, during the time of her widowhood; the tug also to be delivered annually, as long as she remains my widow; the above articles not to be furnished, if she insists on her dower, as it will be plainly understood to be my meaning in my bequeaths to her. I further order him to pay John E. Sands agreeable to the tenor of the gift made him." He next adds: "To my mother, six months after my death, the legacies; six months after my death, to my sisters and Mary A. Clarke; I also direct him to pay all my just debts; as it is my meaning and will, to leave all my property I have not disposed of, as well that in the granary, as that may be a growing at the time of my death, to aid him in the discharging them." Then follows this clause: "In consideration of the devises and bequeaths to Ray T. Sands, I order him to pay five dollars annually to my wife, as long as she remains my widow; and three years after my death, I direct him to pay my brother, John E. Sands, or his heirs, one hundred dollars, interest being allowed on the two last years." The testator afterwards appointed his wife executrix, with John E. Sands, executor of the will. These are the only parts of the will, bearing upon the points argued in the cause. The will was made on the 13th of October, 1818, and appears to have been proved in the probate court in September, 1819.

R. W. Greene and A. C. Greene, for plaintiff.

Mr. Snow, for defendants.

STORY, Circuit Justice. The only important question in the present case is, whether the legacies or bequests unto Anna Sands, the widow of the testator, and the plaintiff in the suit, constitute a charge on the real estate devised by the will to Samuel P. Robinson. If they do, then the plaintiff is entitled to have a decree against the defendants; otherwise, the bill ought to be dismissed. It is observable, that the principal part of the legacies and bequests, at least of that part now in controversy, consists of annual supplies of produce and other articles, which are the common produce, growth, contents, or accompaniments of a farm; and may naturally, therefore, be presumed, from the very language used by the testator, to be exactly those things, which were, and would be, the growth, produce, contents, or accompaniments of the homestead farm devised to Robinson. That farm included the testator's mansion house; and it was manifestly contemplated by the testator, that his wife should, during her widowhood, hold and occupy a part thereof for her own use. It might, therefore, be fairly inferred, that the produce and other articles were to come from the same farm. This is not, in the construction of a will, like this, drawn by an uninstructed yeoman, an unimportant circumstance. If the legacies (or annuities, as perhaps they may more properly be called) be charged on the homestead farm, then it is a just conclusion, that the language used meant to charge it also upon all the other real estate devised to Robinson. In other words, the charge was designed to be a charge upon the real estate, and also upon the person of the devisee, in respect of the devise, and the benefit thereby conferred upon him. It by no means follows, in cases of this sort, that because the charge is on the real estate, it is so exclusively; for it may be a charge on the real estate, and also on the person of the devisee, in respect of the devise. The argument, therefore, that es-

tablishes the one, by no means repels the other. This doctrine was sufficiently shown to be supported by principle and authority, in the case of Gardner v. Gardner [Case No. 5,227]. The devise is to Robinson "and his heirs and assigns, with such reservations as I (the testator) shall hereafter make, and one express condition." The testator, in the same clause, afterwards adds: "These bequests are to him, his heirs and assigns for ever, with the conditions, that will hereafter be expressed." What were these reservations? The reservations are sufficiently manifest. They include, by implication, the part of the homestead devised to his wife during her widowhood, and that part devised to the black woman, Phillis; and by express declaration, the devise to his black boy, John, "it being (as the testator states) one of the reservations I made to Samuel P. Robinson." Another express reservation from the devise to Robinson is, the quarter of an acre in the northeast corner of the homestead farm, to be set apart, as a family repository for the dead.

But what is the condition, or what are the conditions referred to by the testator? We observe, that the expression in one place is, "one express condition;" in another, "the conditions, that will be hereafter expressed." The counsel for the plaintiff contend, that the condition or conditions, here referred to, are the due payment and discharge of the legacies to the plaintiff, and perhaps also the legacies to the other persons named in the will, which are to be paid and discharged by Robinson. The counsel for the defendants, on the other hand, contends, that the words refer to the devise over, after the death of Robinson, if he should die without lawful issue, to Ray T. Sands, of all the estate devised to Robinson, with the same reservations; and the further provision, that in case Robinson should die without issue, that the wife of the testator (the plaintiff) should improve the estate so long, as she remained his widow. Perhaps it is not easy, in a case of this sort, where the will was drawn by an illiterate person, in loose and inaccurate language, to say exactly what the testator did actually intend by the words "condition" or "conditions." If I were compelled to give a construction to the words, with reference to the clauses of the will, to which they might appropriately apply, I should incline to apply them to the clause, in which the testator directs Robinson "to pay all my just debts, as it is my meaning and will to leave all my property I have not disposed of, as well that in the granary, as that may be growing at the time of my death, to aid him in discharging them." It is plain, here, that the testator intended to charge Robinson, in consideration of the devises and bequests to him, with the payment of all his debts. Such a charge of debts upon a devisee, in respect to lands devised to him, has always been held to be, not a mere charge on the devisee personally, but a charge on the lands. This is clearly established in the cases of Clowdsley v. Pelham, 1 Vern. 411; Alcock v. Sparhawk, 2 Vern. 228; and Awbrey v. Middleton, 2 Eq. Cas. Abr. p. 497, § 16,—which fall far short of the stringency, in point of language, which is to be found in the present will.[2] If the language used in this will makes the charge of the debts of the testator a charge on the land devised to Robinson, there is, certainly, very strong reason to apply the same interpretation to the legacies to the plaintiff, if not to the other legacies payable by Robinson. Each of them may be properly deemed conditions annexed to the estate. But I lay no particular stress upon the words "condition" or "conditions," in this will. My judgment proceeds upon the ground of the intention of the testator, derived from the language of the will, with reference to the devise to Robinson. The testator says, "In consideration of the devises and bequests to Samuel P. Robinson, I order and direct (him) as follows;" and he then directs him to provide and supply and furnish his wife with the very articles now in controversy. Here, then, there is a positive direction and order, that these legacies shall be paid to the plaintiff by Robinson. Such an order and direction is in the language of command, and imports a trust fixed upon the estate devised; for it is a charge, in consideration of the devise; or in other words, it is a charge upon the estate in the hands of the devisee. The reasonable intendment of the will was, to provide a sufficient maintenance for the plaintiff during her widowhood, and to have the supplies annually furnished. Now, if the will were to be construed a mere personal charge on Robinson, it is very clear, that, in case of his insolvency, the widow would be left without any maintenance. In case of his death in the lifetime of the testator also, there is no small ground to contend, that the devise might be a lapsed devise, and that the other clauses in the will, devolving the estate and the payment of the legacies on Ray T. Sands, might not apply to such an event; and then, the widow would be left without any maintenance. But if the legacies to the plaintiff are treated, as a charge on the estate devised, the charge will survive, and may be enforced in either event. To carry into effect, then, the obvious intention of the testator from the professed objects of these provisions, ut res magis valeat, quam pereat, (as one may say,) it seems necessary to give this interpretation to the clause. It is at once reasonable, safe, and in entire harmony with the words. Indeed; I understand it to be a general rule in the construction of clauses of this sort, that where the testator de-

[2] See many of the cases collected in 2 Pow. Dev. (by Jarman) pp. 644–663, c. 34. See, also, Anon., Freem. 192; Miles v. Leigh, 1 Atk. 573; Cary v. Cary, 2 Schoales & L. 173, 188; Warren v. Davies, 2 Mylne & K. 49.

vises an estate to a person, and in respect thereof charges him with the payment of debts and legacies, the charges are always treated as charges in rem, as well as in personam, unless the testator uses some other language, which limits, restrains, or repels that construction. Upon no other principle can many cases in the books admit of any rational explanation.

There is an anonymous case in Freem. 192, which fully sustains this doctrine. It was there said: "If a man, by his will, deviseth his lands to J. S. and doth desire, that the said J. S. should pay his debts, or if it be, he, the said J. S., paying his debts, or if, immediately after the devise of his lands, he doth appoint or desire, that his debts should be paid, or, if he useth any expression in his will, whereby it appears, that he had any intent to charge his lands with his debts; in such case his lands will stand charged." Now, the doctrine, here laid down, is applied to words of desire, or directions to the devisee to pay debts, and even to a desire immediately after a devise, that his debts should be paid; so as to hold them to import, per se, a manifest intention to charge the real estate devised with the debts. In the present case the words are "order and direct," "in consideration of the devises," which are far more cogent. The case of Miles v. Leigh, 1 Atk. 573, approaches still nearer to the present. There A. devised his real estate to his wife for life, and then to his son R., and gave his daughter C. a legacy of £150, to be paid her in a twelve months' time after R. should come to enjoy the premises, and if R. should die before his wife, then, that H. (another son) coming to the possession of the premises, and surviving his mother, pay to the daughter C., £200; and the testator made his wife his executrix. The sons died before the mother; but R. left a son, against whom the bill was brought by the daughter for the legacy of £200. The question was, whether the legacy was charged on the real estate. The master of the rolls (Mr. Verney), and afterwards Lord Hardwicke, upon an appeal, held the legacy to be a charge on the real estate, and decreed payment out of it accordingly. On that occasion Lord Hardwicke said; "It is objected, that it is not said, to be paid out of the estate at Hills, nor is it said by whom it is to be paid. But there are many cases, where it is neither said to be paid out of the estate, nor by whom, yet has been considered as a charge upon the estate, where the general intent of the testator has appeared. But here, the whole will being taken together, the subsequent clause directing Henry to pay, he coming into possession, &c. is a plain declaration of the testator's intent, that the person, who possessed the estate, should pay the legacy. The testator intended it should come out of both estates, and he has charged his son in respect to the whole estate he was to have; and that is generally the rule of proportion in charging the son for younger children's fortunes, in respect of the value of the whole estate, that is to come to him. The words are, I think, sufficient to charge the real estate; and as to the personal, it is given absolutely and entirely to the mother; she might spend it, or do what she pleased with it. Nor is the legacy given to be paid at the particular time of the death of the mother; so that it is impossible to imagine, that could be the fund intended by the testator." Now, every word, here stated, applies with increased force to the present case, where the legacies were payable annually. It is plain, that the wife was to receive the same during her widowhood. And yet, if Robinson should die during the life of the wife, leaving issue, they would not be responsible for the charge to her personally; nor, according to the argument, would the estate be chargeable. So that the very objects of the testator would be defeated. His intention was to have a fund for the security of the payment durante viduitate, which can only be by construing the will, as making the legacies a charge on the estate, as well as on the devisee personally, in respect to the estate.

The case of Cary v. Cary, 2 Schoales & L. 173, 188, presents quite as striking an analogy. There, the testator, after sundry bequests, gave to his son, George Cary, "all the rest, residue, and remainder of my real and personal estates, not hereby disposed of; and I do hereby order and direct my said son to pay off my just debts." Lord Redesdale held the debts to be a charge on the real estate. His language was; "He (the testator) charges all his debts on what he gives to his eldest son; that is, all his simple contract debts, as well as the other debts. He says, in effect, I direct they shall be paid out of what I give George Cary. It is not a personal obligation; but an obligation in respect of the property given him." As to its not being a personal obligation, I greatly doubt; but as to the other language, its clear import decides the present question. The testator here expressly charges Robinson with the payment of the legacies, "in consideration of the devises and bequests to him"; that is, as has been already said, and it agrees exactly with the language of Lord Redesdale, it is a charge on him in respect of the property given him by the will; and therefore a charge thereon. Upon the whole, my judgment is, that the legacies given to the plaintiff (Mrs. Sands) are a charge on the real estate devised to Robinson, and that she ought to have a decree accordingly, for the due payment and discharge thereof.

Case No. 12,304.

SANDS v. DELAFIELD.

[2 Paine, 409.] [1]

Circuit Court, D. New York. 1856.

BANKRUPTCY — AWARD TO ASSIGNEE — WHO ENTITLED TO SUE.

Upon the construction of the following act of congress, viz. [6 Stat. 287]: "Be it enacted, &c., that there be paid after the first day of March, one thousand eight hundred and twenty-three, out of any moneys in the treasury not otherwise appropriated, to Ebenezer Stevens and Austin L. Sands, representatives of Richardson Sands, deceased, to Robert Morris, surviving assignee under the late United States law of bankruptcy, of Comfort Sands, or to whomsoever shall appear to the comptroller of the treasury to be entitled to his share, and to Joshua Sands, the sum of twenty-two thousand nine hundred and seventy-eight dollars, in full satisfaction of their claim upon the United States, under an award of referees in favor of them and others, dated at New York, on the twenty-fifth of October, one thousand seven hundred and eighty-seven, and the contracts therein referred to, one-third part of which sum is to be paid to each of the said Richardson, Comfort and Joshua Sands, or to their legal representatives as above mentioned. Provided, that before such payment each of the said parties shall relinquish to the United States all further claim against them on account of said award, and the several contracts upon which that award was founded,"—it was *held*, that Comfort Sands could not be entitled in his own right to any part of the money mentioned in the act; and semble, as there was nothing to prevent a suit's being maintained in the name of any one who was legally entitled, it was unnecessary to use his name to enforce the rights of others.

Motion to set aside a nonsuit.

The declaration was in assumpsit for money had and received, &c., and to which was pleaded the general issue. At the trial it was admitted on the part of the defendant, that on the 15th of December, 1823, he had received from the treasury of the United States the sum of 7,659 dollars 64 cents, by virtue of a power of attorney from Robert Morris, surviving assignee under the bankrupt law of the United States, of Comfort Sands, the plaintiff. It was also admitted that the defendant had received notice not to pay over or part with the money, as it belonged to the plaintiff and not to his assignees. The plaintiff's discharge under the bankrupt law was also admitted. The plaintiff then offered in evidence an act of congress, of March 3d, 1823 [6 Stat. 287], entitled "An act for the relief of Ebenezer Stevens and others," and which was as follows, viz.: "Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that there be paid after the first day of March, one thousand eight hundred and twenty-three, out of any moneys in the treasury not otherwise appropriated, to Ebenezer Stevens and Austin L. Sands, representatives of Richardson Sands, deceased, to Robert Morris, surviving assignee under the late United States law of bankruptcy, of Comfort Sands, or to whomsoever shall appear to the comptroller of the treasury to be entitled to his share; and to Joshua Sands, the sum of twenty-two thousand nine hundred and seventy-eight dollars, in full satisfaction of their claim upon the United States, under an award of referees in favor of them and others, dated at New York, on the twenty-fifth of October, one thousand seven hundred and eighty-seven, and the contracts therein referred to; one-third part of which sum is to be paid to each of the said Richardson, Comfort and Joshua Sands, or to their legal representatives as above mentioned. Provided, that before such payment, each of the said parties shall relinquish to the United States all further claim against them on account of said award, and the several contracts upon which that award was founded."

The plaintiff then called Joshua Sands as a witness, who testified that he was one of the persons named in the act of congress, to whom the grant by the law of 1823 was made; that Comfort Sands, the plaintiff, was interested one-third in the grant; that Ebenezer Stevens married the widow of Richardson Sands. The act was passed for relief of three persons, Richardson Sands' representatives, Comfort Sands and witness, each one-third. The grant was made by congress for damages sustained under a contract made with Robert Morris, superintendent of finance, in December, 1781. Mr. Morris paid all that was due on the contract in 1783, and the grant was made by congress for damages sustained by the contractors, the three Sands, in consequence of the government not taking the surplus that had been purchased by the contractors. To this evidence the counsel for defendant objected, that congress had decided by the law to give and vest the share of the grant which related to Comfort Sands in and to his assignees; and the court sustained the objection, deciding that such was the construction to be given to the act of congress of March 3, 1823. The plaintiff then offered to prove "that the claim on which the act of congress was founded, grew out of a claim on the government of the United States in 1782, and that the claim was assigned, in 1797, to Nathaniel Prime, after the claim had been submitted to arbitrators appointed by the United States, and after such arbitrators had made an award in 1785 in favor of claimants; that Nathaniel Prime pursued the claim for many years before congress, and procured a law to be passed in 1799 on the subject; that the assignment to Prime was for the benefit of creditors, some of which creditors were not yet paid." The plaintiff also offered to prove the report, made in obedience of the act of congress of March 2, 1799 [6 Stat. 38], entitled "An act for the relief of Comfort Sands and others," of John Steele, the comptroller of the treasury of the United States, bearing date the 19th day of March, 1802, on the grounds, history and merits of the claim; and also the report of Albert Gallatin, secretary of the treasury of the United States, bear-

[1] [Reported by Elijah Paine, Jr., Esq.]

ing date the 29th day of March, 1802, on the same object. These reports cannot be condensed, and are too voluminous to be inserted. The plaintiff's counsel also offered in evidence the papers in bankruptcy of Comfort Sands, to show that this claim was never assigned to his assignees, but was excepted out of the assignment to them on the ground of the assignment to said Nathaniel Prime. The whole of the above evidence offered by the plaintiff was ruled out by the court, and a nonsuit granted.

S. P. Staples and J. Hoyt, for plaintiff.

T. A. Emmett and D. S. Jones, for defendant.

THOMPSON, Circuit Justice. Upon the trial of this cause, and also on the argument of the motion to set aside the nonsuit, it seemed to be assumed on both sides, that the money granted by the act of congress, passed March 3, 1823 [6 Stat. 287], and for which this action is brought, was a mere gratuitous bounty of the government, and I perhaps yielded too readily to this view of it; and if the law is so to be considered, it must be determined upon the face of the act to whom this bounty was intended to be extended. There would, upon this view of it, be no ground upon which an inquiry could be properly instituted touching any prior claim. The act would be the foundation of the claim, and the rights of parties under it must be determined by the act itself. Upon further consideration, I think this is not the view which ought to be taken of this act; but that it is to be considered as appropriating a sum of money in payment and extinguishment of a claim set up against the government. If it was intended as a mere gratuity, congress would not have left it open to doubt who the object of their bounty was. But the act expressly declares, that the money thereby appropriated shall be in full satisfaction of a claim upon the United States, under an award of referees dated 25th of October, 1787, and the contracts therein referred to; and this claim, it would seem, was not merely colorable, but had been sanctioned by an award of referees. The money was, therefore, to be paid to extinguish a real and substantial claim, to which congress considered the parties at least equitably, if not legally entitled; and before payment of the money was authorized to be made, the parties were required to relinquish to the United States all further claim on account of said award, and the several contracts upon which that award was founded. The act directs the money to be paid to Ebenezer Stevens and Austin L. Sands, representatives of Richardson Sands, deceased, to Robert Morris, surviving assignee under the late United States law of bankruptcy, of Comfort Sands, or to whomsoever shall appear to the comptroller of the treasury to be entitled to his share, and to Joshua Sands. The money now in question is the share of Comfort Sands, and unless he is entitled to it in his own right, the present action, I am inclined to think, cannot be sustained. I am unable to discover any plausible construction of the act which gives the money to him in his own right. It assumes that he has become a bankrupt, and assigned his property; and it seems, also, to imply, that there may be a dispute as to whom his share belongs. But the language of the act necessarily implies that this dispute is between third persons alone, and not between them and Comfort Sands. His right to it is deemed to be extinguished, by his assignment under the bankrupt law, or in some other way. Had he been considered as having any claim to it, the law would probably have directed the money to be paid to him, or to whomsoever should be entitled to his share; and the subsequent part of the act, which directs one-third part of the money appropriated to be paid to each of the said Richardson, Comfort and Joshua Sands, does not alter this construction. His name is here merely mentioned as representing one-third part. The former part of the act had directed the payment in gross, the latter part provides for its distribution in thirds. That such must have been the intention is evident from the circumstance that one-third is also to be paid to Richardson Sands, when, from the former part of the act, he is stated to be dead. His name is therefore mentioned only as designating one share. But this part of the act does not stop with directing the payment of one-third to be made to each of them, but it is to be made to them, or their legal representatives as above mentioned. Who are the legal representatives above mentioned? Ebenezer Stevens, Austin L. Sands and Robert Morris, must be the persons referred to. If the representatives of Richardson Sands only had been intended, the plural "their" could not have been properly used. If this view of the act be correct, Comfort Sands cannot be entitled in his own right to any part of this money; nor do I see how it can be necessary to use his name, to enforce the rights of others who may set up a claim to it. There is nothing to prevent a suit being maintained in the name of any one who is legally entitled to the money.

Although I am very strongly impressed with the opinion that the present action cannot be sustained, yet I would not be understood as having formed a definitive opinion upon that question. I have thrown out these views of the law, that the attention of the counsel may be more particularly directed to the construction of the act; and as some testimony was offered on the part of the plaintiff, and excluded, which might throw some light upon the real merits of the case, I am inclined to think the ends of justice will be promoted, by setting aside the nonsuit and granting a new trial, with costs to abide the event of the suit.

NOTE. In construing a statute, the intention of the lawgiver, when once ascertained, is

to prevail over the literal sense of the words which are used. Such intention is to be gathered from a consideration of all parts of the statute taken together. This may be presumed according to the necessity of the matter, and of that which is consonant to reason and good discretion. McDermut v. Lorillard, 1 Edw. Ch. 273. When the words of a statute are doubtful, general usage may serve to explain them; but the maxim, "Communis error facit jus," has no application to the usages of particular corporation towns or other places. Currie v. Page, 2 Leigh, 617. In the United States, where the legislative power is limited by written constitutions, a declaratory statute cannot have the legal effect of depriving an individual of a vested right, or of changing the rule of construction as to pre-existing law. Salters v. Tobias, 3 Paige, 338. In the construction of a statute, the whole law is to be examined together, and one part construed by another, with a view to give effect and operation to the whole, if it can be done. Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. 4. It is laid down in some of the books, that, in construing a statute, the title (being no part of it) is not to be regarded; but we have high authority in this country for a different rule of construction. The title, however, cannot control the express words of the enacting clause. Id. The preamble of a statute is a key to its construction. Id. Where a corporation was created to effect a particular object, as to make a river navigable, which was not so before, and no other mode of accomplishing that result was pointed out in the charter, it will be intended that the legislature designed that the river was to be made navigable in any of the known modes in which the navigation of the river may be improved. Id. Every law which is to wrest from an individual his property, without his consent, must be strictly construed. Id. 5. All statutes in pari materia are construed as one law. Id. Statutes should be construed with a view to the original intent and meaning of the makers, and such construction should be put upon them as best to answer that intention; which may be collected from the cause or necessity of making the statute, or from foreign circumstances; and when discovered, ought to be followed, though such construction may seem to be contrary to the letter of the statute. Id. 6. If laws and statutes seem contrary to one another, yet, if by interpretation they may stand together, they shall stand; and, when two laws only so far disagree or differ as that by any other construction they may both stand together, the rule that subsequent laws abrogate prior and contrarient laws, does not apply, and the last law is no repeal of the former. Id. Repeals of statutes by implication are things disfavored by law, and never allowed of but when the inconsistency and repugnancy are plain and unavoidable. Id. When it is manifestly the intention of the legislature, that a subsequent act shall not control the provisions of a former act, the subsequent act shall not have such operation, even though the words of it, taken strictly and grammatically, would repeal the former act. Id. A statute granting chancery powers to relieve against all penalties and forfeitures in actions at common law, it seems may be allowed, if such is its general language, to operate upon penalties and forfeitures already incurred at the time of its enactment; without violating the principle that vested rights are not to be disturbed; the party injured having still the right to recover all which in equity and good conscience is due to him. Potter v. Sturdivant, 4 Greenl. 154. Upon every sound principle of construction, a reference to a term used in a statute, must be in its direct and primary sense, as expressly defined, and not in an assimilated interpretation. And this rule is more especially applicable when the express meaning will accomplish all that was designed by the framers of the law. Per Strong, P. J., Cruger v. Cruger, 5 Barb. 225. The sixteenth section of the act of congress, passed on the 18th of February, 1793, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same" (1 Stat. 305), prescribes the manner in which foreign merchandise shall be specified in the manifest of a vessel going coastwise, and imposes a pecuniary penalty upon the master for failing to comply with it; but does not forfeit the goods. U. S. v. Carr, 8 How. [49 U. S.] 1.

SANDS (SALISBURY v.). See Case No. 12,251.

Case No. 12,305.

SANDS v. SMITH.

[1 Abb. (U. S.) 368;[1] 1 Dill. 290; 4 West. Jur. 189.]

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

REMOVAL OF CAUSES—SEVERAL DEFENDANTS.

1. A non-resident plaintiff, who has brought an action at law in a state court against a citizen of the state in which the suit is brought and a citizen of another state, the latter of whom voluntarily appears, may, by complying with the act of congress of March 2, 1867 (14 Stat. 558), obtain a removal of the cause, as to all the defendants, to the proper circuit court of the United States.

[Cited in Case v. Douglas, Case No. 2,491; Florence Sewing-Mach. Co. v. Grover & Baker Sewing-Mach. Co., Id. 4,883. Disapproved in Case of Sewing-Machine Cos., 18 Wall. (85 U. S.) 587. Cited in Hobby v. Allison, 13 Fed. 404. Cited, but not followed, in Hancock v. Holbrook, 27 Fed. 402.]

[Cited in Bury v. Irick, 22 Grat. 484; Cooper v. Condon, 15 Kan. 575; Galpin v. Critchlon, 112 Mass. 343.]

2. The various acts of congress relating to the removal of causes from the state to the federal courts, discussed, and their construction and operation explained by Dillon, circuit judge.

Motion to remand a cause to a state court. The plaintiff in this action, William G. Sands, was a citizen of the state of New York. Two of the defendants, Charles B. and Julia Smith, were citizens of the state of Nebraska; the third, Lydia A. Salisbury, was a citizen of Missouri. The plaintiff, in April, 1868, brought an action against the above named defendants, in one of the state courts of Nebraska. In 1869, and before final hearing or trial, the plaintiff filed his petition in due form, in the state court, for the removal of the cause to the circuit court of the United States for the district of Nebraska. He also filed in the state court an affidavit, pursuant to the act of March 2, 1867 (14 Stat. 558), stating therein that he had reason to believe and did believe, that from prejudice or local influence he would not be able to obtain justice in the state court, and offered the requisite surety for his entering copies, &c. in the United States court. Subsequently, on this applica-

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

tion coming on to be heard, the state court made an order transferring the cause to the circuit court of the United States. The defendants now moved to remand the cause to the state court, for the reason that, under the circumstances above stated, the order for the removal was erroneously made.

It appeared that the amount in dispute exceeded five hundred dollars and costs. The action was founded upon a joint and several promissory note signed by the defendants, Smith and wife, and by Lydia A. Salisbury and her deceased husband. The Smiths pleaded usury and payment—this payment being alleged to have been made by the receipt by the plaintiff of rents and profits of certain premises mortgaged to secure the note. Mrs. Salisbury pleaded, in the mode authorized by the state practice, by way of counter-claim, or in the nature of a cross action, an equitable defense; and prayed for affirmative relief. She alleged, in substance, that she and Mrs. Smith borrowed the money of the plaintiff for which the note in suit was given, mortgaging a tract which each owned in severalty, and also a tract which they owned in common; that the plaintiff had obtained in the state courts a decree of foreclosure for accrued interest on the note in suit; that this decree was void for want of jurisdiction as to Mrs. Salisbury; that the plaintiff bought in the property under the decree, and has since been in possession, receiving the rents and profits, alleged to be more than sufficient to pay the mortgage debt. She prayed that an account might be taken of the amount due the plaintiff on the note, and of the rents and profits received, and that she might be allowed to redeem the premises from the mortgage, if anything is due thereon.

J. M. Woolworth, for the motion.
Redick & Briggs, opposed.

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

DILLON, Circuit Judge. By the constitution, the judicial power of the United States extends "to controversies between citizens of different states."

In prescribing the jurisdiction of the circuit courts of the United States, the judiciary act did not confer it as broadly as it might have done under the constitutional provision just quoted, but limited it to cases where the "suit is between a citizen of the state where the suit is brought and a citizen of another state." Act Sept. 24, 1789, § 11 [1 Stat. 73]. Under this provision, one of the parties, either the plaintiff or defendant, it matters not which, must be a resident of the state where the suit is brought, and the other not. In other words, it must be a controversy or suit between a resident and a non-resident citizen. The next section of the judiciary act (section 12) provides for the removal of causes, under certain circumstances, from the state courts to those of the United States. Until very recently this was the only statute authorizing the removal on the ground of citizenship of the parties. It authorized the removal by the defendant (under the limitations therein mentioned) where the suit is commenced in the state court "by a citizen of the state in which the suit is brought against a citizen of another state." That is, if the suit is by a resident plaintiff, the non-resident defendant may have it removed; but the resident plaintiff could not. Under section 11 of the judiciary act, a non-resident plaintiff might sue in the circuit court a resident defendant; but if a non-resident plaintiff elected to sue in a state court, section 12 of that act would give neither party the right to remove the cause from the state court to the United States court. The plaintiff was not given the right because he had voluntarily selected the state court in which to bring his action; the defendant was not given the right because it was not supposed that he would have any grounds to object that he was sued in the courts of his own state. So that the right of removal by the judiciary act is limited to the non-resident defendant when sued by a resident plaintiff in the courts of the state.

By section 11 of the judiciary act, as we have seen, the circuit court has jurisdiction when the suit is between a citizen of the state in which it is brought and a citizen of another state.

This was construed by the courts to mean that if there were several plaintiffs and several defendants, each one of each class must possess the requisite character as to citizenship. Strawbridge v. Curtiss, 3 Cranch [7 U. S.] 267.

For example, a citizen of New York and a citizen of Georgia could not join as plaintiffs in suing in New York a citizen of Massachusetts (if found in New York) because the plaintiffs were not each competent to sue, for the citizen of Georgia could not (under section 11 of the judiciary act) sue a citizen of Massachusetts in New York. Moffat v. Soley [Case No. 9,688].

But other and greater difficulties were experienced. Section 11 of the judiciary act also enacted "that no civil suit should be brought in any other district than the one whereof the defendant was an inhabitant, or in which he shall be found at the time of serving the writ."

By the common law, all parties jointly liable must be jointly sued and brought into court, and if any of them reside out of the district where the suit was brought, or in the state in which the plaintiff resided, the national court was deprived of jurisdiction.

To remedy this, the act of February 28, 1839 (5 Stat. 321), was passed. This statute will be referred to more at large hereafter. In my opinion, it gives a citizen of one state the right to commence suit in the circuit court of the United States in any other state against such persons as reside there, or may

be found there, and the jurisdiction of that court is not defeated by the circumstance that other persons (proper but no longer necessary defendants) reside in some other state.

Under section 12 of the judiciary act above quoted, regulating removals, it was held that a cause could not be removed unless all the defendants asked for it; that to bring the case within the act, all the plaintiffs must be citizens of the state in which suit is brought, and all the defendants must be citizens of some other state or states. Beardsley v. Torrey [Case No. 1,190]; Ward v. Arredondo [Id. 17,148]; Hubbard v. Northern R. Co. [Id. 6,818]; s. c., 25 Vt. 715.

But the rule did not apply to persons who were mere nominal or formal parties. Brown v. Strode, 5 Cranch [9 U. S.] 303; Wormley v. Wormley, 8 Wheat. [21 U. S.] 421; Ward v. Arredondo, supra; Wood v. Davis, 18 How. [59 U. S.] 467.

It will be borne in mind that the act of February 28, 1839, above mentioned, authorized suits against defendants who might be non-residents of the district in which suit is brought, or not found therein, and that the plaintiff might proceed to judgment against those served, and against such non-resident defendants as should voluntarily appear.

Under this act a citizen of New York may, as in the case at bar, sue a citizen of Nebraska in the United States circuit court sitting in the latter state, and may also make a citizen of Missouri a party defendant; and if the latter is served within the district of Nebraska, or voluntarily appears to the action, the suit may proceed to trial and judgment against all. So that it is not true, as urged by the defendants, that this suit could not originally have been brought in the circuit court of the United States for the district of Nebraska; and hence, by allowing its removal, the court does not get cognizance of a cause which could not in the first instance have been brought therein.

But if this were so, it would not necessarily follow that the right of removal did not exist; for the circuit court may by removal acquire jurisdiction of a cause which could not have been commenced therein. Sayles v. Northwestern Ins. Co. [Case No. 12,421]; Bliven v. New England Screw Co. [Id. 1,550]; Barney v. Globe Bank [Id. 1,031].

Such being the law and the construction of the courts, congress passed the act of July 27, 1866 (14 Stat. 306), entitled "An act for the removal of causes in certain cases from the state courts." This act provides for removal in cases where the citizenship of the defendants is different. In contemplates cases where the plaintiff in the state court is "a citizen of the state in which the suit is brought," following in this respect the language of section 12 of the judiciary act. But it enlarges the provisions of the judiciary act in that it contemplates the case of several defendants, some residing in the state in which the suit is brought, and some in a state other than that in which suit is instituted; and it authorizes, in certain cases, the non-resident defendant to have the cause removed as to him and to proceed in the state court as to the resident defendants. The effect of this statute is plain:—without it no removal could be made, because all the defendants were not within the act, and under the ruling of the courts before mentioned, unless the cause was removable as to all, it was not removable as to any.

But, as in the judiciary act, the right of removal is confined by the act of July 27, 1866, to cases where the plaintiff is a resident and the defendant is a non-resident, and it is limited to the foreign defendant, and does not extend to the plaintiff.

We now come, in the progress of this discussion, to the act of March 2, 1867 (14 Stat. 558) upon which the right of removal in the case at bar is claimed, and which is the first act which, in any event, extended the right to plaintiffs. It professes to be an amendment to the act of July 27, 1866, last noticed, and it extends the right, in the cases provided for, as well to plaintiffs as defendants, but confines it to such as are non-residents of the state in which the suit is brought, and makes the ground of removal not alone the citizenship of the parties, but prejudice or local influence.

The act provides "that where a suit is now pending, or may hereafter be brought in any state court in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state . . . such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such state court an affidavit, stating that he has reason to believe and does believe that from prejudice or local influence he will not be able to obtain justice in such state court," he may have the cause removed to the circuit court of the United States.

It will be seen that as to the plaintiffs, this follows the language of section 11 of the judiciary act, and not of section 12 of that act; the plaintiff may or may not be a resident of the state where the suit is brought; and the right of removal is given to the non-resident party, be he the plaintiff or defendant.

Speaking of this act, Mr. Justice Miller, in a case in this court (Johnson v. Monell [Case No. 7,309], May term, 1869), says: "The only conditions necessary to the exercise of the right of removal are: (1) That the controversy shall be between a citizen of the state in which the suit is brought, and a citizen of another state. (2) That the matter in dispute shall exceed the sum of five hundred dollars, exclusive of costs. (3) That the party citizen of such other state shall file the required affidavit, stating, &c. the local prejudice. (4) Giving the requisite surety for appearing in the federal court. Congress intended to give the right in every case where the four requisites we have mentioned exist."

In that case the plaintiff was a citizen of

Iowa, one defendant was a citizen of Nebraska, and the other of New York, but the last was not served with process and did not appear; and it was held that the plaintiff was entitled, under the act of March 2, 1867, to have the cause transferred from the state court to the United States court after a verdict of the jury in the state court in his favor had been set aside by the court.

Taking the act of March 2, 1867, in connection with the acts of February 28, 1839, and July 27, 1866, we are of opinion that it was the intention of congress to give (in the enumerated conditions) a non-resident plaintiff the right to remove the cause from the state court, where the adverse parties are citizens of the state where the suit is brought; and this right is not defeated by the circumstance that some one of the persons, made a defendant under the act of 1839, may be a citizen of a state other than that in which the suit is brought. This seems to the court to be the spirit and manifest purpose of the legislature in question. It is the supposed local influence and prejudice that form the basis of right of removal in favor of the non-resident. As against the Smiths, if sole defendants, it is conceded that the right would exist. As respects the defendant, Salisbury, we have seen that suit might have been brought against her and the Smiths in the circuit court:—she is deprived of no right by holding in favor of the removal, and it seems to us to be an extremely technical construction to hold that the right of removal depends upon the circumstance that all the defendants are residents of the state in which the suit is brought.

The act of March 2, 1867, construed in the light of previous legislation and decisions, in its terms covers this case; and if so, this court has jurisdiction over it. This is put very plainly by an eminent judge in speaking of a cause removed under section 12 of the judiciary act: "But the jurisdiction of the United States circuit court, over this case does not depend upon section 11, but on section 12 of the judiciary act. If it be a suit which that section authorizes the defendant to remove, it empowers this court to take jurisdiction over it when removed." Per Curtis, J., Sayles v. Northwestern Ins. Co. [supra].

The view on which the motion to remand is based is that maintained in the early case of Strawbridge v. Curtiss, 3 Cranch [7 U. S.] 267, and overlooks the modifications which subsequent legislation and decisions have made. See Louisville R. Co. v. Letson, 2 How. [43 U. S.] 497, 556; Heriot v. Davis [Case No. 6,404]; Taylor v. Cook [Id. 13,789]; Doremas v. Bennett [Id. 4,001].

It is to be remembered that the plaintiff's action is upon a joint and several promissory note, and that he seeks simply to recover an ordinary personal judgment upon it against the makers. The case is one in which the plaintiff might ordinarily have sued in this court, making the Smiths and Mrs. Salisbury defendants. It is precisely such a case as the act of 1839 contemplated.

Mrs. Salisbury voluntarily appeared in the state court, and answered to the action. The circumstance that she pleads as a defense (under the state practice) matters which properly constitute grounds for a bill in equity cannot defeat the right of removal, if the right otherwise exists; and that it does exist, we have above endeavored to show. The motion to remand is denied; but as in this court law and equity must be kept separate, it is suggested that it may be advisable for the parties to reform the pleadings so as to adapt them to the practice in this tribunal. Motion denied.

[For hearing on a bill to redeem the property from the mortgage, see Case No. 12,251.]

NOTE [from original report in 1 Dill. 290]. The equitable defence of Mrs. Salisbury pleaded in her answer filed in the state court, was subsequently made the subject matter of a bill in equity filed in the circuit court, and as the plaintiff, Smith, was a non-resident of the district, the court made a special order allowing service to be made upon his attorneys of record prosecuting the action at law on the note. The act of March 2, 1867, provides that if "such citizen of another state will make and file an affidavit stating that he has reason to believe, &c., it shall be the duty of the state court to accept the surety," &c. Construing this act, it was in another case held by Dillon and Dundy, JJ., that an affidavit of the plaintiff's attorney stating "that the plaintiff had reason to and does believe that from prejudice or local influence he will not be able to obtain justice in the state court," was insufficient to authorize that court to order the removal, and if ordered, the cause on motion would be remanded to it. In the same case it was also held that the facts showing the reasonableness of the party's belief and the existence of the local prejudice need not be stated in the affidavit, which is sufficient in these respects, if it follows the general language of the act. Whether under this act an attorney could, in any case, make the affidavit, was not decided; but if so, it is perhaps advisable that the reason why it is not made by the party himself should appear. Requisites of petition for removal: Sweeney v. Coffin [Case No. 13,686]. Practice: McBratney v. Usher [Id. 8,661].

Case No. 12,306.

SANDS v. WARDWELL et al.

[3 Cliff. 277.][1]

Circuit Court, D. New Hampshire. Oct. Term, 1869.

PATENTS — PRESUMPTIONS — BURDEN OF PROOF — EQUIVALENTS—COMBINATION OF ELEMENTS.

1. Letters-patent are issued upon the adjudication of a public officer, and the presumption is that the adjudication was correct.

2. Letters-patent, if in due form, when introduced in evidence, afford a prima facie presumption that the person named as inventor is the original and first inventor of what is therein described as the improvement. The burden of proof to sustain an opposite conclusion is therefore on the party attacking the patent.

[Cited in Maurice v. Devol, 23 W. Va. 254.]

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

3. Upon the question of infringement the burden of proof is with the complainant.

4. Technical equivalents do not belong to a combination of old elements. Such a combination is only an improvement upon what was before known, and without the new combination the whole would have been the property of the public.

5. When such a combination is patented it is infringed by every subsequent combination of the same elements as those which compose it; and no subsequent combination is substantially different from the patented one, merely because it was in a single device different from one of its elements, provided such substituted device was at the date of the patent a well-known substitute for the omitted one.

6. Subsequent inventors may obtain valid patents for combinations of the same elements as those which compose a prior one, provided the combinations are substantially different, and accomplish new and useful results.

7. No person is to be treated as an infringer who does not use all the elements of a combination, unless the change is merely formal or colorable; and every subsequent combination is only a colorable change when not substantially different from the first.

Letters-patent [No. 38,987] were granted to the complainant [Thomas Sands], June 23, 1864, for an improvement in machines for making machine knitting-needles. On November 15, 1864, the patent was reissued to him, as he alleged, for the same invention, in due form of law for the residue of the original term. [No. 1821.] The present suit was founded upon the reissued letters-patent, and the charge in the bill of complaint was that the respondents [P. S. Wardwell and others], since the issuing of the reissued letters-patent, had manufactured and used machines and machinery embracing mechanism substantially the same in principle, construction, and mode of operation as the patented improvement of the complainant. The principal defences set up in the respective answers of the respondents were as follows: (1) That the reissued letters were fraudulently procured. (2) That the complainant was not the original and first inventor of the improvement. (3) That the invention, or substantial and material parts thereof, claimed by the patentee as new were known to and used by others with the knowledge of the complainant, and with his consent and allowance, more than two years prior to his application for the original patent. (4) Besides these special defences the principal respondent denied that he or either of the other respondents ever made, used, or vended to others to be used, any machine or machines embracing the patented improvement of the complainant. On the contrary, he alleged that he constructed within the period mentioned in the bill of complaint but one machine for the purpose of making knitting-needles, and he averred that he invented and made the same, and that the mechanical devices employed in the said machine were substantially different from those described in the reissued patent of the complainant, and that neither he nor the other respondents had in any manner infringed the complainant's improvement or any part of what was claimed in the said reissued letters-patent.

J. H. George and Foster & Sanborn, for complainant.

J. Marshal and W. H. Y. Hackett, for respondents.

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

CLIFFORD, Circuit Justice. The proofs introduced by the respondents in support of the allegation of fraud in the procurement of the letters-patent are not sufficient to sustain the charge, and the defence in that behalf is therefore overruled. Further explanations upon the point are unnecessary, as the proofs are quite unsatisfactory and insufficient. Power to grant letters-patent is conferred by an act of congress upon the commissioner of patents. Issued, as such letters-patent are, in pursuance of the adjudication of a public officer, the presumption is that the adjudication was correct. Founded upon that consideration, the settled rule of law is, that letters-patent when introduced in evidence in a suit in equity or at law, if they are in due form, afford a prima facie presumption that the inventor is the original and first inventor of what is therein described as his improvement. Such being the prima facie presumption to be drawn from the letters-patent when introduced in evidence, it follows as a necessary consequence that the burden of proof to establish a contrary conclusion is upon the opposite party. The allegation of the respondents is, that the complainant is not the original and first inventor of the improvement described in the reissued letters-patent. They make the charge and they must prove it, and they have made the attempt, but they have failed to sustain that issue in the pleadings. Extended discussion of a point so clear as that one is in this case would be useless, and consequently we think it sufficient to state our conclusion. Nothing remains to be considered in the case but the question of infringement, and in that issue the burden of proof is upon the complainant. He alleges that the respondents have infringed his reissued letters-patent and prays for an account and an injunction, and unless he proves the charge his bill of complaint should be dismissed, as he is not entitled to any relief.

The statement of the patentee is that his machine is intended to save a great part of the labor heretofore required in making machine knitting-needles by hand, and that it is so constructed that the several operations of carrying forward the steel wire to the block making the eye, stabbing down the wire to the proper shape, and cutting off the wire in a suitable length for a needle, are all performed automatically. His statement also is, that what is termed the eye of the needle is not a perforation through the wire, but a cavity

pressed to receive the point or barb for the purpose specifically set forth in the specification (minute description of the mechanism of the machine and of its mode of operation is given in the specification, which need not be reproduced). Having described the mechanism, the patentee concludes his specification by making four claims; and the complainant insists that the respondents have infringed such parts of his invention as are embraced in the first, second, and fourth claims of the patent. Further reference to the third claim will not be made, as it was conceded at the argument that the complainant had failed to show any infringement in that behalf. Brief notice of the first claim will also show that the complainant is in no better condition in respect to that, as the machine of the respondents contains no such combination as is therein described. Complainant's invention as described in that claim is the burr or equivalent cutter for stabbing that part of the wire which is to form the barb or beak of the needle, in combination with the means or the equivalent thereof for holding the wire by the eye, which has been formed substantially as described, in order that the flattening of the wire by the burr or equivalent cutter may be in proper relation to the eye. Beyond question one of the elements of the combination, by the express words of the claim, is the means described for holding the wire by the eye, and the patentee in that patent is bound by those words. They are a part of the claim, and cannot be rejected as surplusage without meaning. Respondents' machine contains no such means of holding, nor does their machine contain any such element. Infringement therefore of the first claim is not proved.

The second and fourth claims may, to a certain extent, be considered together in respect to the issue of infringement. Before attempting to analyze the second claim, it may be useful to repeat the language, which, in the words of the patentee, is "the combination substantially as described of the means for forming the eye, the means for stabbing that part of the wire which is to form the barb or beak of the needle, and the means for cutting off the wire"; and the patentee in this connection repeats the phrase substantially as described. Stated in other words, the means of forming the eye are those means which advance the wire to the proper position under the punch, the means of holding it there while the punch operates, and the punch and the means which operate it as it performs its described function. Such part of the wire as is designed to form the barb or beak of the needle is subjected to the process of stabbing. In order to accomplish that result in the manner described, there must be a burr or cutter, and the wire must be advanced under the cutter, and there must be means for bringing the cutter down so that it will operate on the wire. Unless the wire is held while the cutter operates, the machine would be a failure; and it is equally essential that the cutter should be withdrawn at the proper time. The remaining ingredient of that claim is the means of cutting off the wire, which are a fixed shear-cutter, or die, as it is called by some of the witnesses,—and a movable cutter, together with the described means of operating the same. Guided by these explanations, it becomes necessary, in order to determine whether the respondents have infringed this claim, to compare their machine with the invention of the complainant as described in the specification.

Both machines have a similar punch, but the means of operating them in the two machines are unlike in construction, but perhaps are substantially the same in principle and mode of action. Differences are apparent in comparing the respective means employed in the two machines in forming the eye of the needle, but they are not as material as those observable in the respective means employed for stabbing the wire. Unquestionably they have a similar burr or cutter, which is capable of being raised or lowered so as to cut more or less into the wire. They also have means of removing the cutter entirely from the wire, but they are substantially different in the means employed to raise and lower the cutter and govern its operation. The cutter in the complainant's machine is mounted on the arm of a lever, while the other arm of the same lever operates over a cam, and in that way determines the form of the stabbing. Turning to the respondents' machine, it is at once seen that it has no cam, but the wire rests upon an inclined bed, with the part designed for the point of the needle slightly elevated. The cutter is brought down, by the use of a toggle joint, or hinged lever, so as to strike the end of the wire, cutting into it and forming the point of the needle, and as the cutter advances, cutting less and less deeply into the wire by reason of its inclination upon its bed until it is finally withdrawn altogether by the operation of the toggle joint. The machine of the complainant is in this respect quite dissimilar in construction and mode of operation. Their machine has no cam, nor is the device employed in their machine a known substitute for such an instrumentality. These two machines are also quite unlike in respect to the respective means they employ in holding the wire while it is stabbed to form the barb of the needle. In the complainant's machine the punch is forced into the eye of the needle, and remains there holding it down upon the bed, and then at the proper moment moves forward with the wire and the bed, still holding the wire by the eye of the needle while the point of the preceding needle is being stabbed and the barb thereof formed.

The next step in the operation is, that the blank, so called, thus stabbed, is cut off, and the punch returns to the position from which it started to operate, hold, and bring forward

another needle. No such means for holding the wire is found in the machine of the respondents. On the contrary, it has a set of "holding dies which, after the wire is cut off, grasp it firmly and present and hold it for the action of the cutter."

The substance and effect of the fourth claim is for a combination of the bed on which the wire is supported during the operation of stabbing the burr or equivalent cutter for stabbing the wire, the means described for causing the cutter to act upon the wire in the direction of its length, and a cam or equivalent pattern to govern the cutter's motions to and from the wire so as to determine the form of the stabbing. Technical equivalents do not belong to a mere combination of old elements. Such a combination is regarded merely as an improvement upon what was before known, and which, without such new combination, would have belonged to the public. Inventors of such improvements, if their rights are secured by letters patent, may treat all others as infringers who make, use, or vend to others to be used, any and every subsequent combination of those elements not substantially different; and no such subsequent combination is substantially different merely because the person constructing a machine under it employs a different device for one of the elements, provided such device was, at the date of the first patent, a well-known substitute for such omitted element. Other inventors may secure valid patents for subsequent combinations of the same elements, provided the combination is substantially different and the invention produces a new and useful result; but no person can be treated as an infringer who does not use all of the elements of the first combination, unless the change is merely formal or colorable, as every subsequent combination is which is not substantially different, and no subsequent change can be regarded as substantially different merely because it drops one of the elements of the one patented and employs in its stead another, which, though different in form, was well known at the date of the patent as a common substitute for the element so dropped.

Applying these principles to the present case, it is quite clear that the proofs do not show that the respondents have infringed upon the second or fourth claim of the complainant's patent. They have no cam, nor have they any equivalent device, nor is the device which they employ a well-known substitute for the one to be found in the complainant's machine. Viewed in any proper light, their machine must be regarded as a substantially different combination, as they do not employ all the elements found in the complainant's machine. No allusion has been made to the evidence tending to show that the principal respondent saw the complainant's machine used, and had opportunity to copy it, as it appears that the machine was then protected by letters-patent, and it is quite as probable that he examined it to avoid an infringement as to copy the improvement.

Bill of complainant dismissed with costs.

SANDS (WOOD v.). See Case No. 17,063.

Case No. 12,307.

In re SANDS ALE BREWING CO.

[3 Biss. 175; 6 N. B. R. 101; 4 Chi. Leg. News, 137; 1 Bench & Bar (N. S.) 98; 6 Am. Law Rev. 574.] [1]

District Court, N. D. Illinois. Jan., 1872.

BANKRUPTCY—MORTGAGE—COVENANT TO INSURE—RIGHTS OF MORTGAGEE.

1. A covenant in a mortgage to keep the mortgaged premises insured for the benefit of the mortgagee creates a specific equitable lien upon the insurance money, which is valid as against an assignee in bankruptcy.

[Cited in brief in Chicago Trust & Sav. Bank v. Bentz, 59 Fed. 645.]

[Cited in brief in Grange Mill Co. v. Western Assur. Co., 118 Ill. 397, 9 N. E. 274. Cited in Nordyke & M. Co. v. Gery, 112 Ind. 539, 13 N. E. 683; Dunlop v. Avery, 89 N. Y. 599.]

2. The mortgage being recorded, the covenant acts upon the insurance as soon as effected, runs with the land, and is notice to creditors; and no subsequent assignment can affect the rights of the mortgagee. It is not necessary that the policies be specifically assigned, nor that the mortgagee select the companies. And any acts of the mortgagor without the consent of the mortgagee will not defeat the effect of the covenant.

3. It seems, that not even a specific assignment to a particular creditor would have avoided the effect of the covenant.

4. Where such covenant is made by a corporation, no subsequent change in the ownership of the stock can change its legal effect.

In bankruptcy.

This was a petition by Francis B. Peabody as trustee, for an order on the assignee of the bankrupt to pay over to the petitioner the proceeds of certain policies of insurance. The bankrupt, a corporation created and existing under the general law of Illinois, on the first day of January, 1868, then being solvent, borrowed, through the petitioner, the sum of $60,000, and to secure the payment thereof executed to him, as trustee, its trust deed bearing date that day, thereby conveying to him as trustee certain lots and parcels of land on which were situate the brewery and buildings occupied and used by the bankrupt for the purposes of its business. This deed contained, among other covenants, the following:

"And the said Sands Ale Brewing Company, for itself and its successors and assigns, does covenant, grant and agree to and with the said party of the second part, and his successors in trust, that it will well and truly pay the said principal sum of money,

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 6 Am. Law Rev. 574, contains only a partial report.]

and interest thereon, mentioned in said principal note, according to the tenor and effect thereof, and will not at any time hereafter, until the said principal sum and the interest thereon shall be fully paid, suffer said premises, or any part thereof, to be sold for any tax or assessment whatsoever, nor do, nor permit to be done, to, in, upon, or about said premises, anything that may in any wise tend to impair the value thereof, or to weaken, diminish or impair the securities intended to be effected under and by virtue of this instrument. And further, that the said Sands Ale Brewing Company, its successors and assigns, shall and will, at all times hereafter, until said principal sum of money, and all arrearages of interest thereon, shall be fully paid, keep all the buildings, outhouses excepted, now situate, or that may hereafter be erected upon said premises, fully insured against loss or damage by fire, in some good and responsible insurance company or companies, (the selection of such insurance company or companies to be left to the option of the said party of the second part, or its successors in trust,) in the fair insurable value of such buildings, and cause such insurance to be made payable, in case of loss, to the said party of the second part, or his successors in trust, and deliver to him or them, each, all and every, the policies of insurance therefor, as soon as and whenever such insurance shall be effected, and all renewal certificates of such policies; * * * and the said party of the second part, or his successors in trust, shall hold each and all such policies of insurance as collateral and additional security for said principal sum of money and interest, and shall have the right to collect and receive any and all money and sums of money that may at any time become collectible or receivable upon each, all and every of such policies of insurance by reason of the damage or destruction of such buildings by fire, and apply the same, when received, in the same manner, as far as possible, as is hereinbefore provided for in case of a sale of said above described premises under the power of sale hereinbefore contained; or, if the legal holder of said principal note so elects, shall disburse the same in the repair or rebuilding of such buildings. * * * A re-conveyance of said premises shall be made by the party of the second part, or his successors in trust, to said party of the first part, its successors or assigns, at its expense, on full payment of the indebtedness aforesaid, and performance of the covenants and agreements made herein by the party of the first part."

Soon after the execution of this deed, and in compliance with this covenant, the bankrupt caused insurance policies on the property to be taken out and assigned to the trustee, and when these policies expired, which was in December, 1868, new policies were taken out, but not assigned or made payable to the trustee, and although policies to a large amount were taken out each succeeding year, they were not assigned or made payable to the trustee, except as to a part of them during the second year. On the 9th of October, 1871, the buildings and improvements on said premises were destroyed by fire, the bankrupt at that time holding policies of insurance to the amount of about $120,000 on the buildings and personal property situate therein; the total value of the buildings being about $200,000. The interest on the debt of $60,000, secured by the deed of trust, had been regularly paid as it fell due, but no part of the principal sum. Up to the time of the fire the corporation was solvent, but soon afterwards it filed a petition in bankruptcy in this district, was duly adjudicated a bankrupt, and the assignee had collected a portion of the money on the insurance policies. The real estate, after the destruction of the buildings, was not adequate security for the amount of the loan.

Paddock & Ide and Samuel W. Fuller, for petitioner.

M. W. Fuller and J. N. Jewett, for assignee.

BLODGETT, District Judge. The petitioner claims that the covenant in the trust deed gives him an equitable lien upon the proceeds of the insurance to the exclusion of the general creditors, while on the part of the assignee and the general creditors it is insisted that the policies in question, not having been assigned to the trustee, nor made specifically payable to him in case of loss, he has no higher right to them than the other creditors, and that the fund, therefore, belongs to the assignee. The bankrupt being a corporation, I do not conceive that any changes which may have taken place in the ownership of its stock since the trust deed was given can affect the question at issue. No matter who buys or sells the stock, or who holds the offices or manages its affairs, the corporate entity remains the same. Its covenant to insure is binding on all stockholders and officers, and all persons in privity with it, and, being on record, is notice to all its creditors. The assignee can hold nothing in this case which the grantor in the trust deed could not have held if bankruptcy had not intervened. His relation is purely representative. Creditors who have trusted the bankrupt must be held to have done so with full notice of the covenant to insure, and of the legal and equitable effect of that covenant. The covenant to insure runs with the land, as much so as a covenant to repair, or rebuild, or for another term, because it is a charge upon the land. Vernon v. Smith, 5 Barn. & Ald. 1, 3; 1 Washb. Real Prop. 426; 4 Kent, Comm. 558; Spencer's Case, 1 Smith, Lead. Cas. Eq. 137.

What then was the effect of that covenant, so far as the right to this insurance money is concerned?

The bankrupt covenanted to insure to the

fair insurable value of the buildings, and to cause the insurance to be made payable, in case of loss, to the petitioner or his successors in the trust. The insurance was effected, but not assigned, nor made payable to the trustee. Can this make any difference? This court must be governed in disposing of this question by substantially the same rules as a court of equity. In 2 Pars. Cont. 440, it is said: "There is authority, strengthened, as we think, by reason, that when a mortgagor is bound by the mortgage contract to keep the premises insured for the benefit of the mortgagee, and does, in fact, keep them insured by a policy which contains no statement that the mortgagee has any interest therein, the mortgagee, nevertheless, has an equitable interest in and a lien upon the proceeds of the policy which a court of equity will enforce for his benefit." See, also, to same point, Thomas' Adm'rs v. Von Kapff's Ex'rs, 6 Gill & J. 372; Carter v. Rockett, 8 Paige, 437; Lazarus v. Commonwealth Ins. Co., 2 Hare & W. Lead. Cas. 834; Nichols v. Baxter, 5 R. I. 491; Norwich Fire Ins. Co. v. Boomer, 52 Ill. 446; Providence Co. Bank v. Benson, 24 Pick. 210; Miltenberger v. Beacom, 9 Pa. St. 198; King v. Insurance Co., 7 Cush. 1; Fland. Ins. 367.

The principle announced in all these cases is but a practical application of the maxim that equity will consider as done what the parties have covenanted to do. But it is objected that the mortgagee, under this covenant, must first select or indicate the companies in which he wishes the insurance effected, before the covenant becomes binding or effective to vest any right in him to the proceeds of the insurance. It would seem a sufficient answer to this objection, that the covenant being to insure to the full insurable value for the benefit of the mortgagee in this case, and the insurance having been effected, it does not lie in the mouth of the mortgagor to say that the mortgagee shall not have the benefit of it because he has acted without the selection or contrary to the selection of the mortgagee. Suppose the mortgagee had selected the companies, and notified the mortgagor, and the latter, in disregard of the selection, had effected insurance in other companies, could such violation of his contract devest the mortgagee of his rights? I think not. But the mortgagor, having effected insurance to nearly, if not quite, the insurable value of the property, has put it out of the mortgagee's power to further insure, because the property can only carry a limited amount. And, therefore, the mortgagee must hold what has been effected, or none. But there seems another answer to this point, arising from the facts in this case. Insurance was effected and assigned, in compliance with the covenant, the first year, and perhaps the second. Was not this a sufficient selection, and was it not the duty of the mortgagor to renew the policies thus effected until notified otherwise by the mortgagee, and if the underwriters have since been changed by the mortgagor, without the mortgagee's consent, this act of the mortgagor cannot be pleaded in equity to defeat the effect of his covenant.

My conclusion then is, that the covenant by the bankrupt to insure operated to assign in equity to the petitioner the benefit of any insurance effected by the bankrupt on the mortgaged property. It is no answer to say that the mortgagee might have insured in default of insurance by the mortgagor, because the mortgagor had insured, and his insurance inured at once to the benefit of the mortgagee. It is urged by way of argument in behalf of one creditor—the Union National Bank—that if all or part of these policies had been assigned to that creditor, it could have been held then as against the petitioner, and that the assignee, holding for the benefit of all creditors, occupies the same position; but this argument is fallacious, because it overlooks or ignores the fact that all creditors had notice of the petitioner's equitable right to this insurance money, and could acquire no valid interest therein as against him. Equity made the assignment the moment the insurance was effected, if the mortgagor did not do it. It is true courts in this country and in England have said that all general liens infringe upon the bankrupt laws, the object of which is to distribute the bankrupt's estate equally, and that equality is equity. But if any one point is carefully guarded by the bankrupt law now in force, it is the protection of all fairly obtained liens, whether legal or equitable in their origin. The authorities quoted, and many others I have consulted in the examination of this case, leave no doubt in regard to the effect to be given this covenant. The lien is neither doubtful nor general, but is clear and specific. It is but carrying out the intent of the parties, and giving the mortgagee the security he had bargained for, and which he had given the whole world notice he was entitled to. The assignee will, therefore, pay to the petitioner the insurance money collected by him on these policies.

NOTE. Where the assured has agreed to insure for the protection of another person having an interest in the property insured, such person has an equitable lien in case of loss upon the money due upon the policy. Ellis v. Kreutzinger, 27 Mo. 311; approved by the New York court of appeals, in Cromwell v. Brooklyn Fire Ins. Co., 44 N. Y. 42, where it is also held that the insurer, having notice of the assignment of a contract providing for such insurance, is liable to the assignee, even though it has actually paid the insurance money to the original vendee.

Case No. 12,308.

In re SANDUSKY.

[17 N. B. R. 452; [1] 10 Chi. Leg. News, 204.]

District Court, S. D. Illinois. 1878.

BANKRUPTCY—PARTNERSHIP—EXECUTION LIEN—EQUITIES OF CREDITORS.

Where an execution lien has been obtained in good faith, before bankruptcy, on the individual property of a member of a partnership firm, under a judgment against the firm, the statutory lien will not yield to the equities of the separate creditors of that partner.

In bankruptcy.

By N. W. BRANSON, Register:

The petition of Thomas Davies, assignee, William Sandusky, creditor, and Abraham Sandusky, the bankrupt, filed in this court on the 28th day of January, 1878, and the answer and cross-petition of Elam Henderson, George H. Holloway, and Jesse R. Holloway thereto, filed February 8, 1878, having been referred to the undersigned register, to take and report the testimony touching the matters in dispute, with my conclusions thereon, I do respectfully report that on the 27th day of February the petitioners appeared by L. H. Bradley, Esq., their attorney, and the respondents and cross-petitioners appeared by N. M. Broadwell, Esq., their attorney, and thereupon it was mutually agreed by and between the said attorneys that the matters in dispute should be submitted for decision upon the papers on file in this matter, without taking any testimony on either side.

The petition alleged in substance that Abraham Sandusky, John C. Short, and Andrew Grundy, partners under the name of John C. Short & Co., made a voluntary assignment, more than six months before the filing of the petition in bankruptcy in this matter, to one Richard T. Leverick, to pay the joint debts out of the joint assets, and the separate debts of the several partners out of the separate assets, and that said Leverick took possession of said individual and partnership property for the benefit of the respective creditors. That the firm of John C. Short & Co. was, as a firm, in partnership with nine other persons in railroad-building, under the firm name and style of H. Sanford & Co., and that the latter firm became largely indebted, and, among other persons, to the respondents herein; and that the respondents recovered a judgment for such debt against H. Sanford & Co. in the Vermillion circuit court; that execution was issued on said judgment and delivered to the sheriff of Vermillion county, by virtue of which said sheriff levied on six hundred fleeces of wool, of the value of seven hundred dollars, as the property of said Abraham Sandusky, claiming and pretending that the same was not the property of the said Leverick, as assignee, and that there had not been a sufficient transfer and change of possession to prevent the levy of said execution; and that thereby the respondents attempted to avoid the effect of said assignments, and to apropriate said wool on said execution, instead of allowing it to be appropriated to the individual creditors of Abraham Sandusky. That said Leverick replevined said wool, and that the replevin suit was afterwards dismissed without a trial on the merits. That said Leverick, together with Abraham Sandusky and William Sandusky, executed a replevin bond to the coroner of Vermillion county in the sum of one thousand four hundred dollars, conditioned according to law; that said coroner, for the use of respondents, has brought suit on said bond in the Vermillion circuit court, against Leverick and Abraham and William Sandusky; that Leverick has sold the wool and holds the proceeds to await the determination of said suit, but is ready to turn the same over to this court, if the prosecution of said suit is enjoined; that Abraham Sandusky is indebted to William Sandusky in the sum of forty thousand dollars, and that the latter is equitably entitled to be paid out of the separate estate of Abraham Sandusky, before any part of such estate can be taken on execution to pay the debts of H. Sanford & Co., and that such separate estate is inadequate to pay the separate debts. The petition makes Leverick and Cunningham, the coroner, defendants, and prays for an injunction and an order on Leverick to pay the amount in his hands to the assignee in bankruptcy. An injunction was ordered, and was served on the coroner. Leverick has not been served with papers, nor has he entered his appearance.

The respondents, Henderson and the Holloways, file their answer to cross-petition, and therein allege in substance that said suit on the replevin bond is being prosecuted for their benefit; that the judgment was obtained in their favor for six thousand four hundred and seventy-three dollars and sixty-one cents in 1876, and the levy was made on said wool on the 7th day of August, 1876; that the assignment mentioned in the petition was made on the 16th of October, 1873, and that the wool levied on and replevied was no part of the property of said firm of Short & Co., or of any one of the members of said firm at the time of said assignment, and was not covered by or embraced in the same, but said will was liable to said execution, at the time of said levy, as the property of said Abraham Sandusky. And that the replevin suit was dismissed because Leverick refused and neglected to prosecute the same. And the respondents ask for the dissolution of the injunction. Abraham Sandusky filed his petition for adjudication of bankruptcy against himself and his copartners, in firm of H. Sanford & Co., on the 4th day of January, 1878, and he was adjudicated a bankrupt the same day, and H. Sanford & Co. were adjudicated bankrupts on the 27th day of February, 1878.

This case was submitted on the papers in the case, and a question of law only, and not

[1] [Reprinted from 17 N. B. R. 452, by permission.]

one of fact, is presented. It will be noticed that the petitioners do not allege in their petitions that the wool in question was ever reduced into the possession of Leverick, the assignee under the voluntary assignment, or that the title thereto ever, in any manner, passed to him; but, on the contrary, the answer alleges that it was no part of the property of said firm of Short & Co., or of any one of the members of the firm at the time of said assignment, and was not covered by or embraced in the same, but was liable to execution at the time of the levy, as the property of Abraham Sandusky. The assignment was made in October, 1873, the levy was made in August, 1876, and the petition in bankruptcy was filed in January, 1878. Thus, the question that would have been raised if the wool had been levied on while in Leverick's possession, is not presented on these papers; and, under the terms of the submission, I am not to inquire into the facts further than they are presented by the papers on file. The petitioners seek to maintain their injunction upon the familiar rule obtaining in equity and in bankruptcy, that the separate estate of an individual partner cannot be applied towards payment of the partnership debts until after the payment in full of his separate debts. The respondents, on the other hand, contend that the above rule does not obtain in this case, for the reason that they had obtained a specific lien on the property in question, by virtue of the levy of an execution thereon.

I have hunted up and examined the authorities on the question thus presented, with such care as my time would permit. The only case in a court of the United States which I have found in point is the case In re Lewis [Case No. 8,313], decided by Judge Rives, of the United States district court for Western district of Virginia, and affirmed on appeal by Judge Bond, of the circuit court. In that case the court holds that although, in the distribution of the general assets of a bankrupt, the partnership assets are to be first applied to the partnership debts, and the individual assets of any separate partner first applied to his individual debts, according to the terms of the bankrupt law, yet, when a judgment has been obtained by a partnership creditor against the members of a concern, such judgment operates as a several lien against the real estate of each partner; and if prior in point of time to a judgment obtained against an individual partner by an individual creditor of such partner, is to be preferred to such subsequent judgment; but the court is further of the opinion that, when such partnership creditor can get satisfaction of any part of said judgment out of the partnership assets, the pro rata distribution to which such partnership creditor is entitled out of the partnership fund shall first be applied as a credit on said judgment against the separate partner, in relief of the fund of such separate partner, for the benefit of the separate creditor. In the case of Meech v. Allen, 17 N. Y. 300, the New York court of appeals say this: It is a settled rule of equity that, as between the joint and separate creditors of partners, the partnership property is to be first applied to the payment of the partnership debts, and the separate property of the individual partners to the payment of their separate debts, and that neither class of creditors can claim anything from the fund which belongs primarily to the opposite class until all the claims of the latter are satisfied. This, however, is a rule which prevails in a court of equity in the distribution of equitable assets only. Those courts have never assumed to exercise the power of setting aside, or in any way interfering with an absolute right of priority obtained at law. In regard to all such cases, the rule is equitas sequitur legem. 1 Story, Eq. Jur. § 553. In Wilder v. Keeler, 3 Paige, 167, Chancellor Walworth says: "Equitable rules are adopted by this court in the administration of legal assets, except so far as the law has given an absolute preference to one class of creditors over another." So in the case of Averill v. Loucks, 6 Barb. 470, Paige, J., says: "Courts of equity, in the administration of assets, follow the rules of law in regard to legal assets, and recognize and enforce all antecedent liens, claims and charges, existing upon the property, according to their priorities." This is also conceded in the case of McCulloh v. Dashiell, 1 Har. & G. 96, where the whole doctrine of distribution in equity of the joint and separate property of partners is very elaborately examined. Archer, J., says: "At law the joint creditors may pursue both the joint and separate estate to the extent of each for the satisfaction of their joint demands, which are at law considered joint and several without the possibility of the interposition of any restraining power of a court of equity." But especially must it be beyond the power of such courts to interfere where an absolute right of legal priority is given by force of a positive statute, as in case of a judgment. Chancellor Walworth, in Mower v. Kip, 6 Paige, 88, says: "The rule of this court is to give effect to the lien of a judgment upon a legal title, so far as it can be enforced by execution at law."

I have thus quoted at large from the opinion of the New York court of appeals, as it is a court of high authority. To the same effect is Straus v. Kerngood, 21 Grat. 584. In New Jersey it is held that the equitable principle above referred to, cannot apply to creditors who have secured their debts by judgment and execution liens. 1 Stockt. [9 N. J. Eq.] 836. The supreme court of Georgia hold that, in cases of co-partnership, the equity in favor of separate creditors will not be enforced to control or take away a right acquired by legal execution on the part of joint creditors against the separate estate. Baker v. Wimpee, 19 Ga. 87; Cleghorn v. Insurance Bank, 9 Ga. 319. In the latter case, Lumpkin,

J., delivering the opinion of the court, says: "The equity in favor of separate creditors will never be enforced to control or take away a right acquired by legal execution on the part of joint creditors against the separate estate." In Wisham v. Lippincott, 1 Stockt. [9 N. J. Eq.] 353, Chancellor Williamson says: "A court of chancery may undoubtedly, where the equities between the parties are to be adjusted and when the assets are before the court, and the court is called upon to marshal them, apply such a rule. I have no hesitation in saying that when a joint creditor of a firm has a judgment and execution levied upon the separate effects of one of the partners, this court ought not, in mere compliance with any such rule as that the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtors, before the partnership creditors can claim anything, to interfere with such execution, either on application of one of the partners or any creditor of the firm, or separate creditor of any of its members." Some cases in New Hampshire would seem to announce the contrary principle, as Crockett v. Cram, 33 N. H. 542; Jarvis v. Brooks, 23 N. H. 136, and Holton v. Holton, 40 N. H. 77. But these cases must be considered in connection with a late decision of the same court (Bowker v. Smith, 48 N. H. 111), which appears to modify the doctrine announced in the earlier cases. In the latter case, Chief Justice Perley, in giving the opinion of the court, and speaking of the equitable doctrine relied on by the petitioner in this case, says: "The grounds on which the doctrine was admitted here afforded no reason for supposing that this right remains to be asserted after the property, once taken for the satisfaction of debts, has been finally appropriated under legal process by levy on the property of the individual partner." The supreme court of South Carolina holds that the private creditors of a partner are entitled to pay out of his separate estate, in preference to partnership creditors, though the latter have recovered judgment against him as surviving partner. Woddrup v. Ward, 3 Desaus. Eq. 203.

Upon consideration of all the authorities upon this point, which I have been able to find, it appears to me that there is a very decided preponderance to the effect that where an execution lien has been obtained, in good faith, before bankruptcy, on the individual property of a member of a partnership firm, under a judgment against the firm, that that statutory lien will not yield to the equities of the separate creditors of that partner. And this is entirely in harmony with the rule which obtains in courts of bankruptcy, that liens generally, including execution liens, which have been acquired in good faith before the commencement of proceedings in bankruptcy, are preserved and enforced. I am therefore of opinion, upon the papers submitted to me in this matter, that the injunction should be dissolved. All of which is respectfully submitted.

TREAT, District Judge. Decision of register affirmed.

SANDUSKY, The (OLMSTEAD v.). See Case No. 10,504.

SANDUSKY SEAT CO. (COMSTOCK v.). See Case No. 3,082.

SANDWICH, The (STEVENS v.). See Case No. 13,409.

SANDY HOOK, The. See Cases Nos. 10,607 and 10,608.

Case No. 12,309.

SANDY RIVER BANK v. MERCHANTS', &c., BANK.

[1 Biss. 146.] [1]

Circuit Court, N. D. Illinois. Jan. Term, 1857.

BANKS — AUTHORITY OF CASHIER TO SETTLE ACCOUNT.

1. The cashier of a bank, as such, has no authority in another state to settle an account, taking private notes and drafts, and giving a receipt in full. In order to bind the bank, his power must be in the nature of an appointment as agent.

[Cited in Bank of Commerce v. Hart, 37 Neb. 197, 55 N. W. 632. Cited in brief in First Nat. Bank v. Pierce, 99 Ill. 273.]

2. His is a limited authority, and parties claiming a discharge otherwise than by payment must show his authority.

[Cited in Bank of Commerce v. Hart, 37 Neb. 197, 55 N. W. 632.]

The Sandy River Bank, of Farmington, Maine, was established in 1853, with a capital of $50,000. Of this capital a controlling interest, amounting to $38,000, was taken by the owners and managers of the Merchants and Mechanics' Bank of Chicago, the remaining $12,000 being held by parties in Maine. At that time Stephen Bronson was cashier and general financial agent of the Merchants and Mechanics' Bank. Through his engineering, Thomas J. Jones, formerly in a banking house in Chicago, was sent to Farmington to become the cashier of the Sandy River Bank. He assumed his position with the secret understanding that his salary of $850, which was all the Sandy River Bank managers allowed him, was to be increased to $2,000 per annum, the difference to be charged to the Merchants and Mechanics' Bank as "money of Jones." With this secret understanding Jones so managed the affairs of the Sandy River Bank, that the Merchants and Mechanics' Bank of Chicago, had at all times, during the Bronson administration, from $10,000 to $40,000 of the funds of the Sandy River Bank, over and above what appeared upon the books of the latter. In July, 1855, the sum of $22,000 stood charged against the

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Sandy River Bank on the books of the Merchants and Mechanics' Bank, and Mr. Woodworth, president of the former bank, with Mr. Bronson, the cashier, had an interview in New York City with Cashier Jones, at which a settlement was arrived at, by Jones giving a receipt in full and taking $12,000 of Bronson's private paper and $10,000 in cash. Of this so-called cash payment, a large part consisted of Bronson's private drafts endorsed officially by Jones as cashier of the Sandy River Bank. These drafts were protested and suits brought by the holders against the Sandy River Bank on its endorsements. The bank being compelled to pay them, brought this action to recover for a balance due on account. The defendant pleaded the above settlement and the receipt then given. The plaintiff insisted that Jones had, as cashier, no authority to make such a settlement or to receive these drafts as cash.

George Evans, for plaintiff.
Corydon Beckwith, for defendant.

DRUMMOND, District Judge (charging jury). Mr. Bronson, as the cashier of the Merchants and Mechanics' Bank, had no right, because he was cashier merely, to make the contract he made with Mr. Jones of the 28th of September, 1853, so as to bind the bank; there must have been an express authority from the bank or one resulting from necessary implication. And in order to be binding on the bank at all, it would have to be in the nature of the appointment of an agent, and not an appointment to the cashiership of a bank in another state.

A bank, undoubtedly, may appoint agents in another state to perform any act which it could perform itself, and which is not prohibited by law.

If the items in the account which it is alleged are charged to the defendant, as salary of Mr. Jones, have been admitted or allowed by the bank as a bank, for services performed, then the jury may charge the defendant with them, or if, with a full knowledge of all the facts attending its payment, the bank has admitted or allowed it, in the nature of compensation for services performed, and not as salary merely, then the defendant was bound by it, but not otherwise.

The cashier of a bank is ordinarily the executive officer of the bank. He is the agent through whom third persons transact their business with the bank. The bank generally holds him out to the world as having authority to act, according to the general usage, practice, and course of business, and all acts done by him within the scope of such usage, practice, and course of business bind the bank as to third persons who transact business with him on the faith of his official character; and perhaps it may be presumed, without proof and merely from his office, that he is authorized to receipt and discharge debts and deliver up securities on payment or discharge of the debt for which they were held, and he may have power to endorse bills, notes, &c., for collection. He may draw checks for funds in other banks. Possibly these powers might be inferred from his official position. But still his authority is a limited authority, and when a party claims a discharge from a debt due the bank, not by payment, but by giving other or different notes, bills, or securities, which the cashier has agreed to take and release the debt, his authority, like that of any other agent, must be shown by proof.

As a general rule, a jury have not a right to infer that a cashier of a bank, as such, has the authority to compromise and discharge debts without payment, or by taking other securities, but the authority from the bank must be shown expressly or by necessary implication, or it must exist and be established by the particular usage, or practice, or mode of doing business of the bank, or it must be ratified or acquiesced in by the bank in order to be binding.

Verdict for plaintiff.

NOTE. The cashier cannot bind the bank except within the scope of his authority, Foster v. Essex Bank, 17 Mass. 479. Has no authority to transfer judgments or dispose of its property. The president and directors are the only persons who can legally make such transfer. If the cashier acts as their agent, his authority must be shown. Holt v. Bacon, 25 Miss. 567. Acts of a cashier are only binding upon the bank when he acts within the sphere of his agency. State v. Commercial Bank, 6 Smedes & M. 218; U. S. v. City Bank of Columbus, 21 How. [62 U. S.] 356. "Ordinary duties" does not comprehend making contracts involving the payment of money, unless it be such as has been loaned in the customary way, without express power from board of directors. Nor to purchase or sell the property of or create an agency for the bank. Id. Consult, also, Hallowell & A. Bank v. Hamlin, 14 Mass. 180; Hartford Bank v. Barry, 17 Mass. 94; Wild v. Bank of Passamaquoddy [Case No. 17,646]; Ridgway v. Farmers' Bank of Bucks County, 12 Serg. & R. 265; Stamford Bank v. Benedict, 15 Conn. 445; Ryan v. Dunlap, 17 Ill. 40; Fleckner v. Bank of U. S., 8 Wheat. [21 U. S.] 338; Bridenbecker v. Lowell, 32 Barb. 9; Bank of New York v. Farmers' Branch of the State of Ohio, 36 Barb. 332; Bank of Pennsylvania v. Reed, 1 Watts & S. 101; Payne v. Commercial Bank of Massachusetts, 6 Smedes & M. 24; Minor v. Mechanics' Bank of Alexandria, 1 Pet. [26 U. S.] 46.

Case No. 12,310.

In re SANFORD.

[7 N. B. R. 351.] [1]

District Court, E. D. Wisconsin. 1873.

BANKRUPTCY — ACT OF — MORTGAGE — INTENT TO HINDER AND DELAY CREDITORS.

Where a petitioning creditor alleges in his petition, as an act of bankruptcy, that on the 29th day of October, 1870, the debtor made certain transfers of real and personal property with intent to delay his creditors; and the debtor, in his answer (which was supported by

[1] [Reprinted by permission.]

the proof), showed that the transfers were by way of mortgages. That both mortgages were given to secure the same sum ($1,080), borrowed by the debtor on the 29th day of October, 1870, from the mortgagee, in order to relieve the debtor's stock in business from a contested attachment, and thus enable the debtor to go on in his business of manufacturing shingles. That the loan was specifically to settle this attachment suit, and also to pay the only overdue paper of the debtor, known by the mortgagee to be outstanding, except only such secured paper as the mortgagee already had. *Held*, that as the mortgages were based upon a present consideration, and were neither given nor received with any intent to delay creditors, they did not constitute an act of bankruptcy. Petition dismissed at cost of petitioning creditor.

S. W. Alden filed petition April 28, 1871, against Sylvester Sanford, alleging as the act of bankruptcy, that on the 29th of October, 1870, the debtor made certain transfers of real and personal property, with intent to delay his creditors. The debtor answered, and the proof supporting the answer showed that the transfers were by way of mortgage; that both mortgages were given to secure the same sum of $1,080, borrowed by the debtor on the 29th of October, 1870, from the mortgagee, in order to relieve his stock in business from a contested attachment, and thus enable the debtor to go on in his business of manufacturing shingles; that the loan was specifically to settle this attachment suit, and also to pay the only overdue paper of the debtor known by the mortgagee to be outstanding, except only such secured paper as the mortgagee himself already had.

THE COURT (MILLER, District Judge) held that as the mortgages were based upon a present consideration, and were neither given nor received with any intent to delay creditors, they did not constitute an act of bankruptcy.

The petition was therefore dismissed at the cost of the petitioner.

Case No. 12,311.

SANFORD v. BOYD.

[2 Cranch, C. C. 78.] [1]

Circuit Court, District of Columbia. June Term, 1813.

OFFICER—SAIL-MAKER—EXEMPTION FROM MILITIA DUTY.

A sail-maker at the Washington navy-yard, appointed by a warrant under the hand of the secretary of the navy and seal of the department, is an officer of the United States and exempt from militia duty.

[Cited in U. S. v. Hartwell, 6 Wall. (73 U. S.) 393; Platt v. Beach, Case No. 11,215; Frelinghuysen v. Baldwin, 12 Fed. 397.]

Replevin [by William Sanford against Washington Boyd] for goods taken by distress for militia fines.

Mr. Jones, for plaintiff. Sanford was appointed sail-maker for the navy-yard at Washington, by a warrant under the hand of the secretary of the navy and the seal of the department, and is therefore an officer of the government of the United States, and exempted from militia duties, by the second section of the act of congress of the 8th of May, 1792 (1 Stat. 271). Wise v. Withers, 3 Cranch [7 U. S.] 331.

Mr. Caldwell, contrà. The case of Wise v. Withers [supra] does not decide this. Wise was a judicial officer and expressly excepted. The act of the 27th of March, 1804 (2 Stat. 297), authorizes the president to attach, to the navy-yard, a sail-maker; but this does not authorize the secretary to make the appointment by a warrant under his hand and the seal of the department only. He is, therefore, not an officer, either judicial or executive, of the government of the United States.

Judgment for plaintiff.

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

SANFORD (BRISTOL v.). See Case No. 1,893.

Case No. 12,312.

SANFORD v. LACKLAND et al.

[2 Dill. 6.] [1]

Circuit Court, D. Missouri. 1871.

BANKRUPTCY—WHAT PROPERTY VESTS IN ASSIGNEE—BENEFICIAL INTERESTS UNDER WILL.

1. All the property of the bankrupt, except such as is specially exempted, vests in the assignee in bankruptcy.

2. A testator cannot give a devisee the beneficial interest in the estate devised, and annex to it the inconsistent condition that it shall not be liable for his debts, but he may provide that the estate of the devisee, on his becoming a bankrupt, shall determine and go somewhere else.

[Cited in Sparhawk v. Cloon, 125 Mass. 266.]

3. A testator gave to trustees an estate for the benefit of his son, but with directions that the trustees should hold it and its accumulations until the son should reach the age of twenty-six years; he was adjudged a bankrupt at the age of twenty-four years: *Held*, that the assignee in bankruptcy, as against the bankrupt, was entitled to the property held by the trustees.

[Cited in Claflin v. Claflin, 149 Mass. 23, 20 N. E. 454.]

Appeal from the district court of the United States for the Eastern district of Missouri.

The plaintiff is the assignee in bankruptcy of Wm. C. Hill. The defendants are Wm. C. Hill, Lackland and Clark, the executors and trustees named in the will of James B. Hill, and Edwards, trustee in a deed of trust for the benefit of Mathews, executed by William C. Hill on the property in controversy.

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

The question in the case is, whether, subject to the Mathews deed of trust, the assignee in bankruptcy is entitled to the interest and right of William C. Hill in the property held by the executors or trustees named in his father's will, consisting of stocks, notes, and real estate. The essential facts are these: In 1862, James B. Hill, the father, died, leaving five children, three sons and two daughters. His will, admitted to probate in March, 1862, so far as material to the present controversy, is in these words: "All the residue of my estate, real, personal, and mixed, I give, devise, and bequeath unto Rufus J. Lackland and William G. Clark, and to the survivor of them, as trustees, in trust, however, to manage, control, and improve the said estate; to receive and collect the debts due me; to receive and collect the rents, issues, and profits of said property; to reinvest any money that may come into their hands as they may deem best or therewith improve any unimproved real estate, to rent or lease any portion of said real estate; and I do hereby invest them with full and complete authority to sell and convey in fee simple any of my real estate, and to reinvest the proceeds of such sales in other real estate, or otherwise, in their discretion, and in trust, as aforesaid, to manage, control, and keep together, my said property as one entire whole; and as I now have five children, to-wit—James B. Hill, William C. Hill, Anna M. Hill, Frank W. Hill, and Mary Hill, upon the further trust: First. Until my children respectively arrive at the age of twenty-one years, or get married, to provide for their support, maintenance, and education out of said estate, which support, maintenance, and education is to be taken as part of the expenses of my estate. Second. My said trustees shall, out of my said estate, pay to each one of my children (if in their opinion such advancement shall not probably amount to more than the equitable share of such child in my estate) as they respectively arrive at the age of twenty-one years, the sum of ten thousand dollars as an advancement, and shall, from the time of such advancement, charge such child with interest thereon at the rate of six per cent per annum, if such advancement be made before the partition hereinafter mentioned. Third. When my eldest child shall arrive at the age of twenty-six years, or if he shall not so long live, then when the next oldest surviving child shall attain that age, my said trustees shall, with the approval of the probate court of St. Louis county, make a partition of all said trust estate among my said children, share and share alike, charging, however, in such division and partition, any child who may have received an advancement as before mentioned, with such advancement, with interest thereon from the time when received as part and portion of the share coming to such child, and upon such partition shall forthwith convey to such eldest child, if such eldest child be a son, the portion allotted to him in absolute property, but shall hold the shares and portions of the others of said children until they severally arrive at the age of twenty-six years; and as the sons severally arrive at that age they shall convey to them the share and portion allotted to such son in absolute property." (And then follows a similar provision as to the share of the estate coming to the daughters.) "After the said partition shall have been made, my said trustees shall keep the portion and share of each of my children separate (except as before), with the rents, issues, and profits belonging to such portion."

On January 29, 1870, James B., the eldest son, became twenty-six years of age, and thereupon the trustees in the will, with the approval of the probate court, made partition of all the property held in trust among all of the children, and there was an order of distribution in accordance with the terms of the will. The property allotted and set apart to the said William C. Hill consisted of specified stocks in certain banks, promissory notes, and real estate, which are still in the possession and custody of the trustees. On July 6, 1870, William C. Hill executed a deed of trust on the property which had been allotted to him to Edwards, trustee for Mathews, to secure ten thousand dollars, which is yet unpaid. The trustees under the will advanced to William C. the ten thousand dollars on his becoming twenty-one years of age. On November 28, 1870, a petition for adjudication in bankruptcy was filed against him, and he was adjudged a bankrupt. The property in the hands of the trustees belonging to him is of the value of $30,760, and he is now between twenty-four and twenty-five years of age. The bill sets out the foregoing facts, and prays that the property in the hands of the trustees allotted to William C. Hill may, subject to the incumbrance of Mathews, be decreed to belong to the assignee in bankruptcy. The district court overruled a demurrer to the bill, and entered a decree as prayed. [Case unreported.] The trustees and the bankrupt appeal.

Cline, Jamison, & Day, for complainant.

Slayback & Haussler and Lackland, Martin & Lackland, for defendants.

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

DILLON, Circuit Judge. The share of the bankrupt in his father's estate has been duly ascertained and set apart in severalty to him, but with the exception of the ten thousand dollars advanced on his attaining his majority is yet in the hands of the trustees, as he was not twenty-six years of age at the time he was adjudicated a bankrupt. By the bankrupt law [of 1867 (14 Stat. 517)], all the property of the bankrupt, with certain exemptions not necessary to be noticed, vests

in the assignee (section 14); and if William C. Hill owned or had a beneficial interest in the property in the hands of the trustees, it passed under the bankruptcy. That he was the owner of the property which had been allotted to him under the will can scarcely admit of a doubt. The will directs a partition of the trust estate to be made among the children, and this has been done, but it also provides that the trustees shall hold the shares of the children until the sons shall severally arrive at the age of twenty-six years, when they are directed to convey to such son his portion in absolute property.

This is not the case of a legacy or gift to vest if the legatee shall arrive at a specified age which has not yet been reached. Nor is the devise or gift to the son made on any condition; there is no limitation over in case the son shall, before attaining the age of twenty-six, become a bankrupt. If William C. had not been adjudged a bankrupt, and had died intestate before reaching the age of twenty-six, can it be doubted that his heirs would have taken the estate? It has not been questioned, nor could it be, that he had the power to mortgage this property for the money borrowed of Mathews. If the intention of the testator was to prevent the property from being liable for the debts of his son, his will fails to express that intention. The testator might have provided if the son should become bankrupt before reaching twenty-six, that his estate should then determine and go somewhere else; but he cannot give the beneficial interest and annex to it the inconsistent condition that it shall not be liable for the debts of the devisee. And in fact the father has not attempted to do this. The estate is given, and the only limitation expressed in the will is that the trustees shall hold it and its accumulations until he shall reach the specified age. The trustees have no beneficial interest in the estate they hold. By operation of the bankruptcy, William C. Hill has no longer any interest in it. It belongs to and is vested in the assignee for the benefit of creditors. The trustees now hold the property in trust for the benefit of these creditors, and as the strict execution of the trusts in the will have been thus rendered impossible, the court properly decreed that the property held by the trustees for the bankrupt should, subject to the Mathews incumbrance, be conveyed to the assignee in bankruptcy. The decree of the court is affirmed.

NOTE. In full support of the foregoing views, see Graves v. Dolphin, 1 Sim. 66; Green v. Spicer, 1 Russ. & M. 395; Brandon v. Robinson, 18 Ves. 429; Rochford v. Hackman, 10 Eng. Law & Eq. 64; Piercy v. Roberts, 1 Mylne & K. 4; Hallett v. Thompson, 5 Paige, 583; Bryan v. Knickerbacker, 1 Barb. Ch. 409; Havens v. Healy, 15 Barb. 296; Collier's Will, 40 Mo. 287, 325; Doe v. Lea, 3 Term R. 41; Nicoll v. Walworth, 4 Denio, 385; 4 Kent, Comm. 310; Say v. Jones, 3 Brown, Parl. Cas. 113; Will. Eq. Jur. 514, 515; Story, Eq. Jur. § 1216.

Case No. 12,313.

SANFORD v. MERRIMACK HAT CO.

[2 Ban. & A. 408; 4 Cliff. 404; 10 O. G. 466; 15 Alb. Law J. 12.] [1]

Circuit Court, D. Massachusetts. Sept. 2, 1876.

PATENTS—PATENTABLE INVENTIONS—COMBINATION—HOW INFRINGED.

1. Patentable inventions defined.

2. The patented invention of complainant's assignor, being construed by the court as consisting of a work-plate, two guides constructed and arranged as described, in combination with a sewing-machine or stitching apparatus, and the defendants' device omitting the guides. *Held*, that the defendants do not infringe.

3. A patent for an invention consisting entirely in a new combination of old elements or ingredients is not infringed unless by the use of all the elements or ingredients of the new combination.

[Bill in equity [by Glover Sanford against the Merrimack Hat Company], praying for an account and for an injunction for the infringement of letters-patent upon a new and useful improvement in sewing-machines for stitching the sweat-cloths to hats. The chief question was that of infringement.] [2]

[The letters patent No. 53,927 were granted to Sanford & Wheeler April 10, 1866.]

E. Avery, G. M. Hobbs, and C. O. Morse, for complainants.

W. W. Swan and Chauncey Smith, for respondents.

CLIFFORD, Circuit Justice. Patentable inventions pertaining to machines may be divided into four classes; first, entire machines, as a car for a railway, or a sewing-machine; second, separate devices of a machine, as the colter of a plow or the divider of a reaping-machine; third, new devices of a machine in combination with old elements, all embraced in one claim, or with separate claims for what is new, together with a claim for the new combination of all the elements; fourth, devices or elements of a machine in combination, where all the devices or elements are old.

What the assignor of the complainant professes to have invented is a new and useful improvement in sewing-machines, and he states in the specification that the invention is designed for the purpose of stitching the sweats or leather lining into hats; and that the invention consists in the peculiar form of the work-plate, with a guide for the sweat and a guide for the hat, combined with a sewing-machine or stitching apparatus. Beyond doubt, he refers to a particular sewing-ma-

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and by William Henry Clifford, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 2 Ban. & A. 408, and the statement is from 4 Cliff. 404. 15 Alb. Law J. 12, contains only a partial report.]

[2] [From 4 Cliff. 404.]

chine, which has a needle-bar, needle, presser-foot, looper and feeding mechanism; but it is unnecessary to pursue that description, as the patentee expressly states that the improvement is alike applicable to other sewing-machines, and that he does not intend to confine himself to any particular stitching apparatus, meaning only that the one referred to is preferred. Special reference is made to the work-plate of the new improvement, in which he states that its upper surface is made concave, and that its front is turned down and curved, as seen in Figs. 1, 2, and 3 of the drawings, and he adds that the plate is arranged relatively to the feed, needle and looper the same as the ordinary flat work-plate, without stating whether it is new or old. Passing from that, he proceeds to refer to the guides, commencing with the guide for the sweat, which he says is attached to the presser-foot or other part of the machine, and that it is formed from thin sheet metal of the proper width, and so as to permit the sweat-leather to pass freely down beneath the presser-foot. Next, he refers to the guide for the hat, and remarks that it rests upon the angle of the work-plate, so as to properly guide the hat up on the work, the angle of the hat brim and body resting upon the angle of the work-plate. Certain directions are then given, as follows: That the hat to which the sweat is attached must be placed upon the table so that the angle of the brim and hat shall come beneath the needle, the hat guide bearing thereon with the force of the spring denoted by the red color in the drawings. Nothing is stated in the specification to denote whether the described guides are new or old, nor does the specification contain any suggestion or intimation that either of the guides may be dispensed with in conducting the operation. Instead of that, the directions continue that the sweat-leather is then passed through the sweat-guide beneath the presser-foot, so that the needle will catch upon the edge of the leather while the machine is operated in the usual manner, stitching the leather to the hat; and the patentee suggests that the peculiar form of the table, combined with the feed, causes the hat to be turned gradually round until the leather is neatly stitched entirely round the hat. Tested alone by the description of the improvement, the better opinion is that the same is a mere arrangement of old elements in a new combination, to work out a new and useful result, and such are the views of the respondents; but the complainants insist that the description of the improvement, when taken in connection with the claim, warrants the conclusion that the work-plate and the two guides are new devices, invented by the patentees. Nothing certainly appears in the description to support the theory that it required any invention to make the work-plate or either of the guides; and the court is of the opinion that the mere fact that the patentees claim those several devices, in combination with a stitching apparatus, is not sufficient to support the conclusion that the commissioner of patents ever intended to adjudge that the patentees were the original and first inventors of those several devices. "Our invention," say the patentees, "is designed for the purpose of stitching sweats to hats, and consists in the peculiar form of the work-plate, and a guide for the sweat, and a guide for the hat, combined with a sewing-machine or stitching apparatus;" but there is nothing in the description of the work-plate to show that it required any invention to make it, or that there is anything in the form of the device to entitle the maker of it to the reward due to an original and first inventor of a new and useful improvement. All that is said about it is that its upper surface is made concave, that its front edge is turned down and curved, so that the rim of the hat rests upon the upper surface of the plate, while the crown rests against the side, and the patentees admit that it is arranged relatively to the feed, the needle and looper, the same as the ordinary flat work-plate.

As before explained, guides are required, but it is not even suggested that they are peculiar in form, or that it involved any invention to construct or arrange those devices. Enough is stated to show that the sweat guide is formed from thin sheet metal, so as to permit the leather to pass freely down beneath the presser-foot, and the statement is that it must be of proper width; but the specification gives no definite description of the form of the guide for the hat, except what may be inferred from the function which it is to perform. Stress is laid upon the peculiar form of the table, but it is not necessary to remark upon that device, as it is not claimed that it is new. Viewed in the light of these suggestions the court is of the opinion that the invention consists of the work-plate, the two guides, constructed and arranged as described, in combination with a sewing-machine or stitching apparatus. Construed in that way, it is very clear that the respondents have not infringed the complainant's letters patent, as they do not use the guide for the hat. Where the invention consists entirely in a new combination of old elements or ingredients, the law is well settled that a suit for infringement cannot be maintained unless it appears that the respondent has used all of the elements or ingredients of the new combination. Prouty v. Ruggles, 16 Pet. [41 U. S.] 341; Vance v. Campbell, 1 Black [66 U. S.] 428; Gould v. Rees, 15 Wall. [82 U. S.] 193; Seymour v. Osborne, 11 Wall. [78 U. S.] 555.

Patents may doubtless be granted for a new device, and for the same in combination with old elements, and if both inventions are properly described and claimed, the patent will be valid for both; but it is not necessary to pursue that inquiry in this case, as the court is of the opinion that neither the description of the supposed improvement nor the claim of the patent in question brings the case before the court within that rule. Infringement not

being proved, the bill of complaint must be dismissed.

Decree, that bill of complaint is dismissed.

[For another case involving this patent, see Case No. 12,314.]

Case No. 12,314.

SANFORD et al. v. MESSER et al.

[5 Fish. Pat. Cas. 411; Holmes, 149; 2 O. G. 470.] [1]

Circuit Court, D. Massachusetts. April 8, 1872.

PATENTS—ASSIGNMENT—LICENSE—IMPROVEMENT IN SEWING MACHINES.

1. Any assignment which does not convey to the assignee the entire and unqualified monopoly which the patentee holds in the territory specified or an undivided interest in the entire monopoly, is a mere license.

[Cited in Hill v. Whitcomb, Case No. 6,502; Webster v. Ellsworth, 36 Fed. 328.]

2. The conveyance of an exclusive right to use and vend, the right to make being retained by the grantors, construed to be a mere license.

[Cited in Rice v. Boss, 46 Fed. 196.]

3. It was not the intention of the legislature to permit several monopolies to be made out of one, and divided among different persons in the same limits.

4. A contract for the purchase of a portion of a patent right may be good as between the parties as a license, and enforced as such in the courts.

5. But the legal right in the monopoly remains in the patentee, and he alone can maintain an action against a third party who commits an infringement upon it.

6. S. & W. conveyed to S. & B. all their right, title, and interest in and to an invention, within the state of Massachusetts, except the right to build the patented machines. In a suit against one who had infringed by making the patented invention: *Held*, that the suit was properly brought in the name of S. & W., without joining S. & B.

[Cited in Wilson v. Chickering, 14 Fed. 918.]

7. An improvement, by which ordinary sewing-machines could be adapted to the sewing of sweat-linings in hats, and of which such machines were an essential element, is not anticipated by complicated and expensive sewing-machines specially adapted to the sewing of sweat-linings, but not capable of use as ordinary sewing-machines.

8. Letters patent for "improvement in sewing-machines," granted to F. S. Sanford and D. Wheeler, April 10, 1866, are valid.

9. The novelty of the improvement in sewing-machines invented by Sanford & Wheeler sustained.

[Bill in equity by Glover Sanford and others against Matthew Messer and others to restrain alleged infringement of letters-patent [No. 53,927] for an improvement in sewing-machines, granted the complainants, as assignees of Frederick S. Sanford and Dwight Wheeler, April 10, 1866; and for an account. It was contended for the defendants, amongst other things, that the bill was defective for want of proper parties plaintiff, the complainants having, before the suit, granted to third parties the exclusive right to use and vend the patented invention in Massachusetts; thus, as was claimed, making them joint owners of the patent with the complainants.][2]

James B. Robb, for complainants.

Chauncey Smith and W. W. Swan, for defendants.

SHEPLEY, Circuit Judge. This is a suit in equity founded on letters-patent granted by the United States "for a new and useful improvement in sewing-machines, applicable to the ordinary sewing-machine, by which it may be adapted to sew sweat-linings into hats without any alteration in the organizations of such machines."

An objection is made, that the bill is defective for want of parties. Defendants claim, that, since the date of the patent, the plaintiffs have transferred such an interest in the patent, in and for the state of Massachusetts, that they have not the exclusive ownership of the patent, and are not entitled to maintain the bill of complaint. It appears that the patentees conveyed to Stanwood and Bailey all their interest in the invention as secured to them by the letters-patent for, to, and in the state of Massachusetts, except the right to build said machines. Any assignment which does not convey to the assignee the entire and unqualified monopoly which the patentee holds in the territory specified, or an undivided interest in the entire monopoly, is a mere license. The monopoly granted to the patentees is for an entire thing. It is the exclusive right of making, using, and vending to others to be used, the improvement described in the patent, and for which the patent is granted. The instrument introduced in evidence by the defendants purports to convey to Stanwood and Bailey the exclusive right in certain specified territory to use, and vend to others to be used, the patented invention; but it does not convey, but expressly reserves to the grantors, the right to make the machines.

As well stated by Chief Justice Taney in Gayler v. Wilder, 10 How. [51 U. S.] 494, it was obviously not the intention of the legislature to permit several monopolies to be made out of one, and divided among different persons in the same limits. Unquestionably a contract for a purchase of a portion of the patent-right may be good as between the parties as a license, and enforced as such in the courts of justice; but the legal right in the monopoly remains in the patentee, and he alone can maintain an action against a third party who commits an infringement upon it. The bill of complaint in this case charges that defendants have made, and do make, the patented invention in violation of

[1] [Reported by Samuel S. Fisher, Esq., and by Jabez S. Holmes, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 5 Fish. Pat. Cas. 411, and the statement is from Holmes, 149.]

[2] [From Holmes, 149.]

complainants' rights under the patent. The bill can unquestionably be maintained for that infringement of the exclusive privileges of the complainants, even if it were necessary to join other parties as complainants in a bill alleging infringement only by vending and using.

The next inquiry is, whether Sanford and Wheeler were the original and first inventors of the improvement described in the specification and letters-patent. To negative this, defendants rely upon letters-patent of the United States granted to Rudolph Eickemeyer Aug. 9, 1859, and Feb. 20, 1866, and to E. M. Hendrickson, Feb. 4, 1862. They have offered these letters-patent in evidence, and have also filed as exhibits in the cause the several machines made by Eickemeyer and Hendrickson, embodying the principles of the invention described in the respective patents. These are machines not applicable to the ordinary sewing-machines in common use. They embody inventions consisting in radical changes in an entire reconstruction of the sewing-machines, to adapt them to the new use. It does not appear to the court that there is any necessary conflict between these machines and the plaintiffs'. They do not contain the elements described in the plaintiffs' patent: namely, "a sewing-machine in which the needle-bar, the presser-foot, the looper, and the feed are all constructed and operated in the usual manner;" nor "a work-plate arranged relatively to the feed, the needle, and the looper, like the ordinary work-plate." The object and purpose of the plaintiffs' invention were to substitute for the ordinary work-plate used in sewing-machines in common use a work-plate of peculiar construction, with a guide for the sweat-lining, and also a guide for the hat, by means of which any common sewing-machine may be used for sewing sweat-linings into hats without any change or alteration in the construction or mode of operation of any of its working parts, so that by changing the work-plate the sewing-machine could be used for sewing sweat-linings into hats, or performing the ordinary work of the common sewing-machine, as occasion might require. In this respect it differs substantially from the Exhibits R, S, T, U, and V, ingenious, but complicated and expensive, sewing-machines, specially adapted for the sole purpose of this branch of manufacture, embodying the inventions of Eickemeyer and Underhill and Hendrickson.

The defendants have infringed, by the use of a work-plate substantially like the plaintiffs', differing from it only in the fact that one of the faces of the angular plate is wood instead of metal; and a guide for the sweat-lining, formed for that purpose on the face of the presser-foot; and a guide for the hat, a contrivance consisting of a peculiar form of the presser-foot, together with a projecting pin;—these two guides, in combination with the work-plate and with the ordinary stitching apparatus, accomplishing the same results as in the plaintiffs' machine, by means substantially the same, and in the same manner and in the same combination. The defendants' machine, Exhibit D, embodies the plaintiffs' invention in a slightly altered form. The organization and operation of the plaintiffs' and defendants' machines are the same in substance, the differences between them consisting only in changes of form, leaving all the elements of the plaintiffs' combination in the defendants' machine. Decree for injunction and account as prayed for in the bill.

[For another case involving this patent, see Sanford v. Merrimack Hat Co., Case No. 12,313.]

Case No. 12,315.

SANFORD v. PORTSMOUTH.

[2 Flip. 105; 6 Cent. Law J. 147; 2 Month. Jur. 14; 6 N. Y. Wkly. Dig. 335.] [1]

Circuit Court, E. D. Michigan. Nov. 26, 1877.

COURTS—FEDERAL AND STATE PRACTICE—JUDICIAL CONSTRUCTION.

1. Section 914, Rev. St., which adopts the practice, pleadings, forms and modes of procedure of the state courts, applies only to such as are established by the statutes of the several states, and not to modes of procedure established by judicial construction of common law remedies.

[Cited in brief in Schollenberger v. Phœnix Ins Co., Case No. 12,476. Cited in Patten v. Cilley, 46 Fed. 892.]

2. The federal courts are not bound by the decision of the supreme court of a state, which decides that mandamus is the only proper remedy upon municipal bonds.

3. Quære, whether this section extends to the practice prescribed by rules of the state courts of general application.

On demurrer to a plea to the jurisdiction. Action of assumpsit upon certain interest warrants or coupons annexed to bonds issued by the town of Portsmouth to aid in the construction of a plank road. Defendant pleaded to the jurisdiction upon the ground that assumpsit would not lie, insisting that mandamus was the only proper remedy. Plaintiff [Horatio W. Sanford] demurred.

Mr. Atkinson, for plaintiff.

Mr. Freeman, for defendant.

BROWN, District Judge. As the point was not raised by counsel it is not necessary here to decide, whether a plea to the jurisdiction is a proper mode of taking advantage of a defect apparent upon the face of the declaration, where the form of the remedy only is in question. That assumpsit is a proper action upon securities of this kind is settled, at least so far as the federal courts are concerned, in Town of Queensbury v. Culver, 19 Wall. [86 U. S.] 83, 92. See, also, Heine v. Levee

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 6 N. Y. Wkly. Dig. 335, contains only a partial report.]

Com'rs, Id. 655, 657. While the question has not been directly decided elsewhere, there is a multitude of cases in the recent volumes of the Supreme Court Reports, where assumpsit or debt has been brought upon municipal obligations of this description, in which the court has impliedly recognized these actions as the proper remedy.

It is equally well settled that a writ of mandamus will not lie in such cases in the federal courts until after judgment has been obtained. The circuit courts have no power to issue a writ of mandamus by way of original proceeding, where such writ is neither necessary nor ancillary to the jurisdiction already acquired. Bath Co. v. Amy, 13 Wall. [80 U. S.] 244. Further discussion of these propositions is concluded by the opinions above cited.

It is insisted, however, that under the practice of this state, as established by the supreme court, assumpsit will not lie, and that under the act of 1872 adopting "the practice, pleadings, forms and modes of proceeding" of the state courts, this construction is obligatory upon this court. The supreme court of this state seem to have adopted the view that mandamus is the only proper remedy where the liability of the corporation is fixed or the amount of the debt liquidated and adjusted. This question was first directly passed upon in Marathon v. Oregon, 8 Mich. 372, in which, after a division of a township, the town boards met and determined the amount of indebtedness to be paid by the new township. It was held by a majority of the court that the amount being a fixed and liquidated demand against the new township, which it was the duty of its town board to allow, mandamus was a proper remedy in an action against the township to recover the amount of the demand. The decision was put partly, at least, upon the ground that by law no execution can be issued against a township, and that as a judgment would be useless, the amount of the debt being already ascertained, a town ought not to be put to the useless expense of a judgment by default of its officers, and the creditor ought not to be put to delay or a double pursuit. There was a strong dissenting opinion in this case by Mr. Justice Christiancy. In Township of Dayton v. Rounds, 27 Mich. 82, the same principle was extended to bonds authorizing the payment of bounties to volunteers, and it was stated to be the settled practice of the state that a remedy by action was improper in such a case. It was again affirmed in the case of McArthur v. Township of Duncan, 34 Mich. 27, in which mandamus was held to be the only proper remedy to enforce the payment of orders regularly drawn by the highway commissioners on the township treasurer, the duty of the township authorities to raise the necessary funds and to make payment, being just as necessary upon the presentation of such orders as it would be after judgment.

Assuming that the supreme court would adhere to this principle if the question arose upon coupons of this character, it only remains to consider whether such construction falls within the scope of the act of 1872 as a "practice or mode of proceeding," existing in the courts of record of this state, within the meaning of this act. I am clearly of the opinion it does not, for the following reasons:

1. I think the practice, pleadings, and forms and modes of proceeding in civil causes, mentioned in section 914, are confined to those established by the statutes of the state, and do not include modes of procedure established by judicial construction of common law remedies. Whenever general principles of law are involved, the federal courts may exercise an independent judgment. By the judiciary act of 1789 (Rev. St. § 721), "the laws of the several states * * * shall be regarded as rules of decision in trials at common law in the courts of the United States;" but it has never been held in construing this section that the judicial decisions of the several states upon questions of general law were obligatory upon the federal courts.

We are bound by the constitutions and laws of the several states, and by the construction given to such constitutions and laws by the courts of the state. It has also been held that we are bound by decisions of the state courts so far as they establish rules of law affecting the title to lands, or principles which have become a settled rule of property, but no farther. Swift v. Tyson, 16 Pet. [41 U. S.] 1; Boyce v. Tabb, 18 Wall. [85 U. S.] 546; Delmas v. Insurance Co., 14 Wall. [81 U. S.] 661; Lane v. Vick, 3 How. [44 U. S.] 464. We had occasion to apply this construction at the last term of this court, where the question arose as to the liability of a city for injuries received from a defective sidewalk. We then held the municipality liable, following the decisions of the supreme court, although the supreme court of the state had held that such liability did not exist.

The supreme court of the United States also held, in numerous early cases, that section 721, above quoted, did not extend to the procedure or practice of the federal courts. Robinson v. Campbell, 3 Wheat. [16 U. S.] 212; Wayman v. Southard, 10 Wheat. [23 U. S.] 1. It was to remedy what was considered a defect in this particular, that the act of 1872 was passed; and I think the same construction should be given to it.

The opinion of the supreme court of the state that mandamus is the only proper remedy, being simply the enunciation of a general principle of law, running counter to the decisions of the supreme court of the United States upon the same subject, is not binding upon this court. Whether the act of 1872 may not also extend to the rules established by the supreme court of the state, of general application to the common law courts of the state, we are not called upon to decide. It would seem, however, that section 914 adopt-

ing the state practice, and section 918, authorizing the circuit courts to regulate their own practice, being contemporaneous acts, should be construed together. This would confine section 914 to the practice established by state statutes, leaving the federal courts still at liberty to adopt any rules not inconsistent therewith.

2. We are required by the act of 1872 above quoted (Rev. St. § 914), to conform our practice, pleadings and forms and modes of proceeding only "as near as may be" to those of the state courts, or as the supreme court has expressed it, as near as may be "practicable." This leaves the act, to a certain extent, mandatory or directory, and vests in this court a limited discretion to reject methods of procedure which are inconsistent with the established and well recognized usages of the federal courts. As observed by the supreme court in Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 301: "This indefiniteness may have been suggested by a purpose. It devolved upon the judges to be affected, the duty of construing and deciding, and gave them the power to reject, as congress undoubtedly expected they would do, any subordinate provision in such state statutes which in their judgment would unwisely incumber the administration of the law, or tend to defeat the ends of justice in their tribunals." This discretion has actually been exercised in a number of cases. In Nudd v. Burrows, 91 U. S. 426, it was held that the practice act of Illinois, which provided that the court should instruct the jury only as to the law, and that they should on their retirement, take the written instructions of the court and return them with their verdict, was not binding upon the federal courts sitting in that state. It was said that the personal conduct and administration of the judge, in the discharge of his particular functions, was neither practice, pleading, nor a form or mode of proceeding within the meaning of the section. So in Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, the court refused a motion to instruct the jury to find specially upon particular questions of fact involved in the issues, in the event they should find a general verdict, and the court held that such instruction was right, notwithstanding a statute of the state requiring the court to submit particular questions to the jury, when requested so to do. So in Beardsley v. Littell [Case No. 1,185], Judge Blatchford held that the provision of the New York Code of Procedure, for the examination of witnesses before trial, did not apply to the federal courts.

It is scarcely necessary to say that a construction which would oust this court of a jurisdiction over a very large class of cases, is not a "practicable conformance" with the mode of procedure in the state courts, within the meaning given to this section by the supreme court.

The plea to the jurisdiction is therefore overruled.

SANFORD (RHINELANDER v.). See Case No. 11,739.

SAN FRANCISCO (BAYERQUE v.). See Case No. 1,137.

SAN FRANCISCO (HOADLEY v.). See Case No. 6,544.

Case No. 12,316.

SAN FRANCISCO v. UNITED STATES.

[4 Sawy. 553.] [1]

Circuit Court, N. D. California. Oct. 31, 1864.

MEXICAN GRANTS — PUEBLO — WHAT CONSTITUTED — BOUNDARIES AND USES — DISPOSAL OF PUEBLO LANDS — DISTRICT ATTORNEY.

1. In the San Francisco Pueblo Case, both the United States and the city having appealed from the decree of the land commission confirming the claim of the city, and the United States having subsequently withdrawn and dismissed their appeal: *Held*, that such dismissal of the appeal on the part of the United States may be regarded as an assent by the government to the main facts upon which the claim of the city rests, namely: the existence of an organized pueblo at the site of the present city upon the acquisition of the country on July 7, 1846; the possession of such pueblo of proprietary rights in certain lands; and the succession to such proprietary rights by the city.

[Cited in U. S. v. Vallejo, 1 Black (66 U. S.) 562; Grisar v. McDowell, Case No. 5,832; Montgomery v. Bevans, Id. 9,735; Knight v. United States Land Ass'n, 142 U. S. 161, 12 Sup. Ct. 261.]

2. A pueblo of some kind, having an ayuntamiento, composed of alcaldes, regidores and other municipal officers, existed at the site of the present city of San Francisco as early as 1834, and continued in existence until and subsequent to the cession of the country to the United States.

3. By the laws of Mexico in force at the date of the conquest, a pueblo or town, when once established and officially recognized, became entitled, for its own use and the use of its inhabitants, to four square leagues of land.

[Cited in Brownsville v. Cavazos, 100 U. S. 139.]

4. Though in some instances under the Mexican laws an officer was appointed to mark off boundaries of the four square leagues to which new pueblos were entitled, and to designate the uses to which particular tracts should be applied, yet the right of the pueblos and their inhabitants to the use and enjoyment of the lands was not made dependent upon such measurement and designation.

5. The government retained the right to control the use and disposition of pueblo lands, and to appropriate them to public uses until by action of the city authorities, they were vested in private proprietorship.

6. The lands assigned to pueblos, whether by general law regulating their limits to four square leagues or by special designation of boundaries, were not given to them in absolute property with full right of disposition and alienation; but to be held by them in trust for the benefit of the entire community, with such powers of use, disposition and alienation as had been already or might afterward be conferred upon them or their officers for the due execution of the trust.

7. The United States attorney is the regular officer of the government, having charge of all

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

its legal proceedings within his district, subject only to the general direction and supervision of the attorney-general; and when other counsel are employed in these proceedings, it is to aid him in their management, not to assume his authority or direct his conduct.

[On transfer from the district court of the United States for the Northern district of California, pursuant to act of July 1, 1864.]

This case, involving the title of the city of San Francisco to the pueblo lands, was originally commenced by the filing of a petition by the city before the board of land commissioners on July 2, 1852. The petition set forth a claim made by the city to so much of the northern portion of the peninsula of San Francisco as would contain an area of four square leagues, upon the ground that upon the acquisition of the country, July 7, 1846, the then pueblo, now city, of San Francisco, was a town having a population of about one thousand inhabitants, and that under and by virtue of the laws of Mexico, it was entitled as such pueblo, to this quantity of land. There was much testimony taken and a number of able counsel engaged, and after a very thorough presentation of the case, the land commissioners, on December 21, 1854, filed their decree confirming to the city all the land south of the fort and casamata at Fort Point, and north of a line running from the southern part of Rincon Point through Lone Mountain to Point Lobos, and known as the "Vallejo Line." The decree did not contain any exceptions or reservations, and did not refer to the character or nature of the title held by the city; but was in terms merely a confirmation of the claim made by the city, within the limits mentioned, particularly describing them. In rendering their decision, Commissioners Thompson and Farwell concurred in the prevailing opinion, and Commissioner Felch filed a dissenting one. The former discussed at great length the Spanish and Mexican laws in reference to pueblos, the various documents and evidence presented in the case, and among others, the so-called Zamorano document. This paper, since ascertained and admitted to be spurious, purported to be a copy of a letter from Governor Figueroa to General Vallejo, dated Monterey, November 4, 1834, containing an approval by the government of a plan therein referred to as having been presented by General Vallejo in reference to the pueblo of San Francisco, adopting the Vallejo line, which had been marked out by him, as the boundary, and providing for the installation of the first ayuntamiento, or town council there. It was called the Zamorano document from the fact that it purported to be attested as a true copy by Zamorano, formerly secretary of the territorial government of California. Besides the Zamorano document, there were several other documents introduced and discussed, as to the genuineness of which no question has been made, showing or tending to show the existence of an ayuntamiento either at the presidio of San Francisco or at the Mission Dolores as early as 1834 or 1835. Upon this branch of the subject, and for the purpose of exhibiting the general character and style of reasoning of the prevailing opinion, the following extract therefrom may be given:

"It is probable, from the testimony, that when the pueblo was first organized, the site of the village or town proper was intended to be at the presidio; but subsequently, from the superior advantages of the anchorage at the place called Yerba Buena, that point was selected as the most eligible for that purpose. It appears from the deposition of Wm. A. Richardson, and the communication of Governor Castro annexed thereto, that in the autumn of 1835 Richardson was employed to lay off and make a plan of a town at that point, which plan was communicated to the governor and approved by him. About the same time the resolution of the deputation was passed, authorizing the ayuntamiento to grant building lots at that place, which was communicated to the municipal authorities in the order of Governor Castro of the twenty-sixth of October, 1835, and dated just six days after the communication to Richardson approving the plan of the town as submitted by him. There is an evident attempt in the testimony of Richardson to make it appear that the municipal organization here referred to was for a pueblo at the Mission Dolores or San Francisco de Asis, as it was indifferently called. But this is so palpably contradicted by the other evidence in the case, both documentary and oral, and so inconsistent with the other parts of his own testimony, as to entitle it to no weight whatever."

"It is objected further, that even admitting these proceedings to be sufficient for the establishment of a pueblo, so far as the territorial authorities were concerned, that in order to give them effect and validity under the law which authorized them, the approval of the supreme government was necessary. This is unquestionably true, and we accordingly find that the resolutions of the territorial deputation directed that they should be communicated to the government at Mexico for that purpose. There is no evidence in the case that such approval ever was had; but the resolutions to that effect were doubtless sent to the government by Governor Figueroa, as we can scarcely imagine that one who was so punctual and exact in the discharge of all his official duties, would have neglected it in this instance. The existence of the pueblo appears to have been uniformly recognized by the public authorities from that time, and its civil officers continued in the exercise of their functions without any question as to their authority or the legality of their acts up to the change of government, a period of nearly twelve years. Such approval, therefore, according to well recognized legal principles, would be presumed."

The conclusions arrived at by Commissioners Thompson and Farwell were stated by

them at the close of their opinion, in the following language:

"First. That a pueblo or town was established under the authority of the Mexican government, in California, on the site of the present city of San Francisco, and embracing the greater portion of the present corporate limits of said city. Second. That the town so established continued and was in existence as a municipal corporation on the seventh day of July, 1846. Third. That at or about the time of its establishment, certain lands were assigned and laid off in accordance with the laws, usages and customs of the Mexican nation, for the use of the town and its inhabitants, and the boundaries of said lands determined and fixed by the proper officers appointed for that purpose by the territorial government. Fourth. That the boundaries so established are those described in the communication from Governor Figueroa to M. G. Vallejo, dated November 4, 1834, a copy of which is filed in the case, marked Ex. No. 18, to the deposition of said Vallejo. These conclusions bring the case, in our opinion, clearly within the operation of the presumption raised in favor of a grant to the town by the fourteenth section of the act of the third of March, 1851 [9 Stat. 634], and entitled the petitioner to a confirmation of the land contained within the boundaries described in the document above mentioned."

Commissioner Felch, in his dissenting opinion, held that the testimony failed to establish the foregoing conclusions arrived at by his associates, and presented a number of reasons tending to show, as he claimed, that there had not been established any municipal organization of a town within the limits described in the decree of confirmation. But at the same time he held that the city was entitled to the presumption of a grant in her favor, under the fourteenth section of the act of March 3, 1851. His language, forming the close of his opinion, was as follows:

"Proof is given of the existence of a small town known as Yerba Buena, on the site of the present city, on the seventh of July, 1846; this was requisite under the law to entitle the present corporation to a presumption of a grant; but this being proved, the presumption extends to the lots as they existed at the time of the passage of the act (of 1851), and was not confined to the limits of the original Mexican town. It was the American city as it existed in 1851, which congress had in its eye, and not the little germ from which it sprung, when it provided for making its corporation the depository of the titles to these lands, and this design of quieting the titles by the presumption of a grant to the city would fail to be secured, and the manifest object of the law be defeated, if all the lots within its chartered limits, at the time the act was passed, were not embraced in the decree of confirmation. Beyond these limits the petitioners have established no rights. The decree, therefore, should, in my judgment, be entered in favor of the city for the lots within the corporation limits as described and established in the charter of 1850, and no more."

The decree of the land commission, which followed the prevailing opinion, was filed, as before stated, on December 21, 1854. Both parties were apparently dissatisfied; the city, because the entire claim had not been allowed, and the United States, because so much of it was allowed; and both gave notice of intention to prosecute an appeal to the United States district court, and to that court the case was taken. Afterward, in 1857, the appeal on the part of the United States was voluntarily withdrawn by direction of the attorney-general, and in accordance with a stipulation filed by the United States district attorney, the appeal was dismissed by the court, and an order entered giving the city leave to proceed upon the decree of the land commission, as upon a final decree. The city, however, declined to accept the proffered leave; but on the contrary, insisted upon its full claim, and continued to prosecute its appeal. Such was the condition of the case, and the position of the parties upon the passage of the act of July 1, 1864 (13 Stat. 332), authorizing a transfer of the case to the United States circuit court. In accordance with the provisions of that act, the district court, on the fifth of September, 1864, transferred the case to the United States circuit court. On the fourth of October following it was argued and submitted, and on the thirty-first of October was decided.

John W. Dwinelle and John H. Saunders, City Atty., for city of San Francisco.

Delos Lake, U. S. Atty., and John B. Williams, for the United States.

Briefs on behalf of the United States were also filed by Nathaniel Bennett, Edmund Randolph and Horace Hawes. The briefs were very elaborate, and were devoted mainly to the question of the existence, or non-existence, of the asserted pueblo under the Mexican government.

FIELD, Circuit Justice. This case comes before this court upon a transfer from the district court under the act of congress of July 1, 1864, "to expedite the settlement of titles to lands in the state of California." It was in the district court on appeal from the decree of the board of land commissioners, created by the act of March 3, 1851. It involves the consideration of the validity of the claim asserted by the city of San Francisco, to a tract of land situated in the city and county of San Francisco, and embracing so much of the peninsula, upon which the city is located, as will contain an area of four square leagues.

The city presented her petition to the board of land commissioners in July, 1852, asserting in substance, among other things, that in pursuance of the laws, usages and customs of the government of Mexico, and the act of the departmental assembly of California, of No-

vember, 1833, the pueblo of San Francisco was created a municipal government, and became invested with all the rights, properties and privileges of pueblos under the then existing laws, and with the proprietorship of the tract of land of four square leagues above described; that the pueblo continued such municipality and proprietor until after the accession of the government of the United States, July 7, 1846, and until the passage of the act of the legislature of the state of California incorporating the city; and that she thereupon succeeded to the property of the pueblo, and has a good and lawful claim to the same.

In December, 1854, the board of commissioners confirmed the claim of the city to a portion of the four square leagues, and rejected the claim for the residue. The land to which the claim was confirmed, was bounded by a line running near the Mission Dolores, and known as the "Vallejo Line." That line was adopted principally in reliance upon the genuineness and authenticity of the document described in the proceedings as the Zamorano document. The spuriousness of that document is now admitted by all parties. From the decree of the board an appeal was taken by the filing of a transcript of the proceedings and decision with the clerk of the district court. The appeal was by statute for the benefit of the party against whom the decision was rendered, in this case of both parties, of the United States, which controverted the entire claim, and of the city, which asserted a claim to a larger quantity of land; and both parties gave notice of their intention to prosecute the appeal. Afterward, in February, 1857, the attorney-general withdrew the appeal on the part of the United States, and in March following, upon the stipulation of the district attorney, the district court ordered that appeal to be dismissed, and gave leave to the city to proceed upon the decree of the commission as upon a final decree. The case therefore remained in the district court upon the appeal of the city alone, and that is its position here. But the proceeding in the district court, being in the nature of an original suit, the prosecution of the appeal by either party keeps the whole issue open. "The suit in the district court," said Mr. Justice Nelson in U. S. v. Ritchie, 17 How. [58 U. S.] 534, "is to be regarded as an original proceeding, the removal of the transcript, papers, and evidence into it from the board of commissioners, being but a mode of providing for the institution of the suit in that court. The transfer, it is true, is called an appeal; we must not, however, be misled by a name, but look to the substance and intent of the proceeding. The district court is not confined to a mere re-examination of the case, as heard and decided by the board of commissioners, but hears the case de novo, upon the papers and testimony which had been used before the board, they being made evidence in the district court; and also upon such further evidence as either party may see fit to produce."

But though the whole issue is thus open, the dismissal of the appeal on the part of the United States may very properly be regarded as an assent by the government to the main facts upon which the claim of the city rests, namely: The existence of an organized pueblo at the site of the present city upon the acquisition of the country by the United States on the seventh of July, 1846; the possession by that pueblo of proprietary rights in certain lands, and the succession to such proprietary rights by the city of San Francisco. The district attorney does not, therefore, deem it within the line of his duty to controvert these positions, but on the contrary admits them as facts in the case, contending only that the lands appertaining to the pueblo were subject, until by grant from the proper authorities they were vested in private proprietorship, to appropriation to public uses by the former government and, since the acquisition of the country, by the United States. He therefore insists upon an exception from the confirmation to the city, of land heretofore reserved or occupied by the government for public uses; and I do not understand that the counsel of the city objects to an exception of this character. It is unnecessary, therefore, to recite the historical evidence of the existence of a pueblo previous to, and at the date of, the acquisition of the country at the present site of the city of San Francisco, which is very fully presented in the elaborate opinion filed by the commission on the rendition of its decision. Since that decision was made, the question has been considered by the supreme court of the state; and in an opinion in which the whole subject is examined a similar conclusion is reached; and if anything were wanting in addition to the arguments thus furnished, it is found in the able and exhaustive brief of the counsel of the city.[2] The documents of undoubted authenticity, to which the opinions and the brief of counsel refer, establish beyond controversy the fact that a pueblo of some kind, having an ayuntamiento composed of alcaldes, regidores, and other municipal officers, existed as early as 1834; and that the pueblo continued in existence until and subsequent to the cession of the country.[3]

The action of the officers of the United

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[2] See extracts from opinion of the supreme court of California in note A, annexed to the report of this case.

[3] In Grisar v. McDowell, 6 Wall. [73 U. S.] 372, the supreme court of the United States said: "It must be conceded that there was a pueblo of some kind at the site of the city of San Francisco, upon the conquest of the country by the United States, on the seventh of July, 1846. We say a pueblo of some kind, for the term which answers generally to the English word town, may designate a collection of individuals residing at a particular place, a settlement or a village, or may be applied to a regular organized municipality." See note B, annexed to the report.

States in the government of the city and the appointment or election of its magistrates after the conquest, both preceding and subsequent to the treaty of peace, proceeded upon the recognition of this fact; and the titles to property within the limits of the present city to the value of many millions rest upon a like recognition.

The material question, therefore, for determination, as the case stands before this court, relates to the extent of the lands in which the pueblo was interested. It is not pretended that such lands were ever marked off and surveyed by competent authority. It is admitted, as already stated, that the so-called Zamorano document given in evidence is spurious. The question presented must therefore be determined by reference to the laws of Mexico at the date of the conquest.

As stated by the commissioners in their opinion, there can be no doubt that by those laws, pueblos or towns, and their residents, were entitled to the use and enjoyment of certain lands within prescribed limits immediately contiguous to and adjoining the town proper; that this right was common to the cities and towns of Spain from their first organization, and was incorporated by her colonies into their municipal system on this continent; and that the same continued in Mexico, with but little variation, after her separation from the mother country. And there is as little doubt that by those laws a pueblo or town, when once established and officially recognized, became entitled, for its own use and the use of its inhabitants, to four square leagues of land. The compilation known as the Recopilacion de Leyes de las Indies contains several laws relating to this subject. The sixth law of title 5 of book 4 provides for the establishment of towns by contract with individuals, and upon compliance with the conditions of the contract, for the grant of four square leagues of land, to be laid off in a square or prolonged form, according to the character of the country.

The opinion of the assessor or legal adviser of the vice royalty of New Spain given to the commandante general in October, 1785, upon the petition of certain settlers in California, for grants of tracts of land situated within the limits claimed by pueblos, recognizes this right of pueblos to have four square leagues assigned to them. His language is that the grants "cannot and ought not to be made to them within the boundaries assigned to each pueblo, which in conformity with the law six, title 5, liber 4, of the Recopilacion, must be four leagues of land in a square or oblong body according to the nature of the ground; because the petition of the new settlers would tend to make them private owners of the forests, pastures, water, timber, wood, and other advantages of the lands which may be assigned, granted, and distributed to them, and to deprive their neighbors of these benefits. It is seen at once that their claim is entirely contrary to the directions of the forementioned laws, and the express provision in article 8 of the instructions for settlements (poblaciones) in the Californias, according to which all the waters, pastures, wood, and timber, within the limits which in conformity to law may be allowed to each pueblo, must be for the common advantage—so that all the new settlers may enjoy and partake of them, maintaining thereon their cattle, and participating of the other benefits that may be produced."

But the royal instructions of November, 1789, for the establishment of the town of Pitic, in the province of Sonora, is conclusive as to the right of pueblos in California under the laws of Spain. These instructions were made applicable to all new towns that should be subsequently established within the general comandancia, which included the province of California. They gave minute directions for the formation and government of the new pueblos, and referring to the laws of the Indies already cited, declared that there should be granted to the towns four leagues of land in a square or prolonged form. They also provided for the distribution of building and farming lots to settlers, the laying out of pasture lands and lands for the propios, the residue to constitute the egidos or commons for the use of the inhabitants.

The general provisions of the laws of the Indies, to which these instructions and the opinion of the assessor refer, continued in force in Mexico after her separation from Spain. They were recognized in the regulations of November, 1828, which were adopted to carry into effect the colonization law of 1824, and in the regulation of the departmental assembly of August, 1834, providing funds for towns and cities. They were referred to in numerous documents in the archives of the former government in the custody of the surveyor-general. The report of Jimeno, for many years secretary of the government of California, found in the expediente of Doña Castro made in February, 1844, is cited by the commissioners in their opinion as removing all doubt on this point. The report is as follows:

"Most Excellent Governor: The title given to Doña Castro is drawn, subject to the conditions that were inserted in many other titles during the time of General Figueroa, in which they subjected the parties to pay censas (taxes) if the land proved to belong to the egidos of the town. I understand that the town of Branciforte is to have for egidos of its population four square leagues, in conformity to the existing law of the Recopilacion of the Indies, in volume the second, folios 88 to 149, in which it mentions that to the new town that extent may be marked, to which effect it would be convenient that your excellency should commission two persons deserving your confidence, in order that, accompanied by the judge of the town, the measurement indicated may be made, and it

may be declared for egidos of the town the four square leagues, leaving to the deliberation of your excellency to free some of the grantees of the conditions to which they are subject. The supreme judgment of your excellency will resolve as it may deem it convenient. Manuel Jimeno. Monterey, February 8, 1844."

The documents to which reference has been made are sufficient to establish the position that pueblos once formed and officially recognized as such, became by operation of the general laws entitled to have four square leagues of land assigned to them, for their use and the use of the inhabitants. It does not appear that formal grants were made to the new pueblos, though in some instances an officer was appointed to mark off the boundaries of the four square leagues, and to designate the uses to which particular tracts should be applied. But the right of the pueblos and their inhabitants to the use and enjoyment of the lands was not made dependent upon such measurement and designation.

It follows from these views that the pueblo, which is admitted to have been regularly established at the site of San Francisco on the seventh of July, 1846, was, as such pueblo, vested with the right to four square leagues of land, to be measured either in a square or prolonged form, according to the nature of the country, excepting from such tract such portions as had been previously dedicated to or reserved for public uses, or had become private property by grant from lawful authority.

It is difficult to determine with precision the exact character of the right or title held by pueblos to the lands assigned to them. The government undoubtedly retained a right to control their use and disposition; and to appropriate them to public uses until they had been vested in private proprietorship. Numerous laws have been cited to show that the title remained absolutely in the government. The same laws were cited to the supreme court of this state when the subject was before that tribunal, and in relation to them the court said: "We see nothing in these laws opposed to the views we have already expressed, that the towns had such a right, title and interest in these lands as to enable them to use and dispose of them in the manner authorized by law or by special orders, and consonant with the object of the endowment and trust. Undoubtedly the right of control remained in the sovereign, who might authorize or forbid any municipal or other officer to grant or dispose of such lands, even for the purposes of the endowment or trust. Such general right, with respect to a public corporation, exists in any sovereign state, and must, of course, have existed in the absolute monarchy of Spain, where the property of private corporations and individuals was to a great degree subject to the royal will and pleasure." Hart v. Burnett, 15 Cal. 569. And referring to objections to the theory of absolute title in the pueblo, and the questions which upon that view might be suggested, the court said: "There is but one sensible answer to these questions, and we think that answer is given in the laws themselves, and in the recorded proceedings of the officers who administered them, and who must be presumed to have interpreted them correctly. It is, that the lands assigned to pueblos, whether by general law regulating their limits to four square leagues, or by special designation of boundaries, were not given to them in absolute property, with full right of disposition and alienation, but to be held by them in trust for the benefit of the entire community, with such powers of use, disposition and alienation, as had been already or might afterward be conferred for the due execution of such trusts, upon such pueblos, or upon their officers." Id. 573. And this view, the court adds, fully reconciles the apparently conflicting disposition of the laws and the commentaries of publicists respecting the relative rights of the crown and the municipalities to which counsel had referred.

In this view of the nature of the title of the pueblo and of the city, its successor, I fully concur; and I am of opinion that under the provisions of the act of March 3, 1851, the city is entitled to a confirmation of her claim. I regret that the recent transfer of the case to the circuit court, and the great pressure of other engagements since, have prevented me from considering at greater length the interesting questions presented. To those who desire to extend their inquiries, the elaborate opinions to which I have made frequent reference, and the able brief of counsel will furnish ample materials.

A decree will be entered confirming the claim of the city of San Francisco to a tract of land, situated in the county of San Francisco, and embracing so much of the peninsula upon which the city is located, as will contain an area equal to four square leagues as described in the petition. From the confirmation will be excepted such parcels of land within said tract as have been heretofore reserved or dedicated to public use by the United States, or have been by grant from lawful authority vested in private proprietorship. The confirmation will be in trust for the benefit of lot-holders under grants from the pueblo, town, or city; and as to any residue, in trust for the use and benefit of all the inhabitants. A decree will be prepared by counsel in conformity with this opinion, and submitted to the court.

In accordance with the foregoing opinion, a decree was entered on November 2, 1864, confirming the claim of the city, and on the same day an order was entered allowing an appeal in behalf of the United States to the United States supreme court. Soon afterward, one John B. Williams, an attorney,

claiming to act on the part of the United States, made a motion to vacate the order allowing an appeal, to open the decree, and to grant a rehearing in the cause. In December following, Delos Lake, United States attorney, under instructions from the United States attorney-general, joined in the motion. The proceedings and points made are fully stated in the following opinion rendered on denying the motion, filed May 11, 1865:

FIELD, Circuit Justice. This case was submitted to the court for its consideration on the fourth of October last, and was decided on the thirty-first of the same month. The decree confirming the claim of the city was settled and entered on the second of November, and on the same day an appeal was allowed at the instance of the United States to the supreme court.

On the fourteenth of November, John B. Williams, styling himself "special counsel" for the United States, gave notice that he would move the court on the twenty-first of the same month, to vacate the order allowing the appeal, to open the decree confirming the claim of the city, and to grant a rehearing of the case, upon the ground that the decision of the circuit court "was rendered under a misapprehension of the facts, and without considering the brief of the United States, which was suppressed by the clerk of this court." In support of the motion, the notice was accompanied with an affidavit of Mr. Williams, in which he states that he is "informed and believes" that the clerk of the court "unwarrantably and in derogation of" his (said Williams) rights "as a member of this bar, and of the rights of the United States as litigants in their own courts, suppressed" his briefs in the case, and "withheld them from the circuit judge, and that the arguments submitted in behalf of the United States were in consequence of such usurpation of power by the clerk, not considered by the circuit judge in his determination of the case, but that said cause was decided under a misapprehension of the positions taken by, and the proofs offered in behalf of the United States."

The affidavit contains other allegations based upon the assumption that the brief had been suppressed and withheld from the circuit judge. It also refers to certain concessions alleged to have been made by the district attorney, which will be particularly considered hereafter.

In this proceeding the district attorney was not consulted, and that officer upon hearing of it, addressed a note to the "special counsel," refusing his assent to the motion, and stating that all motions and other proceedings in the conduct of the cause must be made by him. Mr. Williams, however, persisted in the motion, and endeavored to have the same heard by the district judge, who did not sit in the case or participate in its decision.

The position of the district attorney in claiming the control of the cause was entirely correct. He is the regular officer of the government, having charge of all its legal proceedings within his district, subject only to the general direction and supervision of the attorney-general. When other counsel are employed in these proceedings, it is to aid him in their management, not to assume his authority or direct his conduct. The position of Mr. Williams was solely that of assistant counsel. He could not control the proceedings in the case, or bind the government by his admissions or action.

And it appears also from the statement of the district attorney, that Mr. Williams at the time had been retained and paid as counsel by claimants of what are known as "outside lands;" that is, of lands within the asserted limits of the pueblo, but outside of the tract confirmed to the occupants by ordinances of the city, and the legislation of the state and the general government, and that the interests of these third parties, upon the question of excepting from the decree of confirmation the government reserves, were directly in conflict with those of the United States.

But there were other considerations which undoubtedly governed the conduct of the district attorney. Some of the statements made in the affidavit he knew were inaccurate, and the correctness of other statements he had good grounds to distrust. He was also influenced, as we have reason to believe, by a just sense of the impropriety of asking a district judge, though holding the circuit court, to vacate a decree rendered by the circuit judge, in a case of such magnitude and importance, immediately after that officer had left the state, not upon grounds apparent upon the record, but upon statements, the truth of which rested chiefly in the knowledge of the latter.

The district judge did not sit in any of the cases heard at the October term by the circuit judge, and it is a matter of regret that the benefit of his counsel and assistance was not had in the determination of the present case. The familiarity of that officer with the laws and customs and policy of Mexico in the disposition of her public domain, and in the establishment and endowment of her municipal bodies, would have greatly lessened the labor of investigating the case. But as he did not participate in its consideration, the district attorney, as we may suppose, naturally felt the indelicacy of asking any subsequent interference by him, which, under the circumstances, would have been to ask him to do an act of judicial discourtesy.

The attorney-general, in subsequently directing the district attorney to unite in the motion, was under the impression that it was the ordinary case of an application for a rehearing before the same judge who rendered the decision. When made acquainted with the circumstances, he directed the postpone-

ment of the motion until it could be heard by that officer. In the investigation of the case, the briefs of the special counsel were carefully examined. His first brief was handed by the clerk to the circuit judge the day on which the case was submitted, and the second brief was handed to him on the day of its presentation. Both were retained in his possession until after the decision was rendered and announced in court. Numerous other briefs bearing upon the question of the existence of a pueblo at the site of the present city of San Francisco upon the cession of the country, were also examined by him, particularly the elaborate brief of Mr. Nathaniel Bennett, late one of the justices of the supreme court of this state; the brief of the late Mr. Edmund Randolph, and the brief of Mr. Horace Hawes, of this city. These briefs were all upon the same side of the question taken by the "special counsel," and are characterized by great ability and learning, and until the appearance of the brief of that gentleman they were supposed to have exhausted the argument on that side.

These several briefs were received by the circuit judge without any indorsement by the clerk, and are still in his possession. The briefs of Mr. Williams were returned to the office of the clerk. But as it was generally understood at the time that he was retained by the occupants of "outside lands," and the district attorney knew of no other authority for his appearance as counsel, the clerk indorsed upon one of them the reason for not marking it filed, and upon the other brief that it was marked filed by mistake, and left them both in that condition among the papers of the case to be given to the author when called for. His action in this respect was at that time approved by the circuit judge. No such injurious suggestion was made, or if made, entertained for a moment, that Mr. Williams was also retained by the United States, and thus had a "divided duty" between the settlers and the government.

From these indorsements alone the special counsel drew his conclusion that his briefs were suppressed. Upon these indorsements alone, as he stated on the argument of this motion, he made the affidavit that he was "informed and believes" his briefs were suppressed and withheld from the circuit judge. His conclusion in this respect was illogical; there is no necessary connection between the indorsements made and the suppression alleged. The indorsements gave no such information as represented.

The subject provokes further comment, but we refrain, and will only observe that it is the first time within our judicial experience that any counsel has had the hardihood to make oath to what must necessarily have been with him only a matter of inference, and assuming his inference to be a fact has proceeded to cast imputations of misconduct upon officers of the court.

In the opinion rendered in this case, after stating that by the appeal on the part of the city the whole issue was open, the court said: "But though the whole issue is thus open, the dismissal of the appeal on the part of the United States may very properly be regarded as an assent by the government to the main facts upon which the claim of the city rests, namely: the existence of an organized pueblo, at the site of the present city, upon the acquisition of the country by the United States, on the seventh of July, 1846, the possession by that pueblo of proprietary rights in certain lands, and the succession to such proprietary rights by the city of San Francisco. The district attorney does not, therefore, deem it within the line of his duty to controvert these positions, but on the contrary, admits them as facts in the case, contending only that the lands appertaining to the pueblo were subject, until by grant from the proper authorities they were vested in private proprietorship, to appropriation to public uses by the former government, and since the acquisition of the country by the United States. He, therefore, insists upon an exception from the confirmation to the city of land heretofore reserved or occupied by the government for public use, and I do not understand that the counsel of the city objects to an exception of this character."

The views thus expressed of the effect which may justly be given to the dismissal of the appeal of the United States, the special counsel finds inconsistent with the views expressed in the case of Le Roy v. Wright [Case No. 8,273], and the concessions alleged to have been made by the district attorney he asserts are denied by that officer.

There is no inconsistency in the views expressed in the two cases. In Le Roy v. Wright [supra], certain officers of the army of the United States, acting under orders of the secretary of war, had taken possession of a tract of land adjoining the premises claimed by the complainant at Black Point, within the city limits, and commenced the erection of fortifications for the protection of the harbor of San Francisco, and had declared their intention to take like possession of the premises in controversy, and to appropriate them for the erection of barracks and other buildings required in connection with the fortifications. The complainant, by his suit, sought to restrain such appropriation until compensation to him for the property was previously made. He derived his title under the city of San Francisco, and, as evidence that the ownership of the property had been adjudged to the city as the successor of the former pueblo, he produced the decree of the board of land commissioners confirming her claim. As the appeal from this decree on the part of the United States had been dismissed by consent of the attorney-general, he regarded the decree as closing the controversy between

the city and the government as to the land to which the claim was confirmed, and so his counsel contended.

But the court held that in this view of the case the counsel was mistaken; that, had the city withdrawn her appeal, such result would have followed; but as she continued to prosecute it for an additional quantity beyond that confirmed, the whole issue was opened. The counsel of the United States was therefore allowed to introduce certain documents on file in the office of the surveyor-general of the United States for California, tending to show that a tract embracing the premises in question had been excepted and reserved from sale for public purposes, by order of the president, as early as November, 1850; evidence which had been inadvertently omitted when the case was pending before the board of land commissioners. It was not then pretended by counsel or held by the court, nor has it ever been pretended or held since, that the dismissal of the appeal by the United States was an act without any significance. On the contrary, the dismissal has always been regarded as an admission by the government of the main facts upon which the claim of the city rests. The land commissioners had adjudged that there was an organized pueblo at the site of the present city of San Francisco; that such pueblo held certain proprietary rights to land, and that the city had succeeded to those rights. The United States said in substance, through their highest legal officer, we admit the correctness of this adjudication; we acknowledge the law and the facts to be as there declared; and we consent that this recognition of the validity of the claim of the city to some lands shall be carried into the decree of the court. And it was so carried into the decree, and that decree still remains of record in full force. Although on appeal the whole issue be opened, this recognition of the rights of the city does not lose all efficacy as evidence on the new hearing. Admissions once made in a cause are not necessarily excluded from consideration because a second trial of the same issue is had.

The consent of the government thus remaining on the files of the court, and being embodied in its decree, the only questions of difficulty in the case necessarily related to the extent and boundaries of the claim of the city, and of the reservations of the government for public purposes.

In the statement filed by the district attorney, he mentions that, after the case had been submitted, one or more meetings were had at chambers before the circuit judge, and additional testimony put in and discussion had relative to the government reserves; and that "free conversations took place touching the law and the facts;" that he conceded that by repeated decisions of the supreme court of the state, the existence of a pueblo was the settled law; and that in view of this state of the law, in connection with the fact that the appeal on behalf of the United States had been dismissed by the attorney-general, he neither asked nor desired a re-examination of the question in this court.

To this statement, we will only add that the understanding of the circuit judge of the concessions made by the district attorney, and of the assent made by the counsel of the city with respect to lands reserved or occupied by the government for public purposes, was expressed in the paragraph cited above from his opinion. That paragraph was written after the "free conversations" of counsel before him, "touching the law and the facts," and it was read to the district attorney and to the counsel of the city before the opinion was delivered in court. Neither of these gentlemen expressed at the time any dissent from its language, or any intimation that the circuit judge had misapprehended the concessions, nor was any suggestion made by the district attorney, until after the opinion was published, that the statement of the concession was in any particular too broad and comprehensive.

These concessions, however, did not determine the case. They only obviated the necessity of setting forth a detailed statement of the evidence upon which the claim of the city rested. Referring to them, the opinion says: "It is unnecessary, therefore, to recite the historical evidence of the existence of a pueblo previous to and at the date of the acquisition of the country at the present site of the city of San Francisco, which is very fully presented in the elaborate opinion filed by the commission on the rendition of its decision. Since that decision was made the question has been considered by the supreme court of the state, and, in an opinion in which the whole subject is examined, a similar conclusion is reached; and if anything were wanting in addition to the arguments thus furnished, it is found in the able and exhaustive brief of the counsel of the city."

The decision was based upon the documentary evidence found in the record, and the action of the officers of the government after the conquest.

"The documents," says the opinion, "of undoubted authenticity, to which the opinions and brief of counsel refer, establish beyond controversy the fact that a pueblo of some kind, having an ayuntamiento composed of alcaldes, regidores, and other municipal officers, existed as early as 1834, and that the pueblo continued in existence until and subsequent to the cession of the country. The action of the officers of the United States in the government of the city, and the appointment or election of its magistrates after the conquest, both preceding and subsequent to the treaty of peace, proceeded upon the recognition of this fact; and the titles to prop-

erty within the limits of the present city, to the value of many millions, rest upon a like recognition."

We have thus disposed of the main positions upon which the motion rests. The affidavit, it is true, contains several other matters; it details at some length the connection of the special counsel with the case, and it gives an account of communications made to the public journals of the city in relation to the decision of the court and the brief of counsel, but it is not perceived that these particulars, however interesting in themselves, have any pertinency to the motion presented. The affidavit also attempts to state what the special counsel contended for in his brief, but as this appeared by the brief itself, which was considered by the court previous to the decision, no information is imparted by the statement.

It follows that the motion to open the decree and to grant a rehearing must be denied. It only remains to dispose of that part of the motion which asks that the order granting the appeal be vacated. We are disposed to think that a vacation of the order was only desired as a preliminary to the opening of the decree. Of course, if the United States desire the appeal to be withdrawn, their wishes in this respect will be carried out. The order denying the motion generally will therefore be subject to their right to renew the motion in this particular. Motion denied.

When the judgment of the court was announced that the motion would be denied, it was suggested by counsel for parties claiming lands within the four square leagues confirmed, that the decree of the court, entered on the second of November last, did not embody with entire precision the decision expressed by the opinion of the court delivered at the time, and that said decree should be modified in some respects in its language, in order to avoid any uncertainty or doubt as to its purport and meaning. It was therefore ordered, the attorneys of the city consenting thereto, that the entry of the order denying said motion be stayed until counsel could be heard for a modification of the decree, so that a modification, if allowed, might be made at the same time as the entry of the order denying the motion.

Subsequently, on the eighteenth of May, 1865, counsel having been heard on the suggestion, the order denying the rehearing was entered, and with it an order vacating the previous decree, and directing that in lieu thereof the following decree be entered as the final decree in the cause, which was accordingly done:

"The City of San Francisco v. The United States.

"The appeal in this case taken by the petitioner, the city of San Francisco, from the decree of the board of land commissioners to ascertain and settle private land claims in the state of California, entered on the twenty-first day of December, 1854, by which the claim of the petitioner was adjudged to be valid, and confirmed to lands within certain described limits, coming on to be heard upon the transcript of proceedings and decision of said board, and the papers and evidence upon which said decision was founded, and further evidence taken in the district court of the United States for the Northern district of California pending said appeal—the said case having been transferred to this court by order of the said district court, under the provisions of section four of the act entitled 'An act to expedite the settlement of titles to lands in the state of California,' approved July 1, 1864—and counsel of the United States and for the petitioner having been heard, and due deliberation had, it is ordered, adjudged, and decreed that the claim of the petitioner, the city of San Francisco, to the land hereinafter described, is valid, and that the same be confirmed.

"The land of which confirmation is made is a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, namely: the seventh of July, A. D. 1846), on which the city of San Francisco is situated, as will contain an area of four square leagues—said tract being bounded on the north and east by the Bay of San Francisco; on the west by the Pacific Ocean; and on the south by a due east and west line drawn so as to include the area aforesaid, subject to the following deductions, namely: Such parcels of land as have been heretofore reserved or dedicated to public uses by the United States; and also such parcels of land as have been by grants from lawful authority vested in private proprietorship, and have been finally confirmed to parties claiming under said grant, by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals, in proceedings now pending therein for that purpose; all of which said excepted parcels of land are included within the area of four square leagues above-mentioned, but are excluded from the confirmation to the city. The confirmation is in trust, for the benefit of the lot-holders under grants from the pueblo, town, or city of San Francisco, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the city.

"FIELD, Circuit Justice.

"San Francisco, May 18, 1865."

From this decree and directly after its entry, both parties moved for an appeal to the United States supreme court. The motions were denied, the court filing the following opinion, giving its reasons for the denial:

FIELD, Circuit Justice. Both parties to this case desire to appeal from the final decree entered on the eighteenth instant—the United States from the whole of the decree,

and the city of San Francisco from so much of the decree as includes in the estimate of the quantity of four square leagues confirmed, the parcels of land which have been reserved or dedicated to public uses by the United States.

When the appeal from the decree as originally entered on the second of November last was allowed, it was supposed, without examination, that an appeal would lie to the supreme court. Since then our attention has been called to the act of July 1, 1864 [13 Stat. 333], under which the circuit court acquired its jurisdiction, and to the fact that it makes no provision for a review of the decisions of the court.

The jurisdiction of the supreme court, under previous acts of congress, over the judgments and decrees of the circuit court, is limited to a review of final judgments and decrees in cases originally instituted in that court, or transferred to it from the courts of the several states, or removed to it by appeal or writ of error from the district courts of the United States. The judiciary act of September 24, 1789, § 22 (1 Stat. 73); the act of March 3, 1803, § 2, in addition to the judiciary act (2 Stat. 244); the act of July 4, 1836, § 17, to promote the progress of the useful arts (5 Stat. 124); the act of July 4, 1840, § 3, in addition to the acts respecting the judicial system of the United States (5 Stat. 392); the act of May 31, 1844, amending the judiciary act (5 Stat. 658).

The act of March 3, 1851 [9 Stat. 631], to ascertain and settle private land claims in the state of California, does not provide for any consideration by the circuit court of cases of this character. The jurisdiction over these cases is by that act vested, in the first instance, in a board of commissioners, and afterward on appeal from the decision of the board, in the district court. From the decrees of the district court an appeal lies directly to the supreme court.

The act of July 1, 1864 [13 Stat. 333], authorizes a transfer from the district court to the circuit court of cases of this kind, where the district judge is interested in the land, the claim to which is pending before him, and also where the case affects the title to lands within the corporate limits of any city or town; but it does not confer any right of appeal from the action of the circuit court in these cases after they are transferred.

The supreme court, by the constitution, takes its appellate jurisdiction over cases "with such exceptions and under such regulations as the congress shall make." And the designation, by acts of congress, of the cases to which this jurisdiction shall extend, has been held to be a legislative declaration that all other cases are excepted from it.

"When the first legislature of the Union," says Mr. Chief Justice Marshall, "proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it." Durousseau v. U. S., 6 Cranch [10 U. S.] 307. And, in illustration of this principle, reference is made to the provision of the law which allows a writ of error to a judgment of the circuit court, where the matter in controversy exceeds the value of $2000. "There is no express declaration," says the chief justice, "that it will not lie where the matter in controversy shall be of less value. But the court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction all cases decided in the circuits where the matter in controversy is of less value, and implies negative words."

It follows, therefore, that the appellate jurisdiction of the supreme court exists only in those cases in which it is expressly granted. In conformity with this principle, it has been held that such jurisdiction does not extend to final judgments in criminal cases, it not having been conferred by congress. A question arising in a criminal case can only be brought before the supreme court for decision upon a certificate of a division of opinion between the judges of the circuit court. Forsyth v. U. S., 9 How. [50 U. S.] 571. So under the judiciary act of 1789 [1 Stat. 73], jurisdiction to review a judgment or decree of the circuit court, rendered in an action brought before it from the district court on writ of error, was denied, as the act only mentioned judgments and decrees brought before the circuit court on appeal from the district court. U. S. v. Goodwin, 7 Cranch [11 U. S.] 108. And in Barry v. Mercein, 5 How. [46 U. S.] 120, it was decided that under the twenty-second section of the judiciary act, which provides for a review by the supreme court of final judgments and decrees of the circuit court, where the matter in dispute exceeds the sum or value of $2000, the appellate power of the court did not exist unless the matter in dispute was money, or some right, the value of which in money could be calculated and ascertained. In that case the controversy was between parents for the custody and care of their child, a matter, as justly observed, rising superior to all money considerations; yet the court refused to entertain jurisdiction, observing that there were no words in the law which, by any just interpretation, could be held to authorize it to take cognizance of cases to which no test of money value could be applied; that a similar limitation upon its appellate power existed with reference to judgments in criminal cases, although the liberty or life of the party

might depend on the decision of the circuit court; and that inasmuch as it could exercise no appellate power unless it was conferred by act of congress, the writ of error issued in the case must be dismissed. [Barry v. Mercein] 5 How. [46 U. S.] 103.

From these authorities—and others to the same effect might be cited—it is clear that in the absence of any provision in the act of July 1, 1864, giving a right of appeal from the decision of the circuit court in the present case, the right does not exist.

Nor is the absence of such provision an oversight on the part of congress. It is evident, we think, from the general language of the act, and the object sought to be accomplished by it, that it was the intention of the legislature to give finality to the action of the circuit court in the cases transferred to its jurisdiction.

The act was designed, as its name purports, to expedite the settlement of titles to land in the state. Great delays and embarrassments were found to exist in determining the location and boundaries of tracts confirmed after the question of title had been adjudicated. The hearing by the district court of exceptions to surveys returned by the surveyor-general, interposed by parties possessing or asserting adverse interests, the taking of depositions, the discussion of counsel, and the modifications or new surveys sometimes ordered, necessarily occupied the time usually taken by an ordinary suit at law. Then followed the right of appeal to the supreme court from the action of the district court, not merely by the original contestants to the proceeding, but by third parties intervening, whether adjoining proprietors, purchasers under the original grantee, or persons claiming by pre-emption, settlement, or other right under the United States. To obviate the delays and expense necessarily attending proceedings of this character, particularly as occasioned by the appeal to the supreme court, and to relieve that tribunal, already burdened by a crowded docket, the act limited its jurisdiction to cases in which appeals were then pending, and vested jurisdiction in the circuit court, over cases in which appeals might be subsequently taken. When from the decree of the district court, approving or correcting the survey, no appeal had been taken, "no appeal," says the act, "to that court shall be allowed, but an appeal may be taken, within twelve months after this act shall take effect, to the circuit court of the United States, for California, and said court shall proceed to fully determine the matter."

Following these provisions is the section which directs that when the district judge is interested in any land, the claim to which, under the act of March 3, 1851 [9 Stat. 631], is pending before him on appeal from the board of commissioners, the case shall be transferred to the circuit court, "which shall thereupon take jurisdiction and determine the same." The act then proceeds as follows: "The said district courts may also order a transfer to the said circuit court of any other cases arising under said act, pending before them, affecting the title to lands within the corporate limits of any city or town, and in such cases both the district and circuit judges may sit."

At the passage of the act there were only two cases pending in the district courts of California, with reference to which the authority conferred by this last clause could be exercised—the Case of the City of San Francisco, and the Case of the City of Sonoma, both against the United States. The first case had then been pending in the district court for over eight years. In the meantime the city had extended in all directions, and interests of vast magnitude had grown up which demanded that the title to the land upon which the city rested should be, in some way, speedily and finally settled. The land commissioners had adjudged that the claim of the city was valid within certain described limits. The United States, through their highest legal officer, had assented to this adjudication; and the decree of the district court, declaring its finality as against the government, had been on record for years, and was then in full force. And by the act itself the United States relinquished whatever right and title they possessed to the land within the charter limits of 1851.

The Case of the City of Sonoma had been likewise pending in the district court on appeal for over eight years. In this case the United States had, through the attorney-general, signified their assent to a confirmation of the decree of the board, and the notice of prosecuting the appeal on the part of the city had not been given within the six months prescribed by the act of congress. It was under these circumstances that the law was passed authorizing a transfer of these cases to the circuit court. If an appeal from its action had been intended, no beneficial object would have been accomplished by the transfer for the same delay would follow an appeal from the circuit court as would follow an appeal from the district court. Nor can any reason in that view be assigned for allowing both the district and circuit judges, if they desired, to sit in the hearing of these cases.

If the matter were less clear we might yield to the suggestion of counsel, and allow the appeal pro forma; but as we have no doubt whatever that our decision is final, our duty is plain. We might with equal propriety sign a citation upon an appeal under the twenty-second section of the judiciary act where the matter in dispute is less than the sum or value of two thousand dollars.

The decision not being subject to appeal, the controversy between the city and the government is closed, and the claim of the city stands precisely as if the United States had owned the land and by an act of con-

gress had ceded it, subject to certain reservations, to the city in trust for the inhabitants. Motions to allow an appeal denied.

Subsequently, upon application of the attorney-general, the supreme court of the United States ordered an appeal to be allowed. The opinion of the court upon the application is reported in [U. S. v. Circuit Judges] 3 Wall. [70 U. S.] 673. An appeal was accordingly allowed, but whilst it was pending congress passed the following act, which was approved March 8, 1866 [14 Stat. 4]: "An act to quiet the title to certain lands within the corporate limits of the city of San Francisco: Be it enacted by the senate and house of representatives of the United States of America in congress assembled: That all the right and title of the United States to the land situated within the corporate limits of the city of San Francisco, in the state of California, confirmed to the city of San Francisco by the decree of the circuit court of the United States for the Northern district of California entered on the eighteenth day of May, 1865, be and the same are hereby relinquished and granted to the said city of San Francisco and its successors, and the claim of the said city to said land is hereby confirmed, subject, however, to the reservations and exceptions designated in said decree, and upon the following trusts, namely: That all the said land not heretofore granted to said city shall be disposed of and conveyed by said city to parties in the bona fide actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the legislature of the state of California may prescribe, except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses. Provided, however, that the relinquishment and grant by this act shall not interfere with or prejudice any valid adverse right or claim, if such exist, to said land or any part thereof, whether derived from Spain, Mexico or the United States, or preclude a judicial examination and adjustment thereof."

At the December term of the supreme court for 1866, the term following the passage of this act, the appeal of the United States, and the appeal of the city were both dismissed by stipulation of the attorney-general and counsel of the city. Townsend v. Greeley, 5 Wall. [72 U. S.] 337.

The title of the city of San Francisco, therefore, rests upon the above decree of the circuit court, entered on the eighteenth of May, 1865, and the above confirmatory act of congress. Upon this subject, and referring to the above act, the supreme court of the United States, in Grisar v. McDowell, said: "By this act the government has expressed its precise will with respect to the claim of the city of San Francisco to her lands, as it was then recognized by the circuit court of the United States. In the execution of its treaty obligations with respect to property claimed under Mexican laws, the government may adopt such modes of procedure as it may deem expedient. It may act by legislation directly upon the claims preferred, or it may provide a special board for their determination, or it may require their submission to the ordinary tribunals. It is the sole judge of the propriety of the mode, and having the plenary power of confirmation it may annex any conditions to the confirmation of a claim resting upon an imperfect right, which it may choose. It may declare the action of the special board final; it may make it subject to appeal; it may require the appeal to go through one or more courts, and it may arrest the action of board or courts at any stage. The act of March 3, 1851 [6 Stat. 631], is a general act applying to all cases, but the act of March 8, 1866 [14 Stat. 4], referring specially to the confirmation of the claim to lands in San Francisco, withdrew that claim as it then stood from further consideration of the courts under the provisions of the general act. It disposed of the city claim, and determined the conditions upon which it should be recognized and confirmed. The title of the city, therefore, rests upon the decree of the circuit court as modified by the act of congress." See, also, Montgomery v. Bevans [Case No. 9,735].

NOTE A. The following extracts are from the opinion of the supreme court of the state, in Hart v. Burnett, reported in 15 Cal.:

"On the third of November, 1834, the territorial deputation authorized the election of an ayuntamiento, to reside at the presidio of San Francisco, to be composed of an alcalde, two regidores or councilmen, and a sindico-procurador. The ayuntamiento, when organized, was to exercise the political functions pertaining to such office, and the alcalde was also to perform the judicial functions which the laws conferred upon him. This decree was communicated to the military commandant by the governor, on the fourth of November, 1834. An election was accordingly held on the seventh of December, 1834, at the presidio of San Francisco, and the ayuntamiento duly installed. A similar election was held on the thirteenth of December of the following year (1835), at the same place, which was then officially designated as the pueblo of San Francisco. Other elections of the same character were subsequently held; and there are numerous official documents of undisputed authenticity, which refer to the 'ayuntamiento of San Francisco,' 'the alcalde of San Francisco,' and to the 'pueblo of San Francisco,' proving, as we think, beyond a doubt, that there was at that place, in 1834, 1835, 1836, and subsequently, a pueblo of some kind, with an ayuntamiento composed of alcaldes, regidores, and other municipal officers. What were the rights of this municipality, and what the powers of its officers, and the extent of its territory and jurisdiction, we shall not now inquire. We here refer merely to the fact of the existence, at that time, and at that place, of such an organization, whether corporate or incorporate. And that fact is proved by the official returns of elections, by the official acts of the governor and of the territorial or departmental legislature, by the official correspondence of government officers, and by the acts, proceedings, records, and correspondence of the

officers of the pueblo itself. As a part of the evidence of this fact, we refer to the election returns of December 7, 1834, December 13, 1835, December 3, 1837, and December 8, 1838; to the governor's letters of January 31, 1835, October 26, 1835, January 19, 1836, January 17, 1839, and November 14, 1843; to the expediente of proceedings between May and November, 1835, with respect to certain persons obliged to serve as municipal officers of that pueblo; and to the official correspondence between the alcaldes of that pueblo and the various officers of the territorial or departmental government of California." 15 Cal. 540.

"The evidence in favor of the existence of a pueblo in San Francisco prior to July 7, 1846, and its general right, for pueblo purposes, to four square leagues of land, to be measured, according to the ordinanzas, from the center of the plaza at the presidio, is, to our minds, irresistible. 1st. We have the general laws of Spain and the Indies authorizing the formation of pueblos, assigning their general boundaries, directing how they were to be surveyed out, designating the uses to which such lands were to be devoted, and defining the character or the right which the pueblo acquired in them, and the control which its municipal authorities, as well as the king and his officers, were to exercise over them. 2d. We have the special orders of the king, and the highest officers of his government, with respect to the establishment of pueblos in California, and more particularly for the conversion of presidios into pueblos, and the extent of land assigned to the pueblos so formed. 3d. We have documentary evidence showing that at a very early period, and almost immediately after the discovery of the Bay of San Francisco, the viceroy and governor of California contemplated the establishment of a pueblo at this identical point, and that the foundation of the presidio and mission of San Francisco, in 1776, was then considered and so announced as merely preliminary to the organization of a great town, into which they were to be converted as soon as a sufficient number of settlers could be procured for that purpose. 4th. We have documentary evidence of unquestionable authenticity, showing that the governor and territorial deputation, in 1834, ordered an election at the presidio of an ayuntamiento, consisting of an alcalde, two regidores and a syndico—officers recognized by law as belonging only to pueblos; that this and subsequent elections of the same kind were held at the same place; and that such municipal organization was then, and has been ever since, recognized in numerous official documents signed by the different governors, secretaries of state, and other government officers, as the 'pueblo of San Francisco,' or the 'pueblo of San Francisco de Asis.' 5th. We have documentary evidence showing that the political chiefs, deputations, and other government officers, recognized, in numerous official papers, that this pueblo had some interest in, and its municipal authorities some control over, the lands within the general limits of four square leagues; and that, at different periods, they were authorized to grant in particular localities within such limits, small parcels of these lands to private persons in full ownership; and 6th. We have documentary evidence showing that the municipal officers of this pueblo did, for a long term of years, both before and since the conquest, exercise this authority, by granting small lots of land to numerous individuals, and that their power was recognized both by the Mexican government in California, and by the government of military occupation which succeeded it." 15 Cal. 563, 564.

NOTE B. Documentary evidence relating to the pueblo of San Francisco from the end of 1834 to July 7, 1846. The following synopsis of original papers, of undoubted authenticity, from the archives, city claim, limantour, etc., will serve to prove, if further evidence be required, the correctness of the opinion of the court (supreme court of California) on this (the existence of a pueblo at the site of the present city of San Francisco) and some other points:

January 31, 1835, Governor Figueroa writes to M. G. Vallejo, military commandant of San Francisco, acknowledging the receipt of a letter from the latter, dated January 1, and thanking him for having constitutionally installed "the ayuntamiento of that pueblo" (el ayuntamiento de este pueblo).

June 22, 1835, Governor Figueroa sends a circular to the military commandant and alcalde of San Francisco. This is indorsed by the alcalde, Francisco de Haro, as having been received and published by him, in "San Francisco de Asis, July 12, 1835." It will be seen from this that even at that early day—the first year of the formation of the pueblo, and organization of the ayuntamiento, at the presidio—it was called by the official authorities, without distinction, "San Francisco," and "San Francisco de Asis." Soon after this Jose Joaquin Estudillo applied for a grant of two hundred varas, in the place called Yerba Buena. This application was for a larger amount of land than that designated for house-lots, and consequently the matter was referred to the territorial deputation. On the twenty-second of September, that body, on motion of Alvarado, resolved generally, that the ayuntamiento of San Francisco had authority to grant solares in the place of Yerba Buena, at a distance of two hundred varas from the beach.

September 23, 1835, Governor Castro transmitted to the "alcalde constitutional of San Francisco," a copy of the foregoing resolution of the territorial deputation, with respect to the power of "the ayuntamiento of San Francisco" to grant lots two hundred varas distant from the sea-shore "in the place called Yerba Buena." October 28, he addresses another official letter to the "alcalde of San Francisco de Asis," containing a brief statement of the substance of the resolution of September 22, and directing him to inform the residents of "that pueblo" not to apply to the political chief for lots, "as it is one of the favors which the ayuntamiento can grant." For these grants a canon was to be paid to the ayuntamiento.

There is filed in the city claim a certified copy, from the archives, of an old expediente, which contains several important papers. It begins with a petition to the "gefe politico," dated May 30, 1834, and purporting to be signed by residents of the ranchos of San Pablo, etc., asking to be separated from the jurisdiction of the port of San Francisco, and annexed to that of San Jose. They allege, as reasons for the proposed change, the distance, the difficulty and danger of crossing the bay, and the want of accommodations for themselves and families at the presidio, "for a whole year, when they shall be called upon to discharge some office in the ayuntamiento," etc. This petition was, by the territorial deputation, on the fifth of September, 1835, ordered to be referred to the "ayuntamientos of the pueblos of San Jose and San Francisco," for reports; and the governor so referred it on the twenty-eighth of September. November 4, the ayuntamiento of San Jose reports in favor of the petition, with the remark that the petitioners had previously pertained to that jurisdiction. December 20, the "ayuntamiento of San Francisco" reports against the petition, denying the genuineness of the signatures to it, and the correctness of its statements. With respect to the want of accommodations at the presidio, it says: "It is a well-known and established fact, that the military commandant of the presidio furnished houses to the functionaries of the present ayuntamiento as soon as it was installed." This report is dated, "Port of San Francisco," and is signed

by the alcalde, Francisco de Haro, and the secretary, Francisco Sanchez.

1836, January 2, Governor Castro directs a communication to the "illustrious ayuntamiento of San Francisco de Asis," informing it that he had transferred the political government of the territory to General Nicolas Gutierrez. On the same day Gutierrez directs a communication to the "illustrious ayuntamiento of San Francisco," informing that body that he had been placed in possession of the political government of the territory.

1836, January 22, the alcalde, Jose Joaquin Estudillo, directs an official communication to the sindico-procurador, dated at the "pueblo of San Francisco de Asis."

1836, January 19, Governor Gutierrez transmits to the "alcalde of San Francisco de Asis," a copy of an order received from the supreme government of Mexico.

1836, December 13, Governor Alvarado transmits to the "very illustrious ayuntamiento of San Francisco," copies of decrees of the congress of the "sovereign state of Alta California."

1837, January 2, Alcalde Martinez sends to the sindico-procurador an order for paper for use of the "office of this ayuntamiento." It is dated, "Pueblo of San Francisco." There are various other official papers signed by Martinez, which are dated in the same way. Francisco Sanchez, as secretary of "this illustrious ayuntamiento," signs various official papers dated "Pueblo of San Francisco." In one case he dates "Presidio," and in some others "Yerba Buena."

1837, August 4, Jose Carrillo appeared as the commissioner from the departmental government, to administer the oath to "this municipality," of obedience to the constitution of 1836. The acta states that it was sworn to by the "first alcalde of the port of San Francisco de Asis."

1837, December 3, the primary election "in the pueblo of San Francisco de Asis," is certified to have been held in the "plaza of said pueblo." The return is certified by Francisco de Haro, as president; Francisco Guerrero and Francisco Sanchez, as secretaries; and A. M. Peralta and J. de la C. Sanchez as inspectors. The letter transmitting these returns is dated "San Francisco, December 7, 1837," and directed to the "constitutional alcalde, Ignacio Martinez." At the secondary election, the returns of which were transmitted to the governor on the twenty-third, William A. Richardson was chosen alcalde; but he having applied to the governor to be excused from serving as such, for the ensuing year, Alvarado on the thirtieth, directed a letter to the "constitutional alcalde of San Francisco," ordering a new election, which was held January 8, 1838, and Francisco de Haro elected alcalde in place of Richardson. Domingo Sais was, at the same time, elected second rejidor, which office, it appears, was also vacant. * * *

1839, January 17, Governor Alvarado transmits to Alcalde de Haro a proclamation for putting into effect the constitutional system of 1837, and for holding elections according to the law of November 30, 1836, which he says he received from "the supreme government by the last mail!"

1839, January 18, Governor Alvarado sends another official communication directed "to the alcalde of San Francisco," in which he states that inasmuch as many individuals had asked for solares for building houses in the lands of Yerba Buena, which had previously been prohibited from being granted, and he was desirous of advancing the commerce in that recent congregation of vecinos, he therefore had decreed (dispuesto) that grants for house-lots may be made of any part of said prohibited lands; with the understanding, however, that those asking for such concessions shall present to the government their petitions for the favor, with the necessary reports, or informes. The alcalde is directed to give notice of this to the vecinos.

1839, January 25, Governor Alvarado directs a proclamation "to the alcalde of San Francisco," and orders him to give in due publication.

1839, February 28, Governor Alvarado directs "to the illustrious ayuntamiento of San Francisco" his proclamation of the previous day (twenty-seventh), dividing all California, from the frontier of the north to Cape St. Lucas, into three districts, the First district including all north of the ex-mission of San Luis Obispo. This district was divided into two partidos, one extending from the north of Sonoma to the Llagas, with Dolores as the cabacera, and the other from the Llagas to San Luis Obispo, with the pueblo of San Juan de Castro as the cabacera. He also informs that body of the appointment of Jose Castro as prefect of that district, and that he must be recognized and obeyed according to the laws.

1839, March 9, Governor Alvarado sends "to the alcalde of San Francisco" a proclamation, and directing that the notice be given that all petitions for lands or other things should be transmitted to the secretary through the prefects, for their reports thereon. During the early part of this year Francisco de Haro continued to act as "alcalde," but about the middle or a little after, Francisco Guerrero assumed the duties of juez de paz, and continued to act in that capacity till the end of 1841, when he was succeeded by Francisco Sanchez, who held that office to the end of 1843, when the election was held for two "alcaldes of nomination," under the new organization made by Micheltorena.

1843, May 23, Francisco Sanchez, as "juez de paz of the jurisdiction of the port of San Francisco," issues an order to the owners of gardens "in the establishment of Dolores," respecting irrigation. He dates this order in "San Francisco."

1843, November 14, Governor Micheltorena issues a proclamation restoring, in part, the old system of ayuntamientos, and discontinuing the prefects from the beginning of the coming year. The pueblo of San Francisco was to elect, on the following December, two alcaldes, of first and second nomination, the first to act as judge of first instance and to take charge of the prefecture. At this election William Hinckley was elected alcalde of first nomination, and Francisco de Haro alcalde of second nomination. The former resided at Yerba Buena, and the latter at the old mission.

1844, January 20, Secretary Jimeno writes to the "first alcalde of the port of San Francisco," congratulating him, in the name of the governor, on his election, and hopes he will devote himself to the public welfare, and the improvement of that town and its vicinity.

1844, March 6, Secretary Jimeno directs two official communications to the "first alcalde of San Francisco."

1844, March 14, Jimeno directs an official communication to "the alcalde of first nomination of the port of San Francisco."

1844, March 30, the superior tribunal addresses an official communication to "William Hinckley, alcalde of first nomination of San Francisco." April 29, the tribunal addresses him as "first constitutional alcalde in San Francisco de Asis;" on June 4, as "first alcalde of San Francisco;" and on October 29, as "first juez of San Francisco," etc. There are various official documents extant, addressed to him by the governor, the secretary, the military commandant, and other government officers, as "alcalde of San Francisco," "alcalde of San Francisco de Asis," "alcalde of the port of San Francisco," "alcalde of the pueblo of San Francisco," "alcalde of the pueblo of San Francisco de Asis," "alcalde of Yerba Buena," "juez of first nomination of the pueblo of San Francisco de Asis," etc. Of the local authorities and private persons, some addressed him as "alcalde

of San Francisco," some as "alcalde of San Francisco de Asis," some as "alcalde of Yerba Buena," some as "alcalde of the pueblo of San Francisco," etc., etc. Hinckley dated his official papers, sometimes, "pueblo of San Francisco," sometimes, "court of first nomination of San Francisco de Asis," "Yerba Buena," etc., etc. In the official correspondence between him and the second alcalde, the former residing at Yerba Buena, and the latter at the Mission, their letters are dated, indiscriminately, "San Francisco," "San Francisco de Asis," "pueblo of San Francisco," etc. At that time, at least, no distinction was made in the use of these names. On the 12th of November an order was issued by the governor, and directed to the "first alcalde of San Francisco," to hold an election of alcaldes on the first Sunday in December, for the coming year. On the fifth of December Hinckley issued a notice, dated "San Francisco de Asis," for an election to be held in "Dolores," on Sunday, the eighth, for first and second alcaldes, no election having been held on the previous Sunday. At the secondary election, held December 15, Juan Padilla was chosen first alcalde, and Jose de la Sanchez second alcalde. In the returns it is described as an election "in the pueblo of San Francisco de Asis;" and these returns are sent to Hinckley, who resided at Yerba Buena, and is addressed as "first alcalde of San Francisco de Asis." Hinckley writes an official letter, dated "pueblo of San Francisco de Asis," and sends it to De Haro, at the Mission, addressed to the "alcalde of second nomination of San Francisco de Asis."

1845. In the official correspondence of this year, Padilla and Sanchez are addressed as "first and second alcaldes;" sometimes "of San Francisco," sometimes "of San Francisco de Asis," and sometimes "of the pueblo of San Francisco," etc., etc. On the twelfth of October, of this year, Sanchez issued a proclamation, dated at "Yerba Buena," in which he styles himself "constitutional alcalde of the jurisdiction of San Francisco."

1846. Sanchez continued to act as alcalde during the early part of this year; and, after him, Jose Jesus Noe seems to have officiated until July. Noe is called, in the official documents, "alcalde of San Francisco," "juez of San Francisco," "alcalde of first nomination," "juez de paz," etc., etc. The officers appointed and elected after the military possession by the United States, in July, at first assumed the title of "magistrate," but very soon afterwards adopted the Spanish word "alcalde," which was continued until 1850.

The foregoing is but a brief synopsis of a very small number of the official papers and records still existing. They are sufficient, however, to show the correctness of the reasoning of the court on this point, and to disprove the absurd theories which have been raised by interested parties, about the different names applied, in old documents, to the pueblo generally, and to particular localities. The attempt of Richardson, and other Limantour witnesses, to ignore the pueblo of San Francisco, which was organized at the end of 1834, and to erect a new "pueblo of Yerba Buena," with a little plat of land between California and Dupont streets, and the beach, is so thoroughly exploded by the official records as to deserve not the slightest consideration. Note 5 to opinion in Hart v. Burnett, by a member of the California bar.

(This member of the bar was the late General Halleck, of the U. S. army, who, while secretary of state, under the government of General Riley, and afterward, while practicing his profession of the law in San Francisco, had given great attention to the subject of land titles in California, and particularly to the claims of pueblos existing upon the acquisition of this country to lands embracing the sites of such pueblos, or within their immediate vicinity.)

Case No. 12,317.

SAN FRANCISCO SAVINGS & LOAN SOC. v. CARY.

[2 Sawy. 333;[1] 17 Int. Rev. Rec. 109.]

Circuit Court, D. California. Jan. 20, 1873.[2]

INTERNAL REVENUE — BANKS — DIVIDENDS — INTEREST.

1. If an appeal is taken from an illegal assessment, decided against the appellant, and the tax afterward collected, it is not necessary to take a second appeal after payment, before commencing suit to recover the tax so collected. 14 Stat. 111, 152, § 19.

2. Where a savings institution, having a capital stock and reserve fund which are security for the deposits, receives deposits, loans the capital, reserve fund and deposits, and, after paying the expenses, sets apart a portion of the net earnings for the reserve fund, and divides the balance among the capital stock, reserve fund and deposits in proportion to the respective amounts and the time they have been drawing dividends, the moneys so paid to depositors are dividends within the meaning of the section 120 of the internal revenue act, and not interest within the meaning of the proviso to that section, and are subject to five per cent. tax. 14 Stat. 138.

The plaintiff had a capital stock of $500,000, and a reserve fund of about $300,000, both of which are security for deposits. It receives deposits, and the capital stock, reserve fund and deposits are loaned out mainly but not wholly on real estate securities; and all the interest received is divided substantially as follows: In January and July of each year the board of directors ascertain the earnings during the preceding six months. After deducting therefrom the salaries and other expenses during that time, a portion, not exceeding ten per cent. of the net earnings, is set apart and credited to the reserve fund, and the remainder forms a dividend which is declared and paid upon the capital stock, reserve fund and deposits. The dividends payable to depositors are calculated according to the amount of the deposit, and the time of its continuance after it begins to draw dividends. But if the deposit is withdrawn between dividend days, a low rate of interest, fixed by the directors, is allowed in lieu of dividends. On July 8, 1870, the board of directors of plaintiff ascertained in this manner the net earnings for the six months ending June 30, 1870, and after deducting five per cent. to be added to the reserve fund, declared a dividend of eleven per cent. per annum on the capital stock, reserve fund and deposits, and made said dividends payable on July 10, 1870, and they were paid without deducting any tax, under section 120 of the internal revenue act [of 1866 (14 Stat. 138)], from the dividends so paid to depositors. September 20, 1870, the assessor of internal revenue for the proper district, under the provisions of said section, assessed the plaintiff five per cent. on said dividends, amounting to $17,647, which said assessment

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

[2] [Reversed in 22 Wall. (89 U. S.) 38.]

was duly listed and certified to [L. Cary] the collector of the district. Said defendant, as such collector, on the twenty-seventh of November, 1870, demanded payment of said tax, and upon refusal by plaintiff, threatened, and was about to seize and sell the property of plaintiff to satisfy said tax, whereupon plaintiff paid the same under protest, and subsequently demanded re-payment, which was refused. After the said assessment and before payment, the plaintiff duly appealed from the assessment to the commissioner of internal revenue. The commissioner decided against the plaintiff, and this suit was commenced to recover the said sum, within six months after the decision of said appeal. No appeal was taken after payment.

Jarboe & Harrison and Tilden & Wilson, for plaintiff.

L. D. Latimer, U. S. Dist. Atty., for defendant.

SAWYER, Circuit Judge. The first point made by the defendant is, that the suit was prematurely commenced, on the ground that an appeal must be taken to the commissioner after payment before suit brought. 14 Stat. 111, 152, § 19, and regulations prescribed by the secretary of the treasury.

But an appeal was taken from the assessment before payment, and decided against plaintiff. This I think sufficient. There could be no object in appealing a second time to the same officer in the same cause, and upon precisely the same question. The commissioner had already decided the identical question, and the object of the law was accomplished in the first appeal.

The next question arises under section 120 of the internal revenue act as amended in 1866. The plaintiff insists that the said sums paid to depositors are interest paid to depositors within the meaning of the proviso, and not dividends within the meaning of the term as used in the body of the section. The body of the section, so far as it affects the question, is as follows:

"There shall be levied and collected a tax of five per centum on all dividends * * * declared due * * * and * * * payable to depositors * * * as a part of the earnings, income or gain of any * * * savings institutions; * * * and said * * * savings institutions * * * are hereby authorized to deduct * * * from any dividends or sums of money that may be due and payable as aforesaid, the said tax. * * * And a list or return shall be made * * * on or before the tenth day of the month following that on which any dividends or sums of money become due or payable as follows: 'Provided: * * * the annual or semi-annual interest allowed or paid to the depositors in savings banks or savings institutions "shall not" be considered dividends.'" 14 Stat. 138.

It was certainly contemplated by the provision in the body of this act to tax something as dividends in the hands of "savings institutions," for they are expressly named. What is it that is to be taxed? The act says: "Dividends * * * declared due * * * and * * * payable to depositors * * * as part of the earnings, income, or gains of any savings institutions." The only income, earnings or gains of the plaintiff were the moneys before mentioned, and these moneys were the very earnings, income and gains, and the only ones which the plaintiff either could, or did, in fact, divide and declare "due and payable to its depositors." They clearly come within the express terms of the act, and nothing else belonging to plaintiff or arising in its business does come within the terms. But plaintiff says, conceding this to be so, yet these payments are interest, and nothing else, as a rate per cent. is ascertained depending upon the amount of earnings, and then the amount to be paid found by calculating the sum to be paid upon the amount deposited for the time it has been on deposit, after beginning to draw interest at the rate per cent. fixed, and that this constitutes interest, notwithstanding the rate per cent. is determined by the amount of earnings; that it is compensation paid for the use of money; that being interest allowed depositors, it is by the express terms of the proviso taken out of the general definition of the term dividends, as it would be otherwise construed in the body of the act. In other words, that the act itself in the proviso limits by express definition the term dividends as used in the body of the section, by saying this interest shall not be considered dividends as the word is there used. It is not apparent to what the term "dividends payable to depositors" could apply, if not to these earnings. On the other hand, it is suggested that there are, or may be, cases where interest in the strict sense of the word is paid to depositors upon which the words of the proviso may operate; that in some savings institutions in the United States an option is given to their depositors to take a pro rata share of the earnings, that is to say, dividends, or to take a fixed rate of interest without regard to earnings, whether great or small; and that there are different classes of depositors in some institutions, some of whom are entitled to share pro rata in the earnings, and others only to receive a low rate of interest, irrespective of profits or earnings, and that the proviso is intended to apply to those who thus elect to take interest, or who are only entitled to receive interest instead of sharing in the profits. It is also claimed that those in this company, who draw their deposits between dividend days, and are only entitled to a low rate of interest in lieu of dividends, are within the proviso.

The cases suggested may, perhaps, be within its provisions; but, however that may be, or whatever cases the proviso may be intended to cover, I am satisfied that the sums in question are not within the exception. Interest is the sum paid by the party having or

using the money to the owner for its use. It is paid at some specific rate per cent., fixed either by the law or the terms of the contract, without any regard to the profits derived from its use, by the party paying the interest. The rate is fixed, specific, not contingent. In the case in hand the plaintiff is not the party using or paying for the use of the money. It is, substantially, a simple agent entrusted with the capital stock, reserve fund and deposits, to loan out to individuals on interest. There is no interest or dividends, unless the money is so loaned, and the amount divided depends wholly upon the amount so loaned out and profits earned. The parties to whom it loans are the borrowers, and they pay interest. The expenses of the management are first paid out of the earnings, and the net earnings or profits of the transactions are divided among the various owners of the funds loaned, and not upon a fixed specific rate per cent. previously ascertained by law, or by the terms of the contract. It is simply all divided, be it more or less, in proportion to the amount deposited by each, and the time it has been on deposit. It is not paid for the use of the money lent, but divided as profits. The amount divided depends wholly upon the amount earned and the expenses. Rate per cent. cuts no figure as a necessary element in the case. It is not an element in the contract between the plaintiff and the depositor. The ratio or rate per cent. is only ascertained and introduced as a mere matter of calculation, for the purpose of ascertaining what part of the sum to be divided is to go to each party. The elements to be considered in the distribution are the amounts entitled to dividends, the time and the earnings less expenses. The rest is simply arithmetical calculation. If this does not strictly constitute dividends, it will be difficult to say what does. On any other view the exception in the proviso would be as broad as the provision in the body of the section, and be void for repugnancy, or would nullify the act. The body of the section, although changed as to the phraseology, is, substantially, identical with the language before the amendment, so far as saving institutions are concerned. The only object of the amendment as to these institutions seems to be to make the exception in question in the proviso. If it was intended to give the exception the construction claimed by plaintiff, the obvious and natural way of making the amendment would be to strike the words "savings institutions" from the body of the act. This would be all that is necessary. But, instead of doing this, congress retained these words, and then adopted the awkward expedient of nullifying the provision by means of the proviso. It seems absurd to suppose that congress would adopt this mode of accomplishing the object indicated by the interpretation insisted on by plaintiff. I think the money in question dividends, within the provision of the body of the act, and not interest within the meaning of the proviso.

[3] [The next point is, that this tax is not a tax upon the savings institution, but upon the income of its depositors; that the savings institutions are only agents for its collection and payment, and that, at the time these dividends were declared, made payable, and paid, there was no law imposing the tax, in the hands of the plaintiff, or requiring plaintiff to withhold it from the depositors, and pay it over to the collector of internal revenue; that the tax is a tax levied upon the income of the individual depositors, under section 116 of the act [supra], to be collected and paid over by the savings institutions, and not a tax upon the institutions themselves, seems to necessarily follow from the decision of the supreme court in Railroad Co. v. Jackson, 7 Wall. [74 U. S.] 269. Mr. Justice Strong, on the circuit, elaborately examines the various sections of the statute, and reaches a similar conclusion in Philadelphia & R. R. Co. v. Barnes [Case No. 11,087]. He further holds that, under section 119, this income tax, the collection of which is provided for in section 120, as well as those provided for in other sections, was not to be continued after December 31, 1870, although the tax for the income of 1869 was to be levied and collected in 1870; that the various companies mentioned are merely government agents, upon whom the duty is imposed of collecting and paying the tax to the government; that between December 31, 1869, and July 14, 1870, there was no law in force imposing said tax, or requiring said companies to collect and pay it over; that the act of July 14, 1870 [16 Stat. 256], declaring that the said former act should be construed to extend the tax till August 1, 1870, while it might impose a tax upon said individual incomes, it did not act retrospectively, so as to affect transactions which, in the meantime, had been closed, and wherein the rights of parties had become fixed, or make wrongful acts of said companies which were proper when performed; and that they were not liable for the dividends declared and paid in the meantime, and before the passage of said act of July 14, 1870. The same question was determined in Home Mut. Ins. Co. v. Stockdale [Case No. 6,662]. The dividends now in question accrued, were declared, and made payable after January 1, and before July 14, 1870, and were accordingly paid by the plaintiff without deducting the tax. Under these authorities, this was rightfully done, there being no law at the time imposing the tax, or requiring plaintiff to collect and pay it over. The rights of the parties, as between the plaintiff and depositors, became fixed when the dividends became payable, on July 10, 1870. After that, the plaintiff had no means of collecting the tax. The deposits themselves, as well as the dividends, may have been withdrawn. At all events, the transactions, with respect to those dividends, as between the plaintiff and

[3] [From 17 Int. Rev. Rec. 109.]

the depositors, were closed. If the act of July 14th, imposed the tax upon these dividends, it was after they had passed beyond the control of plaintiff, and it was too late for the company to collect it.

[On July 14, 1870, the date of the passage of the declaratory act, it was income in the hands of the depositors, and, as it was not then within the exception of "income received from institutions or corporations whose officers are required by law to withhold a per centum of the dividends made by such institutions, and pay the same to the officers authorized to receive the same," under section 117, it was taxable, under other provisions of the act, if rendered taxable at all by the said declaratory act of July 14th, in the hands of depositors only, and not in the hands of the plaintiff, from whose control it had already passed. Says Mr. Justice Strong, in the case already cited: 'It was their [the plaintiffs'] right as well as their duty, to pay over the entire dividend to the stockholders who had then acquired a vested right in it, and the plea of the defendants does not aver that the whole dividend was not at once thus paid over. Then the distress which the plea attempts to justify was made to enforce the performance of a duty that has no existence. It was substantially an attempt to enforce a penalty upon the plaintiffs for an omission to do that which they had no right to do, a penalty equal to the amount of a five per cent. tax with an additional five per cent. thereon. It is to be remembered that the tax is levied upon the shareholders, and that the company is merely the governmental agent to collect it. Its liability to a distress, if any there be, arose out of an unlawful failure to collect the tax and pay it over. But the failure was not unlawful at the time. Surely it will not be maintained that the declaratory act of 1870 can be regarded as operating retrospectively, to make the act or omission of the plaintiff unlawful, and punishable as an offence, when the act or omission was innocent at the time when it occurred. Were it conceded that the construction given by congress is binding in all cases where it would not disturb vested rights, or operate practically as an ex post facto law, it is not to be presumed it was intended for application to such a case as the present." It necessarily follows from this view that the assessment of this tax against, and collection from, the plaintiff was made without authority of law. The effect would be to impose a penalty upon the plaintiff for not doing an act which, at the time it could have been done, was not required by law, and which it had no authority to do.

[As to the one twenty-fourth of one per cent. assessed and collected under the 110th section of the internal revenue act (14 Stat. 136), the facts are substantially the same as in the case of German Saving & Loan Soc. v. Oulton [Case No. 5,362], decided in this court by Mr. Justice Field, in September, 1871. On the authority of that case, I hold that this tax was also collected without authority of law. Let judgment be entered for plaintiff.] [3]

[On appeal to the supreme court, the judgment of this court was reversed. 22 Wall. (89 U. S.) 38.]

German Saving & Loan Soc. v. Cary, San Francisco Savings Union v. Oulton, San Francisco Savings Union v. Cary, are similar cases, and decided in the same way.

SANGER, Ex parte. See Case No. 4,835.

Case No. 12,318.

In re SANGER et al.

[5 N. B. R. 54.] [1]

District Court, S. D. New York. April 24, 1871.

BANKRUPTCY—COUNSEL FOR PETITIONING CREDITORS—AMOUNT OF FEE.

Where a counsel for petitioning creditors obtains an adjudication, and performs other services incident to the bankruptcy proceedings, but it does not appear that he has in any way recovered property fraudulently conveyed to or possessed of by creditors, and the assets of the estate amount to about the sum of fifteen thousand dollars, an allowance of one thousand dollars made to the counsel for petitioning creditors, by the register before whom proceedings are pending, is too extravagant, and will not be confirmed unless assented to by the assignee, the bankrupts and all the creditors who have proved their debts.

[In the matter of Sanger & Scott, bankrupts.]

By JOHN FITCH, Register:

It having been referred to me to take the testimony upon the services that have been performed herein by the counsel for the petitioning creditors, and also to tax the disbursements actually and necessarily incurred herein, and also to report on proof what counsel fee should be reasonably allowed said counsel for his services in obtaining said adjudication in view of the amount of assets in the hands of the assignee, and to report the same with my opinion thereon to the court, do respectfully report as follows: That on the twenty-first and twenty-second days of April, eighteen hundred and seventy, the counsel for the petitioning creditor and his witness attended before me. The assignee, Rich. Warren, Esq., being present on the first day, and having heard the testimony as to the amount of assets, and not dissenting therefrom. That I took the testimony of said counsel and witness; and that by said testimony it appears that the counsel performed considerable service in those proceedings, being occupied daily in said proceedings for some time. That the said services were reasonably worth, in view of the assets being at least fifteen thousand dollars, the sum of one thousand dollars, and I therefore, upon said testimony, do report that in my opinion the

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[3] [From 17 Int. Rev. Rec. 109.]

[1] [Reprinted by permission.]

sum of one thousand dollars would be a reasonable amount to allow said counsel for his services herein, in and about the obtaining of said adjudication, and I do further report that I have taxed the costs and disbursements actually and necessarily incurred herein, and that the sum amounts to one hundred and sixty-eight dollars and seventy cents. All of which is respectfully submitted.

BLATCHFORD, District Judge. The one thousand dollars is too extravagant. I cannot allow it unless the assignee and the bankrupts and all the creditors who have proved their debts assent in writing.

Bill of costs and disbursements in the above case:

1871		Docket fee	$ 20 00
February	24.	Paid clerk's fees on filing petition	9 40
"	25.	Paid certified copy order of injunction....	2 50
March	3 & 4.	Affidavits	75
"	6.	Certified copy order of reference	1 60
"	3.	Certified copy order of adjudication	1 60
"	18.	Clerk and register's fees on warrant....	58 55
"	25.	Commissioner's fees..	10 50
"	25.	Printed notices	10 00
"	29.	Postage	1 75
"	29.	Affidavits	25
"	30.	Paid copy order of sale for Toffeng	1 60
"	31.	Paid copy order of sale for Wilmerding, Hoguet & Co.....	1 60
		Register's bill for affidavits, orders, summons, testimony of witness and day's examination	32 00
		Attending on order of reference as to counsel fee, report, affidavit and listening..	15 00
		Total	$168 70

Alex. Blumenstiel being duly sworn says that he is attorney for the petitioning creditors herein, that the foregoing disbursements have been actually and necessarily incurred herein. A. Blumenstiel.

Sworn to before me, this twentieth day of April, eighteen hundred and seventy one. John Fitch, Register.

SANGER (FERSON v.). See Cases Nos. 4,751, and 4,752.

Case No. 12,319.

SANGER v. SARGENT.

[8 Sawy. 93.] [1]

Circuit Court, D. California. Sept., 1874.

PUBLIC LANDS—RAILROAD GRANTS—"RESERVED" LANDS—MEXICAN GRANTS.

[1. Under the act of July 1, 1862, granting lands to certain railroad companies to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, there was a present grant, which attached to particular sections within the prescribed limits upon the definite location of the road, unless such lands were excepted or reserved from the operation of the act, and this grant could only be defeated by failure to perform the conditions of building the road as prescribed.]

[2. Lands in California, which were claimed at the time of the definite location of the road under alleged Mexican or Spanish grants, which were in fact fraudulent and void, and were afterwards so declared by the proper court, passed by the grant to the railroad companies; and were not excepted or "reserved," so as to be excluded from the grant either by the act of 1851, to settle private land claims in California, or by the act of 1852, providing for the survey of public lands in that state, or by the acts of March 3, 1853, to extend pre-emption rights to such lands.]

[Cited in U. S. v. McLaughlin, 30 Fed. 157.]

In equity.

SAWYER, Circuit Judge. The complainant filed his bill in equity against the defendants for the purpose of establishing his right to certain lands, which have been patented by the United States to the defendants, and procuring a decree for the conveyance of such title as passed by virtue of the patents. The complainant claims to be entitled to the lands by virtue of certain acts of congress and transactions thereunder set out in the bill, and he alleges that defendants, notwithstanding his right to the lands, have wrongfully procured patents to be issued to themselves. The defendants demur to the bill, and the question to be determined is whether the facts alleged, taken to be true, entitle complainant to the relief sought. According to the allegations of the bill, complainant has acquired by proper mesne conveyances all the right, title, and interest vested in the Central Pacific and Western Pacific Railroad Companies, under the acts of congress granting lands to said corporations to aid in the construction of the Western Pacific Railroad. The right of the complainant depends upon whether the said corporations under which he claims, acquired a right to the land under the acts of congress set out in the bill. Section 3 of the act of July 1, 1862 [12 Stat. 489], "to aid in the construction of a railroad and telegraph line, from the Missouri river to the Pacific Ocean," etc., provides as follows:

"That there be and is hereby granted to the said companies, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed." 12 Stat. 492.

That this section constitutes a present grant

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

of the number of sections mentioned, which becomes definitely attached to the specific alternate sections situate within the limits prescribed in the act, not reserved or excepted by virtue of the words of reservation or exception, as soon as "the line of said road is definitely fixed," there can be no doubt. This is both clearly apparent from the language of the act itself and is thoroughly settled by judicial construction in many cases wherein the language is precisely similar. Doll v. Meador, 16 Cal. 315; Van Valkenburg v. McCloud, 21 Cal. 335; Higgins v. Houghton, 25 Cal. 255; Bludworth v. Lake, 33 Cal. 261; Chapman v. School Dist. [Case No. 2,608]; Lamb v. Davenport [Id. 8,015]; Central Pac. R. R. Co. v. Dyer [Id. 2,552]; Lessieur v. Price, 12 How. [53 U. S.] 75, 76; Foley v. Harrison, 15 How. [56 U. S.] 446; Hannibal & St. J. R. Co. v. Smith, 9 Wall. [76 U. S.] 97, 99, 100; Burlington & M. R. R. Co. v. Fremont County, Id. 94, 95.

This grant could only be defeated by a failure to perform the conditions of building the road as prescribed. When the line of the road became "definitely fixed" in the mode prescribed, the right of the railroad companies under which complainant claims attached to every alternate section of the public land within the limits prescribed of ten miles on each side of the road, which was not mineral lands, had not at that time been "sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim," or some other right under the statutes, had not attached. A subsequent act [14 Stat. 538] extended the grant to ten, instead of five, sections, to be selected within twenty miles on each side of the line, and defined the exceptions in more specific terms, which in no way affect the question at issue. Upon the filing by the company of a map designating the general route of the road, the act, with the amendments, also authorized the secretary of the interior to withdraw the land within twenty-five miles of such designated route from pre-emption, private entry, or sale. The bill alleges that said map was filed, designating the general route, October 5, 1864; and that on December 1, 1864, the secretary of the interior withdrew the lands within twenty-five miles of the route so designated from pre-emption, private entry, or sale.

The bill avers that the lands in question are within the prescribed limits; were, at the time of the said withdrawal, and "at the time when the line of the said road was definitely fixed," public lands of the United States, and were alternate sections designated by odd numbers, and not within any of the said exceptions mentioned in any of the said acts. If this be so, then the right of the company vested and became perfect, and it was entitled to a patent upon fulfilling the prescribed conditions, and no other party could acquire any right under the laws in force against the said railroad corporations, after the line of the said road became "definitely fixed," and the grant had become thus attached to these specific tracts. See cases before cited.

The only ground upon which it is claimed that these lands are within the exception, and, therefore, excluded from the grant, is that they had been "reserved." The bill alleges in direct terms that they had not been reserved. The bill, however, makes the further allegation, that the only reason that patents were not issued to complainant was "that at the date of the final location of the road there was a claim to said land, under a Mexican grant, which said claim was without any foundation, and was wholly void, and was finally rejected by the supreme court of the United States in December term of 1864, long before said portion of said road was completed that gave the right to the said lands; and the said Mexican claim was rejected because the alleged grant on which the claim was founded was a fraud, and was absolutely void"; that it was pretended by the officers of the government "that the fact of said lands being so claimed made them 'reserved' under the act of congress, whether said claim was just or unjust, legal or illegal, and that on this account alone" the issue of a patent to complainant was refused. This allegation presents the only other question in the case on the merits, viz. whether the mere fact that the lands in question at the time the filing of the map required, the time of the withdrawal from pre-emption, private entry, or sale, and the time of the final location of the line of the road, and were within the exterior boundaries of a tract claimed under a Mexican grant, whether fraudulent or genuine, of itself constitutes them lands "reserved," within the meaning of the section making the grant. It does not appear, and it is not claimed, that before said definite location, or at any time, there was, in fact, any actual order of the president, or of any department or officer of the government authorized to make one, made, reserving these specific lands, or any lands within the external boundaries of this pretended grant.

That the lands were public lands there can be no doubt. The fact that they were claimed under a fraudulent and invalid Mexican grant did not prevent them being public lands. The final rejection of the grant did not change the ownership of the lands from the claimant to the United States. It was only an adjudication—a judicial determination—that the grant was invalid, and that the claimant never had any right whatever, legal or equitable, entitled to recognition under the treaty with Mexico; or, in other words, an adjudication in a litigation between the only party setting up any claim and the United States that the entire title was in the United States, and that the lands were public, not private, lands. There being no right or title to these lands in any private individual, the proposition that they were always a part of the public domain, or public lands of the United States, from the

time of their cession by Mexico, seems to be so clear that no argument can make it plainer. If a confirmation relates to, and takes effect from, the date of the filing of the petition, or the date of the grant, as held in many cases, a rejection must have the same relation. But there is no occasion to apply the doctrine of relation. Being public lands, they were subject to grant, and were granted, unless within some one of the exceptions made in the granting act. It is not pretended that they are within any exception, unless it be under the head of "reserved" lands.

As before stated, it is not pretended that there was any specific order by any competent authority reserving these lands, or any lands embracing these, or that they are reserved at all, unless by force of some statute, without any further act by any department or officer of the government. No statute has been called to my attention reserving them in express terms from this grant to the railroad, in consequence of their being within the external limits or otherwise of an invalid Mexican grant. The word "reserved" itself, as used in the railroad acts, does not profess to point out what lands are reserved, within the meaning of the act. It does not attempt to define "reserved" land. It does not include any lands not reserved already by other acts, or other words or provisions than the word itself. In other words we must go outside of that word "reserved," as there used, to other acts, to find the lands intended to be designated by it. And going outside of this word, I have been referred to no statute, and I have not found any that appears to me to reserve these lands from grant. I find nothing in the act of 1851 [9 Stat. 631], to settle private land claims in California, reserving any lands of the United States from any grant that congress may see fit to make. So far as I am aware, that act is the first one passed affecting the titles to lands in California. There were no public lands at that time open to sale or pre-emption in the state of California. There were at that time no means by which private rights not already vested or initiated under the laws of Mexico could be acquired in any of the public domain of California. As the said act did not provide for any disposition of the public lands other than to ascertain what grants had already been made by the Mexican government, and to perfect the rights, inchoate or otherwise, in the said grants, and there was no other law by means of which any pre-emption or other rights could be acquired in the public lands of California, and, the president having the power already to reserve any land for the government's specific uses, there was no occasion for making any general reservation in that act to avoid future complications, and none was made. The whole scope and purpose of the act was to ascertain what lands belonged already to private parties, and what to the public domain; and this object must be kept in view in its construction. The disposition of the public lands to private parties was left for future legislation.

The next act, as far as I am advised, affecting the public lands in California, is in the appropriation made for the survey of the public lands in that state in 1852, 10 Stat. 90, 91. This act authorizes the dividing of a certain amount of the public lands into townships and sections. Also the survey of private claims under Mexican grants presented in good faith for confirmation. But it only authorizes the survey of such unconfirmed grants "as the gradual extensions of the lines of the public surveys as he (the surveyor general) shall find within the immediate sphere of his operations, and which he is satisfied ought to be respected and actually surveyed in advance of confirmation." What does this mean? Certainly not that all lands within the exterior boundaries of a Spanish grant shall be reserved from survey, or reserved at all. On the contrary, it expressly authorizes the surveyor general, when, in extending the lines of the public surveys, he comes upon an unconfirmed Spanish grant of the usual kind, which he is satisfied is good, and ought to be respected, to survey it "in advance of confirmation," in order that he may survey as public lands the surplus, after satisfying the grant, and thus prepare it for sale as soon as congress should see fit to authorize its disposition. Congress had no idea, in passing this act, that all lands within the exterior boundaries of a grant which sometimes embraced ten times the amount of land required to satisfy the grant, and in one case, the whole state of California (see Yturbide v. U. S., 22 How. [63 U. S.] 290, and Fremont's Case, 17 How. [58 U. S.] 573*),[2] had been reserved for any purpose, and certainly up to this time there had been no such reservation.

The act of March 3, 1853, "to extend pre-emption rights to certain lands therein mentioned" (10 Stat. 244), clearly has no application. It had reference to prior legislation applicable to lands in the older states. There was nothing, at the time of the passage of the act, in California, to which it could apply. But afterwards, on the same day, the next act was passed by congress, relating to lands in California,—the act of March 3, 1853, "to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes." 10 Stat. 244–248. This appears to be the first act under which rights in the public lands, as against the United States, could be originally acquired; and this act relates to this specific subject-matter, and cov-

[2] The grant to Yturbide was finally rejected in 1860,—only about two years before the date of the railroad grant in question,—in Newhall v. Sanger [92 U. S. 769]. Had the final rejection been accidentally delayed till July 2, 1862, not a foot of land in California would have passed to the railroad company under the decision in Newhall v. Sanger, and the whole grant would have been defeated by the judgment of the court.

ers and disposes of the entire subject for the present. Section 6 of this act extends the right of pre-emption to California, and excepts from the right of "pre-emption lands claimed under any foreign grant or title." But this act makes no exception of such lands, as such, from any other grant that congress may afterwards see fit to make. Its exception only applies to pre-exemption and other rights to be acquired under that act. Besides, the act itself clearly shows that lands claimed under Spanish grants are not intended by congress to be included under the head of "reserved" lands; for the language of this act is, "with the exception of lands * * * reserved by competent authority," and then adds, "and excepting also the lands claimed under any foreign grant or title." If it had been supposed that the lands within the exterior boundaries of a Spanish grant would be included in the words "reserved by competent authority," the last clause would have been useless. It was not so supposed, but it was intended to add something else. The word "and" indicates some additional lands. The other word, "also," as its definition indicates, shows, too, that there was to be something "further," something "in addition to" the lands already included in the word "reserved," excepted from pre-emption rights; and these further or additional lands were "lands claimed under any foreign grant or title." All these lands were excepted from the operation of the pre-emption laws. They were not reservations. There is a clear distinction between reservations and exceptions. Reservations, in the sense here used, are clearly, "tracts of the public lands reserved for some specific use" (Webst. Dict.), such as for forts, military purposes, Indians, and the like, or lands reserved generally in express terms.

All reservations of this kind, and also lands claimed under Mexican grants, were alike "excepted" from the operation of the pre-emption laws. Lands "reserved by competent authority" were excepted, and so were lands claimed under Spanish grants excepted, not reserved. So, in like manner, under the railroad acts in question, the term "reserved," is manifestly used in the same sense, and all lands so "reserved," sold, or otherwise disposed of, all lands to which a pre-emption or homestead right had attached, were excepted from the operation of the grant.

The act of congress in relation to Mexican grants in New Mexico also provides that "Until the final action of congress on such claims, all lands covered thereby shall be reserved from sale or otherwise disposed of by the government, and shall not be subject to the donations granted by the provisions of this act." 10 Stat. p. 309, § 8. This is as specific on this point as the act extending pre-emption rights to California.

Thus it is apparent that whenever congress designs to except from the operation of any legislative grant, or reserve from sale, those portions of the public lands lying within the bounds of any tract claimed under a Mexican grant, it has no difficulty in finding and using apt language to express the intent clearly and explicitly; and with these former acts before that body it can hardly be supposed that congress would have failed to use appropriate words to exclude this class of lands in the railroad grants, had such been the design. As their lands are not in terms excepted, it must be held that congress did not intend to exclude them from the operation of the grant. I have mentioned the only acts relied on, and they are the only ones I have found from which a statutory reservation can be deduced, independent of any specific order by some officer of competent authority reserving the lands. It is not pretended that there is found any express reservation in either or all of these acts; and to my mind none can be implied by any reasonable construction.

Besides, I find nothing in the policy of the grant that would justify any such strained construction or implication. The policy of the act was to give to the railroad company every alternate section of the public domain within ten miles on each side of the road, to which no private right had attached, and not already appropriated to some specific public use, to aid in the construction of this great public improvement. The donation was designed to be, and was, liberal. If reservations of this kind could be worked out by shadowy implications, in extended sections of the country, there would be no land granted, and no aid thereby conferred. This grant is to receive a reasonable construction, in view of the public object to be accomplished; and so construing it, it is obvious that the act granted everything within the general descriptions not taken out by specific enumeration. And the lands in question are, in my judgment, clearly not within the meaning of any one of the classes enumerated. The railroad act does not define its exceptions by reference to the pre-emption laws as a test. It names specifically each class intended to be excluded, and each has a subject-matter upon which it can clearly operate, without embracing lands of the class in question. I am satisfied that the lands in question are within the grant to the Central Pacific Railroad Company.

Case No. 12,320.

SANGSTER v. MILLER et al.

[2 Fish. Pat. Cas. 563; 5 Blatchf. 243; Merw. Pat. Inv. 92.] [1]

Circuit Court, S. D. New York. Aug. 22, 1865.

PATENTS — SPRING CATCHES FOR LANTERNS — NOVELTY.

1. A claim for "constructing and arranging the spring catches to cause the attachment of the lamp to the lantern, by the operation of pressing the lantern down upon the spring catches," is not the subject of a patent, but a mere result from the arrangement and combination of the parts.

[Cited in Smith v. Thomson, 38 Fed. 606.]

2. The mode of fastening being substantially the same, there is no substantial difference between attaching a lamp to a lantern by pressing the lamp up into the lantern, and pressing the lantern down upon the lamp.

3. The improvement in lanterns patented to Hugh Sangster, June 10, 1851, and reissued August 21, 1855, is neither new nor original.

[In equity. This was a final hearing, on pleadings and proofs. The bill was founded on letters patent [No. 8,154] for an "improvement in lanterns." The patent was originally issued June 10th, 1851, and claimed the mode of attaching the lamp to the lantern by means of the springs and flanges, as therein substantially described. A suit was tried upon the patent in the District of Massachusetts, at the May term, 1855, upon pleadings and proofs, in which the novelty of the improvement was attacked, and a decree was rendered for the defendants [Daniel D. Miller and others]. The patent was afterwards surrendered, and a reissue granted on the 21st of August, 1856 [No. 325], in which the patentees [Hugh and J. Sangster] disclaimed the fastening of the lamp to the lantern by springs, and, also, the fastening of the springs to the upper part of the lamp and extending down so as to spring outward, over a flange in the lantern, but claimed the constructing and arranging the springs to cause the attachment of the lamp to the lantern, by the operation of pressing the lantern down upon the springs, and, also, arranging thumb pieces at the base of the lamp, by extending the springs toward each other horizontally, and thus forming an elbow catch to rest against the shoulder of the flange of the lantern.] [2]

Vine W. Kingsley, for plaintiff.

Lucien Birdseye, for defendants.

NELSON, Circuit Justice. The amendment of the claim will hardly help out the novelty of the improvement, against the proof of lamps previously in use, embracing substantially a similar arrangement of the parts connecting the lamp with the lantern. Causing "the attachment of the lamp to the lantern by the operation of pressing the lantern down upon the spring catches," is not well distinguishable from the process of causing the attachment by pressing the lamp upwards through the aperture into the lantern —the mode of fastening being the same— which seems to have been in general use at the date of this discovery. The construction of the parts is the same, in substance, in the reissue, as that described in the original patent, but the patentees suppose that they have avoided the objection by changing the form of the claim. I think they have fallen into an error; and that the claim itself, as set forth in the reissue, is not the subject of a patent, but is a mere result from the arrangement and combination of the parts.

Then, as to the second claim—the arrangement of the thumb pieces attached to the springs. This is but a change of form. The springs may, perhaps, be worked with greater facility than when the thumb piece is straight, instead of being bent; but the change is only in degree. It involves no invention. It is simply the device of the mechanic.

Upon the whole, I think it quite clear that the improvement described in the original patent was the one which the patentees supposed they had made, and that the change of the claim in the reissue was an afterthought, resorted to after the trial, in May, 1855, in the District of Massachusetts; and further, that, upon the proofs, there was nothing original or novel set forth in either patent.

A decree must be entered, dismissing the bill.

[1] [Reported by Samuel S. Fisher, Esq., and by Hon. Samuel Blatchford, District Judge, and here compiled and reprinted by permission. The syllabus and opinion are from 2 Fish. Pat. Cas. 563, and the statement is from 5 Blatchf. 243. Merw. Pat. Inv. 92, contains only a partial report.]

[2] [From 5 Blatchf. 243.]

Case No. 12,321.

SANGSTER v. QUANTRILL.

[1 Hayw. & H. 18.] [1]

Circuit Court, District of Columbia. Jan. 23, 1841.

ACTION UPON AN AWARD.

1. Where a party to an award without any fraudulent intent revoked the submission and gave notice thereof before the award was made and signed, the authority of the arbitrators thereupon ceased.

2. An award will not be set aside except for the reasons mentioned in the act of Maryland of 1778 (chapter 21, § 9), or for such reasons as are apparent on the face of the award.

This was an action of debt upon an award in favor of plaintiff made by arbitrators, in a controversy between plaintiff and defendant.

H. Morfit, for plaintiff.

J. Marbury, for defendant.

The following is the agreement submitting the claims of the parties: "It is agreed be-

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

tween Thos. Sangster and Thos. Quantrill, that they refer their business to the arbitrament of T. L. Thurston and Wm. Stewart, who shall call a third party in case of their disagreement; and the said referees, in all respects, shall have power of decision in law, in justice and in honor; they shall award in all cases, and where defects in proof or contract does not supply them with definite data to form an opinion, they are at liberty to supply the same agreeably to the established custom of business and their idea of right; and their decision shall be final, and they are at liberty to make statement, and, if necessary, produce, on any matter of account, proof. 13th day of Aug., 1839. Thos. Sangster. Thos. Quantrill."

After examining the proofs, &c., submitted to them, the arbitrators made the following award: "Whereas, divers disputes and controversies have heretofore arisen between Captain Thomas Sangster, of Fauquier county, state of Virginia, and Captain Thomas Quantrill, of Georgetown, in the District of Columbia, concerning their affairs generally; and the said Thomas Sangster and Thomas Quantrill having mutually agreed that all matters in difference between them relative to their said affairs generally, should be submitted to the arbitrament, final end, and determination of the subscribers, and having entered into a mutual agreement, or obligation, thereby binding themselves each to the other, to stand to, abide, perform and keep the award which the subscribers shall make: Now know ye, that we, the subscribers, having fully examined, and duly considered, the proofs and allegation of both parties aforesaid, that have been submitted to us, do award as follows: That the said Thomas Quantrill shall pay to the said Thomas Sangster the sum of $1,303.51 current money of the United States on or before the 1st day of November next ensuing the date hereof; upon the payment of which sum the said Thomas Sangster shall sign and deliver to the said Thomas Quantrill a release in full for all demands or claims whatsoever which might have arisen in consequence of the matters in dispute submitted to the arbitrament, decision and award of the subscribers, excepting so far as relates to their existing joint claims or interest in reference to pension claims, and land from the general and state governments, and of individuals. In testimony whereof, we have hereunto set our hands, this 28th October, 1839. Wm. Stewart. Th. L. Thurston."

Copy of the award was served on the defendant, and demand for payment of the amount of the award was made on the first day of November, 1839.

On the trial of the cause the defendant, through his attorney, prayed the court to instruct the jury: "That if the jury believe from the evidence that Mr. Quantrill, without any fraudulent intent, revoked the submission, and gave notice thereof to the said arbitrators before the award was made and signed by the arbitrators, the authority of the arbitrators thereupon ceased, and the award made thereafter was null and void, and the plaintiff is not entitled to recover thereon in this action."

THE COURT gave the instruction as prayed, and there was a verdict for plaintiff for the amount of the award.

The defendant, by his attorney moved for a new trial because of misdirection in a matter of law by the court to the jury.

Mr. Marbury cited Green v. Pole, 6 Bing. 443, and 4 Moore & P. 198.

Plaintiff, who had taken a verdict subject to an award under an order at nisi prius, after the case had been heard, and just before the award was about to be made, revoked the arbitrator's authority, with circumstances savoring of mala fides, and gave fresh notice of trial.

Mr. Morfit, contra, cited Dorsey v. Jeoffray, 3 Har. & McH. 121. No reasons good to set aside an award but those mentioned in the act of Maryland of 1778 (chapter 21, § 9), or which are apparent on the face of the award.

THE COURT, after hearing argument overruled the motion.

NOTE. Act Md. 1778, c. 21, § 9: That such award shall remain seven days in general court during their sitting, if returned to the general court, or four days in the respective county courts during their sitting, if returned to any county court, after the return thereof, before any such judgment shall be entered up; and if it shall appear to the justices of the court to which any such award shall be returned, within the respective times aforesaid, that the same was obtained by fraud or malpractice, in or by surprise, imposition or deception of the arbitrators, or without due notice to the parties or their attorney or attorneys, it shall or may be lawful for the said court to set aside such award, and refuse to give judgment thereon.

Case No. 12,322.

The SAN JOSE INDIANO.

[2 Gall. 268.] [1]

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

PRIZE—ENEMY PROPERTY—RESIDENCE OF OWNERS—PARTNERS—PRESUMPTIONS.

1. A ship is deemed to belong to the country, where the owners reside.

2. If a ship carry the Portuguese flag, but the owners reside in England, she is condemnable as prize of war.

3. Courts of prize look to the legal interest in the ship, and will not recognise neutral equitable interests.

4. The property of a person may acquire a hostile character, although his residence be neutral. Therefore, where a person is engaged in the ordinary or extraordinary commerce of an enemy's country, upon the same footing,

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

[2] [Affirmed in 1 Wheat. (14 U. S.) 208.]

and with the same advantages as native resident subjects, his property employed in such trade is deemed incorporated into the general commerce of that country, and subject to confiscation, be his residence where it may.

See Curt. Dig. tit. "National Character."

[Cited in The Sarah Starr, Case No. 12,352.]

5. If there be a house of trade established in the enemy's country, the property of all the partners in the house is condemnable as prize, notwithstanding some of them have a neutral residence. But such connexion will not affect the other separate property of the partners having a neutral residence.

See Story, Partn. § 316, and authorities there cited.

[Cited in The Cheshire, 3 Wall. (70 U. S.) 233.]

6. If such house ship goods, on their own account, to one of the partners, who is domiciled in a neutral country, it is liable as prize; but it is otherwise, if the shipment be made by the order of the partner, on his separate account and risk, and not on joint account.

[Cited in Rogers v. The Amado, Case No. 12,005.]

7. If a person domiciled in the enemy's country be a partner in a house of trade established in a neutral country, and ship goods to them upon their joint account and risk, and not on his separate account, the goods are not liable to condemnation. But it is otherwise, if shipped for his separate account.

8. In general, the residence of a stationed agent in an enemy's country will not affect the trade of the neutral principal with a hostile character. But this is true only, as to the ordinary trade of a neutral, as such, carried on in the ordinary manner; for if such trade is carried on, not on the footing of a foreign merchant, but as a privileged trader, or by an incorporation with the general commerce of the enemy, in the same manner and with the same benefits, as a native merchant, it is deemed hostile.

9. Therefore, if a partner in a neutral house be domiciled in the enemy's country, and engaged in its general commerce, for the benefit of his neutral house, the property is condemnable as prize.

10. The doctrine as to stoppage in transitu applies only to the case of insolvency, and presupposes, not only that the property of the goods has passed to the consignee, but that the possession is in a third person in transit to the consignee. It cannot apply to a case, where the actual or constructive possession remains in the shipper, or his exclusive agents.

11. In general, the rules of the prize court, as to the vesting of property, are the same as those at common law.

12. Where a merchant abroad, in pursuance of orders to purchase goods, sells either his own goods, or purchases goods for his correspondent on his own credit, no property in the goods vests in his correspondent, until he has done some notorious act to divest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent.

13. A shipment made by the shipper to his own agent, of the goods so purchased, giving him a right to hold them, until he has made arrangements with his correspondent, does not devest the title or possession of the shipper.

14. Where a shipment is made to a firm, and the persons who compose it do not appear, further proof will be required of the names and domicil of the parties.

15. Where a shipment is made to partners, they are held by the prize court to take in equal moieties, unless upon the original papers a different proportion appears.

16. Where a shipment is made in an enemy's vessel, in a voyage from an enemy's country, it is presumed to belong to enemies, unless a distinct neutral character be impressed upon it. [The San José Indiano] 1 Wheat. [14 U. S.] 208.

17. The treaty of 1810, between the Portuguese and British governments, did not prevent British merchants, resident in the Brazils, from acquiring the neutral character of their domicil.

[18. Cited in The Sarah Starr, Case No. 12,353, to the point that neutrals are entitled to a reasonable time, after the breaking out of the war, in which to withdraw their business connections in the enemy's country.]

[19. Cited in brief in The Revere, Case No. 11,716, and cited in United States v. One Hundred Barrels of Cement, Id. 15,945, and The Cheshire, 3 Wall. (70 U. S.) 233, to the point that intentional misrepresentation of the character and destination of the voyage of the captured vessel is sufficient cause for condemnation of the vessel and cargo.]

[20. Cited in The Cuba, Case No. 3,457, to the point that the claimant must make his claim and affidavit without the assistance of the ship's papers in shaping them; and, if they be found to agree substantially with the documents, he may afterwards be permitted to rectify formal errors from the documents themselves.]

This was a prize cause, coming before this court on appeal from the district court of Maine. The cargo was claimed by the master in behalf of twenty-six different shippers, including a claim for his own adventure; and the ship was claimed by him as the property of Da Costa, Guimaraens and Co. of Liverpool.

At the opening of the cause, Pitman, for the captors, stated, that in the court below the claimant had been permitted to examine the papers before filing the claim, and he produced the record, from which it appeared, that an objection to this course, made by the captors, was overruled by the court.

STORY, Circuit Justice. This is contrary to the ordinary practice. In general, the claimant must make his claim and affidavit, without being assisted by the papers in shaping them, and if they be found substantially to agree with the documents, he will afterwards be permitted to correct any formal errors from the documents themselves. But in special cases, where a proper ground is laid by affidavits, an order will be made for an examination of such papers, as are necessary to a party to make a proper specification of his own claim, but not for a general examination of all the ship's papers. See The Diana [Case No. 3, 876].

As the several claims, with the facts relating to them, are distinctly considered in the opinion of the court, it will be unnecessary here to detail the circumstances of each shipment. It will be sufficient to observe, that the claimants were either Portuguese or British subjects, residing, some in Brazil, and others in England, and for the most part mem-

bers of commercial houses, having establishments, or resident partners, in both the countries. The cases divided themselves into three classes: (1) Where there were houses in both the countries constituted by the same persons. (2) Where there were houses in both the countries, but the partners not all the same. (3) Where there was no house in the belligerent country, but a partner residing there for the purpose of transacting business.

The questions of law discussed in the argument were, either as to the neutral or hostile character of the property, considered in relation to the residence and commercial connexions of the owner; or they concerned the right of property, whether it remained in the belligerent shipper, or had vested in the neutral claimant, at the time of the capture?

In regard to the first, Pitman for the captors made two points:

1. That where a partner of a house in an enemy's country resides in a neutral country, and there carries on the trade of the house, the character of the traffic will make the property hostile, notwithstanding the personal residence. The Vigilantia, 1 C. Rob. Adm. 14, 15; The Herman, 4 C. Rob. Adm. 230; The Portland, 3 C. Rob. Adm. 41; The Jonge Klassina, 5 C. Rob. Adm. 302; The Dree Gebroeders, 4 C. Rob. Adm. 235; The Anna Catharina, Id. 118.

2. That British subjects, resident in the Portuguese dominions, were considered in England to retain their British character, and were therefore excepted from the general principles of prize law, as to commercial residence.[3]

Upon these grounds, the captors sought condemnation of the whole of the property belonging to British subjects, wherever resident, and of all that belonging to Portuguese subjects who resided in Great Britain.

W. Sullivan, for claimants.

The captors rest their claim of condemnation upon two grounds: (1) That, though residing in a neutral country, the claimants enjoy there such privileges, as can only belong to British subjects. (2) That they are concerned in houses of trade in the enemy's country.

As to the residence, it is contended, that an Englishman resident in a neutral country is neutral. The Indian Chief, 3 C. Rob. Adm. 12; The Emanuel, 1 C. Rob. Adm. 296; M'Connell v. Hector, 3 Bos. & P. 113. Do the circumstances, under which they reside in the Portuguese dominions, prevent the application of the general principle in the present instance? The 10th article of the treaty, which is relied on for this purpose, cannot have this effect. It provides for nothing more, than the establishment of a tribunal, similar to the consular courts, which exist throughout the world. It is a mere commercial concession, for which the British government gives an equivalent by the treaty. The judge is a Portuguese, chosen by the British subjects, but confirmed by the Prince Regent of Portugal. A British subject so situated might commit treason against the Portuguese government. Chit. Law Nat. 41–46; Id. 37.

Does the connexion with a house of trade in England take away the neutral character? The principle of neutrality derived from residence being once established, it follows, that a British subject so resident may carry on trade with his native country. He may ship, and receive returns, and his goods, in going and coming, will be protected from capture. He may do whatever any other neutral may do. If then he may carry on the trade, how is the case varied, if he choose to connect himself with others in the enemy's country? It cannot deprive him of his neutral character. If he and his partner ship their joint property on the ocean, the belligerent may seize and bring it in; he may make prize of the hostile part and restore the neutral. The belligerent therefore suffers nothing. The Franklin, 6 C. Rob. Adm. 127; The Herman, 4 C. Rob. Adm. 228. The cases cited on the other side do not show, that connexion in a house of trade will make the whole property good prize. The Case of Ostermeyer [3 C. Rob. Adm. 41] amounts to no more, than that his adventure began and was to end at Ostend. The principle is, that an association with a house of trade, established in the enemy's country, does not subject neutral property to condemnation, nor take away the neutral character, if the trade be such, as

[3] The Henrick and Maria, 4 C. Rob. Adm. 61; The Flad Oyen, 1 C. Rob. Adm. 142; the treaty of amity, &c. between his B. M. and the P. R. of Portugal, made at Rio, Feb. 19, 1810, art. 10. (The material part of that article is as follows: "His royal highness, the Prince Regent of Portugal, desiring to protect and facilitate the commerce of the subjects of Great Britain within his dominions, as well as their relations of intercourse with his own subjects, is pleased to grant to them the privilege of nominating, and having, special magistrates to act for them, as judges conservators in those ports and cities of his dominions, in which tribunals and courts of justice are or may hereafter be established. These judges shall try and decide all causes brought before them by British subjects, in the same manner as formerly, and their authority and determinations shall be respected; and the laws, decrees, and customs of Portugal, respecting the jurisdiction of the judge conservator are declared to be recognised and renewed in the present treaty. They shall be chosen by the plurality of British subjects residing in, or trading at, the port or place, where the jurisdiction of the judge conservator is to be established; and the choice so made shall be transmitted to his Britannic majesty's ambassador, or minister resident at the court of Portugal, to be by him laid before his royal highness the Prince Regent of Portugal, in order to obtain his royal highness's consent and confirmation, in case of not obtaining which, the parties are to proceed to a new election, until the royal approbation of the Prince Regent be obtained."—The residue of the article provides for the removal of the judge conservator by application through the ambassador or minister; and also contains some stipulations in return on the part of his Britannic majesty.)

might have been carried on by the neutral on his own account. The Vigilantia, 1 C. Rob. Adm. 1.

Prescott, on same side.

There are two commercial houses, Dyson Brothers and Co. in England, and Dyson Brothers and Finney in Rio, both being composed of the same partners. The property captured was on its way from the house in the enemy's country to that in the neutral country, and it is contended:

1. That the part belonging to the partners domiciled in the neutral country is not subject to confiscation. The laws of nations authorize the belligerent to abridge the rights of the neutral, so far only as may be necessary for his own protection. The law of contraband is governed entirely by this principle. In peace, the neutral has a right to carry on trade with another country, either by shipments and returns, or by establishing houses in the two countries consisting of the citizens of each. If this right may be taken away in war, it can only be because it is injurious to the belligerent. It is true, that by such commerce one of the belligerents may be enriched, but this circumstance alone cannot give the opposite party a right to interfere. To a certain degree the enemy is benefited by all commerce carried on with him by other nations; yet the commerce is not therefore illegal. It will not be denied, that the neutral may have an agent in the enemy's country, and however intimate the trade, it is not to be intercepted. Why then should the belligerent have a right to interfere, when there are two houses? What reason is there for saying to the neutral, "you may carry on a direct trade, and send your ships backwards and forwards, as much as you will, but you shall not have any association with merchants there?"

If the doctrine contended for on the part of the captors were well founded, it would be necessary, on the breaking out of war, to dissolve all partnerships existing between the citizens of either of the belligerent powers, and those of other countries. The neutral partners must abandon their commercial connexions and return home, and those remaining in the belligerent country must find new employment, distinct from that of their partners. There is no authority to countenance a doctrine so extensively mischievous. None of the cases alluded to will embrace the present. They are all cases of persons, who, having a commercial house in the hostile country, and being citizens of that country, abandon it after or shortly before the war, and continue to employ their capital in adventures, which terminate in the enemy's country, where the house is still kept up. In most of the cases under consideration, there is a house of trade in the neutral country, and a partner resident in the enemy's country, and the enemy is not profited by the trade more than the neutral. The case would not be different, if the neutral traded directly with the enemy's country, without any partner there. It is true, that the national character may be affected by the traffic, as well as by the residence. Such is the case of the Dutch fishing vessel. The Vigilantia, 1 C. Rob. Adm. 11. But this is very different from the case of a house having one of its partners in a neutral country and the other in that of the enemy, and still more unlike the case of two houses of trade, one in each of the countries. In Ostermeyer's Case (The Portland, 3 C. Rob. Adm. 41), Sir W. Scott's difficulty arose from a suspicion that Ostermeyer had a sole house of trade in Ostend, and perhaps also, from his having been engaged with a partner in that place. That case is very far from supporting the principle contended for here. In Rudolf's Case (The Herman, 4 C. Rob. Adm. 230), the property appearing to be shipped on the account of Rudolf, who resided and carried on a separate business at Embden, the trade was considered legal, though he was at the same time a partner in a house in London, to which the property was shipped from the enemy's country.

STORY, Circuit Justice. How do you distinguish between the case, where a man has one house in the enemy's country, and another in a neutral country, in the latter of which he resides, and the case, where there are a hostile and a neutral house composed of two partners, one residing in each country?

Mr. Prescott. Sir W. Scott has not put the case of a person having a house in the neutral country. They are however distinguishable. When there is but one man, one house must be subsidiary to the other, and the belligerent would be defrauded by the neutral's covering the whole by means of his residence. But in the case of two partners, both may be principal houses, and in that case one half is liable to condemnation. The cases of the St. Eustatius house, and of the emigrants from Nantucket, cited 1 C. Rob. Adm. 14, are directly in point for the claimants.

2. It is contended, that the provisions of the 10th article of the treaty of 1810 have no effect to make this case an exception from the general rule as to national character. The general rule I have ever supposed to be, that all persons resident in the territory partake the character of the sovereign. Peace with him is peace with all, who are under his government. It cannot be conceived, that persons, living under the jurisdiction of the same sovereign, should have different rights as to foreign powers; that some should be at peace, while others are at war. The treaty does no more, than to revive certain commercial privileges, which had anciently subsisted between England and Portugal. The judge conservator is always to be a native Portuguese; and in fact his tribunal differs not essentially from the consular courts. The authority of the judge emanates from the sovereign of Portugal, and that sovereign must enforce the judgment. There is no reason, why an English-

man should not be as much domiciled in Portugal, as a Jew in England. The rule, as to persons resident in factories, does not apply to this case. The rule itself has never been extended further than to factories established in the dominions of the Asiatic powers. If the doctrine contended for were true, it would follow, that if we were at war with Portugal, and at peace with Great Britain, the property of British subjects resident in Portugal would be protected from capture. And, on the other hand, what would there now be to restrain an American cruiser from entering a Portuguese harbor and taking out British ships? Upon this principle, the territory would not be neutral. There would be at best a divided empire, and we should be at this moment at war with many of the subjects of Portugal.

Mr. Dexter, in reply.

The question is simply as to the commercial character of the claimants. It is personal, and does not relate to the branch of trade they are engaged in. And though it is necessary to consider this question in two points of view, viz. how far the commercial character is affected by the trade, and how far by the treaty, still these must be put together, to determine the national character.

1. Though it be true, that a neutral may carry on commerce, in time of war, with our enemy's country, yet he cannot carry it on in that country. In The Vigilantia, 1 C. Rob. Adm. 14, two cases are cited, in which the part belonging to a partner resident in a neutral country was restored. Sir W. Scott says, that from these it had been supposed, that the character was determined from residence alone, but it was otherwise ruled in a case before the lords of appeal, and held, that such restitution was confined to cases happening at the commencement of a war. The principle established by the case of the Vigilantia is, that trade, carried on in a belligerent country by one resident in a neutral country, is subject to confiscation, if he does not withdraw his trade after reasonable notice of the war. How is trade to be carried on then, he being absent? The strongest case, perhaps, is that of a house of trade in the belligerent country, in which a neutral is a partner. But the principle extends yet further, and embraces a case where there is no house established in the enemy's country, but the trade is carried on by an agent residing there. What is done by the partner or agent is done by the neutral himself. It is by no means necessary, that a man should have a counting-house in any place, in order to make him a merchant of that place. Jonge Klassina, 5 C. Rob. Adm. 297. The Case of Ostermeyer also confirms this view of the prize law. It was thought, that if he was still a secret partner in the house in Ostend, or if, though a neutral, he was carrying on trade by an agent in Ostend, he was, as to such trade, an enemy, and his property engaged in it was liable to capture. He is called upon for further proof, both as to sole and joint trade, and the inference is, that either of these would be sufficient to subject his property to confiscation. There can be no difference between a trade carried on from Great Britain to Rio Janeiro, and from Great Britain to France or any other country. The residence of the claimant in Rio can make no difference whatever, as to his rights in this respect. But how far is this to be considered, in reason, as a trade carried on to Rio? It is not denied, that if half of the owners are in England, and half in Rio, one half of the property is to be condemned. The remaining half cannot be considered as exclusively the trade of Rio. It is equally the trade of Great Britain, and there would be, as to this half, at least as much reason to condemn as to acquit. Here the distinction is to be attended to. The neutral has not engaged in trade with the enemy, but in the enemy's country. With regard to enterprises originating in Great Britain, he is, according to the decision in the Jonge Klassina, to be considered a British merchant, and with regard to those originating in Rio, as a Portuguese merchant. Now this voyage originates in Great Britain. The distinction is a reasonable one. The whole trade cannot be considered as neutral, and part being transacted in England, part in Rio, there is no better rule, than to adjudge that portion hostile, which originates in Great Britain, and the other neutral.

STORY, Circuit Justice. If there were nothing in the papers to show where the voyage began, is the property then to be considered hostile?

Mr. Dexter. It might depend on the fact, when and by whom it was purchased and laden.

2. Not only are the claimants resident in a neutral country, and carrying on trade in the enemy's country, but, in most of the cases, they are native subjects of Great Britain, residing in the Portuguese dominions, without intention of mixing with the people of that country, and permitted by treaty to remain there without such mixture. Is their domicil changed by a residence under such circumstances? There must be an animus manendi, to constitute domicil. This is Vattel's definition. The domicil is not changed, until the man not only resides in the country, but becomes a member of the civil community. The treaty between Great Britain and Portugal provides, that the subjects of the former resident in the dominions of the latter may choose a judge. It must be intended, that he should judge according to the English laws. Did the sovereign of Portugal mean to admit, that his own courts were corrupt? This is hardly to be supposed. The only probable account of the article is, that the Portuguese courts not understanding the English laws, the Prince Regent was willing, that a court should be formed, in which the British should enjoy their own laws. They were thus separated and distinguished from his own subjects, as to all commercial purposes, and

therefore the principal reason is here wanting, which in ordinary cases makes the domicil and the national character to follow the residence. We have no reason to apprehend from this doctrine the extravagant effects, which have been attributed to it. A third nation would not be bound to acknowledge the British residents in Portugal, as retaining their British character. There would not therefore be the imperium in imperio supposed on the other side. Sir W. Scott has, in several instances, spoken of British subjects so situated, as continuing to be British. In The Indian Chief we have the reason given, why the residents in factories are still considered citizens of the country, to which the establishment may belong. It is, that they cannot mix with the natives. In the present case, the sovereigns of both countries have entered into an agreement, that their subjects shall not mix. This compact of the two sovereigns is certainly equivalent to the prohibition of one. The case is analogous to that of the establishments in the East Indies.

Argument upon the questions of proprietary interest:

In several of the claims, the manner of the shipment gave rise to questions, as to the proprietary interest at the time of the capture. Before introducing the argument, it will be necessary to state briefly the circumstances of the two principal claims.

Claim of J. Lizaur—In this case the bill of lading expressed the property to be shipped by Dyson Brothers and Co., consigned to Dyson Brothers and Finney, but contained no account and risk. The invoice declared the goods to be consigned to Dyson Brothers and Finney, "by order and for account of J. Lizaur." From a letter it appeared, that the purchase was made by order of the claimant, and exceeded the amount of funds in the shippers' hands; that they debited him the amount of the invoice, including freight, commissions, &c. at six months' credit; and the consignees are directed to do as they think proper.

Claim of J. M. Pinto.—The bill of lading and invoice were similar to the last. A letter informed Dysons and Finney, that they were debited the amount of the goods ordered by them for Pinto, and enclosed a bill of exchange for the same sum on Pinto to order of Dysons and Finney, "which they would use or not, as they pleased."

Pitman, for captors.—The property had not vested in the claimants. When the delivery depends upon a condition to be performed, the property of the shipper is not devested until performance of the condition. The Constantia, 6 C. Rob. Adm. 327.

Mr. Sullivan, for claimants, cited as to change of property, 1 C. Rob. Adm. 336; 4 C. Rob. Adm. 113, note; 2 Com. Cont. 210, where the cases on the subject of sales are collected.

STORY, Circuit Justice, stated briefly the facts and points adjudged in several cases, which had recently been determined in the supreme court of the United States, viz. The Frances (French's claim) 8 Cranch [12 U. S.] 359; the claim of W. and J. Wilkins; and the claim of Kimmell and Albert.[4]

Prescott, for claimants.

The cases of Lizaur and Pinto very much resemble that of Wilkins, decided in the supreme court, in favor of the claimant. Here was an order from Lizaur to purchase and ship merchandise for his account, and he made a remittance in payment. The order, it is true, exceeded the amount of funds, but there was an agreement on Lizaur's part to purchase the goods, and that the funds should be applied towards the payment. Dyson Brothers and Co. accordingly purchased and shipped on account of Lizaur. The goods were at his risk from that time, and indeed from the time of the purchase, if the purchase for his use could be proved. Had the warehouse of the shippers, after such purchase, been consumed by fire, the loss of the goods would have been Lizaur's. The difficulty arises from the manner of the consignment. The goods are shipped to Dyson Brothers and Finney, in order to give a right of stoppage in transitu, or at least to preserve the shipper's lien on the goods. There was a right to retain until the money was paid. Lizaur, after tendering the price, might have recovered the goods, and Dyson Brothers and Co. might have brought an action for the money and recovered it of Lizaur. As the goods had been purchased by his order, he could not have defended himself upon the ground that the goods had not been delivered. A general rule for ascertaining whether the property has vested, is to ascertain whether any thing remains to be done by the vendor. If a bargain be made, and before delivery the thing is destroyed, it is settled, that if nothing further was to be done by the vendor, the buyer must sustain the loss. Rugg v. Minett 11 East, 210. The same doctrine is to be found in Pothier. Pinto's case is even stronger than Lizaur's. The goods were purchased in compliance with an order given to the house in Rio. They were shipped for account and risk of Pinto, and a bill of exchange drawn on him for their value. They were sent to the house in Rio, that they might deliver them to Pinto, and procure his acceptance of the bill.

Dexter, in reply.

The questions before the court are not now to be settled by the authority of English books. They have received a direct determination in our own supreme court. The broadest principle established in favor of the neutral is, that the property shall vest, when it appears to have been delivered to the captain as his agent, being shipped in pursuance of orders, or when, instead of an absolute consignment, such papers are sent to the claimant, as will enable him to obtain possession of the property. The cases of Lizaur

[4] These cases do not appear to have been reported.

and Pinto differ, but in neither of them is there a delivery to the claimant or his agent. On the contrary, they are to be delivered to the shippers themselves. In the case of Pinto, there was to be no sale, unless the house should be satisfied of his credit.

STORY, Circuit Justice. This is a case of a Portuguese ship with a very valuable cargo on board, bound on a voyage from Liverpool to Rio de Janeiro in the Brazils, and captured on the 16th day of May last, by the private armed ship Yankee, and carried into Portland, in the district of Maine, for adjudication. Various claims were interposed by the master for himself and others, as owners of the ship or of some portions of the cargo, in the district court of Maine, and from the sentence of that court an appeal has been taken to this court. It will be necessary to give these several claims a distinct consideration.

Claim of Costa, Guimaraens and Co. for the ship: The ship is claimed by the master, as the property of the house of Messrs. Costa, Guimaraens, and Co. of Liverpool. The claim alleges, that the house consists of four persons, viz. Antonio Julico Da Costa and Manuel Rilairo Guimaraens, who are Portuguese subjects domiciled in England, and Carlos Lucena Mendes and Joao Gaudentio Da Costa, who are Portuguese subjects domiciled at Maranham in Brazil. The master, in his answer to the standing interrogatories, declares the owners to be Messrs. Da Costa and Guimaraens, who, he alleges, are partners in trade, and produces a copy of a bill of sale, by which the legal property of the ship is vested in Guimaraens alone. It is unnecessary to consider the effect of this contrariety between the answer of the master and the asserted claim, though for myself, I am free to declare, that it will be extremely difficult to maintain that his regular answers can ever be outweighed by any subsequent declarations, after the pressure of the case is fully known, and counsel has been taken. It is clear, that the legal title of the ship can be asserted in the prize court, as to those persons only to whom a bill of sale regularly conveys it. Whatever equitable interests may exist in other persons is immaterial; the court looks singly to the bill of sale, as a document, which is recognised by the law of nations, and the ownership must be decided by it. It is, as Sir William Scott observes, the universal instrument of transfer of ships in the usage of all maritime countries, and in no degree a peculiar title deed or conveyance, known only to the law of England. The Sisters, 5 C. Rob. Adm. 155. The ownership therefore in this case must be deemed to be in Mr. Guimaraens, and, as he is domiciled in the enemy's country, it must be condemned as enemy's property. The Vigilantia, 1 C. Rob. Adm. 1 (1 Kent, Comm. 78, 79).

The next claim is that of Messrs. Dyson Brothers and Finney, of Rio de Janeiro. The goods in this claim were shipped by Messrs. Dyson Brothers and Co. of Liverpool, by order, for account of, and consigned to Messrs. Dyson Brothers and Finney, of Rio de Janeiro. From the letters and accompanying documents it appears, that the houses at Rio and at Liverpool are composed of the same persons, who are all native subjects of Great Britain, viz. James Finney domiciled at Rio, Thomas F. Dyson, at Liverpool, and —— Dyson, at Halifax, in England.

Upon these facts, respecting which there is no controversy, the captors claim condemnation of two thirds of the shipment, as the property of British subjects domiciled in England, and, as to this property, there is no doubt that condemnation must follow. As to the other third, which constitutes the share of James Finney, the captors contend, that it is liable to condemnation on two grounds:—1st. As the property of a person connected in a house of trade in the enemy's country, and continuing that connexion after and during the war, the property having been purchased and shipped on the account and risk of the same house. 2d. Because under the Portuguese treaty of 1810 with Great Britain, British subjects domiciled in the dominions of Portugal are deemed, for commercial purposes, as retaining their British, and consequently, in the present case, their hostile, character. As each of these questions is applicable to several of the claims before the court, I will give each of them a distinct examination.

And as to the first point, it is very clear that, in general, the national character of a person is to be decided by that of his domicil; if that be neutral, he acquires the neutral character; if otherwise, he is affected with the enemy's character. But the property of a person may acquire a hostile character, altogether independent of his own peculiar character derived from residence. In other words, the origin of the property, or the traffic, in which it is engaged, may stamp it with a hostile taint, although the owner may happen to be a neutral domiciled in a neutral country. Such are the familiar instances of engagements in the colonial, coasting, fishing, or other privileged trade of the enemy. The Vigilantia, 1 C. Rob. Adm. 1; The Susa, 2 C. Rob. Adm. 251; The Princessa, Id. 49; The Anna Catharina, 4 C. Rob. Adm. 107; The Rendsborg, Id. 121; Berens v. Rucker, 1 W. Bl. 313; The Immanuel, 2 C. Rob. Adm. 186, 4 C. Rob. Adm. Append. A.; The Maria, 5 C. Rob. Adm. 365; The Vrow Anna Catharina, Id. 161; The Vriendschap, 4 C. Rob. Adm. 166. So the produce of an estate belonging to a neutral, in an enemy's colony, is impressed with the character of the soil notwithstanding a neutral residence. The Phœnix, 5 C. Rob. Adm. 20; The Dree Gebroeders, 4 C. Rob. Adm. 232. So if a vessel, purchased in the enemy's country, is by consent and habitual occupation, continually employed in the trade of that country during

the war, she is deemed a vessel of the country from which she is so navigating, whatever may be the domicil of the owner. The Vigilantia, 1 C. Rob. Adm. 1; The Jonge Emilia, in The Portland, 3 C. Rob. Adm. 41–52. The principle to be extracted from these cases seems to be, that where a person is engaged in the ordinary or extraordinary commerce of an enemy's country upon the same footing and with the same advantages, as native resident subjects, his property, so employed, is to be deemed incorporated into the general commerce of that country, and subject to confiscation, be his residence where it may. And the principle seems founded in reason. Such a trade, so carried on, has a direct and immediate effect in aiding the resources and revenue of the enemy, and in warding off the pressure of the war. It is not distinguishable from the ordinary trade of his native subjects. It subserves his manufactures and industry; and its whole profits accumulate and circulate in his dominions, and become regular objects of taxation, in the same manner as if the trade were pursued by native subjects. There is no reason, therefore, why he, who thus enjoys the protection and benefits of the enemy's country, should not, in reference to such a trade, share its dangers and its losses. It would be too much to hold him entitled, by a mere neutral residence, to carry on a substantially hostile commerce, and, at the same time, possess all the advantages of a neutral character. I agree, therefore, "that it is a doctrine, supported by strong principles of equity and propriety, that there is a traffic, which stamps a national character on the individual, independent of that character, which mere personal residence may give him." And I think the case now before the court comes clearly within the range of the principle which I have already stated. Here is a house of trade, composed entirely of British subjects, established in the enemy's country, and habitually and continually carrying on its trade, with all the advantages and protection of British subjects. It is true one partner is domiciled in the neutral country; but for what purposes? For aught that appears, for purposes exclusively connected with the Liverpool establishment. At all events, the whole property embarked in its commercial enterprises centres in that house, and receives its exclusive management and direction from it. Under such circumstances, the house is as purely British in its domicil (if I may use the expression) and in its commerce, as it could be, if all the partners resided in the British empire. If the case, therefore, were new, I do not at present perceive, how it could be extracted from the grasp of confiscation, from its thorough incorporation into the enemy's character.

But, how stands the case upon the footing of authority? It is argued, that no decision comes up to the point, and that the court is called upon, by the captors, to promulgate a novel doctrine. If, however, I am not greatly deceived, it will be found, on an attentive examination, that there is a strong current of authority all setting one way. From the cases of The Jacobus Johannes and The Osprey, 1 C. Rob. Adm. 14, note, an erroneous notion had been adopted, that the domicil of the parties was that alone, to which the court had a right to resort in prize causes. But, in the case of Coopman (The Nancy, 1 C. Rob. Adm. 14, 15, note), those cases were put upon their true foundation, as cases merely at the commencement of a war, in reference to persons, who, during peace, had habitually carried on trade in the enemy's country, though not resident there, and, therefore, entitled to have time to withdraw from that commerce. But the lords of appeal, in that case, expressly laid it down, that if a person entered into a house of trade in the enemy's country in time of war, or continued that connexion during the war, he should not protect himself by mere residence in a neutral country. Now, I am utterly at a loss to know, how terms more appropriate could be employed to embrace the present case, which is that of a connexion in a house of trade in the enemy's country, continued during the war. This doctrine, held by the highest authority known in the prize law, has been repeatedly recognized and enforced by the same learned court. Vide, in The Susa, 2 C. Rob. Adm. 255; The Indiana, 3 C. Rob. Adm. 44, note. In the cases of The Portland (3 C. Rob. Adm. 41), &c. the very exception was taken, as to Mr. Ostermeyer, who, though domiciled at Blankanese, was alleged to be engaged in the trade of Ostend, either as a partner, or as a sole trader. In those cases the general principle was explicitly admitted, and one vessel (the Jonge Emilia) eventually condemned on that ground. It is a mistake of the learned counsel for the claimant, that the court, in those cases, confined the further proof to the fact, whether Mr. Ostermeyer was a sole trader at Ostend; it will appear on a careful examination, that further proof was also required as to the alleged partnership, and particularly as to a letter in the Frau Louisa, pointing to that partnership. In The Jonge Klassina, 5 C. Rob. Adm. 302, which was a very strong case of its rigid application, Sir W. Scott avows the same doctrine, and declares, that a man may have commercial concerns in two countries; and if he acts as a merchant of both, he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries. The case of The Herman, 4 C. Rob. Adm. 228, so far from impugning the principle, evidently proceeds upon the admission of it; and I think it may be affirmed without rashness, that not a single authoritative dictum exists, which can shake its force. It has been attempted to distinguish those cases from that before the court, by alleging, that none of them present the fact of a shipment made from a house in the enemy's country to its connected house in the neutral coun-

try. But, it does not seem to me, that this difference presents any solid ground, on which to rest a favorable distinction. On the whole, I am of opinion, that the shipment, in this case, being made by a house in the enemy's country, for their own account, in a voyage originating in that country, must be deemed enemy's property, and that the share of Mr. Finney must follow the fate of the shares of his partners.

The captors have further contended, in reference to other claims before the court, that the same principle applies in cases, where a house, in the enemy's country, ships goods to one of its partners domiciled in a neutral country, either in his single name, or to a neutral house there, of which he is also a partner; and é converso, where a partner of a neutral house is domiciled in the enemy's country, and ships to such house goods the manufactures of that country. In respect to the two former cases, I agree at once to the position, if the shipment be really made on the account, and for the benefit of the house in the enemy's country. For, in such case, the neutral partner, or house, acts but as their agent, and the whole property and profits of every enterprise rest in the hostile house. And, indeed, it is wholly immaterial, under such circumstances, to whom the consignment may be, whether to a partner or a stranger. The property, in its origin, transit and return, is thoroughly imbued with the enemy's character. And the same may be affirmed of the third case, if the partner, so domiciled in the enemy's country, be really engaged in the general commerce of that country, for the exclusive benefit of his neutral house. For although, in general, the residence of a stationed agent in the enemy's country will not affect the trade of the neutral principal with a hostile character, yet this is true only as to the ordinary trade of a neutral as such, carried on in the ordinary manner. But where such trade is carried on, not on the footing of a foreign merchant, but as a privileged trader, or by an incorporation with the general commerce of the enemy in the same manner, and with the same benefits, as a native merchant, it would seem to be embraced in the general doctrine, which I have already stated. Vide The Anna Catharina, 4 C. Rob. Adm. 107–119; The Rendsborg, Id. 121–139; The Indiana, 3 C. Rob. Adm. 44, note.

But the principles contended for by the captors, as I understand the argument, spread over a wider surface, and extend to cases, where a shipment has originated in a house in the enemy's country, of which such partner is a member, although the shipment be bona fide, and exclusively on account and risk of such neutral partner or house. And the declaration of Sir William Scott in The Jonge Klassina, 5 C. Rob. Adm. 297–302, which I have already quoted, is relied on as an authority, which supports the argument. But I do not think, that the language of Sir William Scott, correctly considered, admits of this interpretation. He is merely alluding to the origin of transactions, which exclusively regard the interests of a house of trade established in a particular country, and not transactions, where it acts merely as an agent, or shipper, for other persons. To show this more distinctly, the learned judge in The Portland, 3 C. Rob. Adm. 41–44, says: "I know of no case, nor of any principle, that could support such a position as this, that a man having a house of trade in the enemy's country, as well as in a neutral country, shall be considered in the whole concerns as an enemy's merchant, as well in those solely, which respect his neutral house, as those, which belonged to his belligerent domicil. The only light, in which it could affect him, would be as furnishing a suggestion, that the partners in the house in one place were also partners in the other." And in The Herman, 4 C. Rob. Adm. 228, where a shipment was actually made from an enemy's port, by order of the neutral house to the belligerent house, but on account of the former, the property was adjudged to be restored. These cases do, as I think, assign and establish the true and reasonable limits of the doctrine; and I have no difficulty in affirming, that shipments made by an enemy's house, on account and risk, bona fide and exclusively, of a neutral partner or house, are not subject to confiscation as prize of war. And the same principle must apply in the converse case of a partner or agent, domiciled in the enemy's country, and making shipments to his neutral house, or principal, on the exclusive account of the latter.

I now come to the consideration of the effect of the Portuguese treaty as to British subjects domiciled in the Portuguese dominions; a question which, though it may well be spared, as to the claims of Messrs. Dyson Brothers and Co., rides over a large mass of claims, and must eventually decide them. The articles relied on by the captors are the 8th and 10th. The former in substance provides, that British subjects within the Portuguese dominions shall not be restrained by any monopoly, contract, or exclusive privileges of sale or purchase (saving only those of the crown); but shall have free permission to buy and sell without being obliged to give any preference or favor in consequence of such monopolies, &c. The latter grants to such British subjects the privilege of nominating, subject to the approbation and ratification of the crown of Portugal, judges conservators, who are to try and decide all causes brought before them by British subjects in the same manner as formerly; and the laws, decrees and customs of Portugal respecting the jurisdiction of such judges are declared to be recognized and renewed by the same treaty.

It is contended by the captors, that the privileges granted by these articles completely revive the exclusive British charac-

ter in British subjects within the dominions of Portugal; and the case is likened to that of the factories in the Eastern world, in which the residents have been universally held to take the national character of the establishment itself, under whose protection they carry on their trade. The Indian Chief, 3 C. Rob. Adm. 22, and the cases there cited. It is to be recollected, however, that this is a rule of the law of nations applying peculiarly to those countries, and different from what ordinarily prevails in Europe and the western parts of the world; and is founded on the immiscible character kept up from the earliest times in the East, where foreigners are never incorporated into the general society of the natives. It is indeed asserted by Sir W. Scott (The Henrick and Maria, 4 C. Rob. Adm. 43, 61) that the subjects of Great Britain, resident in Portugal, are distinguished by special privileges (the same in effect as secured by the present treaty); that they retain the British character in spite of the Portuguese domicil, even in the estimation of the enemy himself (i. e. France); and that they exercise an active jurisdiction at least over their own countrymen established in those parts. And in The Flad Oyen, 1 C. Rob. Adm. 135, 142, he alludes in the same manner to these extraordinary privileges. This language is exceedingly strong, and, though introduced in a collateral discussion, affords considerable countenance to the argument of the captors. Perhaps the same inclination of opinion may be traced in The Nayade, 4 C. Rob. Adm. 251. But whatever may be the bearing of this opinion, it seems now settled by the lords of appeal, that a British born subject, resident in the English factory at Lisbon, so far possesses the Portuguese character, as that his trade with the enemies of his native country is not illegal (The Danous, 1802, 4 C. Rob. Adm. 255, note); and from thence I infer, that he must be deemed, as to purposes of trade, as taking the general character of his domicil. Upon the footing of authority therefore, the case for the captors is not made out. And upon principle, I think it is as difficult to maintain. The 8th and 10th articles of the treaty secure no more, than the freedom of trade, and the right to have all causes tried by a special tribunal according to the laws and customs of Portugal. Still, however, it is an incorporation of British residents into the general commerce of the country. They are still subject to the general laws respecting revenue and taxes; to the general duties of qualified allegiance; and to the general regulations of social and domestic, as well as commercial, intercourse. Far different is this from the case of Eastern factories, where the laws of the factory govern the parties, who claim protection under it, and no general amenability to the laws of the country is either claimed or exercised. Without going more at large into this topic, I am satisfied, that British residents in the dominions of Portugal take the character of their domicil, and as to all third parties, are to be deemed Portuguese subjects.

The next is the claim of Mr. J. Lizaur of ——— in Brazil. The shipment was made by Messrs. Dyson Brothers and Co., and by the bill of lading the goods are consigned to Messrs. Dyson Brothers and Finney, Rio de Janeiro. The accompanying invoices express the shipment to be made by order and for account of Mr. J. Lizaur, and contain charges of freight, commission and insurance, and an acknowledgment of giving credit for three and six months. In a letter of the 4th of May, 1814, addressed by the shippers to the consignees, they say "for Mr. Lizaur we open an account in our books here, and debit him £2450. 2s. 3d. amount of 14 bales, at six months credit, and £1764. 11s. 7d. for 16 cases of cambrics, &c. at three months' credit; we cannot yet ascertain proceeds of his hides, &c. but find his order will far exceed amount of these shipments, therefore consign the whole to you, so as you may come to a proper understanding. We have charged our usual commission of two and a half per cent. in the invoices, but should you have made any stipulation to the contrary, he can again bring same to our debit. Invoices, bills of lading, and patterns of what goods are requisite, we forward as usual in a small box to your address."

The single question presented in this claim is, in whom the property vested during its transit; if in Mr. Lizaur, then it is to be restored; if in the shippers, then it is to be condemned. It is contended on behalf of the claimant, that the goods, having been purchased by order of Mr. Lizaur, the property vested in him immediately by the purchase, and the contract being executed by the sale, no delivery was necessary to perfect the legal title; that nothing was reserved to the shippers, but a mere right of stoppage in transitu, and that if they had been burnt before the shipment, or lost during the voyage, the loss must have fallen on Mr. Lizaur.

As to the doctrine of stoppage in transitu, I do not conceive it can apply to this case. That right exists in the single case of insolvency, and presupposes, not only that the property in the goods has passed to the consignee, but that the possession is in a third person in their transit to the consignee. It cannot therefore touch a case, where the actual or constructive possession still remains in the shipper or his exclusive agents. Abb. Shipp. pt. iii, c. 9, p. 402.

I agree also to the position, that in general the rules of the prize court, as to the vesting of property, are the same as those of the common law, by which the thing sold, after the completion of the contract, is properly at the risk of the purchaser. Feise v. Wray, 3 East, 93; Rugg v. Minett, 11 East, 210; Hanson v. Meyer, 6 East, 614;

The Constantia, 6 C. Rob. Adm. 321; Kinloch v. Craig, 3 Term R. 119, 783. But the question still recurs, when is the contract executed? It is certainly competent for an agent abroad, who purchases in pursuance of orders, to vest the property, immediately on the purchase, in his principal. This is the case, when he purchases on the credit of his principal, or makes an absolute appropriation and designation of the property for his principal. But where a merchant abroad, in pursuance of orders, sells either his own goods, or purchases goods on his own credit, (and thereby in reality becomes the owner) no property in the goods vests in his correspondent, until he has done some notorious act to divest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent. Until that time he has in legal contemplation the exclusive property, as well as possession; and it is not a wrongful act for him to convert them to any use, which he pleases. He is at liberty to contract upon any new engagements, or substitute any new conditions, in relation to the shipment. And this I understand not only as the general law, but as the prize law pronounced by that high tribunal, whose decision I am bound to obey. In The Venus (at February term, 1814) 8 Cranch [12 U. S.] 253, on the claim of Magee and Jones, in delivering the opinion of the court, Mr. Justice Washington observed: "To effect a change of property, as between seller and buyer, it is essential, that there should be a contract of sale agreed to by both parties, and if the thing agreed to be purchased is to be sent by the vendor to the vendee, it is necessary to the perfection of the contract, that it should be delivered to the purchaser or to his agent, which the master (of a ship) to many purposes is considered to be." And adverting to the facts of that claim he further says: "The delivery of the goods to the master of the vessel was not for the use of Magee and Jones, any more than it was for the shipper solely, and consequently it amounted to nothing, so as to devest the property out of the shipper, until Magee should elect to take them on joint account, or to act as the agent of Jones."

In the present claim before the court, the delivery to the master was not for the use of Mr. J. Lizaur, but for the consignees,who are in fact the shippers. They, therefore, retained the constructive possession as well as right of property; and it is apparent from the letter, that the shippers meant to reserve to themselves, and to their agents in relation to the shipment, all those powers, which ownership gives over property. It is material also, in this view, that all the papers respecting the shipment were addressed to their own house, and the claimant could have no knowledge or control of the shipment, unless by the consent of the consignees under future arrangements to be dictated by them. In this view, I cannot distinguish the case from that of Messrs. Kimmell and Albert's claim in the Merrimack [8 Cranch (12 U. S.) 316], at February term, 1814; and it steers wide of the distinction, upon which Messrs. Wilkins' claim in the same ship, at the same term, was sustained. The authorities also cited at the argument by the captors are exceedingly strong to the same effect. The Aurora, 4 C. Rob. Adm. 218, approaches very near to the present case. There the shipment, by the express agreement of the parties, was in reality going for the use and by the order of the purchaser, but consigned to other persons, who were to deliver them, if they were satisfied for the payment. And Sir W. Scott there quotes a case, as having been lately decided, where goods sent by a merchant in Holland to A., a person in America, by order of B. and for account of B. with directions not to deliver them unless satisfaction should be given for the payment, were condemned as the property of the Dutch shipper. On the whole, I am of opinion, that the goods included in this shipment were, during their transit, the property of and at the risk of the shippers, and therefore subject to condemnation. The claim of Mr. Lizaur must therefore be rejected.

In this connexion, it may be well to dispose of the claim of Joaquim Martins Pinto, of Rio de Janeiro. The shipment is made and the papers enclosed by Messrs. Dyson Brothers & Co. to their house at Rio de Janeiro, as in the former case. In the bill of lading no account or risk is stated, but the invoice is headed, shipped, &c. by order of and consigned to Messrs. Dyson Brothers and Finney for account and risk of Joaquim Martins Pinto. In a letter of the 4th of May, 1814, the shippers write to the consignees: "You are debited £233. 19s. 4d. for a case of stocking web ordered for Joaquim Martins Pinto; for the same sum we enclose first our draft on Mr. Pinto at 30 days sight to your order at the exchange of eighty-two and a half per mil rea, which you can either make use of, or not, as you think proper." I do not think this can, in point of law, be favorably distinguished from the preceding case. Mr. Pinto is not, but the consignees are, debited with the amount. Had the shipment under these circumstances been to a third person, he must have been deemed the vendee, having the constructive possession and property of the goods and entitled to give any new direction to them. As the shippers and consignees are here the same persons, the language used shows, that it was not intended to vest any property in Pinto; but to leave the delivery and disposition of them to the house in Rio. The claim of Mr. Pinto must therefore be rejected.

The next is the claim of Messrs. Antonio Roiz Dos Santos & Co. of Rio de Janeiro. The proof of property in the claimants hardly admits of a doubt. But as further proof will be necessary, as to who compose the house

of Santos & Co. and of the domicil of the partners, it may be well also to furnish the court with proof of the orders sent to Messrs. Dyson Brothers respecting the shipments made by them.

The next is the claim of Messrs. Heyworth Brothers & Co. of Rio de Janeiro. The shipment is made by the house of Ormerod Heyworth & Co. of Liverpool, which, upon a careful examination of the letters, appears to be composed of the same persons as the house at Rio, viz. Ormerod Heyworth and James Heyworth of Liverpool, and Lawrence Heyworth at Rio de Janeiro, and is upon the account and risk of the Rio house. The case therefore falls directly within the decision on the claim of Dyson Brothers and Finney. And this claim must be rejected.

The next is the claim of Messrs. Turner, Naylor & Co. of Rio de Janeiro, which firm consists of John Turner and George Naylor of that place, and John Todd Naylor of Wakefield in England. The claim includes six distinct shipments. The first is shipped by George Green of Liverpool to Turner, Naylor & Co. and the invoice and bill of lading express only a consignment to them. By a letter of the 4th of May, 1814, addressed by Messrs. Nathaniel and Falk. Phillips & Co. to the house at Rio, dated at Manchester, it appears that this shipment is made on the joint account of both houses. The moiety of Messrs. Phillips and the sixth part of Mr. John Todd Naylor must be condemned. And the two sixths of Messrs. John Turner and George Naylor, upon principles which I have already discussed, must be restored. The second is shipped by George Turner and Naylor of Liverpool to the house at Rio, and in the invoice is stated to be sent by the order, and for the account and risk of the latter, by John and Jeremiah Naylor & Co. of Wakefield. As to a part of the bale No. 14 included in this shipment, it does not appear from the papers to have been shipped by order of the consignees. In the letter of the 30th of April, 1814, of Messrs. J. and J. Naylor of Wakefield, to the house at Rio, they say "Please note the end of fine merino packed in bale No. 14 is quite a new article, which J. T. Naylor thinks will take in your market, of which pray advise us. Should it not, and there be any loss, debit us with it." And John Todd Naylor in a postscript of a letter of the 30th of April, 1814, addressed to George Naylor at Rio says: "There is a piece of stocking stuff of a new manufacture sent out by the house in one of the bales; I think it is an article likely to answer; pray give me your sentiments upon it as soon as possible; if it answers, it can be for our account; if you think it won't answer, sell it for account of J. and J. N. & Co. It is almost as fine as silk net." It is clear therefore that this must be deemed the property of the house at Wakefield, and of course be condemned. As to all the other packages, including No. 705 in a separate invoice, I must consider them as falling under the class of goods ordered by the consignees; and if bona fide the property of the consignees, two thirds must be restored. But there appears from the letters in the case such an intimate relation both in blood and business, between the house at Wakefield, and the house at Rio, that I think myself called upon to require further proof, as to the general connexion in business between these houses, and the terms and manner and circumstances, under which these and other shipments have been made. One third part of the property is at all events liable to condemnation. The third shipment is by George Turner and Naylor of Liverpool to the house in Rio of 40 barrels of shot on joint account of the two houses, and of 109 firkins of butter on joint account of the same houses and J. Todd Naylor, one third each. Of the first parcel two thirds, and of the last parcel seven ninths, are to be condemned, the residue to be restored. The fourth shipment is made by George Turner and Naylor to the house at Rio and by a bill of parcels and letter in the case the goods appear to have been purchased of Holgate Massey & Co. at Burley, and debited by them to the house at Rio. There is no question therefore as to the property—one third must be condemned and two thirds restored. The same may be observed of the fifth shipment bought of Leonard Slater, and of the sixth and last, consisting of two bales of blankets.

The next is the claim of P. F. Archango Dos Querubens, procurator general of the religious order of St. Antonio. This shipment is included in a bill of lading from George Turner & Naylor to the house of Turner, Naylor & Co. at Rio Janeiro. The invoice is of two bales sent for by order of Messrs. T. N. & Co. to be delivered at the custom house of Rio de Janeiro to the R.' P. F. Archango Dos Querubens, procurator, &c. &c. or to whom may be acting for him, and signed by J. and J. Naylor & Co. In a letter of the 30th of April, 1814, in which the invoice and bill of lading were inclosed, J. and J. Naylor & Co. write to the house of Turner, Naylor & Co. at Rio: "We have taken due note of the contents of your letters. but the request of the friars of St. Antonio to have their clothes exactly similar to those sent per Roscius, &c. arrived too late, the bales being on their way to Liverpool, when we received your letter; the directions we before received from you were not to exceed the former price. Inclosed you have their invoices for sixteen bales, and shipped per the San Jose Indiano for your account and risk, viz. two bales St. Antonio, No. 4 and 5, amount, £338. 0s. 7d. to be remitted for on arrival," &c. It appears also, that insurance is charged on these goods at £3. 3s. the same as the other goods confessedly belonging to the house at Rio. Under all the circumstances of this claim, the strong inclination of my mind is, that the goods in their transit were not at the risk of the friars of St. Antonio. As, however,

further proof is not strenuously opposed, I shall allow it to be given, reserving any absolute opinion till it shall come in.

The next is the claim of March Brothers & Co. of Rio de Janeiro, which firm consists of William March of Liverpool, and Thomas March and George March of Rio de Janeiro. No question exists in relation to the two shipments included in this claim, which were purchased of Mr. Joseph Shore, and Messrs. Brittain, Wilkinson and Brownell. The title to this property is clearly in the firm; therefore, two thirds are to be restored and one third condemned. There are two other shipments made by Smith and Massey, one consigned to William March & Co. and the other to March Brothers & Co.; and in respect to these shipments there are no papers, except two bills of lading, which express no account or risk and are enclosed in blank letters, viz. that to W. March & Co. enclosed to March Brothers & Co. and that to the latter enclosed to the former. Notwithstanding this apparent contrariety, it is probable that both houses are in reality the same. But in my judgment this inquiry is not material. I hold it to be clear law, that in a time of war parties are bound to put on board such papers as shall evince the neutrality of the property, if it be entitled to that character; and where shipments are made from an enemy's country in an enemy's vessel, the presumption is, that every shipment belongs to enemies, on which a neutral character is not distinctly impressed. I condemn, therefore, these two last shipments to the captors.

The next is the claim of Seaton, Plowes & Co. of Rio de Janeiro. John F. Seaton of London, and John Plowes of Rio, are two of the partners of the house. It does not appear, who are the other partners, and as to the property, there is no question but that it belongs to the house. The general presumption of law is, where nothing to the contrary appears, that in a case like the present there are at least three partners; and, as to captors, the partners are deemed to take in equal moieties, unless on the face of the original papers a different apportionment appears. And the reason of the rule is manifest, for were it otherwise, as the evidence to change the proportions must come from the enemy, whose interest it must be to diminish his own share as much as possible, the court would, by admitting further proof, be exposed to every species of belligerent fraud. In the present case, if the captors do not ask that further proof may be admitted as to the other partners, I shall restore two thirds and condemn one third of the shipment.[5]

The next is the claim of William Harrison & Co. of Rio de Janeiro. There is no question as to the title of the property, and upon an examination of the papers, it appears that the house at Rio, at the time of this shipment (for at a previous time a Mr. Huntley seems to have been in the firm), consisted of William Harrison of Rio, and the house of A. and R. Harrison and Latham of Liverpool. The evidence is very clear, that A. and R. Harrison are domiciled in England, and there is not the slightest intimation that Latham is not there also. I shall restore William Harrison's one quarter part and condemn the residue.

The next is the claim of Francis and John Sommers. The shipment was made on joint account of Francis Sommers of Rio de Janeiro and the Rev. John Sommers, Mid Calder. The share of Francis Sommers must be restored. If Mid Calder be, as I presume it is, in the north of England, the other moiety must be condemned. As to this fact I will hear proof, if the parties wish.

The next is the claim of Miller and Flenning of Rio de Janeiro. The shipment is made on their account and risk, and appears to have been paid for out of funds of the claimants in the possession of the shippers. It is true, that the master has not in his answers sworn to the property of this shipment; and by the rigid rule of the prize law it might be deemed a case of further proof. The Juno, 2 C. Rob. Adm. 116, 122. But I cannot think so very plain a case will be urged to be within the range of the rule. I therefore restore the property.

The next claim which requires any particular examination, is that of the master for his own adventure. Claims of this sort, made by the master, are received with great indulgence by the court, when he appears to testify with fairness, and conducts himself with good faith. There are however, in the present case, after all the deductions, which even liberal explanations allow to a stranger speaking another language, some discrepancies and difficulties in the master's testimony, that none of his affidavits (even if they were all admissible), have been able satisfactorily to clear up. In his answers to the standing interrogatories, he has enumerated the various packages, which he claims as his sole property. In his claims he has included other packages, and particularly the whole invoice No. 4, amounting to £373. 16s. 10d. which in his answers to the standing interrogatories, he explicitly declared to be the property of Messrs. Da Costa, Guimaraens & Co. The goods also in invoice No. 1, amounting to £1159. 3s. 1d. and invoice No. 2, amounting to £1698. 13s. 5d. in his interrogatories, he swore were his sole property; in his claim, made after an examination of the papers, he swears, that one third part of the same invoices he purchased for one Francisco Gaudencio Da Costa of Maranham. This is not all, for it appears in the accounts of the shippers, Messrs. Da Costa, Guimaraens and Co., that the master is charged only with two thirds of these invoices—so that he could not be deemed the purchaser of the other third for Da Costa. The invoices of these two shipments (No. 1

[5] This claim was afterwards ordered to further proof as to the two thirds.

and 2) are expressed to be on account and risk of whom it may concern, to be delivered to J. J. Felis, and on the invoice (No. 1) these words are added, "Deliver to Sr. Felis 7 cases of silk stockings." In the bills of lading of the same invoices, the goods are to be delivered to the master; if absent, to Sr. Domingo Gomez Louveira and Sons. The same consignment is of invoice No. 4. If these shipments had been in reality for the account of the master, it is difficult to account for such an extraordinary consignment; if for the real, though concealed, account of Messrs. Costa, Guimaraens and Co., the letter from Mr. Costa to Mr. Louveira of the 5th of May, 1814, and the letter of Costa, Guimaraens and Co. of the same date, to Gomez Louveira and Sons, afford a key to the solution. It is also remarkable, that the invoices No. 3 and 5, which are charged in the account current as the master's property, and I have no doubt are so, are, by order of the master, deliverable to his order, or on account of the master. And the bill of lading of No. 3 (which is the only one found) is to the sole consignment of the master. These are some of the circumstances, which certainly throw a shade over the claim of the master; and it seems to me hardly to be expected, that a court should so far throw the mantle of charity over the case, as to decree a restoration of the whole property. I shall decree a condemnation of the goods in the invoice No. 4, being perfectly satisfied, that they do not belong to the master. The goods in the invoices No. 3 and 5 are to be restored. As to the goods in invoices No. 1 and 2, I fear that the order for further proof, which I shall allow, is under all the circumstances a relaxation of the prize law, which stands on the utmost limits of indulgence. I hope that it may not be drawn into precedent.

I give no opinion on the point, how far the master in this case is to be deemed to take the national character of the ship, in which he has sailed so many voyages from England. That point has not been argued, and upon the dry facts before me I have not felt it proper to touch that delicate subject. Vide The Embden, 1 C. Rob. Adm. 16.

As to the other claims in the case, I do not think it necessary to deliver any formal opinion. They are completely decided by the principles of law, which I have already stated, or depend on facts of the greatest simplicity.

[NOTE. On a question as to marshal's fees, it was held that the marshal was entitled to commissions upon prize property removed from his district, by consent of parties, to another district, and there sold. Case No. 12,323. For a final decree upon the master's claim, see Id. 12,324. This cause was taken to the supreme court, where the decree of this court was affirmed. 1 Wheat. (14 U. S.) 208.].

SAN JOSE (BRAGG v.). See Case No. 1,803.

Case No. 12,323.

The SAN JOSE INDIANO.

[2 Gall. 311.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1814.

PRIZE — SHARES — SPECIAL AGENTS — MARSHAL'S COMMISSIONS.

1. Practice as to payment of prize shares to special agents.

2. The marshal is entitled to commissions upon prize property removed from his district, by consent of parties, to another district, and there sold. See The Rendsberg, 6 C. Rob. Adm. 142.

G. Sullivan presented a petition of the officers of the private armed brig Yankee, praying that their shares in the proceeds of the prize, San Jose Indiano, should be paid over to their special agent, Captain Snow, they revoking the powers given by them to the general agents. They also prayed, that the shares of some part of the crew, represented by them, should be paid in the same manner. A part of the property was still uncondemned. Commissioners were appointed. See The St. Lawrence [Case No. 12,233]. In this case, the prize goods, by an agreement of the parties, were removed from the district of Maine to Boston, and there sold by an auctioneer. The proceeds were paid into the circuit court, before which the cause was brought by appeal. A part of the cargo being condemned at this term, the marshal claimed commissions.

J. T. Austin contended, that, as the law directed the property to be sold, when condemned by the marshal of the district, the marshal of Massachusetts could not, in this case, be defeated of his rights, by the agreement of the parties. The property was originally in the custody of the district court of Maine, but it being afterwards brought within this district, and here condemned, the right of the marshal of Maine was transferred.

Mr. Pitman contended, that if any officer was entitled to commissions in this case, it was the marshal of Maine.

STORY, Circuit Justice, said, that when it appeared to be for the interest of all parties, that the property should be sold at a different place, or by a different person, than would arise under the ordinary practice of the court, and an agreement was made by the parties to this effect, the court would ratify such agreement, taking care, however, that the marshal should be protected in his rights. That in this case, it was the marshal of Maine, who had a title to fees. If the property had remained in the district of Maine, and the cause had come up to this court, by appeal, a warrant would have gone to the marshal of Maine to sell the property.

[NOTE. For final decree upon the master's claim in this cause, see Case No. 12,324. The

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

cause was carried to the supreme court, where the judgment of this court, as rendered in Case No. 12,322, was affirmed. 1 Wheat. (14 U. S.) 208.]

Case No. 12,324.

The SAN JOSE INDIANO.

[1 Mason, 38.] [1]

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

PRIZE—ORDER FOR FARTHER PROOF—SHIPMENTS.

In general the prize court will not trust a claimant with an order for farther proof, who has shown himself capable of abusing it. Every shipment remains on the account and risk of the shippers, unless there be an express or implied authority to change the proprietary interest, and put the shipment at the risk of the consignee. Defects of the case on farther proof, inflame suspicions. Circumstances leading to condemnation.

The farther proof ordered in this cause, as to invoices Nos. 1 and 2, part of the goods claimed by the master, being now brought in, the counsel of the respective parties were heard by the court. The circumstances attending this claim are fully stated in the opinion of the court, delivered at October term, 1814 [Case No. 12,322]. The nature of the farther proof, now produced, will appear in the opinion which follows.

Dexter & Pitman, for captors.

William Sullivan and Mr. Prescott, for claimants.

STORY, Circuit Justice: The only remaining claim, now to be decided, is that of the master, as to the property in the invoices Nos. 1 and 2, respecting which farther proof was ordered at October term, 1814. That order was made under very special circumstances; and if it can be reconciled at all with the rules of the prize court, it stands upon the very limits of the law. It was made in favor of a party, whose statements under oath were contradictory, and who was finally detected in an attempt to practise an imposition on the court by the cover and claim of property, which has been condemned as the property of enemies. The difficulties also of the claim, as to the invoices Nos. 1 and 2, were very serious, and were in part stated in the opinion, which was then delivered, and to which I again refer. The master was then personally present in court, and so strong were the solicitations of counsel in his behalf, as a foreigner, seeking the compassion of the court, and so earnest was their belief, that every explanation could be made by him to its entire satisfaction, that the indulgence was yielded after considerable doubt of its legal propriety. It is a clear rule of public justice, enforced for the most obvious reasons by prize courts, that a party shall not be trusted with an order for farther proof, who has already shown himself capable of abusing it. Under these circumstances the party was put upon his utmost diligence; and was distinctly informed, that the clearest proof and documents would be expected, to relieve the claim from the weight, with which it was oppressed; and that the apparent contrarieties and singularities must be minutely explained.

The farther proof has now been brought in, and it consists altogether of a certificate of a Mr. Da Costa of Lisbon, not under oath; and of an affidavit of Mr. Da Costa of Liverpool, one of the firm of Da Costa, Guimaraens, & Co., the owners of the ship. The master himself has offered no supplemental affidavits or documents explaining the contrarieties in the case, or showing any funds or special circumstances, from which so large a shipment might have arisen. Nor can it be pretended, that he has, in these respects, acted under a mistake. Independent of the admonition of the court, there are now before me the written instructions of counsel, as to what was proper and necessary to be done; and these instructions were not only known to the master, but were transmitted to Messrs. Costa, Guimaraens, & Co. It was certainly to have been expected, that the master, before leaving the country, would have given his final explanation of the real transactions, minutely and fully; and that at least, after the lapse of a year, he would have produced some original documents, either to himself, or to his asserted partner in this transaction, that would have assisted in the verification of his claim. It is in proof, that such documents actually exist. The bills of lading of the invoices Nos. 1 and 2 are without signatures, and if there be not a mis-translation (as I suspect there is) in the consignment, the production of the originals, in the possession of the shippers, would have been some corroboration of the claim, especially if connected with the "letter of orders" referred to in the certificate of Mr. Da Costa of Lisbon.

This certificate, independent of its not being verified by oath, is essentially defective for every purpose of farther proof. In the claim of the master, two thirds of the shipment were claimed, as the property of the master, and one third as the property of Mr. Francisco Gaudencio Da Costa of Maranham. In the certificate it is nowhere averred, that Mr. Da Costa of Lisbon is the same person, as Mr. Da Costa of Maranham. It was certainly incumbent on the party to show this; and if a removal had taken place, to state at what time the event happened, and what was his real domicil at the time of shipment. If this gentleman had never lived at Maranham, or had removed before the shipment was made, it would have thrown great doubt upon the master's veracity; and in no possible view could it be an unimportant circumstance in clearing away difficulties. The certificate states, that the invoices annexed to it, "are faithfully copied from the respective original invoices of the merchandises therein specified, shipped at Liverpool on

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

board the San Jose Indiano, a Portuguese built vessel, and the property of a Portuguese, Ignacio Jose Felis master, bound for Rio de Janeiro, by Costa, Guimaraens, & Co. for account of the deponent, concerned in one third part of the capital and interest, and the other two third parts for account of the said captain of the same vessel, I. J. Felis, pursuant to the letter of orders given by the shippers to the above said captain; which said original invoices remain in his possession, together with their respective documents sent to him by the aforesaid shippers." This is the whole of the certificate. It is somewhat remarkable, that neither the originals, nor copies of these documents, and letter of orders, are produced, nor the time of their receipt mentioned by the claimant; nor does he pretend, that any authority or orders were given by him for the shipment; nor is there shown any correspondence, or course of trade, between himself and the shippers, from which an implied authority could be inferred. Consistently with the language of the certificate, the shipment might have been made without any authority express or implied, and without any interest in the claimant, except the nominal interest asserted in the papers. The letter, too, of the claimant, addressed to Mr. Sampayo (the agent for the ship and cargo in this court) which accompanied the certificate, shows in a very marked manner his utter ignorance of the whole transaction. He directs him in every thing to follow the instructions, that Messrs. Costa & Co. have given, relating to this business. The letter is, of itself, calculated to awaken the strongest suspicions; and, combined with the other circumstances, it cannot but raise a presumption, that Mr. Da Costa of Lisbon is but a dramatic personage, ushered into the scenes, to act a part for the benefit of the original shippers, or some other concealed hostile owner. It is sufficient, however, that the shipment does not appear to have been made in pursuance of any orders; and it is clearly settled, that every shipment remains on the account, and at the risk of the shippers, unless there be an express or implied authority to change the ownership of the property, and put it to the account, and at the risk of the consignee.

Equally unsatisfactory is the affidavit of Mr. Da Costa of Liverpool. It is a naked declaration, in general terms, and unaccompanied with a single original document, letter of orders, or statement, explanatory of the manner or circumstances, under which the shipment was made. Not a single difficulty, which appeared in the original papers, or in the account current, is attempted to be accounted for; though certainly it was peculiarly in the power of this gentleman, to have given the most ample and minute information.

Whether, therefore, we examine the proofs in the case, or the defects, which the parties have had an opportunity to supply, and have neglected to do it, the case now presents even stronger doubts, than accompanied it at the original hearing. A claimant, asserting rights and interests before a prize court, must make them out by competent and sufficient proofs. The onus probandi rests on him (The Walsingham Packet, 2 C. Rob. Adm. 77; The Countess of Lauderdale, 4 C. Rob. Adm. 283); and if he fail to relieve the court from legal doubts as to his title, condemnation must pass to the captors. There seems, indeed, but one way of explaining the almost total defect of evidence, to support the order of farther proof. And I think, that it is not a rash inference, that a minute disclosure of the facts, on the part of the claimants and shippers would not aid the asserted claim, or sustain the explanations heretofore made. From the defect of the proper proofs, I condemn the goods in the invoices Nos. 1 and 2, as good and lawful prize to the captors, with costs and expenses.

[On appeal to the supreme court, the decree of this court, as rendered in Case No. 12,322, was affirmed. 1 Wheat. (14 U. S.) 208.]

Case No. 12,325.

The SANTA ANNA.

[1 Blatchf. & H. 79.] [1]

District Court, S. D. New York. May, 1829.

MARITIME LIENS—SURPLUS AFTER SALE—MASTER'S CLAIM FOR WAGES—DISBURSEMENTS.

After the liens upon a libelled vessel are satisfied out of the proceeds of her sale, the surplus funds remaining in court are subject, as against the owner, to the master's claim for wages and for disbursements on account of the vessel up to the time of her seizure, but not for wages or disbursements after the time of her seizure.

[Cited in The Balize, 52 Fed. 415.]

These were petitions in regard to the disposition of the surplus moneys arising from the sale of a libelled vessel, the brig Santa Anna.

BETTS, District Judge. This vessel has been libelled and sold to discharge seamen's wages, and the surplus, after satisfying the libellants, has been paid into court. Two petitions are now presented for these proceeds. One is by the master, who was engaged in June, 1828, and navigated the vessel until she was sold, and who seeks satisfaction for his wages and disbursements on account of the vessel, for that period. The other is by one Tracy, a creditor of the former owners of the vessel, and who represents that she was assigned to him as security for advances made in December, 1827. The letter of the former owners, to which he refers as evidence of the pledge of the vessel, asserts a positive sale of the vessel to Tracy for $4,000, and that he is her true and lawful pro-

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

prietor. It would be unjust to allow him, clothed with this double capacity of assignee or owner, as his interest may lead him to act, now to put forward the one which may be most to his own advantage, and most prejudicial to the other petitioner. If, therefore, the claim of the master will be at all strengthened by holding Tracy to the character of owner of the vessel, he has a right to require him, under the proofs presented, to stand in court in that capacity alone.

It appears to me that a very essential difference exists between the privileges of a creditor who has a prior bona fide lien on a vessel, and those of the owner, in a controversy with the master relative to the proceeds of such vessel after her sale upon liens. As against such creditor, I do not well perceive how the master could maintain a claim for his wages, as the law seems settled that he has no lien on the vessel in that behalf, which he could enforce specifically against her or against the moneys in court which represent her. The Favourite, 2 C. Rob. Adm. 232; The Grand Turk [Case No. 5,683]. But however this may be, he is entitled to payment out of these specific moneys, as against the owner. As to his wages, he has a right to resort to this court for their recovery, by an action in personam against the owner. Willard v. Dorr [Id. 17,679]. The demand of a master, equally with that of a seaman, for wages, falls within the cognizance of a court of admiralty; and the decree, when rendered, will be made alike efficacious with respect to any means of the owner within reach of the process of the court.

Although the marshal might not be able, by his execution, to reach funds deposited in court, still the court would not allow those funds to be paid over to the owner until the decree was satisfied, as no one can obtain the funds without satisfying the court that he is equitably entitled to them. The equitable power of the court would be ample to retain the funds, to enable a creditor to pursue his relief against them by bill in equity, or it might direct their application on its decree for a maritime demand, upon the petition of the libellant in such decree. Courts proceeding according to the course of the common law, have exercised a like authority over funds placed in court by virtue of process, or remaining in the hands of the officers of court. Upon that principle, moneys in the hands of a sheriff, after satisfaction of the process which made them, have, on summary motion, been applied upon executions subsequently delivered to him. Armistead v. Philpot, 1 Doug. 231; Ball v. Ryers, 3 Caines, 84; Van Nest v. Yeomans, 1 Wend. 87. See, however, Williams v. Rogers, 5 Johns. 163, and Willows v. Ball, 2 Bos. & P. [N. R.] 376. In some of the states of the Union, such funds have, by statute, been made subject to levy. The court of chancery, too, will exercise its broadest powers to retain and decree for a suitor whatever moneys, derived from or held by those who ought to respond to him, may be within its control.

The authority of a court of admiralty is not less extensive and salutary, and, under like circumstances, is exercised in the same manner. Accordingly, although, for reasons very little consonant with the enlarged and remedial principles cherished in this court, a master cannot maintain an original suit in rem for wages, or for materials or advances furnished by him to the ship under his charge, yet he is allowed to come in and obtain a satisfaction for his services and for such advances, from surplus moneys in court arising from a sale of the ship. Gardner v. The New Jersey [Case No. 5,233]; Zane v. The President [Id. 18,201]. See, also, The John, 3 C. Rob. Adm. 288. The justness of the master's demand, in this case, is admitted by the other petitioner. A part of it is for disbursements made for the ship, and falls within the terms of the case of Gardner v. The New Jersey [supra], and the rest is for his own wages, and comes within the principles already stated. The whole, it seems to me, should be treated by this court as if evidenced by a decree for the amount. In the case of such a decree in form, the money would be withheld from the owner until the decree was satisfied; and I shall apply the like principles to the present state of facts. Holding that the master is entitled to have Tracy regarded in this application as the real owner, I shall order payment out of the surplus moneys in court to the amount of the master's account, both for disbursements and for his own wages up to the time the vessel was seized.

The account of the master which accrued subsequently, did not arise from his charge and responsibility as master of the vessel, as she was then in the custody of the law; and if he was employed in port as keeper, by the marshal, he must obtain his compensation from the marshal; and it will be then for the court to decide whether the payment will be allowed the marshal in the adjustment of his accounts against the vessel. It does not appear that Tracy ever assented to that employment of the master, or had any knowledge of it. Nor, if his acquiescence could be shown, would it probably vary the case, as the contract of Tracy or of the marshal with the master, would be regarded as personal and not of a maritime character coming within the jurisdiction of the admiralty, none of the parties having had authority, during the arrest of the vessel, to make contracts respecting her, except under the express order of the court. Order accordingly.

Case No. 12,326.

The SANTA CLAUS.

[1 Blatchf. 370.] [1]

Circuit Court, S. D. New York. Oct. Term, 1848.[2]

COLLISION—ON HUDSON RIVER—LIGHTS—WHOLLY IN FAULT.

Where a collision occurred between two steam vessels, the O. and the S., on the Hudson river, the former going up and the latter down, and it appeared that the O. had but one light, that the night was dark and the weather thick and cloudy, and that, under those circumstances, a vessel carrying but one light, though moving, appears to an approaching vessel as if at anchor, and her course can be determined only when very near, *held*, that even though the S. mistook the position of the O., yet as the want of two lights on the O. was calculated to and probably did mislead, the S. was not wholly in fault.

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

George W. Aspinwall and others, owners of the propeller Ocean, filed a libel in rem, in the district court, against the steamboat Santa Claus, to recover damages caused to the former vessel by a collision with the latter in the night time, on the Hudson river, just above Dunderbarrack Point, about 42 miles from New York, the propeller being bound up the river and the steamboat coming down. Both vessels were very much injured. The district court decreed in favor of the libellants [Case No. 12,327], and the claimants appealed to this court. The answer was amended in this court, and a large amount of additional evidence was taken, which varied the case altogether from that presented below. The facts sufficiently appear from the opinion of the court.

Erastus C. Benedict, for libellants.
Edward Sandford, for claimants.

NELSON, Circuit Justice. The proofs in the court below and those on appeal leave no doubt whatever—First, that the propeller had but one light on board at and for some time before the happening of the collision; and secondly, that in a night as dark as the night of the collision, the weather being thick and cloudy, a vessel carrying but one light, although moving, appears to persons on board an approaching vessel as if she were remaining fast at anchor, and that it is very difficult, if not impossible, for the latter to determine the course of the former, until near enough to discern the situation of her hull.

Two steamboats that met the propeller the same night below where the collision occurred came near running afoul of her on account of the above embarrassments, and only avoided the disaster by a rank sheer on discovering that she was in motion. They happened to be in a position where they had room enough to escape by this manœuvre. This seems to have been the impression of the court below on the proofs, but the fault was supposed to be countervailed and overcome by the answer, which was considered as admitting that the position and course of the propeller were seen by the steamboat in season to have avoided her. That ground is now removed by an amendment of the answer, and the decision must depend on the effect of the evidence. This is full and undeniable, both upon the point that the propeller had but one light, and also in respect to the effect of that upon a vessel approaching.

Under these circumstances it is impossible to hold that the steamboat was wholly in fault. Even admitting that she misapprehended the position of the propeller as she was coming around Dunderbarrack Point, as held by the court below (and in which view I am inclined to concur), yet, inasmuch as the want of a second light on the propeller was calculated to mislead and probably did mislead, the steamboat ought not to be held exclusively responsible for the consequences.

I agree that, upon the evidence, it is somewhat difficult to determine which of the vessels was in fault, the hands on each maintaining the proper navigation of their own vessel. I do not think the steamboat was in fault in taking the western side of the channel. If she was in fault at all it was in not discovering that the propeller was hugging or intending to hug the western shore and in not passing outside of her. But she may have been misled by the propeller's having but one light, till it was too late to correct the mistake. Although I would not hold the propeller responsible for the damage to the steamboat, I do not think the latter should, under the circumstances, be held responsible for the damage to the former.

Judgment reversed, without costs.

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

[2] [Reversing Case No. 12,327.]

Case No. 12,327.

The SANTA CLAUS.

[1 Olc. 428.] [1]

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

COLLISION — ADMISSIONS IN ANSWER — LIGHTS — RULE OF PASSING—CULPABLE NEGLIGENCE.

1. In an action in rem for a collision, the answer of the owners of the colliding vessel admitting facts to their prejudice will prevail in favor of the libellants against the testimony of the pilot of the vessel to the contrary.

2. There is no positive provision of law compelling a steamboat running on inland waters in the night time, to carry two signal lights, one in her bows and the other suspended above the deck at her stern.

3. The practice is an usual and useful one, and the omission to set them will be evidence of culpable negligence in the complaining vessel; but if the pilot of the colliding vessel discovers her bows and heading, the absence of a head light upon her is no excuse for the collision.

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

[2] [Reversed in Case No. 12,326.]

4. The rule that two steam vessels going in opposite directions, and meeting in the night time, shall each port her helm, and both pass to the larboard, is not of absolute obligation.

5. When one steamboat is ascending a river at her larboard side, within sixty or seventy feet of the shore, and another is descending on her starboard so far off as to leave ample room for her safe passage, the two are not so meeting, within the sense of the rule, as to justify the descending boat attempting to run in shore of the other, or to require the latter to port her helm and steer to the starboard.

6. A propeller, heavily laden, going up the Hudson river in the night, against an ebb tide, is justified by the usages of the river navigation, and upon general principles of marine law, to hug the western bank at or near Dunderbarrack Point, for the advantage of an eddy or slacker tide supposed to be found there, and other boats passing in the opposite direction are to be presumed cognizant of such usage and opinions, and are bound to take precautions accordingly.

7. The question of culpable negligence is not determinable absolutely by any rule of navigation. These rules are not inflexible, and a vessel which adheres to them in form may still be, at the same time, guilty of a tortious injury to another which fails to observe them.

[Cited in The Pilot, Case No. 11,168.]

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

The passenger steamboat Santa Claus, going down the Hudson river, and the iron steam propeller Ocean, proceeding up the river, deeply loaded with coal, came in collision about twelve o'clock on the night of the 5th of June, 1846, a quarter of a mile above Dunderbarrack Point, at the foot of the Horse Race. The larboard guard of the Santa Claus was broken up, the outer timber wrenched off and driven nearly through the propeller, breaking a hole in her starboard bow, and was found passed athwart her seventeen feet under her upper deck. The Santa Claus received great damage in her guard timbers, wheel paddles and arms. The owners of the propeller attached the steamer, claiming compensation for the injuries caused by the negligence or want of skill of the persons managing her. The case set up by the respective parties by the libel and answer is this: The libel alleges that the propeller is owned in Philadelphia, is of 190 tons burthen, and sailed from that port for Albany and Troy, on the 4th of June; that on the night of the 5th she was violently and carelessly run into by the Santa Claus, about forty-two miles above New-York, a few rods above Dunderbarrack Point, the propeller then having two signal lights burning, one at the stem and the other at the main gaff; that the blow made a breach in her starboard bow, six feet in length by three feet in width. That the tide was ebb and strong and wind ahead, and the propeller was not making headway exceeding four miles the hour; that to avoid the strength of wind and tide the propeller was kept close to the west side of the river, not more than three or four rods from the shore, after leaving Caldwell's landing. That on doubling Dunderbarrack Point, the Santa Claus was discovered coming down the river one-third across from the eastern shore, and apparently heading directly down the reach, on a line far eastward of the propeller and her course. That the propeller continued close to the west shore, till observing the Santa Claus had suddenly changed her course and was apparently heading directly for the propeller, when her helm was put hard a port, and her engine was stopped and backed, so that her headway became entirely deadened, and her engine kept rapidly backing when the Santa Claus ran upon her at high speed, striking her on her starboard bow with the larboard bow of the Santa Claus, causing the injuries before specified. That the propeller was at the time on a proper, safe and usual course in navigating that portion of the river, and did every thing promptly which ought to have been done to avoid the collision, and that it was out of her power to do so; but the Santa Claus, with ease and safety, could have avoided the collision, if those navigating her had not unskilfully and negligently steered across and upon the bows of the propeller; and that the damage was occasioned by the fault and mismanagement of the Santa Claus, and not that of the propeller. The answer denies generally the statement of particulars made by the libellants, and avers that the facts were—That at about midnight of the 5th of June, the Santa Claus was running down the river on the usual and proper track and course, with an ordinary head of steam, and at the rate of from twelve to fifteen miles the hour, and at a quarter of a mile above the turn of the Dunderbarrack, her pilot discovered the propeller below, half a mile to the southward and eastward, and three or four hundred yards from the western shore, having one light elevated above her decks, two masts, and her sails down, and he supposed her a vessel at anchor, her head being up the river. That the pilot and crew of the Santa Claus did all in their power, and exercised proper and due vigilance and skill to avoid the collision, and that it was caused by the wilful ignorance, carelessness and negligence of the master, pilot and crew of the propeller. That it is usual and customary, and the law of the river for steamboats going up in turning Dunderbarrack Point, to keep well to the eastward, so as to leave room for boats coming down to make that turn in safety; that the pilot of the propeller failed so to do, but headed to the northward and westward in violation of his duty, &c., &c. That steamboats meeting on the river are each bound to port their helm and turn to starboard or the right, so as to pass with safety to the larboard of each other, but the pilot of the propeller ignorantly and carelessly neglected so to navigate his vessel; but on the contrary, starboarded his helm and steered to the larboard. That the propeller was bound by law and the usage and custom of the river to carry and show two sufficient lights, one at her stem and the other raised above her stern, but

that she had at the time no light at her stem; and that at the time of the collision she was widely out of her proper track and place. The answer also charges the ignorance and incompetency of the pilot and crew of the propeller.

The points contested upon the hearing, and to which numerous witnesses were examined, turned chiefly on the inquiry whether the propeller was guilty of culpable negligence on the occasion which caused the collision complained of. Those charged against her related to her position in the river and her proximity to the western shore, and particularly to her omission to display a stem and stern light; and that running with only a light hoisted above her stern disabled the Santa Claus determining how she was heading, and from taking proper measures to avoid her. Much time was consumed in taking proofs on that branch of the defence. It was overlooked on both sides, until the evidence had closed and the argument was opened, that it was stated in the answer "that the pilot (of the Santa Claus) discovered a vessel with two masts and her sails down, distant about half a mile to the southward and eastward, and about three or four hundred yards from the western shore; he supposed it to be a schooner at anchor, her head being up the river." This dispenses with the necessity of setting forth in detail the evidence given to this point by both parties. It was regarded as a cardinal fact, touching the condition and navigation of the propeller, to ascertain whether she was so fitted and conducted as to render it uncertain to the approaching vessel how she was heading, and the explicit declaration of the claimants in their answer that the pilot knew her head was up the river being considered by the court conclusive against them on that point, the evidence at large is omitted.

The other facts in the case will sufficiently appear in the opinion of the court.

E. C. Benedict, for libellants.
Geo. F. Schufeldt, for claimants.

BETTS, District Judge. The libel and answer stand in flat contradiction in respect to the courses and positions of the two vessels immediately preceding the collision. The statements in these pleadings do no more than form issues between the parties upon all the material facts connected with the transaction, except in one particular, in which the answer makes an allegation affording evidence in behalf of the libellants, which, in my judgment, disposes of that branch of the controversy. The proof is pretty satisfactory that the propeller had but one light burning at the time she was first seen from the Santa Claus. The one placed at her bow, as the night came on, had burned out, or was extinguished without the knowledge of her crew, when the two vessels came in sight of each other.

The testimony of masters and pilots experienced in the navigation of the river prove clearly that placing one light above the stern of a steamer, and another in her bows, is of essential aid to vessels meeting her in determining her true position and course. The law requires at least one light to be plainly exposed (Act July 7, 1838, § 10 [5 Stat. 306]), and the practice of exhibiting two in the above arrangement has become so general as to authorize the presumption that navigators will be governed by the expectation that all steamers in motion in the night time conform to it. The necessity or value of this trim consists in its furnishing a sure means to vessels nearing her to determine the direction of her head. This the experts almost unanimously testified could not be ascertained by the stern light without the aid of a head light. The omission of that signal, without other equivalent warning, would, in my opinion, show the propeller guilty of negligence or misconduct, and would excuse the Santa Claus in not employing higher care and precaution for avoiding her. Bullock v. The Lamar [Case No. 2,129]. That ground of defence is taken from the claimants by their answer, and they must be held to have known the position and direction of the propeller, as well from seeing her stern light and the direction of her head or bows, as if a light had been at her stem also. Steamers are not required by positive law, nor any authenticated custom of the maritime law, to carry and exhibit a light both on the stem and stern when running in the night time. It has become a common and commendable practice to do so, particularly in the navigation of inland waters, as an increased measure of precaution. It would undoubtedly, in this instance, have afforded the Santa Claus a better means, in connection with the stern light, to determine the bearing of the propeller than she could derive from the exhibition of a stern light alone, and that, in a nautical point of view, is all the importance of having two lights. The act of congress (July 7, 1838, § 10) compels steam vessels to carry one or more signal lights at night. No edict of any maritime code is shown requiring more than one to be exhibited. And it is of no consequence whether any light is shown, if the approaching vessel has plain notice without it, of every thing its exhibition could communicate. Here the pilot of the Santa Claus saw the bow of the propeller. That supplied him a range line to her stern, and thus apprised him whether she was at anchor swinging on the tide, or moving towards him on a direct or oblique line.

The only essential fact, then, to be determined is, whether the propeller was in a wrong position, or was unskilfully or carelessly navigated in reference to the course and position of the Santa Claus. If, however, the claimants became in that manner apprised of the heading of the propeller, the blame of the collision would be cast upon

them, leaving no ground of excuse because notice was not given of her direction by a signal light at her head. The maritime law settles no determinate course or direction vessels are bound to take when approaching each other. The exigencies of the particular case must govern. There are general rules of navigation which furnish guides on ordinary occasions, but they do not necessarily excuse or charge fault or liability in all cases of collision. One of those usages and rules is, that steamboats running in opposite directions shall, when meeting on coincident or approximating lines, port their helms or bear off to starboard, and thus give each other a berth to larboard. The usages in the United States and the Trinity rules in England recognise this mode of navigation as the proper one to be pursued, and a deviation from it will raise a presumption of want of skill and good conduct in the vessel committing such deviation. But none of those rules are absolutely inflexible. They give way and accommodate themselves to emergencies as they arise. They are employed as standards by which courts of admiralty regulate, in a general sense, their appreciation of the care, skill or fidelity with which the respective vessels have performed their duties in case of a collision. Westm. Rev., No. 42, Sept., 1844; 3 Kent, Comm. 230; The Hope, 1 W. Rob. Adm. 157; The Friends, Id. 478; Abb. Shipp. 308. And this state has, by statute, established a like provision. 1 Rev. St. p. 682, § 1.

It is not definitely settled what the bearing of approaching vessels must be towards each other to constitute a meeting, within the legal import of the term. It probably would be understood to signify that when the advance of the vessels in a common direction which must apparently, if continued, bring them into collision, each must then change her course by bearing off to the right, or show adequate reasons excusing that movement. The purpose and spirit of these laws of navigation aim at the safety of the vessels. The method designated is wholly secondary, and every rule is satisfied when the vessels go clear, although they pass each other on the starboard side and in near contiguity. The Friends, 1 W. Rob. Adm. 478. It is eminently proper that a strict observance of any of these regulations should be avoided when there is a plain risk in adhering to them, and it is entirely in the power of either vessel to escape a collision by departing from the methods prescribed by the rules. But I should think this a case in which the customary mode of porting the helm was properly adopted by the Santa Claus, provided the evidence showed that the two boats were meeting in the sense of the rule, when she bore off to the right.

In the agitation and confusion necessarily attendant upon a collision in the night time, it must always be difficult to determine, with reasonable certainty, how either vessel was conducting at the moment, or what would have been the best measure either or both could have pursued in the exigency to avoid or lessen the danger. In the present case, when the danger of collision was discovered to be imminent, the two vessels were crowded towards the west shore, the persons on board of each believing the other vessel was furthest out in the river, and pressing on them from that direction. It is testified by the pilot of the Santa Claus and several hands on board her, that they observed the propeller down the river, east of their course, and heading westwardly towards them, and they ported their wheel once, and quickly repeated the movement, pressing it down until their boat was brought within fifty feet of the west shore, where the propeller drove into her, bows on, just abreast her wheel guards, and fifty feet aft her stem. It is incredible that those witnesses could have been aware of the nearness of their vessel to the west shore when they made that movement, for it involved her inevitable destruction had she not been intercepted by the propeller. She was arrested in full speed at fifty feet from the shore. Nothing in her power to do could have saved her at that point from going head on upon the rocks. The pilot, engineer and firemen of the propeller testify that the Santa Claus, immediately before the collision, varied her course from one straight down the river and well east of them, to the starboard, and directly towards them, and came down upon them whilst they were endeavoring to escape her, just passing her stem across the propeller, and striking her starboard bow with the larboard guards of the Santa Claus, and with such force as to break off the facing of her guard and drive it entirely through the propeller.

The disaccord in the opinions of the witnesses as to particulars connected with the collision would naturally arise from the perturbation of the moment, and the different positions from which objects were viewed by them, and the court might be compelled, if the testimony was confined to the facts observed when the vessels were in the act of striking, to regard the fault as inscrutable, or equally imputable to both parties. But it seems very plain to my mind, from all the circumstances in proof, that the pilot of the Santa Claus mistook the position of the propeller, from the time he first observed her, and that her position and course was always westward of his position and course, and not to the eastward, as he supposed, and under that misapprehension he made the desperate attempt to crowd his vessel between the propeller and the shore, thinking, no doubt, he was several hundred yards east of it. The testimony of Babcock, May and Bradley, on board the propeller, is positive that she was running close to the west shore, within a distance of four or five rods. The pilot states that he hugged the rocks as near as was safe. This evidence is corroborated by Peter Van Elton, who observed the progress of the boat from his ves-

sel, (anchored near Caldwell's.) He says, "She sheered in near Caldwell's, close to the shore, and kept close round the point, going round it a short distance from it." Although Morey, pilot of the Santa Claus, Conklin and Turner, who were in the wheel-house with him, and Hubbard, a deck hand, all testify that the propeller, when seen by them, was three or four hundred yards eastward of the point, (or one-third of the width of the river,) and east of the Santa Claus, so far as to leave ample room for the latter to pass to the west, yet this is only matter of opinion and estimate; they point to no fixed objects which enabled them to form that judgment or verify its justness. The answer is probably incorrectly copied in stating "the Santa Claus was a quarter of a mile above the turn, (at the point,) when she discovered the propeller, about half a mile to the southward and about three or four hundred yards from the western shore," because the testimony of the pilot and other witnesses speaking to that fact all represent the Santa Claus as one-half or a mile above the point when they discovered the propeller to be in motion, and they allege the collision actually took place a quarter of a mile above the point. This must manifestly be what the claimants intended to aver in their answer.

The preponderance of evidence upon these statements is clearly with the libellants. Their witnesses, all on the propeller but one, speak with certainty as to her position in relation to the west shore, a line of land almost within their reach, whilst those of the claimants were out in the river upon a vessel moving rapidly, and they judge from the apparent bearing of a high light, distant from them half a mile or a mile, and looked at in the night time in thick weather. In these circumstances it would be more probable they would mistake largely her distance from the shore than that her officers and crew could. The facts proved on both sides, moreover, support the superior accuracy of the libellants' witnesses on this point. The vessels came together eighty rods above the point, and only fifty or sixty feet (between three and four rods) from the west shore. They were running at the relative speed of four to one, the Santa Claus going twelve to seventeen miles the hour and the propeller three to four, and accordingly the former would come down the river a mile whilst the latter was ascending a quarter of a mile, and assuming that the Santa Claus was at either point of distance testified to by her pilot and crew, above the place of collision when she sheered off westwardly, it would be physically impossible that the propeller could have advanced up the river three-quarters of a mile, and westwardly three or four hundred yards, during the time the Santa Claus, at her high speed, was descending one-half a mile or a mile. The direction of the propeller westwardly, observed by the Santa Claus, could not have been, therefore, as supposed on board the latter, a course commenced whilst the former was still below, and several hundred yards east of the point, but must have been, as described by the pilot of the propeller, her direction on turning the point of rocks and hugging close to the west shore, which, according to the chart and diagrams of the river in proof, would necessarily lead her to steer and head N. W. and W. N. W. It is palpable that the pilot of the Santa Claus must have miscalculated the distance of the propeller from him and the shore, when he made his sheer west, and followed it by a second one to counteract her bearing in that direction. His movements made after he had passed Van Wagenen's Island would, consistently with all the testimony, account for his intercepting the propeller at the spot the two vessels struck. The diagrams and the line of courses described by the different experts, and concurred in by those managing the Santa Claus, connected with the testimony in the cause, demonstrate, to my judgment, that the error was wholly on the part of the Santa Claus, and that if she had not sheered to the west, but had held the course she had been running to the moment of porting her helm, she would have gone widely to the east of the propeller, or, had only one sheer been made, would have cleared her. A slight angle of deviation to larboard, commenced three or four hundred yards off, would certainly have brought the Santa Claus east of the track of the propeller; because she had been worked round at right angles to the shore when brought into collision, in running less than that distance on her sheer to starboard. The effort to get the shore side under a wrong impression of the true distance and course of the propeller, thus brought the Santa Claus almost perpendicularly across the path of the latter; indeed a tangent further round, for her port guards struck the starboard bow of the propeller.

The true position of the two vessels relative to each other, and their respective movements being thus ascertained, the remaining inquiry is, whether the propeller had wrongfully placed herself in the way of the Santa Claus, or, which is the same thing, whether she was blamable for not going to the eastward of the latter. The lights of the Santa Claus were distinctly seen when she came round the Nose, by the pilot of the propeller, the latter then being off the point of rocks, probably from one to two miles distant from the Santa Claus. He had before determined to run close to the west shore, and accordingly took no precautions in respect to the Santa Claus, leaving her an abundant breadth of channel to the east. Admitting that the two vessels were at that time on the same north and south line, on the track proper for the Santa Claus to pursue, and which the pilot of the propeller was bound to suppose she

would hold, was he required to go east of that line, so as to keep the Santa Claus on his larboard side, or could he justifiably course up along shore west of it? The usage or law is by no means peremptory or inflexible, that steamboats shall each steer to the right when approaching and meeting on the same track. Like other general rules this must yield to the necessities and reason of particular cases, even when the vessels are brought into dangerous proximity, and each relies upon the other that her movements will conform to that rule. Abb. Shipp. pp. 311, 312, § 4. Reefs or shoals, or other impediments in the way, eddies, currents or tides may impede or prevent one vessel observing the rule on her part, and cast on the other the duty of avoiding her; or she may take a course opposite to that indicated by the rule when there is reasonable ground to believe such proceeding necessary to her safety or more secure navigation.

In the case of The Friends, Dr. Lushington discusses the effect of extraordinary contingencies, and holds that they must afford exceptions to the standing rule, however positive its terms may be, and in that case admitted a vessel, though out of the required course, to recover damages sustained from a collision in that situation. 2 W. Rob. Adm. 485. A circumstance adverted to as of weight in that case also exists in this, that the vessel was deviating from the course prescribed by the rule of navigation with a view to a more favorable state of tide. The testimony of the pilot of the propeller is corroborated by that of experts upon the river, that in a strong ebb-tide there is a species of eddy or reaction of tide close in by Caldwell's or the point, which aids a vessel ascending; and even if this was a mistaken opinion, the pilot should be presumed to have acted under an honest persuasion that such was the fact, and to have passed close up the west shore to avail himself of that advantage, his vessel being heavily loaded and of feeble propelling power. This consideration would be of weight to show that he was not proceeding negligently and improvidently in that direction, but I think the fair weight of evidence proves an advantage was to be obtained by him in that mode of navigation, and it was the duty of the Santa Claus to have anticipated that slow vessels might be found at such state of tide in that locality, and shaped her course to meet the contingency. This case was a disastrous one to the Santa Claus, both in injuries to the boat, and more especially in the destruction of the life of a person on board; and from the nature of her employment, as well as the character of her officers and crew, no imputation can justly be made of want of skill for her management, or of an anxious desire to employ it, so as to protect herself and other vessels she might encounter. But on the evidence I am constrained to say, that on the occasion in question she was, through mistake and want of proper precaution, put off the proper course, so as to bring her into collision with the libellants' vessel, and cause an injury to the latter, which the owners of the Santa Claus are bound to indemnify.

I shall accordingly decree that the libellants recover their damages occasioned by the collision, and that the Santa Claus be condemned in the amount. It must be referred to a commissioner, upon the proofs in court and other pertinent evidence, to inquire into, ascertain and report these damages to this court.

NOTE. The above case was removed by appeal to the circuit court, where "the answer was amended, and a large amount of additional evidence was taken which varied the case altogether from that presented below;" and in October term, 1848, the decision of the district court was reversed. [Case No. 12,326.] No opinion at large was given by the circuit court, and the decision of the court below is therefore reported.

Case No. 12,328.

The SANTEE.

[2 Ben. 519.] [1]

District Court, S. D. New York. Oct., 1868.[2]

BILL OF LADING—SPECIAL CLAUSE—DELIVERY OF CARGO—AGENT.

1. Under an ordinary bill of lading, delivery on a wharf of the goods transported by the vessel is sufficient, provided due notice be given to the consignee, and provided the different consignments are properly separated, so as to be open to inspection by their respective owners, and a fair opportunity is afforded to the consignee to remove his goods.

[Cited in Dibble v. Morgan, Case No. 3,881; Unnevehr v. The Hindoo, 1 Fed. 629; The Surrey, 26 Fed. 794; Bonanno v. The Boskenna Bay, 36 Fed. 698.]

2. Under such a bill of lading, the carrier is responsible for the value of the goods, if he deliver them to the wrong person, even though by mistake or imposition.

[Cited in Willis v. The City of Austin, 2 Fed. 415.]

3. Where a bill of lading for cotton contained the following clauses: "It is expressly understood that the articles named in this bill of lading shall be at the risk of the owner, shipper, or consignee thereof, as soon as delivered from the tackles of the steamer at her port of destination, * * * and they shall be received by the consignee thereof package by package, as so delivered, and, if not taken away the same day by him, they may (at the option of the steamer's agent) be sent to store, or permitted to lie where landed, at the expense and risk of the aforesaid owner, shipper, or consignee," *held*, that such clauses were not unreasonable, and were such as a court should enforce.

[Cited in Willis v. The City of Austin, 2 Fed. 413.]

4. Where 142 bales of cotton were shipped on board a vessel, under bills of lading containing the above special clauses, there being also other cotton on board, and, on the arrival of the vessel, the consignee of the 142 bales paid the

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

[2] [Affirmed in Case No. 12,330.]

freight on them, and sent carts to remove them before any of them were discharged, and all of the 142 bales were discharged from the vessel on the wharf, but thirteen of them were not received by the consignee, and it did not appear what had become of them, but, after all the other consignees had received all the cotton which they claimed, there remained on the dock thirteen bales without marks, which did not form part of the 142 bales, the cotton having been unladen bale by bale, and the mate of the vessel having tried to separate the various consignments after the bales were landed, and having required receipts to be given for all the cotton that was removed from the wharf before he would allow it to be removed, *held*, that the vessel was not liable for the value of the missing bales.

5. The duty of the vessel, under the bill of lading, was discharged when the cotton was put on the dock.

[Cited in Willis v. The City of Austin, 2 Fed. 413.]

6. Under the bill of lading, the consignees, having had due previous notice, were bound to examine each bale as it left the vessel's tackles, and was deposited on the wharf, and see if it was their cotton.

7. Any custody or control of the cotton on the wharf which the mate assumed to exercise over it was unauthorized, and he had no right to demand a receipt before allowing it to be removed from the wharf.

In admiralty.

E. H. Owen and S. P. Nash, for libellants.

C. Donohue and L. B. Bunnell, for claimant.

BLATCHFORD, District Judge. This libel is filed against the steamer Santee, to recover the sum of $5,000, as the value of thirteen bales of cotton shipped from Mobile to New York by that vessel. The libellants' claim is founded on two bills of lading, one dated January 19, 1866, for seventy-two bales, and the other dated January 24, 1866, for seventy bales. The shipment was by Baker, Robbins & Co.; and each bill of lading specifies that the bales of cotton described in it (and the marks on which are given in the bills of lading) shall be delivered at the port of New York, the dangers of the seas, &c., excepted, to the libellants, Sawyer & Wallace, or their assigns. Each bill of lading also contains, following the foregoing delivery clause, these words: "It is expressly understood that the articles named in this bill of lading shall be at the risk of the owner, shipper, or consignee thereof, as soon as delivered from the tackles of the steamer at her port of destination (the collector of the port being hereby authorized to grant a general order of discharge immediately after the entry of the ship), and they shall be received either at New York or Brooklyn, by the consignee thereof, package by package, as so delivered, and if not taken away the same day by him, they may (at the option of the steamer's agents) be sent to store or permitted to lay where landed at the expense and risk of the aforesaid owner, shipper, or consignee." The one hundred and forty-two bales were properly marked and numbered when they were shipped, with the same marks and numbers set forth in the bills of lading. The entire cargo was cotton, except that there was one bag of wool. There were, in all, on board, seven hundred and ten bales of cotton, shipped under bills of lading. On the arrival of the steamer at New York, the libellants paid the freight to the agents of the steamer, on the one hundred and forty-two bales of cotton, on the presentation of a bill therefor by such agents, and before any of the cotton was unladen from the vessel. Only one hundred and twenty-nine of the bales specified in the bills of lading came to the possession of the libellants. The whole one hundred and forty-two bales were unladen from the vessel at New York, and placed upon the wharf. After all the parties, except the libellants, who claimed cotton that was on board of the vessel, had removed from the wharf such cotton as they desired to remove, there remained on the wharf thirteen bales of cotton, but none of those bales corresponded, as to mark or number, with any of the bales consigned to the libellants, and it is clear, from the evidence, that no one of those thirteen bales was cotton consigned to the libellants. It is not denied by the claimant that the vessel was bound to deliver, under the bills of lading, the identical bales of cotton that were shipped. The claimant insists, however, that the responsibility of the vessel under the bills of lading was discharged by the unlading of the cotton specified in the bills of lading, from the vessel, and its deposit on the wharf, after notice to the libellants of the arrival of the vessel and of the place where the cotton would be discharged. In regard to this point, not only did the libellants know of the arrival of the vessel, and pay the freight on the cotton, but it is shown that the libellants sent cartmen with carts to the wharf where the vessel was lying, to receive the cotton, before the vessel commenced to discharge the cargo. The libellants claim that the vessel failed to comply with the bills of lading, in not delivering the thirteen bales to the libellants, and in wrongfully delivering them to some other party. No evidence is given to show what became of those thirteen bales. The libellants also claim that the special clause in the bills of lading does not relieve the vessel from liability; that the conditions contained in it are unreasonable and should not be enforced; that if the consignees were required under it to receive the cargo, package by package, then the entire cotton on board should have been assorted on the vessel, and the lot belonging to each consignee should have been delivered by itself and at one time; that as, in this case, no separation was attempted until after the cotton was landed on the wharf, the consignees were thereby absolved from the duty of receiving the cotton package by package; and that, notwithstanding such special clause, the general rule is applicable to

this case, which requires that the different consignments in a cargo, shall, when discharged, be separated by the vessel, so as to render them accessible, to their respective consignees. It is shown that in this case the cargo of cotton was unladen, bale by bale, as it came to hand, without reference to what consignment it belonged to; that the mate of the vessel, who had charge of the unlading of her, tried to separate the various consignments of cotton, and among others, the consignment of the libellants, after the bales were landed, and that receipts were required by the mate, and were given, for all the cotton that was removed from the wharf, before it was allowed by him to be removed. It is insisted by the libellants that this course of conduct shows that the vessel claimed, retained, and exercised possession of the cotton after it was landed on the wharf; that, therefore, the mate, acting for the vessel, must have made a wrong delivery of the thirteen bales of cotton; and that the case is thereby taken out of the operation of the special clause in the bill of lading.

The special clause in question is, so far as my observation extends, one recently introduced into bills of lading, and I am not aware that any judicial construction has been given to it. The general law, in the case of an ordinary bill of lading, containing merely the usual clause for delivery to the consignee at the port named, is well established—that delivery on the wharf of the goods transported by the vessel is sufficient, provided due notice be given to the consignee, and provided also the different consignments are properly separated so as to be open to inspection by their respective owners, and a fair opportunity is afforded to the consignee to remove his goods, but that the carrier is responsible for the value of the goods if he delivers them to the wrong person, even though by mistake or imposition. The Eddy, 5 Wall. [72 U. S.] 481, 495; Story, Bailm. § 545b; The Huntress [Case No. 6,914]. Under the ordinary bill of lading the due and proper separation of the goods by the carrier for the use of the consignee is an indispensable prerequisite, in addition to notice to the consignee of the time and place of delivery, to relieve the carrier from responsibility. 3 Kent, Comm. 215; The Eddy, above cited; The Ben Adams [Case No. 1,289]. But, I think the rule is different in regard to a bill of lading containing the special clause in question. That clause seems to have been introduced in view of the law as settled in regard to what is required to constitute a delivery under an ordinary bill of lading. It seems to have been framed expressly to relieve the vessel from the responsibility of separating the different consignments on the wharf after they are unladen. It provides, first, that the cotton shall be at the risk of the consignee as soon as it shall be "delivered from the tackles" of the vessel, at New York. If the case rested on this clause alone, there might be a question as to the meaning of the word "delivered," and, although the clause does not speak of a delivery to any person, but only of a delivery "from the tackles of the vessel," it might fairly be argued that the word "delivered" is here used in the same sense in which it is used in the earlier portion of the bill of lading, where provision is made for a delivery to the consignees—a sense, the meaning of which is fixed as above explained. But the clause goes on to provide, secondly, that the cotton shall be received either at New York or Brooklyn, by the consignee thereof, "package by package, as so delivered." The words "so delivered," mean, as delivered from the tackles of the vessel; and this branch of the clause shows that the delivery from the tackles of the vessel is, in the view of the parties to the contract, something distinct, as an act, from the receipt of the article by the consignee. This second branch of the clause authorizes the vessel to deliver the cotton from her tackles, package by package, that is, bale by bale, and requires the consignee to receive each bale as and when so delivered. But, even under this clause, it might perhaps be properly contended that the delivery from the tackles intended by it is a delivery to the consignee, and not a delivery to some other person. The third branch, however, of the clause, provides, that if the cotton, after it shall be so delivered from the tackles, shall not be taken away the same day by the consignee, it may, at the option of the agents of the vessel, be "sent to store," or be "permitted to lay where landed" at the expense and risk of the consignee. This provision is not ambiguous, and plainly shows that the parties intended that a landing of the cotton on the wharf, at the place of destination, should be regarded as a delivery of it from the tackles of the vessel. All three branches of the clause must be construed together. When so construed, there is no room for doubt as to what the contract is. As each bale of the cotton is landed on the wharf from the tackles of the vessel, the responsibility of the vessel in regard to it ceases, and the risk of the consignee in regard to it commences. I agree that if the vessel discharges the cotton from her tackles upon the cart of some other person than the consignee, she makes a wrong delivery of it, and her responsibility for it continues. But that is not the present case. As each bale of this cotton left the tackles of the vessel, and was deposited on the wharf, the consignees, having had due previous notice, were bound to examine it and see whether it was or was not their cotton. Any custody or control of the cotton, which the mate of the vessel assumed to exercise after the cotton was landed on the wharf, was in violation of the terms of the bills of lading, and was wholly unauthorized. After it was placed on the wharf from the tackles of the vessel, the mate had no right to require from the

consignees a receipt for it, and they had the right to take it without giving a receipt for it. Under the special clause, the consignees undertook the entire obligation of seeing to the removal of their cotton from the wharf, and the responsibility of the vessel, in regard to the cotton, ceased as soon as it was landed on the wharf from her tackles. The vessel was not bound to separate the libellants' cotton, either on the vessel or on the wharf, from the cotton of other parties, except by landing it, bale by bale, on the wharf. By landing the libellants' cotton on the wharf, the vessel afforded to them all the opportunity to remove the cotton from the wharf which she was bound by her contract to afford, and made all the designation and separation of the cotton which she was bound to make. Such landing on the wharf, after due previous notice, was a delivery to the right person, the freight having been paid, even though the wrong person afterwards obtained possession of the cotton.

It is argued on the part of the claimant, that this interpretation of the bills of lading is inconsistent with the doctrine, that the vessel's lien on the cargo for freight continues after the landing or unlading of the cargo, and that the vessel may, after such landing of the cargo, refuse to deliver it to the consignee till the freight is paid. Certain Logs of Mahogany [Case No. 2,559]. No such question arises in this case, as the freight was paid in advance of the unlading. But I do not perceive the inconsistency suggested. Under the bills of lading in question here, the cotton was at the risk of the consignee as soon as it was landed on the wharf, but, if the freight had not been previously paid, the vessel would have had a right to retain possession of the cotton so on the wharf, and her lien for freight on it would have continued. The consignee could not have claimed that such landing was such a delivery to him as to destroy the vessel's lien on it for the freight, while at the same time, the clauses in the bills of lading in regard to the risk of the consignee would have operated in full force. In the Case of One Hundred and Fifty-One Tons of Coal [Id. 10,520], it was held, that the mere manual delivery of an article by a carrier to the consignee, does not, of itself, operate necessarily to discharge the carrier's lien for the freight, but the delivery must be made with the intent of parting with the lien.

I perceive nothing unreasonable in the conditions of these bills of lading, and nothing that a court should hesitate to maintain. The contract is a plain one, deliberately entered into by intelligent commercial men, and the libellants had it entirely in their power to comply with its terms by stationing a proper person to watch for their cotton as it left the tackles of the vessel for the wharf.

The libel must be dismissed, with costs.

[On appeal to the circuit court, the decree of this court was affirmed. Case No. 12,330.]

Case No. 12,329.

The SANTEE.

[6 Blatchf. 1.] [1]

Circuit Court, E. D. New York. Nov. 26, 1867.

COLLISION—DEMURRAGE—COMPENSATION.

The fact that the claimant in a suit, in rem, for a collision, by putting repairs on the libellant's vessel, before suit was brought, made her worth more than she was worth before the collision, furnishes no reason for refusing to the libellant a recovery for demurrage, for the time occupied in making such repairs.

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

This was a libel, in rem, filed in the district court, in a case of collision. The claimants had repaired the damage done to the libellant's vessel, but refused to pay any demurrage, for the time occupied in making repairs, and the libel was filed to recover such demurrage. The district court decreed for the libellant [case unreported], and the claimants appealed to this court. The ground taken, on the appeal, was, that no demurrage ought to be recovered, for the reason that, by the repairs, the vessel had been made worth more than she was worth before the collision.

THE COURT held, that the ground taken furnished no reason for reversing the decree below, and that it must be affirmed.

Case No. 12,330.

The SANTEE.

[7 Blatchf. 186.] [1]

Circuit Court, S. D. New York. March 19, 1870.[2]

BILL OF LADING—FAILURE TO DELIVER—CARRIERS—NOTICE OF DISCHARGE OF CARGO.

1. Where a bill of lading, covering the shipment of bales of cotton by a vessel, contained a clause that such bales should be at the risk of the owner, shipper, or consignee thereof, as soon as delivered from the tackles of the vessel at her port of destination, and that they should be received by the consignee thereof, package by package, as so delivered, and that, if not taken away the same day by him, they might be permitted to lie where landed, at the risk of such owner, shipper, or consignee, the consignee libelled the vessel for the non-delivery of some of the bales. It appeared that the consignee had proper notice of the arrival of the vessel, and of her discharge, and that the proffer of discharge was at a reasonable and proper time, and that the consignee had an opportunity, by reasonable diligence, to identify his cotton and receive it, and it was placed safely on the wharf, when discharged, and was not actually delivered by the agents of the vessel to another party: *Held*, that the vessel was not liable for the loss of the cotton.

[Cited in Willis v. The City of Austin, 2 Fed. 413; The Surrey, 26 Fed. 794; Constable v. National Steamship Co., 14 Sup. Ct. 1068, 1075.]

[Distinguished in Collins v. Burns, 63 N. Y. 5.]

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

[2] [Affirming Case No. 12,328.]

2. It was the duty of the carrier, notwithstanding such special contract, to give reasonable notice of the arrival and discharge of the vessel, to land the goods at a proper time, and to give to the consignee a fair opportunity to identify his goods, and receive them into his care.

[Cited in The Boskenna Bay, 40 Fed. 93; Constable v. National Steamship Co., 14 Sup. Ct. 1068, 1074, 1075.]

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

This was an appeal in admiralty, from a decree of the district court dismissing the libel. [Case No. 12,328.]

Edward H. Owen, for libellants.

Charles Donohue, for claimant.

WOODRUFF, Circuit Judge. The libel in this case is filed for the purpose of charging the steamer Santee with the value of thirteen bales of cotton, part of two certain shipments of cotton, together consisting of one hundred and forty-two bales, from Mobile to New York, which thirteen bales the libellants allege were not delivered as required by the bills of lading. Those bills contain this special clause: "It is expressly understood, that the articles named in this bill of lading shall be at the risk of the owner, shipper, or consignee thereof, as soon as delivered from the tackles of the steamer at her port of destination; and they shall be received either at New York or Brooklyn, by the consignee thereof, package by package, as so delivered; and, if not taken away the same day by him, they may, (at the option of the steamer's agents,) be sent to a store, or permitted to lay where landed, at the expense and risk of the aforesaid owner, shipper, or consignee."

The steamer brought a cargo of 710 bales of cotton for various consignees, all of which were discharged from the vessel on the dock. When the cartmen who were engaged in removing the cotton stopped work, there remained on the dock thirteen bales, which the witnesses for the libellants testified were not part of the 142 bales consigned to the libellants; and the charge is that thirteen bales belonging to the libellants were removed by some other person or persons, and did not come to their possession.

The proof that the libellants did not receive the full number of bales mentioned in their bills of lading was not very precise; but, assuming that they failed to receive their thirteen bales, the question arises—who must bear the loss of the thirteen bales, which must have been stolen after they were placed on the dock, or were, by mistake, carted by other cartmen to other consignees? On this point, the owner of the steamer claims, that, under the special terms of the bills of lading, he had discharged his whole duty, and placed the cotton at the risk of the libellants. Such was the view of the subject taken by the court below, and the libel was dismissed on that ground.

The special clause in the bills of lading is, of course, to be treated as the contract between the parties, and as expressing a condition upon which the carrier assumed the duty to transport at the rate of compensation therein expressed. It was plainly intended to relieve the carrier from any risk or responsibility for the safe keeping of the goods after the delivery thereof from the vessel. It is, however, in respect of the manner of such delivery, to receive a reasonable construction; and no obligation otherwise resting upon the carrier is relaxed, except such as is expressed or reasonably implied in the special clause itself. Thus, the carrier was still bound to give suitable information to the consignees, to enable them to attend and receive the goods, and themselves assume and exercise that care and responsibility of which the carrier was to be relieved. The delivery to be proffered at the ship's tackles must also be at a reasonable and proper time, in order to such attendance by the consignees. Moreover, the act of discharging from the vessel, and the opportunity to receive at the ship's tackles, must be so conducted, that, by reasonable diligence, the consignees or their servants may identify the property, and receive it into their care. But, these conditions having all been complied with, and the agents of the consignees being present to receive the goods, the carrier was not bound to watch the property after it passed beyond the ship's tackles, to see that it was kept safe, or protected from removal, through mistake or design, by third persons. And, once more, the carrier must be held responsible if he or his servants, through negligence, make an actual delivery of the goods to a third person.

It is not claimed, in the present case, that the libellants had not due and sufficient notice of the arrival of the vessel, and of her discharge; or that the time was not, in all respects, reasonable and proper. It is claimed that the libellants used due diligence, but that the discharge of the goods was so conducted that they were unable to receive and take care of the goods when landed; and, also, that the goods were in fact delivered by the servants of the carrier to the wrong person or persons.

The proofs, although they create a strong presumption that the goods were carried away by some person or persons not entitled to receive them, wholly fail to show that there was an actual delivery by the servants of the carrier to such person or persons. On the contrary, the inference is, to my mind, quite clear, that the goods were removed after they had been deposited on the dock, and without any active instrumentality of the carrier's servants. The question of liability becomes narrowed down, therefore, to the enquiry, whether the discharge of the vessel was so conducted that the libellants might, by reasonable diligence, have taken these goods and assumed and exercised due care thereof, and, as a question connected therewith, if not involved therein, whether the libellants did use such diligence. On these questions, it is to be observed, that the express agreement was, that

the consignee should receive the cotton, package by package, as delivered from the tackles of the steamer. The carrier, therefore, was not bound to set a watch over the cotton after it had been removed beyond the reach of the tackles, and was accumulated upon the dock awaiting removal. That duty the shipper or his consignees assumed, when they consented to receive the cotton, package by package, and that it should be at their risk as soon as delivered from the tackles. On the extreme question, what, under such a bill of lading, the carrier should do in a case in which the consignee could not be found, or should not appear at all to receive the goods, it is not necessary to express an opinion. Here, the consignees did appear, paid the freight, and were in attendance for the purpose of receiving the goods.

The first officer of the steamer, who superintended the discharge of the cargo from the vessel, testifies, on the part of the claimant, that he commenced as soon as he received the custom-house permits; that he stood on the wharf and, as fast as the cotton came over, took the marks, and put each lot by itself as fast as he could discern the marks; that all consignments to the various parties were put by themselves, as far as he could discern the marks, comparing the marks with his cargo-book; that there were some six bales on which he could see no marks; that those, also, be kept by themselves until the last of the cotton was delivered, and they were a part of the thirteen bales which remained on the wharf, and were afterwards stored; that the whole cargo of 710 bales was delivered upon the wharf; that the cotton consigned to the libellants was placed on end by itself; and that they were about four days in all in discharging. The testimony on behalf of the libellants shows, that the discharge commenced as early as the 16th of February; but that the cotton of the libellants was not all carted from the wharf until the 22d, and one bale was carted on the 23d. If this testimony is to be believed, the delivery was conducted with due regard to the rights of the libellants. The libellants' witnesses say, however, that, although the delivering officer "tried to sort out the libellants' cotton, he did not do all of it." But it is not shown that the agent of the consignees, if at the ship's tackles, had not an opportunity to identify his cotton, and take proper care of it. On the contrary, the inference is that the agent of the vessel was there to co-operate with and assist therein.

The chief complaint insisted upon is, that the several lots of cotton were not separately stowed on the steamer, and that, therefore, the several bales in any lot were not consecutively delivered; and it is insisted that the consignees were not bound to have a person in attendance to receive the bales, bale by bale, unless they were delivered consecutively. Whatever liability may rest upon the carrier if there be unreasonable delay, from any cause, in making delivery of the goods, I am of opinion that this claim of the libellants cannot be sustained. It is according to the express contract, that the cotton shall be received bale by bale as delivered from the tackles; and this action is not brought for not delivering in due season or with sufficient rapidity, or for detaining the libellants, and subjecting them to too great expense or consumption of their time.

What, then, was the diligence of the libellants; and did they attend according to the contract, for the identification and receipt of their cotton? Their principal cartman sent there five trucks for cotton of the libellants, and cotton consigned to another house. He himself was not there when the discharge commenced, and, apparently, he was present but once while the discharge of the cotton was in progress. His son received a part of the cotton, and carted it away; but he did not see all of the cotton that was received, and cannot say how many bales he saw taken. Obviously he, being himself engaged in carting to the store, did not attend to the delivery at the ship's tackles. But he says that, when he was absent, Tilden was present. Tilden went to the steamer after she had begun discharging, and says that he thinks he attended that day, the 16th, and every day, to receive cargo, but he cannot say how many bales he "got personally." He says: "I did not watch as it came out, to see whose it was. I paid no attention, nor did any one from Sawyer, Wallace & Co.," the libellants, "as it came out." This, with other circumstances disclosed by the evidence, shows, that the libellants did not assume the care of the cotton as it was delivered from the tackles; that they paid no regard to the obligation to receive it, package by package, as so delivered; and that they were occupied in carting from the accumulating quantity on the wharf, either for themselves or the other house whose cotton they also carted, overlooking entirely the provision in the bills of lading, that, package by package, as delivered from the tackles, the cotton was to be at the risk of the consignees. If the actual discharge of the cargo was, as the mate testifies, completed in four days, exclusive of Sunday, they were occupied two days, at least, after that, in removing the cotton from the wharf. Other cartmen were there, and no doubt, there was some embarrassment in taking the cotton away. But, under the special contract, this did not cast on the steamer the duty of watching the cotton, to see that no one took away cotton to which he was not entitled.

I think the libellants failed to put the steamer in fault, and that the libel was properly dismissed. The decree must, therefore, be affirmed.

Case No. 12,331.

SANTIAGO v. MORGAN et al.

[Hoff. Op. 447.]

District Court, N. D. California. July 9, 1851.

PILOTS — NEGLIGENCE — ASSOCIATION OF PILOTS — PARTNERSHIP.

[1. A licensed pilot, who, with the wind blowing off a shoal in fair weather and open daylight, runs his vessel upon it, is liable for resulting damages; and it is no defense that the vessel was unprovided with a hawser, by means of which she might have been warped off without injury.]

[2. An association of licensed pilots owning a boat, in the name of which bills for services of the individuals are made out, collected, and credited, and to which moneys paid to the individuals are turned over, the profits, after deducting expenses, being equally divided, is a partnership, and liable for the misfeasance or negligence of one of such pilots while employed in piloting a vessel.]

In admiralty.

E. Cook, for libelant.

Jno. H. Saunders, for respondents.

HOFFMAN, District Judge. This was a libel in personam for a marine tort. The injury complained of, is the unskilfulness and negligence of the respondent Morgan, in running the ship Eliza, under his charge as a licensed pilot, on the Tonquin Shoal in this harbor. It seems that Morgan came on board the ship on the morning of the 4th January. The vessel had previously sustained considerable injury from a collision the night before, and when boarded by the pilot she was in a situation of some danger. She was, however, extricated and got under way by the pilot without any difficulty or extraordinary exertion. She commenced her course, and about dusk was run on the shoal, and sustained the damage for which this action is brought.

Much testimony was taken at the hearing which I do not think it necessary minutely to consider. It is asserted by those on board the Eliza, that the wind was free, being from the southwest; while the witnesses on the part of the respondents maintain that it was from the southeast. The course made by the vessel, from the point where she was got under way to the shoal where she struck, was not far from east southeast, and it is somewhat difficult to perceive how that course could have been made with a southeast wind; the pilots, however, assert, by striking the lee bow of the vessel to force her to windward, and the court cannot disregard the opinion of experts on such a point. But, in the view I take of the case, the inquiry is immaterial. It is on all sides conceded, that the wind was such as enabled the vessel to make a direct and safe course to her anchorage. Assuming the wind to have been southeast, the difficulty was not to keep off the shoal, but to get on it. It seems to be established, that the usual and proper course of the vessel was along the shoal on which she struck. The pilots, it is true, testify more strongly. They assert that the shoal is by no means dangerous: that vessels touch upon it almost daily; and that they should regard the chances of striking upon it as deserving of little consideration. But this court cannot consider running upon any shoal as the usual and proper mode of navigating vessels in or out of this harbor. It must regard the pilot as bound to avoid running a ship ashore, even though, in his opinion, it may be done without danger; and if he, relying upon previous escapes, should by undue want of caution incur such a hazard, the risk and the loss should be his own. That such an accident is not always unattended with danger, the experience of the Eliza sufficiently establishes.

But it is alleged that the immediate cause of the accident was the vessel's being taken aback, and it was supposed by the counsel for the respondents, that she had already passed the shoal an hour and a half, and that on being taken aback, she drifted astern and grounded. Without adverting to the gross negligence on the part of the pilot, involved in the supposition, that on good anchorage ground, in the immediate vicinity of vessels safely moored, he suffered his ship to drift upon a shoal he had passed an hour and a half before, it is enough to say, that there is no evidence to sustain the hypothesis. By the testimony of the respondents' witnesses, the wind was from the southeast; but they all agree that on approaching the shore the wind hauls more to the southward. This change of the wind is in some degree relied on when accounting for the course actually made by the vessel. The shoal lay to the southward of the course of the vessel. It is evident that if the wind hauled to the southward, it would become more free instead of heading off the ship.

It is asserted that the ship was in a condition so disabled as to be peculiarly exposed to such an accident. But she was in the same condition when the pilot took charge of her, and it would have been easy for him, knowing that condition, to have avoided all possibility of danger. His course, it is true, lay along or near the shoal, but not on it. Nor can I perceive how I can acquit a pilot of negligence who, with the wind blowing off a shoal, in fair weather and open daylight, runs his ship upon it. It was exactly the kind of danger to enable vessels to avoid which his services were required and his office established by law. Much stress was laid on the fact that the ship was unprovided with a hawser, by means of which, it is suggested, she might have been warped off the shoal. But that experiment was tried by Capt. Simpton the next morning without success, nor can the court say whether an effort made immediately after the accident might not have had the same result. It is to be remembered, also, that Capt. Simpton found means to run a line to the shore by using the clew lines and other ropes for the purpose,—an expedient which does not seem to have occurred to Mr.

Morgan. But this action is not brought for omitting to warp the ship off the shoal, but for running her on it. The pilot ought to have known whether there was a hawser on board before he ran the risk of putting his ship on shore, relying on the hawser to extricate him without injury. If he were guilty of negligence in getting on the shoal, it does not seem to lie in his mouth to say that if she had some other equipments, she might possibly have escaped with less damage. I have not thought it necessary to consider what is the precise degree of liability the law fixes upon a pilot. For I think he is, in this case, liable, under either view of the law that has been taken.

The only remaining point to be considered is whether these defendants are jointly liable with Mr. Morgan as partners. It appears in evidence that the pilots are divided into "associations of six pilots each." Each of these associations owns a boat with which the business is conducted. It is proved that all the moneys paid to individual pilots belonging to a boat are brought in to a common agent and credited to the boat. The profits, after deducting expenses, were equally divided amongst those belonging to the boat. It further appears that bills for pilotage by individual pilots were made out in the name of the association, collected by the agent, and credited to the boat. Under these circumstances I am unable to conceive any definition of a partnership which would not include an association like the one described. Any member of it would be clearly entitled to an account, and each participated in the profits, as such, and was liable for his proportion of the losses. It follows that the partnership must be liable for malfeasance or negligence committed by one of the partners in the course of his employment and within the scope, and while engaged in performing the business of the partnership. 11 Wend. 571, 18 Warden, 175.

No evidence of the amount of injury sustained by the libellants was given at the trial, that inquiry having been reserved by consent until the question of liability should be determined. It must therefore be referred to the commissioner to take testimony on that point, and report the result to the court.

Case No. 12,332.

The SANTIAGO DE CUBA.

[4 Ben. 264.] [1]

District Court, E. D. New York. June, 1870.[2]

COLLISION AT SEA—STEAMERS CROSSING—LOOKOUT—LIGHTS—IMPERFECT SCREEN.

1. The propeller B. was going along the coast of New Jersey, heading south half west, with all her lights set, but having her side lights so imperfectly screened, that their rays crossed at her stem. She saw, off her port bow, and distant two or three miles, the white light, and afterwards the green light of the steamship S. which, bound from Havre to New York, was running northwest by north. No material change of course was made by either vessel, till they were close together, when the B. ported, and the S. starboarded, and the vessels came together, the S. striking the B. abaft amidships on the port side, nearly at right angles: *Held*, that, in this position, it was the duty of the S. to avoid the B., and of the B. to keep her course as she did.

2. The burden was therefore on the S. to show that her omission to avoid the B. arose from some fault on the part of the B.

3. The condition of the screens on the B. was faulty.

4. The cause of the collision however, was not that defect in the screens of the B. but a negligent lookout on the S. by reason of which the lights of the B. were not seen, till the vessels were in close proximity, when the helm of the S. was starboarded.

5. The S. was therefore solely responsible for the collision.

These were four actions tried together. The first was brought by Jacob Lorillard, owner of the steamer Brunette, against the steamship Santiago de Cuba, the second by Henry Lyles, Jr., a shipper of cargo on board the Brunette, against the Santiago de Cuba, the third by Edward Murphy, also a shipper of cargo on the Brunette, against the Santiago de Cuba and Jacob Lorillard, and the fourth by the North American Steamship Company, owners of the Santiago de Cuba, against Jacob Lorillard. The actions arose out of a collision which occurred off Squam Inlet, on the night of February 1st, 1870, between the steamship Santiago de Cuba, a large steamer, of 1,600 tons burden, bound from Havre to New York, and the Brunette, a propeller of 200 or 300 tons burden, bound from New York to Philadelphia.

Man & Parsons, for the Brunette.

T. E. Stillman and Beebe, Donohue & Cook, for the Santiago de Cuba.

BENEDICT, District Judge. These are four cases, which have been tried together, and in which the court is called on to determine by whose neglect it was that these two steamers came together without slackening speed, on a clear starlight night, in an open sea, no other vessels being near to interfere with their movements.

On examining the testimony introduced to prove the various faults which these vessels charge upon each other, I find little contradiction as to many of the material facts.

It appears that the Brunette, at the time of the collision, was bound on her regular trip from New York to Philadelphia. From the Tavern Houses, her course down the coast was south half west, the proper course for that locality. She carried a white light and green and red side-lights burning brightly, and her master was on deck in charge of her navigation. The night was clear starlight, with a fresh breeze from the northwest, under which, with jib and spanker set, the propeller was steaming at the rate of nine or ten knots an hour.

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

[2] [Modified in Case No. 12,333.]

When about off Squam Inlet, those in charge of the Brunette observed a white light off her port bow, and distant some two or three miles. Soon after, a green light was discerned, and it became apparent that a steamer was approaching the course of the Brunette, and having the propeller upon her starboard bow. The green light was examined by the master of the propeller with his glass, and her course then judged to be northwest by north. This proved to be correct. She was the Santiago de Cuba, bound from Havre to New York, then on a course northwest by north, running at a speed of six knots with all her lights set. No material change of course was made by either vessel until they were close upon each other, when the Brunette ported, and the Santiago starboarded, and immediately the vessels were in contact, the Santiago striking the Burnette on her port side, abaft midships, nearly at right angles, but standing a little forward on the Brunette. The Brunette sank almost instantly, only part of her crew saving their lives, and the Santiago was seriously injured.

These facts show that the course of the Santiago was such as to impose upon her the duty of avoiding the Brunette, while the duty of the latter was to hold her course, as she did. The burden is, therefore, upon the Santiago to show, that her omission to avoid the Brunette arose from some fault on the part of the latter. Several faults are charged upon the Brunette, of which the evidence requires me to consider here but a single one, and that relates to her side-lights. It is conceded that the propeller carried a white masthead light, and that she also had red and green side-lights in her fore-rigging, which were burning brightly; but it appears that the side-lights were so screened as to permit the rays to cross at the stem. She was a narrow vessel, it is true. Nevertheless her side-lights were improperly screened if they crossed at the stem, inasmuch as by this arrangement they would show across the bows immediately ahead, and the arc of the three lights, which is the arc of doubt, would be rendered too broad to enable a vessel approaching within a reasonable distance, to determine in time the course of the vessel from her lights.

It is accordingly claimed, in behalf of the Santiago, that the Brunette was seen off their starboard bow, showing a green light, from which those in charge of the Santiago were led to suppose that the course of the Brunette was south-southeast, and as the vessels were approaching with green to green, the Santiago was thereby misled into the belief that she was not called on to alter her course. This position, which is now relied on by the Santiago as the controlling feature of the case, is not very distinctly taken in her pleadings. While the averment that the lights of the Brunette were not properly set, is sufficient to permit proof of the condition of the screens, the general nature of the averments affords some ground for the argument that so much stress was not intended to be placed upon the defective screens, when the pleadings were drawn, as has been since done.

But I make no point upon the pleadings. The difficulty with the position is, that the evidence discloses the fact that the side-lights of the propeller, although burning brightly, were not seen at all by those in charge of the Santiago until the vessels were close together, and a collision imminent. A reference to the testimony of the witnesses produced by the Santiago will make this apparent. Thus Cornelius, who was the officer in charge of the deck of the Santiago, and to whose testimony, respecting what was seen and done on his own vessel, the owners of the Santiago cannot object, says that when he saw the green light, he ordered his wheel hard a-starboard; and his evidence, as well as that of the wheelsman who obeyed the order, shows that the vessels were in contact by the time the order was executed. He also says that he gave no signal whatever to the engineer before the vessels struck, which tends to show a sudden consciousness of the immediate presence of an approaching vessel.

If the officer in charge of the Santiago had noticed the Brunette over his starboard bow three miles off, as he says, and upon a south-southeast course, it is not probable that she could have drawn so near him as to show her hull, without causing him to slack his speed. If, as the wheelsman and others of the witnesses say, the Brunette, when seen, bore about north, and was supposed to be on a south-southeast course, the fact that she neared the Santiago at all was sufficient to put the officer of the deck on his guard. The proximity of the vessels to each other is also indicated by the evidence of the wheelsman, that when he observed the Brunette's green light, the vessels were about to cross courses immediately. Further, the wheelsman says that he saw the hull of the Brunette before he received the order, which the officer of the deck says he gave when he saw the green light. Of course, the vessels were close together when the hulls could be seen. These statements, added to the significant omission to call out, from either of the seamen who were forward, any testimony calculated to show the distance run, or time which elapsed after they saw the Brunette before the collision, coupled with the statement made in the pleadings of the Santiago, that the green light was seen when her helm was starboarded, and about or just before the time the Brunette's helm was ported, at which time the vessels were within 75 or 100 yards of each other, constitute a strong body of testimony adverse to the position that seeing the green light of the Brunette led to the omission of any effort on the part of the Santiago to avoid her. The

truth undoubtedly is, that the Brunette's lights were not discovered at all until close at hand. This is not only shown by the evidence already referred to in regard to the green light, but by the conceded fact that the red light of the Brunette was not seen until she was near by. This port light was burning brightly, and capable of being seen at a long distance. The course of the Brunette was such as to display it to the Santiago, and yet it was not seen until the last moment. An attempt has been made to account for this circumstance by the suggestion that the light was hid by the jib, until opened by the sharp sheer of the propeller at the last moment. No witness states that the jib hid the light, which was upon the outside of the fore-rigging, and I am not able to determine from any evidence in the case that, with the wind northwest, and course south half west, the jib would hide the port light from the observation of a vessel approaching three points on the port bow. In this connection, it is worthy of remark that the pleadings of the Santiago aver that the red light was never seen, and so the officer of the deck testified when first upon the stand, but when recalled by the court, he said very positively that the red light was seen, after he saw the green light, and that it was when he saw the green light that he gave the order to hard a-starboard. The wheelsman, who does not agree with the officer as to the number of orders given, says that seeing the red light was the occasion of the order hard a-starboard.

These observations respecting the testimony of the witnesses produced by the Santiago indicate the view which I take of this case. I consider it beyond reasonable doubt that the cause of the collision was the failure of those in charge of the Santiago to discover in time the course of the Brunette.

The position and course of the Santiago made it incumbent on her to keep the most careful watch for vessels, across whose courses she was known to be running. The Brunette might have been seen at a long distance, and if she had been, and due attention had been paid to her, the impression stated in the pleadings, that she was running south-southeast, would have been at once corrected. For no matter what lights she showed, being seen about north—three points on the starboard bow, her bearing, as she came on, would in a very short distance, indicate that she was not running to east of south, but to west of south, as she was in fact. In that locality a steamer approaching from the starboard, would naturally be supposed to be upon a course south by west, and I cannot suppose that any officer seeing a steamer two miles off his starboard bow, showing a green light, and which he supposed was running south-southeast, would see her draw in ahead, and close to him, and yet keep up his speed.

The evidence shows why the Santiago neither slackened speed, nor changed her course. The Brunette was not noticed until the vessels were close together, and there was no time to stop, to hail or to do anything with proper consideration. I do not therefore take time to discuss other features of this case, which have presented themselves in my study of the evidence, for I consider its controlling feature to be, the failure of those in charge of the Santiago, to discover the course of the Brunette in time to avoid her; and I cannot doubt that if as vigilant a watch for approaching vessels, had been kept by the officer in charge of the Santiago, as was kept by the master of the Brunette, and as the position of the Santiago demanded, the course of the Brunette would have been discovered, and she would have been easily avoided. For this neglect she must be held to be solely responsible for the damages which resulted.

In the action of Edward C. Murphy, libellant, therefore let the libel against the owners of the Brunette be dismissed, and a decree entered against the Santiago de Cuba.

In the actions of Henry Lyles, and of Jacob Lorillard, let the decrees be for the libellant, and in the action of the North American Steamship Company, let the libel be dismissed.

[NOTE. The owners and the mortgagee of the steamship Santiago de Cuba appealed from this decree. The circuit court held that both the Brunette and the Santiago de Cuba must contribute to the whole loss, and that if, upon the ascertainment of the whole loss, the contribution due from the Santiago de Cuba to the fund, over and above her own loss, should be sufficient to indemnify the owner of the cargo of the Brunette, it should be applied to that purpose. If not, then the parties should be heard on the question by whom, if by any one, the deficiency should be made good. Case No. 12,333.]

Case No. 12,333.

The SANTIAGO DE CUBA.

NORTH AMERICAN STEAMSHIP CO. v. LORILLARD.

MURPHY v. The SANTIAGO DE CUBA et al.

[10 Blatchf. 444.] [1]

Circuit Court, E. D. New York. Feb. 25, 1873.[2]

COLLISION — RIGHT OF WAY — CHANGE OF COURSE — PRESUMPTION — IMPROPER SCREENS — APPORTIONMENT OF LOSS.

1. In a collision between two steam vessels, the S. and the B., the 14th rule (Act April 29, 1864; 13 Stat. 60,) that, "if two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other," was applied to the S., and the 18th rule (Id. 61), that, where "one of two ships is to keep out of the way, the other shall keep her course," was applied to the B.

2. The B. having changed her course, it was held that such change was made in the jaws of

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

[2] [Modifying Case No. 12,332.]

peril, and was justified by the circumstances, and tended, in some slight degree, to increase the chances of escape.

[Cited in The Athabasca, 45 Fed. 656.]

3. The presumption of fault, under the 14th rule, was *held* to be against the S., throwing the burthen on her of excusing herself for the collision.

4. It was *held*, that the S. was in fault, in not making seasonable and correct observation of the situation of the B., in not properly observing her approach, in changing to a course which promoted danger, when proper attention would have so informed her, and in not slowing, stopping and backing when the danger became obvious.

5. It was *held*, that the B., also, was in fault, in not having her green light so screened that it could not be seen across her port bow, it having been so seen by the S. as to mislead the S.; and in not slowing, stopping and backing.

6. In a court of admiralty, a disregard of the rules of navigation. by one vessel, cannot be justified, on the mere ground, that, if the other vessel, also, had not violated her duty, no harm would have resulted.

7. The rule in regard to setting and screening colored lights must be strictly observed.

8. The B. and her cargo having been lost by the collision, and the S. damaged, and the owner of the S. having sued the owner of the B., and the owner of the B. having sued the S., and the owner of the cargo on the B. having sued, in one suit, both the S. and the owner of the B., the decree was, that both the B. and the S. must contribute to the whole loss; that, if, on ascertaining the whole loss, the contribution due from the S., to the fund, over and above her own loss, should be sufficient to indemnify the owner of the cargo on the B., it should be applied to that purpose; and that, if not, the parties would be heard, on the question as to by whom, if by any one, the deficiency should be made good.

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

[These were libels by the North American Steamship Company against Jacob Lorillard, and by Edward Murphy against the Santiago de Cuba and Jacob Lorillard, to recover damages for collision.]

John E. Parsons, for owner of the Brunette.

Thomas E. Stillman, for the Santiago de Cuba and her owners.

Charles Donohue, for owner of the cargo of the Brunette.

WOODRUFF, Circuit Judge. The appeal, in these cases, is by the owners and the mortgagee of the steamship Santiago de Cuba, which was held, in the district court [Case No. 12,332], to be the guilty cause of a collision with the steamer Brunette, on the night of the 1st of February, 1870, at about ten o'clock. The Brunette and her cargo were totally lost. The owners of the Brunette libelled the Santiago de Cuba, the owners of the latter vessel sued the owner of the Brunette, and the owner of the cargo of the Brunette sued, in one suit, the Santiago de Cuba and the owner of the Brunette.

Certain facts, either alleged and not denied, or proved without material contradiction, may be stated as a basis of the inquiries by which these cases are to be decided. The Brunette was on her passage from New York to Philadelphia, and was pursuing her course south half west, at a speed not less than nine, and not exceeding ten, miles an hour, about four miles off the coast of New Jersey, near, or opposite, Squam Inlet. The Santiago de Cuba was on her passage from Havre to New York, and was pursuing a course northwest by north, at a speed of about six miles an hour, (described by the witnesses as half speed.) The Brunette saw the Santiago de Cuba off her port bow. The Santiago de Cuba saw the Brunette off her starboard bow. It is obvious that the courses of the two vessels must cross each other at some point either ahead or astern of the Brunette. The fact of a collision occurring some time after the vessels came within sight, makes it certain, that the point of intersection of the two courses was ahead of the Brunette. A collision occurred. The Santiago de Cuba struck the Brunette near midships, and the injury to her was so great that she sank, with her cargo, and two of her seamen were lost. No change was made in the course of either vessel, which affects the statement thus far made, and neither vessel slowed or slackened speed. They came together with full headway on: but, the blow given by the Santiago de Cuba was nearly direct, (at right angles to the keel of the Brunette,) inclining, however, about one point forward or towards her bow. The inclination of the blow shows, and the proofs also establish, that, before the collision, the Santiago de Cuba had changed her course to the westward; and the proofs also show, that the Brunette had sheered slightly to the west. The proofs are conceded, by the counsel for the appellants, to show, that, at the moment of collision, the Santiago de Cuba was headed west by north, and the Brunette south southwest.

It follows, from this statement, that the Santiago de Cuba, being on a course which crossed the course of the Brunette ahead of the latter, and having the Brunette on her starboard side, was within the fourteenth of the rules of navigation prescribed by congress (Act April 29, 1864; 13 Stat. 58), and was bound to keep out of the way of the latter vessel; and that the Brunette was, by the eighteenth of the said rules, bound to keep her course. The Brunette observed this latter rule, until the peril became imminent. I think it clearly established, that it was not until the collision became, in a very high degree, probable, that she ported her helm and sheered a point and a half to starboard. It was a struggle to escape, made at the last moment, and when she saw that the Santiago de Cuba, whose duty it was to avoid her, and whom she was bound to leave at liberty to avoid her, unembarrassed by any movement on her part, had failed to do so, and collision was impending. It is true that one witness

(Ross) expresses the opinion, that, if she had not ported, the collision would not have happened; but, apart from the qualification of his testimony, due to various circumstances impairing confidence therein, I deem the position, course and speed of the vessels, at that moment, to show, that it was a measure adopted when "in the jaws of the peril," justified by the circumstances, and tending, in some slight degree, to increase the chances of escape. At the most, it could only be an error of judgment, in a moment of great danger; and, if that danger was not caused by her fault, she is not prejudiced thereby, unless her duty to slow, stop and reverse had become apparent, at a moment when it might have been useful, which will be hereinafter adverted to.

The Santiago de Cuba was, therefore, under the full pressure of the rule which required her to keep out of the way of the Brunette, and the Brunette was not bound to depart from her course. Indeed, if she had done so, and a collision had ensued, it would have been imputed to her as a fault. The Santiago de Cuba could have successfully claimed, that she had her choice of means of avoiding collision, and that the means chosen were thwarted by the Brunette's failure to keep her course, as required by rule 18, before referred to. Why, then, did not the Santiago de Cuba avoid the Brunette? The rule required her to do so, and she did not. The actual position and course of the vessels required her to do so, and yet she did the contrary. The presumption of fault is against her. The Brunette may properly rest on the actual position and course of the vessels. The burthen is, therefore, on the Santiago de Cuba, of excusing herself from actual conformity with the rule. She, prima facie, took the hazard of the success of any effort she made to avoid collision. She knew that she had the Brunette on her starboard side. All her witnesses agree in this. If she knew, or had reason to believe, that her course crossed the course of the Brunette, as, in fact, it did, then she can have no sufficient excuse. Her responsibility and duty were complete and final. In that condition of things, all the proofs, and all the arguments of counsel, addressed to the questions, how long before the collision the master and crew of the Brunette saw the Santiago de Cuba, whether their lookout was diligent, and the like, are not important, so long as it appears that the Santiago de Cuba was seen in sufficient season for any manœuvres which it was the duty of the Brunette to make, and that she kept her course until the danger was imminent, and then only departed slightly, in the vain hope of averting the consequences of the near approach of the other vessel.

The pressure of the duty to keep out of the way is felt by the owners and claimants of the Santiago de Cuba. A view of the actual course and position of the two vessels makes it so plain that the admitted starboarding of her helm, and falling off of her course, to the westward, was the cause of the collision, that there is, to my mind, no alternative but to say, that, unless her navigators, notwithstanding the exercise of reasonable vigilance and skill were deceived respecting the course of the Brunette, she is wholly undefended and indefensible.

It is not a little remarkable, that, in this case, the parties, libellants and claimants, and the witnesses on behalf of each, give such a statement of the position and course of the vessels, when sighted, as, if true, makes it certain, that, if each vessel had kept its course, no collision could have occurred. Thus from the Brunette, the libel of her owner, and her witnesses, say, that, while she was on her course south half west, at a speed of nine miles an hour, she saw the Santiago de Cuba three miles distant, three points on her port bow. The course of the Santiago de Cuba was northwest by north, and her speed six miles an hour. If this be true, then, had each vessel kept her course, the Brunette would have passed the point of intersection of the courses long before the Santiago de Cuba could have reached it. The Brunette, going at much the greatest speed, had less than one-fifth of the distance to go which the Santiago de Cuba must traverse, to reach that point. And, no small allowance from precise accuracy of statement (due to imperfect observation) will change this result. It is, however, quite pertinent to observe, that, assuming the proximate accuracy of the statement in the libel, and of the witnesses from the Brunette, the actual manœuvres of the Santiago de Cuba, proved by her own witnesses, would bring the vessels into collision as they in fact collided. On the other hand, from the Santiago de Cuba, the answers, and the libel of her owners, and her witnesses, state, that, while she was on her course northwest by north, at a speed of six miles an hour, she saw the Brunette, then distant about three miles, three to four points on her starboard bow. The actual course of the Brunette was south half west, and her speed nine miles an hour. Now, if this be true, it is perfectly certain, that, had each vessel kept her course, the Santiago de Cuba would have crossed the course of the Brunette, passing the point of intersection long before the Brunette could have reached it. For, in such case, the Santiago de Cuba had less than one-fifth the distance to go which the Brunette must traverse to reach that point. Nor, in reference to either of these statements, is the distance given, three miles, very material, for, in each case, whether the distance apart be greater or less, the relative distances of the vessels from the point of intersection would be in the same proportion to each other.

This, however, is not the only criticism due to the statements made on behalf of the Santiago de Cuba. If the facts had been as set up in the libel and answers on her behalf, and as testified in her favor, that is to say,

if, running, at a speed of six miles an hour, on a course northwest by north, she saw the Brunette three or four points off her starboard bow, (which would be due north, or north by east, of her,) the Brunette being on a course south half west, at a speed of nine miles an hour, it would have been impossible to bring the vessels into collision by changes of course which headed the two vessels in the directions in which they are conceded to have been at the moment when they collided, without imputing to the Brunette an earlier change of course than can be reconciled with the testimony.

What, then, is the excuse of the Santiago de Cuba for not avoiding the Brunette? Obviously, the excuse must be one which justifies her in starboarding her helm, and falling off to the westward, into the track of the Brunette; and the excuse alleged is, that, when she saw the Brunette, she saw her white and green lights, and those only. This indicated that the latter was passing her on her starboard; that each, therefore, had the other on her own starboard; that this was a position and course of entire safety; that each might, therefore, keep her course, without any reason to apprehend collision, for, in this relation of the vessels to each other, their courses could not cross; that, with green light to green light, no precautions were necessary; and that, with those appearances before them, the starboarding and falling off to the west was giving the Brunette a wider berth, not, indeed, called for, but in no wise objectionable, while, on the other hand, under those circumstances, to port and go to the eastward would have been palpably wrong, a plain running after the Brunette, an attempt to reach her course when entirely away therefrom, and in no danger of meeting her, a clear departure from safety, and a seeking of peril. If there was no other fact than what is contained in this alleged excuse, bearing on the movements of the Santiago de Cuba, it would be difficult to say that she would not have been justified in either keeping her course or falling off to the westward; but, other facts must be brought into view, before we pronounce her excuse sufficient.

First, it is to be observed, that the appearances testified to, and which are claimed to have misled her, assume that the red light of the Brunette was not visible from the Santiago de Cuba, for, if it was, the indication was that they were approaching end on or nearly so, and the Santiago de Cuba should have ported and gone to the right. Next, they assume that the green light of the Brunette was seen across her own port bow, which was, on her part, a violation of the rule respecting the setting and screening of lights. Let this be assumed, and test its proper influence on the navigation of the Santiago de Cuba, when the actual position, course and speed of the Brunette are brought into connection therewith; and, in order to give the Santiago de Cuba the full benefit of her claim, let it be granted, (contrary to the conclusion of the court below,) that she actually saw the Brunette's green light three or four points on her port bow, three miles distant, as her witnesses testify. What must inevitably be the result, if she observed it continuously, or even long enough to form any rational judgment? Herself going northwest by north, six miles an hour, the Brunette approaching on a course south half west, at nine miles an hour, that green light must and did close in rapidly on her bow. This is certain. Had the Brunette been, as those on the Santiago de Cuba profess to have at first supposed, and as the appearances indicated, passing to the eastward, that green light would have opened more and more, till it passed abeam. That is equally certain. Not the ten or more minutes they had the Brunette under view, but a much less number of minutes, would have taught them, that whatever bore that green light was approaching rapidly, and that they were crossing its course. In fact, it did close in upon their very bow before the collision, and yet they persisted in their turn or swing to the westward. According to their own account of the circumstances, they had abundance of time to discover, by the actual changes in the bearing of the lights, that they were running into danger. They are, therefore, reduced to this alternative—they did not keep a proper lookout, and see the Brunette so soon as they ought, (which was the conclusion of the court below); or, they suffered themselves to be too long misled by the appearance of the Brunette's green light, and failed to take the precautions which a proper observation of its approach, and its closing in upon their bow, would have suggested. But, what is, under these circumstances, especially plain, they wholly neglected the precaution which the sixteenth of the rules of navigation, as well as the dictates of ordinary prudence, required of them. That rule is peremptory, and cannot, I think, be too rigorously insisted upon, namely: "Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse." Now, however misled, in the first instance, by the green light of the Brunette, the testimony from the Santiago de Cuba shows, that she had time to observe, and did observe, the constant drawing nearer and nearer of the two. Whether the Brunette was or was not in fault, her changing bearings from the Santiago de Cuba certainly showed risk, and great risk, of collision; and yet the Santiago de Cuba made no effort whatever to slow, stop or back. The importance of this fault is intensified, when it is seen, that, in the actual position of the vessels, the Santiago de Cuba was coming upon the other, and that a retardation equivalent to a delay of less than ten seconds would have cleared her.

I cannot, upon all the evidence, resist the conclusion, that the Santiago de Cuba was in fault, first, in not making seasonable and cor-

rect observation of the situation of the Brunette, in not properly observing her approach, in continuing to fall off to the westward, when proper skill and attention would have taught her, although misled in the first instance, that that course was running into danger, and in not slowing, stopping and backing when the danger became clear and obvious. True, one of the witnesses in this court states, that a signal to stop was given; but, if he tells the truth, he concedes it was not until it was too late to be of any use, and the engineer testifies that he received no such signal before the blow.

It does not, however, follow, that the Santiago de Cuba is alone responsible for this collision. The proof seems to me to establish, that those in charge of the Santiago de Cuba were actually misled by the improper exhibition of the Brunette's green light; and, if so, then, although it be true that an attentive observation of its motion and its approach might have enabled the Santiago de Cuba to discover her error, yet this does not exonerate the Brunette, when it is shown that she led the other vessel into the error, and so invited the very manœuvres which proved so disastrous.

It should be borne in mind, that the rules of navigation, whether by statute or the law maritime, are founded in regard for property and life, and in that public policy which demands their protection; and that a disregard of those rules is not to be justified, or the proper penalty therefor evaded, on the mere ground, that, if the other party had not also failed in duty, no harm would have resulted. Hence, where there is concurring fault on both sides, both contributing to injury and loss, a court of admiralty visits the consequences upon both.

Is it, then, shown, that the lights of the Brunette were improperly set, and did that operate to mislead those who were in control of the Santiago de Cuba? The rule (article 3 of the act already cited) requires, that the lights, (both green and red,) "shall be so constructed as to throw an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam. * * * The said green and red side lights shall be fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent those lights from being seen across the bow." Here is no permission to allow the range of the two lights to cross at the bow, nor in fact to cross at all. In practice, it is, no doubt, true, at least, it is often so testified, that, at long distances ahead, both lights can be seen on a vessel approaching; but this rule recognizes no necessity for the crossing of the lights anywhere. It requires that each shall be so screened, that it can be seen only from right ahead, and that it cannot be seen across the bow. Here, the testimony of the owner of the Brunette, while it does not admit that the range of the lights crossed at the bow, does concede that they crossed at some short distance ahead; but, the other witnesses from the Brunette warrant the inference that they did cross, so that a man standing forward, and inside the bow itself, could see both lights, by the mere turn of the head towards each, and their testimony is not inconsistent with the facts testified by the witnesses from the Santiago de Cuba on that subject; and, I may add, that the testimony of witnesses to what they actually saw, is, if they are credible, of more weight than the opinions or retrospective judgment of any witness. Five witnesses, the officer of the deck, the quartermaster at the wheel, the ship's carpenter, and two seamen on the lookout, all testify, unqualifiedly, to seeing the green light of the Brunette. Their reasoning on the subject, and conclusion that the approaching vessel would pass to their starboard, and their actual starboarding on and after seeing the green light, to give her a wider berth, tend to confirm their statement. I cannot conclude that they are, in this, all perjured witnesses, nor can they, I think, be mistaken. Their words and their acts concur herein; and the proofs from the Brunette itself make the truth of their statements not only possible but probable. If, now the testimony given in behalf of the Brunette, on her libel itself, be taken as true, in respect to the position and course of the vessels, it becomes certain, that the range of the Brunette's lights crossed her bows; and the obliquity was much greater than the recollection of her owner suggests. Thus, her libel states, and her witnesses testify, that the Santiago de Cuba was seen three points off their port bow. As already shown, in considering the faults of the Santiago de Cuba, that statement is not greatly erroneous; and yet, the green light of the Brunette was seen from the Santiago de Cuba then, or very soon after, and when the vessels were at a distance apart quite sufficient for any manœuvre which the appearances called for; and, influenced thereby, the Santiago de Cuba was turned, first slightly, to the westward, but for which the collision could not have occurred. The observations made in the case of The North Star [Case No. 10,331] are apt to this case, on that point. Indeed, on more than one point, the observations in that case have a significant bearing on the present.

This rule in regard to setting and screening the colored lights cannot be too highly valued, or the importance of its exact observance be overstated. Better far to have no side lights, than to have them so set and screened as to be seen across the bow. In that situation, they operate as a snare, to deceive even the wary into error and danger; and, in the present case, I confess, that, were it not very clear, that the Santiago de Cuba did not exercise all the diligence which was due, I must have held this the actual and sole cause of collision, subject only to such observations

on the duty to slow, stop and back as the circumstances called for. In this view, I do not stop to consider whether the Brunette's red light was hidden from view by the flow of her stay-sail, or whether it was or was not seen from the Santiago de Cuba till the instant before the collision. It is possible that it might have been so hidden; but, whether it was or not, I have, upon other grounds, held the Santiago de Cuba in fault, in not making more diligent and more accurate observation upon the position and course of the Brunette; and no determination of the question, whether the sail hid the red light, will change the fact, that the green light was seen across her bows, and misled the officers of the Santiago de Cuba as to her course.

Nor am I satisfied that the Brunette, in not slowing, stopping and backing, was not herself in like fault with the Santiago de Cuba. If, instead of porting her wheel, when she saw the danger, she had done this, and, especially, if, besides and before porting, she had slowed, stopped and reversed, it is greatly probable that no collision would have happened. True, under the general rule, she was entitled to keep her course, but the time did come when she saw danger of collision, and when the rule, that "every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse," became applicable to her, also. She did see the danger. She did port, in order to escape. If, in due season, she had slowed, stopped and reversed, it is hardly possible that the two would have collided. A delay equivalent to a few seconds would have permitted the Santiago de Cuba to go clear. As already observed, these rules are not framed as the mere rule of obligation between the two colliding vessels. They are not based upon the idea that one may say to the other—you are in fault, and I will, therefore, do as I will. The interests of human life and the protection of property demand, that, in circumstances of peril, the dictates of the highest prudence, and, especially all just and peremptory rules of precaution, shall be observed by both, and their disregard shall bring both under condemnation. Had the Brunette made even an ineffectual endeavor, it would have been credited to her, but, on the contrary, she rushed, without any effort to check her, full speed, upon the destruction which she encountered.

The decree, in each of the cases founded upon this collision, must proceed upon the basis of contribution, by both the Brunette and the Santiago de Cuba, to the whole loss. If, upon the ascertainment of the whole loss, the contribution due from the Santiago de Cuba, to the fund, over and above her own loss, shall be sufficient to indemnify the owner of the cargo of the Brunette, it shall be applied to that purpose. If not, then the owner of the cargo shall be at liberty, on the ascertainment of the fact, to apply to the court for further decree or direction, or, if counsel prefer, I will hear them further on the question, by whom, if by any one, the deficiency shall be made good.

SANTISSIMA TRINIDAD, The. See Case No. 2,568.

SANTISSIMA TRINIDAD, The (CANIZARES v.). See Case No. 2,383.

SANTOS (BOWDEN v.). See Case No. 1,716.

SANTOS (UNITED STATES v.). See Case No. 16,222.

SAPPHIRE, The (POPE v.). See Case No. 11,276.

Case No. 12,334.

The SARAGOSSA.

[1 Ben. 551.] [1]

District Court, S. D. New York. Nov., 1867.

SALVAGE — IN DISTRESS — COMPENSATION — DISTRIBUTION.

1. Towing a steam vessel which has lost the use of her steam machinery by an accident, although she is sound in hull and masts, is a salvage service.

[Cited in The Emily B. Souder, Case No. 4,455; The Plymouth Rock, 9 Fed. 416; McMullin v. Blackburn, 59 Fed. 178.]

2. It is not necessary that the distress should be actual or immediate, or that the danger should be imminent or absolute. It is sufficient if, at the time when the service is rendered, the vessel has encountered any damage or misfortune which may possibly expose her to destruction if the service be not rendered.

[Cited in McConnochie v. Kerr, 9 Fed. 53; The Plymouth Rock, Id. 416; The Alaska, 23 Fed. 608; The Veendam, 46 Fed. 491.]

3. Where a steamer, which has lost the use of her machinery, was towed by another steamer about sixty or sixty-five miles to Charleston, the latter losing by the service not over two or three hours of time, and the former saving three or four days, the vessel towing, with her cargo, being worth $230,000, and the saved vessel and her cargo being worth $100,000, the court awarded $900 salvage. Of this $900, $400 was allotted to the owner of the saving vessel, and $50 to her master, and the remaining $450 was ordered to be divided among the officers and crew, including the master, in proportion to their wages.

[Cited in The Colon, Case No. 3,024; The Leipsic, 5 Fed. 113.]

In admiralty.

Beebe & Donohue, for libellants.

E. C. Benedict, for claimant.

BLATCHFORD, District Judge. This is a libel for salvage, filed by Cornelius K. Garrison and others, owners of the steamer San Salvador, on behalf of themselves and all others claiming any interest, against the screw steamer Saragossa, her tackle, &c. The crew of the San Salvador have come in by petition and been made co-libellants. On the 30th of April, 1867, the Saragossa, being, with her cargo, of the value of $100,000, and on a voyage from New York to Charleston, broke

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

the coupling to her shaft so that her screw became of no service. While in this condition she was found by the San Salvador, at a point about sixty to sixty-five miles from Charleston bar, and about fifty miles south of Frying Pan Shoales. The San Salvador was on a voyage from New York to Savannah, with a cargo and passengers, and was, with her cargo, of the value of $230,000. The Saragossa was in the usual track of vessels running down the Atlantic coast, and attracted the attention of the San Salvador by hoisting her ensign, union down. She had her sails set, the wind being light from the northward and eastward, but she was making very little headway. She asked the San Salvador to tow her to Charleston. The San Salvador towed her from sixty to sixty-five miles, using the hawser of the San Salvador, and left her in a safe place inside of Charleston bar. The service occupied about nine hours, at a speed of about seven knots an hour, the usual speed of the San Salvador in like weather being about eight knots an hour. What wind there was was fair to carry the Saragossa to Charleston by means of her sails, and she was in all respects in a good condition, except the accident to her machinery. The sea was very smooth, and it would probably have taken her three or four days to reach Charleston with her sails, it being nearly a dead calm. The usual route of the San Salvador would have carried her about nine miles outside of Charleston bar, and she deviated from her route at an angle of about fifteen degrees. The loss of time to the San Salvador was not over two or three hours, with the corresponding increased expense of coal, and the saving of time to the Saragossa was three or four days, with the saving of her expenses for that time.

This service was a salvage service. In order to make a salvage service it is not necessary that a vessel, whether sailing or steam, should be unnavigable, or that a steam vessel should be injured not merely in her machinery but in her hull or her sails also. Where a vessel has not received any injury or damage, and is in the same condition she would ordinarily be in without having encountered any damage or accident, a service rendered to her is not a salvage service. The Reward, 1 W. Rob. Adm. 177. A steam vessel which has lost the use of her steam machinery by an accident, is not in the same condition she would ordinarily be in, although she is sound in hull and masts and has the use of her sails, and a service rendered to her under such circumstances, by towing her, is not a mere towage service, but is a salvage service. It is not necessary that the distress should be actual or immediate, or that the danger should be imminent or absolute, but it is sufficient if, at the time the assistance is rendered, the vessel has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered. The Charlotte, 3 Rob. Adm. 68, 71.

I think, in this case that $900 is a proper compensation. Of this sum I award $400 to the owners of the San Salvador and $50 to her master. The remaining $450 is to be divided among the officers and crew, including the master, in proportion to their respective monthly wages, the apportionment to be made by a commissioner, on a reference, unless the parties agree upon it. The claimant must, also, pay the costs of the suit.

Case No. 12,335.

The SARAGOSSA.

[1 Ben. 553.] [1]

District Court, S. D. New York. Nov., 1867.

SALVAGE — CHARACTER OF SERVICE — COMPENSATION—DISTRIBUTION.

1. Where a steamer which had broken her machinery, so that it could not be used, but could have been made fit for use in a day or two, and which was making two and a half knots an hour under canvas, was towed by another steamer, for about thirty-four hours, to Fortress Monroe, and thence to Norfolk, where the salvor vessel was compelled to go for coal, and, at the time of their arrival at Fortress Monroe, it began to blow, and stormed so heavily that the latter was unable to go to sea till the second day after, and she then met with severe weather on her way to New York, by which she was somewhat injured and was also compelled to put back to Norfolk for more coal: *Held*, that neither could the fact, that the salvor vessel was saved from exposure to storm by going into Fortress Monroe, be taken into consideration to diminish her compensation for the services she rendered, nor could the storms which she afterwards met, or the injury which they inflicted upon her, be considered for the purpose of increasing that compensation.

[Cited in The New Orleans, 23 Fed. 911.]

2. The salvor vessel with her cargo and freight being worth $434,000, and the vessel saved with her cargo and freight being worth $100,000, and both carrying passengers, the court awarded $9,000 salvage.

[Cited in The Alaska, 23 Fed. 613.]

3. This sum was distributed, one half to the owners of the salvor vessel, $500 to her master, and the rest to her officers and crew, including the master, in proportion to their wages.

4. It is the policy of courts of admiralty to encourage salvage services by large, powerful, well equipped and valuable steamers, by giving their owners one-half of the compensation awarded.

In admiralty.

Richard H. Huntley, for libellants.

Beebe & Donohue, for claimants.

BLATCHFORD, District Judge. This is a libel for salvage, filed by William H. Goodspeed, owner, and George W. Ward, master, of the steamer Charles W. Lord, on behalf of themselves and of the crew of the Charles W. Lord, against the screw steamer Saragossa, her tackle, &c., and her cargo and freight money. The Saragossa was on her way from Charleston to New York. The Charles W. Lord was on her way from Galveston, Texas, via Key West, to New York.

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

On the night of the 17th of March, 1867, at about ten o'clock, the Charles W. Lord, having reached a point about nineteen miles south-east of Cape Hatteras light, had her attention attracted by the burning of blue lights to the south-east of her. She was then heading to the northward, having rounded Cape Hatteras Shoals, but, on seeing the lights, she kept off and ran down to them. She there found the Saragossa with some canvas set but not under steam. In reply to a hail, the Saragossa asked to be towed to Fortress Monroe, and said that she had broken down. The Charles W. Lord assented to taking her in tow and did so. The disabling of the Saragossa was caused by the giving way of the coupling between two sections of her shaft, which rendered her screw useless. She was making about two and a half knots an hour under canvas, and was engaged in repairing, or in making preparations to repair, the machinery. Her engineer says, that he could have repaired the break, at sea, in from twenty-four to thirty-six hours, so as to have made three and a half knots an hour under steam without canvas, and have made a port. There was a bad sea on at the time, and the wind was strong from the north-west, and the Saragossa was about five or six miles from the Gulf Stream. About half past eleven o'clock that night the towing began by a hawser run from the stern of the Charles W. Lord. For the first eight hours little progress was made, on account of the bad sea and the strong head wind. About eight o'clock on the morning of the 18th, the wind moderated, and the vessels got in under the land. They arrived at Fortress Monroe on the morning of the 19th, about seven or eight o'clock. The shaft of the Saragossa was disconnected during all the time of the towing, so that her machinery was not used. She was in good condition in all respects, except the accident to her machinery, and her sails and spars and masts were in good order. The Charles W. Lord had about seventy tons of coal when the towing commenced, and about thirty-two when she reached Fortress Monroe. She would have used from twenty-six to thirty tons in reaching New York, from the place where the towing commenced, if she had not done the towing. She was of the value of $150,000 at the time of the service, and was a new vessel. She had on board a cargo valued at $273,000, (of which $70,000 was the value of $50,000 of specie). Her freight money for the voyage was $8,700, and her stores were worth $2,500. Her cargo consisted principally of cotton, hides and wool. She had sixteen passengers. The Saragossa had a crew of thirty-seven persons and twenty-three passengers, among whom were some females. The Saragossa was worth from $45,000 to $50,000, her cargo was worth $52,000, and her freight money was $1,500.

The service rendered in this case was a salvage service, and was, one of merit, and ought to be properly rewarded. But there is nothing in the case to justify the extraordinary demand made at the trial, that the libellants should receive more than $40,000 as salvage compensation. The weather was not stormy; there was no exposure or risk of life on the part of the master and crew of the Charles W. Lord; there was no imminent peril to the Saragossa; there was no great amount of labor or skill bestowed or displayed on the part of the salvor vessel; nor was there any great length of time occupied in the service. On the other hand, the value of the property imperilled by the deviation of the Charles W. Lord from her voyage was large, and the service was rendered promptly and efficiently; and the policy of the law is to encourage salvage services by steam vessels, especially when rendered to steam vessels which are carrying passengers.

I do not consider, as an element in the salvage service in this case, any speculation, growing out of the gales which blew between the time the vessels arrived at Fortress Monroe and the time the Charles W. Lord subsequently arrived at New York. Whether the Saragossa would or would not have been able to repair her machinery before the gales came on, so as to have had its aid in keeping off from a lee shore, or in keeping her head to the wind, or whether, if she had not succeeded in repairing her machinery before the gales came on, she would or would not have been able to lay to in a gale by the use of her sails alone, are questions having too many contingent ingredients, to be considered in estimating the value of the salvage service. And, if I were to consider them, I should hold, that the weight of the testimony is, that the Saragossa could have repaired her machinery, so that she would have had the use of steam before the gales came on, and that if she had not repaired her machinery she would still have been able to lay to by the aid of her sails alone. So, also, as to the gales which the Charles W. Lord encountered on her voyage from Fortress Monroe to New York, and which caused damage to her, and which it is claimed she would not have encountered if she had not deviated from her voyage to assist the Saragossa, because she would have reached New York before the gales came on,—all such considerations are too remote to enter into the question of the compensation for the service rendered. In the case of The Emulous [Case No. 4,480], it was argued, that a storm which occurred the next day after the saved vessel and cargo reached a harbor, would have very probably occasioned their total loss if they had not then been in port. In reply to this, Judge Story says: "Admitting that to be true, still it cannot constitute a material ground, in a case like the present, for enhancing the salvage. Salvage is a compensation for the rescue of the property

from present impending perils, and not for the rescue of it from possible future perils. It is a compensation for labor and services, for activity and enterprise, for courage and gallantry, actually exerted, and not for the possible exercise of them, which, under other circumstances, might have been requisite. It is allowed because the property is saved, not because it might have been otherwise lost upon future contingencies. Subsequent perils and storms may enter as an ingredient into the case, when they were foreseen, to show the promptitude of the assistance and the activity and sound judgment with which the business was conducted, but they can scarcely avail for any other purpose. Ought the salvage to be diminished by a favorable state of the weather after the arrival in port? If not, why should it be increased by an unfavorable state of the weather? To introduce such ingredients into the element of salvage, which were neither foreseen nor acted upon, would compel the court to deliver itself over to conjectures resting on loose probabilities, the nature and extent of which could never be measured. It would be to go off soundings, to desert the facts, and to be guided by speculations always questionable and sometimes deceptive." These views are eminently sound, and have always been followed by courts of admiralty in the United States. They were applied by this court in the case of Winso v. The Cornelius Grinnell [Id. 17,883], October, 1864. In that case, a salvage service was rendered by a steamer. The steamer, in pursuing her voyage afterwards, struck, at low water, at a place where she would not have struck at high water, and it appeared that, if she had not been delayed by stopping to render the salvage service, she would have passed at high water, instead of at low water, the spot where she struck. She was injured, by the striking, to the amount of $2,500, but the court threw out all consideration of the damages caused by the striking.

In the present case, the Charles W. Lord was engaged in towing the Saragossa for about thirty-four hours, from the time she took her in tow till the two vessels arrived at Fortress Monroe. The Charles W. Lord was obliged to go to Norfolk to procure coal, and arrived there about ten o'clock a. m. on the 19th of March. When she was about to anchor the Saragossa at Fortress Monroe, she was requested by the Saragossa to tow her to Norfolk, and consented to do so, because she had to go there herself for coal. She accordingly took the Saragossa in tow to Norfolk. About the time the two vessels arrived at Fortress Monroe it commenced to storm, with snow, and about six hours afterwards to blow. It blew heavily that day, and blew a gale from the eastward that night and through the 20th and until the morning of the 21st, so that the Charles W. Lord would not go to sea. During that gale it blew so heavily that eight or ten steamships came into Hampton Roads from sea for a harbor. When the Charles W. Lord did go to sea, she encountered a gale which compelled her, after about three days and a half, to return to Norfolk for more coal. During that gale she carried away her steering gear for a time, but repaired it at sea, and suffered other damage. Now, if we could enter the region of speculation so as to take into account what might have happened to the Saragossa if she had been out in the gales which came on after she reached Fortress Monroe, we must equally speculate in regard to the Charles W. Lord. And, on the evidence, it would be reasonable to say that, in consequence of her having been delayed by towing the Saragossa, she was saved from exposure and damage, to an extent open wholly to conjecture, by not being out in the gale which commenced on the 19th. But this fact ought not to diminish the value of the salvage service she rendered; nor can the losses she did suffer in the gales she afterwards met with, before she reached New York, enhance such value. Notwithstanding the season of the year, nothing which happened in regard to wind or weather, can, in fact or in judgment of law, be reasonably said to have been foreseen, much less acted upon, during the time the salvage service was in progress.

In view of all the facts in this case, the salving vessel being a steamer, her value and that of her cargo, stores and freight money being $434,200, the risk to which she was put in reference both to herself and her cargo, the value of the Saragossa and her cargo and freight money, which was, in round numbers, $100,000, the condition in which the Saragossa was, and the nature and duration of the salvage service, I think that the sum of $9,000, or a little less than one eleventh of the value of the property saved, is a liberal and, at the same time, a fair compensation. Of this sum I award one-half, or $4,500, to the owner of the Charles W. Lord. The usual proportion given to the owner is one-third. Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, 269, 271; The Henry Ewbank [Case No. 6,376]. But that was a rule fixed in reference to sailing vessels, and the policy of courts of admiralty now is to encourage salvage services by large, powerful, well equipped and valuable steamers, by giving to their owners as large a share as one-half in the compensation awarded. The Howard, 3 Hagg. Adm. 256; The Earl Grey, Id. 363; 2 Pars. Mar. Law, bk. 3, c. 7, p. 622, note 7. Of the remaining $4,500, I award $500 to the master of the Charles W. Lord, on account of his responsibility in undertaking the salvage. The remaining $4,000 will be distributed among her officers and crew in proportion to their respective monthly wages, the master sharing pro rata in the $4,000, in addition to the $500 specially allotted to him. The apportionment will be made by a commissioner,

on a reference, unless it is agreed upon by the parties. The costs of the suit, also, must be paid by the claimants.

Case No. 12,336.

The SARAGOSSA.

[2 Ben. 544.] [1]

District Court, S. D. New York. Nov., 1868.

SHIPPING—DELIVERY OF CARGO—GOODS NOT PUT ON BOARD—LIEN.

1. Where a libel alleged that 303 bales of cotton were shipped on board a steamer to be carried to New York, and that a bill of lading therefor, a copy of which was attached, was signed by the agents of the vessel, and that seven of the bales were not delivered, and were not lost by perils of the sea, and the answer admitted that the vessel agreed to carry the 303 bales, and that her agents signed a bill of lading, and alleged that a copy of it was attached to the libel, and alleged that only 273 bales were ever received on board the vessel, but that the rest were brought to New York by another vessel, and discharged upon the wharf, on due notice to the consignee, *held*, that on the pleadings, the authority of the agents to bind the vessel by the contract in the bill of lading must be considered as admitted;

2. On the bill of lading, the burden of proof was on the vessel to show that the bill of lading was signed for bales of cotton that were never received on board the vessel;

[Cited in Crenshawe v. Pearce, 37 Fed. 435.]

3. That fact was not proved by the mere statement of the purser of the vessel, that they received 303 bales, and left 30 behind;

4. There was no proof of the delivery of the seven bales at New York, and the vessel was liable for their value.

In admiralty.

Robert D. Benedict, for libellants.

Welcome R. Beebe, for claimant.

BLATCHFORD, District Judge. The libel avers the shipment on board of the steamship Saragossa, at Charleston, on the 17th of November, 1866, of 303 bales of cotton, under an agreement by the vessel to carry them to New York, and deliver them there to the agent of the libellants, such agreement being set forth in a bill of lading signed by the agents of the vessel. A copy of the bill of lading is annexed to the libel. It states that the 303 bales of cotton have been received "by E. N. Fuller, R. & F. agent S. C. R. R. steamship called the Saragossa, whereof ——— is master, now lying in the port of Charleston, S. C., and bound for New York." It gives the marks and numbers on the bales, and states that they are to be delivered at the port of New York, the danger of the seas only excepted. It is not signed by the master or purser of the vessel, but is signed "Ravenel & Co., Agents." The libel avers that the contract of the vessel was not performed by her, in that seven of the bales were never delivered in New York, and were not lost by dangers of the sea. The amount of damages claimed is $1,291.39.

The answer admits that the vessel agreed to carry the 303 bales of cotton to New York, and deliver the same there to the person named in the bill of lading, and that the agents of the vessel signed a bill of lading for the cotton, wherein the agreement was more fully set forth, and that a copy of such bill of lading is annexed to the libel. The answer also avers that all of the bales of cotton that were taken on board under the bill of lading were delivered at New York; that on the arrival of the vessel at New York, with cotton on board received under the bill of lading, due notice of her arrival, and that he was required to attend to the receipt of the cotton laden on board, was given to the consignee named in the bill of lading; that thereafter the bales of cotton which were actually shipped on the vessel were duly discharged from the vessel, and that the vessel, both by law and the custom of the port, was entirely discharged from liability therefor; that only 273 bales of the cotton mentioned in the bill of lading were ever taken or received on board of the vessel; that those 273 bales were actually discharged upon the wharf from the vessel, on due notice to the consignee; and that the rest of the 303 bales were afterward brought to New York by the steamship Granada, and were, upon due notice, discharged upon the wharf, and delivered to the consignee.

It being admitted in the answer that the vessel agreed to carry the 303 bales of cotton to New York, and that the agents of the vessel signed the bill of lading in question, the authority of such agents to bind the vessel, by signing the bill of lading, to whatever contract is set forth therein, must be considered as admitted and established, although the bill of lading is not signed by the master or purser of the vessel. The libellants gave no evidence in regard to the bill of lading, or in regard to the shipment of the cotton on board of the vessel. Their case, in this respect, rests wholly on the admissions of the answer. The bill of lading, though very inartificial, must, I think, be fairly interpreted as averring that the 303 bales of cotton were received on board of the Saragossa to be carried to New York. In the face of that evidence, it is for the claimant to show that the bill of lading was signed for bales of cotton that were never received on board of the vessel, in order to relieve her from responsibility. This the claimant undertook to do, but the evidence fails to show it. It is clear that the seven missing bales were part of the 303 bales. The purser of the vessel merely states that they received 303 bales in Charleston, and left 30 behind. Those 30, it is shown, were brought by the Granada. But the evidence on the part of the claimant is entirely consistent with the fact that the entire 303 bales were, as stated in the bill of lading, received on board of the Saragossa, and that then 30 of them were put back upon the wharf. The libellants received the 273 bales which

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

the Saragossa brought, and 23 of the 30 which the Granada brought. The libellants had a right to rely on the bill of lading, and it was easy for the claimant to have shown, if the fact was so, that only the 273 bales went on board of the Saragossa, and that thus the bill of lading was signed for bales that were never received on board of her, so as to relieve the vessel from liability for any more than the 273 bales. The claimant has not made such proof, nor has he shown that the seven bales in question were delivered to the libellants at New York, according to the tenor of the bill of lading.

There must be a decree for the libellants, with a reference to ascertain the damages sustained by them.

SARAGOSSA, The (HUSSEY v.). See Case No. 6,949.

Case No. 12,337.

The SARAH.

[Blatchf. Pr. Cas. 195.] [1]

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

PRIZE—ENEMY PROPERTY.

Vessel and cargo condemned as enemy property.

In admiralty.

BETTS, District Judge. The pleadings and preparatory proofs show that this vessel and cargo were enemy property, owned in Mobile, and were captured in the Gulf Stream, off Mobile and Ship Island; that in the latter place the vessel was delivered to the government, on appraisal; and that the cargo was sent to New York for adjudication. The allegations of the libel are fully sustained by the evidence, and condemnation of both vessel and cargo are decreed accordingly.

Case No. 12,338.

The SARAH.

[2 Spr. 31.] [2]

District Court, D. Massachusetts. Jan., 1861.

SHIPPING—MASTER—DAMAGE TO CARGO—ABSENCE OF CREW.

1. Much must be left to the discretion of the master of a vessel in determining the necessity of a deviation from the course of the voyage, the port of distress, and the time of remaining in such port.

2. Where the crew of a coasting vessel, anchored in a harbor, were absent at night with the consent of the master, who remained on board alone, and the vessel was driven by a gale on a ledge of rocks; it was held, that the vessel was liable for the damage done thereby to the cargo, although the gale arose after the crew left, the absence of the crew rendering the vessel unseaworthy.

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

[2] [Reported by Hon. Richard H. Dana, Jr., and here reprinted by permission.]

In admiralty.

John Lathrop, for libellant.
Seth J. Thomas, for claimant.

SPRAGUE, District Judge. This is an action to recover damages for the non-delivery of a cargo of wood shipped by the libellant on the schooner Sarah, at the port of Wells, Maine, to be transported to Cambridge, in Massachusetts. It appears in evidence, that the vessel left Wells, with the wood on board, shortly before the state election in September last; that the crew consisted of the captain and two men: that on the night of the 4th of September, when within ten miles of Thatcher's-Island light, the captain left his course, and put back to Portsmouth harbor, where the vessel remained several days, and on the night of the 12th of the month was driven on a ledge of rocks during a severe gale, and the cargo swept overboard. The wood was afterwards recovered in a damaged condition, and sold by the master at Portsmouth. It also appears that the master went to Wells on the 8th of the month for the purpose of voting, returned on the 10th, the day of election, and allowed the two men who composed his crew to go home for the same purpose; and on the night the vessel was wrecked, the master was on board alone.

On this state of facts, the libellant contends: (1) That the vessel deviated by leaving her course without necessity. (2) That if it was necessary for her to leave her course, the master should have put into the nearest port, and should not have gone to Portsmouth. (3) That the vessel remained at Portsmouth longer than was necessary. (4) That the vessel was in an unseaworthy condition at the time of her loss, the master being the only person on board.

If either of these positions is true in point of fact, it follows as a conclusion of law that the libellant is entitled to recover. As to the first point, it appears in evidence, that, at the time the vessel left her course, she had all sails set, and that there was merely a pretty stiff breeze blowing. The master, however, testifies that he apprehended that a gale was coming on, and that he deemed it prudent to put back. Much, in matters of this nature, must be left to the judgment and discretion of a master. On the evidence, I am unable to say that the master transcended the limits placed to his authority by law, in leaving his course, in selecting Portsmouth as his port of refuge, and in remaining there as long as he did. I cannot, therefore, regard his acts in these respects as amounting to a breach of the contract of affreightment.

It is evident, however, that the vessel was in an unseaworthy condition at the time she met with the disaster. The master was the only person on board. He should either have kept his crew with him, or, if it was necessary to let them go home for any purpose, he should have procured suitable and competent

persons in their place. It appears that the vessel dragged her anchors before going on to the rocks. This perhaps might have been prevented by paying out the chain on both anchors. The master, being alone, was unable to do this. Whether this would have saved the vessel or not, I cannot consider the vessel in a seaworthy condition at the time of the disaster; and the claimant has not satisfied me, that the loss was in no way owing to such unseaworthiness. A decree must be entered for the libellant.

Case No. 12,339.

SARAH v. TAYLOR,

[2 Cranch, C. C. 155.] [1]

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

SLAVERY—ISSUE BORN—OBLIGATION TO MANUMIT.

If a female slave be sold, to serve the vendee for a term of years, with an obligation by the vendee to manumit her at the expiration of the term, and if, during the term, she has issue, such issue is entitled to freedom.

This was a suit for freedom [by negress Sarah against Elijah Taylor], and a verdict for the plaintiff was taken subject to the opinion of the court upon the following facts: On the 8th January, 1789, a negro slave called Tamah was sold by Alexander Smith, her then master, to one Thomas Taylor, in the manner and upon terms and conditions mentioned in a bond given by the said Taylor to the said Smith of the same date, the condition of which bond was as follows: "Whereas the above bound Thomas Taylor hath this day purchased of the said Alexander Smith, one negro woman named Tamah, about five and thirty years old, to serve him, the said Thomas Taylor, nine years from the date thereof and no longer. Now the condition of the said obligation is such that if the above bound Thomas Taylor, his heirs, executors, administrators, or assigns, do not carry or suffer to be carried, the aforesaid negro out of the counties of Fairfax, Loudon, Prince William, Fauquier, Berkley, or Frederic, in this commonwealth, during the term aforesaid of her servitude, and, at the end thereof, give her, if she be living, a full and fair discharge from his service, and set free and emancipate the aforesaid negro according to the act of assembly in that case made and provided, and now in force in this commonwealth, then the above obligation to be void, else to remain in full force and virtue in law." It is further agreed that the daughter of the said Tamah was born after the said 8th of January, 1789, and before the expiration of the nine years, which her mother, under the said contract of sale, was bound to serve. It is admitted that the said Tamah has since been duly and legally manumitted in pursuance of the contract aforesaid, and that the plaintiff is now, and was, at the institution of this suit, detained by the defendant claiming her as his slave. It is agreed that a verdict shall be taken for the plaintiff subject to the opinion of the court whether she is entitled to her freedom on the above statement.

Mr. Taylor, for plaintiff. The plaintiff was not the slave of Mr. Smith, for he had sold her for nine years and had agreed that she should then be free. She was not the slave of Taylor, for he had only a right to her service for nine years. 1 Tuck. Bl. Comm. pt. 2, 127, 423.

Mr. Mason, contra, cited Pleasants v. Pleasants [unreported], at April term, 1819.

THE COURT rendered judgment for the plaintiff.

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

SARAH A. BOICE, The (JAMES v.). See Case No. 7,183.

Case No. 12,340.

The SARAH AND CAROLINE.

[Blatchf. Pr. Cas. 123.] [1]

District Court, S. D. New York. March, 1862.

PRIZE—CAPTURE—PROOFS—JURISDICTION OF COURT.

1. Vessel and cargo held as enemy property, on the papers found on board; but, no legal proofs being furnished of the actual capture, or of any inability to furnish proof of the time and place of seizure, a decree of condemnation was deferred, until such testimony should be produced, or an excuse be furnished for the admission of secondary proof.

2. There having been no appearance, on due return of the warrant of arrest of the cargo, and the capture having vested jurisdiction in the court over the property seized, the court ordered the cargo to be sold, and the proceeds to be brought into court.

3. The vessel was not arrested on the monition.

In admiralty.

BETTS, District Judge. The libel in this suit alleges that the schooner, with the cargo of sixty barrels of spirits of turpentine, was captured by the United States steamer Bienville, on the 11th of December, 1861, on the Atlantic Ocean, off the mouth of St. John's river, Florida, and that they are prize of war. The schooner, on survey, was at the time reported unseaworthy to be navigated in the winter season to a northern port, and her cargo was transshipped December 20, 1861, on board the merchant brig Belle of the Bay, and brought to the port of New York. The papers on the vessel authenticated by the Rebel authorities of Florida, show that the vessel and cargo were enemy property, and are, accordingly, both subject to condemnation and forfeiture; but no legal proofs are laid before the court of the actual capture of the same at sea, nor that any

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

physical or moral inability existed to produce evidence of the time and place of seizure. Therefore, according, to the ordinary procedure in a prize court, a decree of condemnation of the same must be deferred until such testimony is produced, or a lawful excuse is furnished for the admission of secondary or lesser proof.

No appearance having been entered in the suit on due return of the warrant of arrest of the cargo, and the capture having vested jurisdiction in the prize court over the property seized, it is ordered that an interlocutory order for the sale of the cargo arrested in the cause be made, and that the proceeds thereof be deposited in the cause in the registry of the court, to abide the further order of the court.

No return of the arrest of the schooner on the monition is made to the court, and no order for her condemnation can be granted without ulterior proceedings in the action to that end.

[Further proofs were laid before the court, and on the hearing a decree of condemnation was entered. Case No. 12,341.]

Case No. 12,341.

The SARAH AND CAROLINE.

[Blatchf. Pr. Cas. 214.] [1]

District Court, S. D. New York. Sept., 1862.

PRIZE—VIOLATION OF BLOCKADE.

Cargo condemned, on further proof, for a violation of blockade by the vessel.

In admiralty.

BETTS, District Judge. This case was called for hearing July 29, 1862, but, on examination, it was found that there was no proof furnished convicting the property of any confiscable offense, and the court ordered the proceedings in the suit to be suspended, and, no person appearing to defend the property seized, or to claim it, gave leave to the United States attorney to offer further proofs within a year and a day. [Case No. 12,340.] On the 15th of September, instant, proofs in preparatorio in the cause were laid before the court. Charles G. Loring, an acting master in the United States navy, testified that he was present at the capture of the schooner, at the mouth of the St. John's river, in East Florida, on the 11th of December, 1861, by the United States vessel of war Bienville. The schooner was being towed out of port by a steamer. She was pursued and fired upon by the Bienville, and was then dropped by the steamer, and changed her course, and endeavored to get back into port. She was overtaken by the Bienville, and was found deserted by her crew and anchored at the mouth of the St. John's river. The Bienville was one of the blockading squadron off that port. The schooner was laden with turpentine and a few shingles. She was captured about 6 o'clock in the evening. The port was under an order of blockade, and the vessel was endeavoring to break the blockade when arrested. She was detained by the United States flag officer at Beaufort, South Carolina, and the cargo seized on board was transmitted to this port. The vessel was of about fifty tons burden. Letters were found on board of her addressed to Nassau, N. P., but no papers were brought from her into this port with her cargo. This evidence leaves no ground to doubt that the vessel was captured in the act of violating the blockade, and the cargo seized on board of her became liable to forfeiture from that cause.

Decree of condemnation accordingly.

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

Case No. 12,342.

The SARAH ANN.

[2 Sumn. 206.] [1]

Circuit Court, D. Massachusetts. May Term, 1835.[2]

PLEADING IN ADMIRALTY — AMENDMENT — NEW FACTS — ALLEGATIONS — PROOFS — MARINE INSURANCE — ABANDONMENT — STALE DEMANDS—SALE BY MASTER.

1. In admiralty pleadings, the better practice is to present new facts, when necessary, by an amendment to the libel and answer, as in chancery, and not by way of replication and rejoinder.

2. The proofs and allegations must coincide. Proofs to facts not put in contestation by the pleadings, and allegations of facts not established by proofs, will both be rejected.

[Cited in The Morton, Case No. 9,864; The Aurania and The Republic, 29 Fed. 116.]

3. Appellate courts in admiralty allow parties, under certain circumstances, non allegata allegare, et non probata probare.

4. An abandonment once made is considered as a continuing abandonment, notwithstanding a refusal to accept it, unless it is withdrawn by the party offering it.

5. The master is the agent of all concerned in the voyage, and, whenever an abandonment has been accepted, becomes, by relation, the agent of the underwriters from the time of the loss, and a sale by him is then on account of the underwriters.

6. A valid sale may be made of personal goods, which are out of possession, and the sale will be of the thing itself, and not of a mere chose in action.

[Cited in Tome v. Dubois, 6 Wall. (73 U. S.) 554; Murphy v. Dunham, 38 Fed. 506.]

[Cited in Chapman v. Campbell, 13 Grat. (Va.) 111; Couillard v. Johnson, 24 Wis. 540; Dahill v. Booker, 140 Mass. 311, 5 N. E. 496; Meyers v. Briggs, 11 R. I. 182.]

7. If an owner stands by and knowingly suffers an innocent person to be misled by his silence, and to purchase his property without giving him notice of his title, a court of equity will treat it as a fraud upon the purchaser, and grant an injunction against the future assertion of that title by the owner.

[Cited in Baldwin v. Howell, 45 N. J. Eq. 532, 15 Atl. 236. Cited in brief in Haven v. Adams, 86 Mass. 86.]

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

[2] [Affirmed in 13 Pet. (38 U. S.) 387.]

8. Courts of admiralty, so far as their jurisdiction extends, administer it upon the principles of a court of equity, and not upon those of strict law.

9. Courts of admiralty, like courts of equity, govern themselves by the analogies of the common law limitations of actions, and, only under very strong circumstances, depart from them. Independently of any limitations, they will not entertain suits for stale demands.

[Cited in Jay v. Allen, Case No. 7,235; Packard v. The Louisa, Id. 10,652; Scull v. Raymond, 18 Fed. 553; Bailey v. Sundberg, 1 C. C. A. 387, 49 Fed. 586.]

10. Where the acceptance of an abandonment occurred in October, 1828, (which related back to the loss in the preceding March,) and the libel was brought in September, 1834: *Held*, that, if the vessel had been within the reach of the process of this court for a reasonable time, to the knowledge of the libellants, after such a lapse of time, the libel ought not to be maintained.

[Cited in Cadmus v. Polhamus, Case No. 2,282a; Smith v. Sturgis, Id. 13,111; Southard v. Brady, 36 Fed. 561. Cited in brief in The Detroit, Case No. 3,832.]

[Cited in brief in Goddin v. Welton, 34 Mo. 454.]

11. It is not sufficient to justify a sale of a vessel by a master, that he acted in good faith, and in the exercise of his best discretion, unless there appears to have been an urgent necessity to sell for the preservation of the interests of all concerned.

[Cited in Copelin v. Phœnix Ins. Co., 46 Mo. 215; Duncan v. Reed, 39 Me. 418; Howland v. India Ins. Co., 131 Mass. 255. Cited in brief in Prince v. Ocean Ins. Co., 40 Me. 486.]

12. If an owner of reasonable prudence would have directed the sale from the opinion, that the vessel could not be delivered from the peril without the hazard of an expense, disproportionate to her real value, then the sale by the master must be deemed justifiable.

[Cited in The Lucinda Snow, Case No. 8,591; Fitz v. The Amelie, Id. 4,838.]

[Cited in Cox v. Foscue, 37 Ala. 505; Hundhausen v. U. S. Fire & Marine Ins. Co. (Tenn.) 17 S. W. 154; Mutual Safety Ins. Co. v. Cohen, 3 Gill, 471.]

13. In a case of urgent necessity, the master has a right to sell the vessel, as well on a home shore, as on a foreign shore, and whether the owner's residence be near or at a distance. It is otherwise, if the necessity be not urgent.

[Cited in Mutual Safety Ins. Co. v. Cohen, 3 Gill, 471.]

14. A sale by a master *held* valid, under the circumstances, and after a survey of the evidence, on the ground of urgent necessity.

[Cited in The Lucinda Snow, Case No. 8,591; Copeland v. Phœnix Ins. Co., Id. 3,210.]

15. Semble: If the court should decree a sale by the master invalid, where the transaction was clear from fraud, it would compel a proper allowance for the expenditures of the original purchasers in getting off and repairing the vessel.

[Cited in Mutual Safety Ins. Co. v. Cohen, 3 Gill, 471; Robertson v. Western M. & F. Ins. Co., 19 La. 227.]

[Cited in Pike v. Balch, 38 Me. 306.]

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

This was a case of an appeal from a pro formâ decree of the district court, sitting in admiralty, dismissing the suit. [Case unreported.] The original libel was a proceeding in rem in the nature of a petitory suit in the admiralty, for the ascertainment and establishment of the title of the libellants (The New England Marine Insurance Company) to the proprietary interest of the brig Sarah Ann, and, as consequent thereon, for a decree for the possession of the vessel. It appeared from the proceedings and proofs in the cause, that the libellants, on the first day of March, 1828, at Boston, underwrote a policy of insurance upon the brig valued at $4,000, in port and at sea, during the term of one year, from the 22d of February, 1828; and while the policy was in full force, to wit, on the 25th of March, 1828, the brig was stranded on the shore of the island of Nantucket, in the state of Massachusetts; and on the succeeding day an abandonment was made by the owners to the libellants, for a total loss by the perils of the sea. The abandonment was not, however, at that time accepted by the libellants; but was expressly refused. It was not, however, withdrawn by the owners; and finally, on the third day of October, 1828, a compromise took place between the owners and the libellants, by which all the right and title of the owners in the brig was assigned to the libellants. This constituted the title set up by the libellants. The claimants [Obadiah Woodbury and others] did not deny these facts; but they asserted a title to the brig (as intermediate purchasers), derived under a sale made by the master after the stranding, upon the ground of an alleged necessity; and no question was made as to the regular derivation of their title, if the sale of the master was justifiable in point of law, under all the circumstances.

S. Hubbard, for libellants.

C. P. Curtis, for claimants.

STORY, Circuit Justice. I regret, that the pleadings in this case do not present all the points made in argument in a clear and definite form. The old course of practice, indeed, was to introduce additional matters by way of replication and rejoinder; but the modern and certainly the better practice, is to present new facts, when rendered necessary, in an amendment of the libel and answer, as is the ordinary course in chancery. There is, too, a want of certainty and precision in some of the allegations on both sides, which is somewhat embarrassing; for, although the admiralty proceedings do not partake of the severe strictness of the common law, they do not yet require, that all material facts should be stated with convenient certainty as to times, and facts, especially when they are the turning points of the cause. However, as no exceptions on this head have been taken at the hearing, they must be deemed to be waived by the parties, though not without inconvenience to the court.

The principal, though not the sole question, arising in the case is, whether the sale was under all the circumstances a valid sale. Be-

fore, however, proceeding to the consideration of this question, it may be well to dispose of some minor objections, which are taken to the title of the libellants. In the first place, it is said, that the title of the libellants, under the abandonment, cannot be maintained, because it was not accepted at the time when the sale was made by the master; but it was at that time utterly rejected; and that the subsequent title under the assignment, not being propounded in the pleadings, is not matter properly in contestation in the suit; for the cause must stand before the court to be heard, secundum allegata et probata. It is certainly true, that the proofs and the allegations must coincide; for if there be proofs to facts not put in contestation by the pleadings, or allegations of facts not established by proofs, in each case they must be rejected. But, as I understand the posture of the present case before the court, the assignment is not now offered as a substantive proof of the creation of an original title, but merely as proof of the final acceptance of the title by abandonment under a compromise; and if so, then, by the final acceptance of the abandonment, the title of the libellants relates back to the time of the loss, and takes effect, retroactively from that period. An abandonment once made is considered as a continuing abandonment, notwithstanding a refusal to accept it, unless it is withdrawn by the party offering it. But this is the less necessary to be minutely sifted, because this court could, by allowing an amendment of the libel, bring the matter properly before it, since it is a well known rule of the appellate courts in admiralty causes to allow the parties non allegata allegare et non probata probare, under some qualifications not here necessary to be mentioned.

Then, it is said, that as the sale was made before the abandonment was accepted, it was a sale made by the master, as agent of the owners; and, that by implication the abandonment admits the necessity of the sale, and adopts and justifies it. But here, again, I cannot admit the entire correctness of the argument. When a loss takes place, for which an abandonment may be made, the master is not exclusively the agent of the original owners of the ship; but he is the agent of those, who retroactively become owners of the ship, in consequence of that event, if an abandonment is made, and is justifiable. The common doctrine is, that the master is the agent of all concerned in the voyage; and, that he becomes, by relation, the agent of the underwriters, whenever an abandonment has been accepted, from the time of the loss, to which that abandonment refers, although the abandonment may not have been offered or accepted, until months after the event. So that in the present case, if the libellants have finally accepted the abandonment, and it was persisted in by the owners, and never withdrawn by them, but was a continuing abandonment on their side, the act of the master in the sale is to be treated as his act, as agent of the libellants, and not of the original owners. Now, there is not a scintilla of proof in the case to establish the fact, that the original owners ever withdrew their abandonment, or that it was ever contemplated by the parties, that the assignment in October, 1828, should take effect as a new and substantive title, independently of the abandonment. There is this additional consideration, which ought not to be forgotten; and it is, that the sale of a ship by an owner, out of possession, is not the sale of a chose in action. I know of no principle of law, that establishes, that a sale of personal goods is invalid, because they are not in the possession of the rightful owner; but are withheld by a wrong doer. The sale is not, under such circumstances, the sale of a right of action; but it is the sale of the thing itself, and good to pass the title against every person, not holding the same under a bona fide title, for a valuable consideration without notice; and á fortiori against a wrong-doer.

Then, again it is suggested, that after the sale, the brig was gotten off, and was repaired and came to Boston; and was there sold, and a register afterwards taken out in the name of the purchasers, without any objection on the part of the libellants, although they had full knowledge of the facts; and consequently their conduct amounted to a waiver of all claim against the vessel, at least against bona fide purchasers. And especial reliance is placed on the letter of the libellants to the agent of the original owners, dated the 14th of May, 1828, in which they express their determination to refuse the abandonment, and state that the brig is then in Boston; and then add: "As she is now within your own control, as agent for the owner, if you do not take possession of her in his (their) behalf, the company must consider the sale of her at Nantucket, as affirmed by him (them), and that she is sold for his (their) account. We, of course, shall contest the validity of the sale, as it regards ourselves; and we think, the owners ought to contest it themselves."

Now, I agree to the doctrine stated at the bar, that if an owner stands by, and knowingly suffers an innocent person, without giving him notice of his title, to purchase his property, and to be misled by his silence in not asserting that title, a court of equity will treat it as a fraud upon the purchaser, and grant an injunction against the positive assertion of that title. And I also agree, that a court of admiralty, so far as it possesses jurisdiction, does administer it upon the principles, not of strict law, but upon the principles adopted by courts of equity. And, if this case stood upon proofs of this sort, going directly to the point, I should not hesitate to say, that for this ground alone the court would be bound to dismiss the libel. But the facts of the present case, present a clear distinction. At the time when the transactions in Boston took place, the title was in contest between the original owners, and the

underwriters. The latter did not claim or assert any title, but denied the abandonment to be good. And on the contrary, the original owners insisted, that the abandonment was good. So that neither party was in a situation to assert a title, without compromitting rights then actually in contestation. And it was, therefore, under such circumstances the duty of the purchaser to look to his title-deeds, and to satisfy himself by all due inquiries of the true nature and validity of his title; for the maxim of law, caveat emptor, strictly applied to him. So far, indeed, were the libellants from acquiescing in, or countenancing this sale, that the letter of the 14th of May expressly establishes their determination to contest it. Then, as to the lapse of time, which is relied on as another point of objection to the maintenance of the present libel. The abandonment was in March, 1828; and the final acceptance of it, if at all, was in October of the same year. The present libel was filed in September, 1834, after the lapse of nearly six years. Now, courts of admiralty, like courts of equity, govern themselves in the maintenance of suits by the analogies of the common law limitations; and are not inclined, unless under very strong circumstances, to depart from those limitations. But, independently of any statutable limitations, courts of admiralty will not entertain suits for stale demands. The party, who seeks redress there, must come within a reasonable time, or the court will not incline to exert its powers actively in his behalf. And if there were suitable allegations and proofs in this cause, that, after the final acceptance of this abandonment in October, 1828 (which, as we have seen, must relate back to the loss in the preceding March,) the brig had been within the ports of Massachusetts, and within the reach of the process of this court, for a reasonable time, to the knowledge of the libellants, I should much incline to the opinion, that after such a lapse of time the libel ought not to be maintained. But no such allegations and proofs are brought forward, so as to justify the court in such a proceeding.

We are, then, driven to the consideration of the question already suggested, whether the sale made by the master was, under all the circumstances, justified by necessity. If it was, the title of the claimants is unexceptionable. If it was not, then it seems to me, that the libellants are entitled to a decree for possession upon their title under the abandonment. The facts, as stated in the protest, are as follows: The brig, having on board a cargo of rice and cotton, sailed on a voyage from Savannah for Boston, and, on the 23d of March, 1828, was stranded on the south-west side of the island of Nantucket. On the next day, assistance was obtained from the shore, and the anchors were got out and hove tight, in order to start the vessel, but without success. In the course of the forenoon, the wreck-master came on board with twenty men, and pursuant to his directions, the deck-load was thrown overboard. They then hove on the cables again, but with no beneficial effect. They then proceeded to open the hatches, and discharge the cargo from the hold; and then hove on the cables again, but to no purpose, as the tide had fallen, and there was a considerable surf rolling in shore. The captain and crew remained on board that night; and the day following nothing could be done, as the wind blew strong at the south-east, and there was a heavy surf. After the weather moderated, the cargo was, with much difficulty, got on shore. The wind and the surf of the sea had driven the brig so far on shore, as to render it impossible to get her off. Such is the statement of the protest, which, in many of the important particulars, is corroborated by the other evidence in the case. It further appears from the evidence, that the place, where the brig was stranded, was a sandy beach, about twelve miles distance by sea and six miles by land from the town of Nantucket, and that she was at no time high and dry there. The depth of water about her varied; sometimes it was ten feet, and sometimes six feet; and she was no time of the tide out of water. The cargo was discharged in about five days; and the spars, sails and rigging were then stripped off and carried on shore, and sold in small lots to the highest bidders. After the cargo was discharged, the brig became loose in the sand, and slewed round, and lay with her broadside to the shore. She was sold on the 28th day of March, by the master, at public auction, where she lay, for $127, at the same time that the spars, sails, and rigging were sold. The latter brought $422.40. No efforts appear to have been made after the brig was unladen, to get off from the shore, though she had not then sustained any serious injury. Three intelligent surveyors, at a subsequent period, estimated the cost of repairs of her hull as not exceeding the sum of $492.25. The brig was gotten off by the purchasers soon after the sale, and was carried to the port of Nantucket, and there repaired. The whole cost of the brig to the purchasers, including her repairs, and outfits to Boston, is represented to have been $2,494.67; and she was actually sold, under their orders, at Boston, in July, 1828, for the net sum of $2,736.41.

Such being the general outline of the facts in evidence, the question is, whether, connecting these facts with the opinions of the witnesses given in the case, the necessity of the sale is clearly made out. I agree at once to the doctrine, that it is not sufficient to show, that the master acted with good faith, and in the exercise of his best discretion. The claimants (upon whom the onus probandi of the validity of the sale is thrown) must go farther, and prove that there was a moral necessity for the sale, so as to make it an urgent duty upon the master to sell for the preservation of the interest of all concerned. And I do not well

know how to put the case more clearly than by stating, that if the circumstances were such, that an owner of reasonable prudence and discretion, acting upon the pressure of the occasion, would have directed the sale from a firm opinion, that the brig could not be delivered from the peril at all, or not without the hazard of an expense utterly disproportionate to her real value, as she lay on the beach, then the sale by the master was justifiable, and must be deemed to have been made under a moral necessity. And this I consider the true doctrine deducible from the case of Gordon v. Massachusetts Fire & Marine Ins. Co., 2 Pick. 249, where the subject is examined very much at large and with great ability.

It has been suggested at the argument, that as the stranding was on a home shore, at no great distance from the residence of the agent of the owners, the master was not authorized to sell without consulting the agent or the owners. I agree at once to the position, if there is no urgent necessity for the sale. But if such an urgent necessity does exist, as renders every delay highly perilous, or ruinous to the interests of all concerned, the duty of the master is the same, whether the vessel be stranded on the home shore or on a foreign shore, whether the owners' residence be near, or be at a distance. I am aware of the doctrine maintained by my brother, the late Mr. Justice Washington, in Scull v. Briddle [Case No. 12,569]; and, unless it is to be received with the qualification above stated, I cannot assent to it. The fact, that the brig was actually gotton off by the purchasers after the sale, is certainly a strong circumstance against the necessity of the sale. But it is by no means decisive; for we are not, in cases of this sort, to judge by the event; for a vessel may be apparently in a desperate situation, and yet by some lucky accident, or unexpected concurrence of fortunate circumstances, she may be delivered from her peril. We must look to the state of things, as it was at the time of the sale; and weigh all the circumstances; the position and exposure of the brig; season of the year; the dangers from storms; the expense of any attempts to get her off; the probable chances of success; and the necessity of immediate action on the part of the master, one way or the other.

As to the position of the brig, there is abundant evidence, that it was truly perilous. She was on an open shore of shifting sand, exposed to the constant action of the surf, and in case of a storm, to the full fury of the wind and sea. Indeed, the testimony is exceedingly strong, and I had almost said, conclusive, that if a southerly storm had occurred after the sale, and before the brig was gotten off, she would have gone to pieces. One did occur, a few hours after she was gotten off, which several of the witnesses think would have been fatal to her, if she had been on the shore. The probability of a storm, at that season of the year, upon our coast, is too well known to require any comment. It is the very season of blustering and variable weather, which has rendered the vernal equinox proverbial for its dangers and uncertainties. Some unsuccessful efforts had been already made to get the brig off; and a storm, which had already taken place, had driven her higher up, and broadside to the shore, and of course had placed her; being constantly in the surf, in a more hazardous situation. Considerable expense would necessarily be incurred in any new attempts to get her off, because the cables and anchors, and purchases used on a former occasion had been left in the surf, and could not be regained; and if the probability of success was small, this very expense would be a dead loss to all concerned. If a storm should, in the mean time, take place, a total wreck would be almost inevitable. We find, too, from the evidence, that, of all the vessels stranded upon the shore of Nantucket, a very small proportion have ever been gotten off. A list of such vessels is appended to the evidence, which establishes this fact beyond controversy. One of the witnesses (a very experienced merchant and wreck-master) says, that there has not been a brig or ship got off from the south and west seaboard of the island of Nantucket for twenty years before the Sarah Ann, except the brig Pearl.

The circumstances, attending the sale, are also fit to be brought under review. Full public notice appears to have been given; and a large company attended. The sale appears to have been fairly and freely conducted; and no combination is suggested to affect the biddings, or to produce a sacrifice of the property. Several of the witnesses testify, that they went there to bid for the vessel; but that she was sold for a price beyond what they thought her worth, or they were willing to give. Now, certainly, under such circumstances, a sale in the immediate neighborhood of a populous and flourishing seaport of great intelligence and enterprise, for so small a sum as about $549 for the hull, spars, sails, and rigging, does indicate a very strong opinion in those present, that the chances of saving the brig were few, and her situation was eminently perilous. The hull, rigging, and other appurtenances sold for a sum less than one-seventh of the valuation in the policy of insurance. The necessary repairs to put the brig in order, if she should be gotten off, are admitted to be properly estimated at $492. To these must be added, the expenses for the rigging, &c., estimated at about $444, and of getting off the brig estimated at about $1,205, making in the whole an outlay, by the purchasers, according to their estimate, of about $2,690, a sum sufficiently startling to be given for a stranded vessel, valued at $4,000 in the policy, and in all probability a very high valuation, and then in a state of peril, from which it was uncertain, whether she could ever be delivered.

It is said, that some of these charges and expenditures are over-estimated and imaginary. But the clerk of one of the purchasers, who settled the accounts, swears, that the whole

cost of the brig, including the expense of getting her off, and repairing her and her outfits, amounted to $2,494 73; and that the purchasers settled the account between themselves, and adjusted the balance upon the footing of that amount. Even if we were to strike off one fifth part from this amount for any supposed over-estimate, it would still appear, that an expenditure equal to one half of her valuation was indispensable to restore her to her former state. But to this in all fairness must be added the positive risk of a total loss of the brig upon the shore. In point of fact, the brig was afterwards (as we have seen) sold at Boston for $2,736, so that even in the successful events, which were anticipated, she brought little more than an indemnity to the purchasers.

In regard to the opinions of the witnesses, that the brig was capable of being gotten off, and that farther efforts ought to have been made for that purpose, there is the testimony of Mr. North, who assisted in discharging her, who speaks pointedly and affirmatively on the subject. He was on the spot, and doubtless he is on that account a witness of peculiar competency. The mate and one of the seamen, of the brig, also speak to the same point with equal decision. But their testimony is of less weight, because they were unacquainted with the shore, never having been at Nantucket before or since that occasion. Capt. Adams, also, who was the agent of the underwriters, expresses a similar opinion. But as he was not present, while the brig was ashore, and as he had never been at Nantucket at any other time, his testimony certainly is not so stringent, as it otherwise would be. But, what is most material in the consideration of this testimony is, that so far as it respects getting off the brig, it proceeds upon the supposition, that the weather should continue favorable, and no storm should occur.

If the case were to be decided by this testimony alone, I confess, that I should incline to listen to it with great confidence in its accuracy. But it is encountered by very strong testimony on the other side, coming from numerous witnesses, inhabitants of the island, who are well acquinted with the shore, and with the situation of the brig. They express a very decided opinion, that the conduct of the master in directing the sale was prudent and proper under the circumstances; that the brig was in a perilous situation, with little chance of being gotten off; and in case of a storm, with almost a certainty of going to pieces; that the brig was sold for as much as she was worth in her then situation, and for more than some of them were willing to give. And this, in an especial manner, in the opinion of the wreck-master, who went on board in the morning after the stranding, and continued to assist in all the operations, until the sale was completed; and his judgment must have had great weight with the master in all that he did, and all that he left undone. Under such circumstances, as a man of great experience, and a public officer, and entirely disinterested, I cannot but place great confidence in his judgment. He had peculiar means of forming a correct judgment, not only from his intimate knowledge of the coast, and the disasters thereon, but from his having been often employed as an agent in cases of wrecked vessels. He is fully confirmed in all his statements by another witness, who has also acted as a wreck-master and agent for a considerable number of years, and assisted in all the arrangements made in the case of the Sarah Ann, who says, "that if the brig had not gone off in two days more, in my opinion she would have been all in pieces. Where she lay was a sandy bank and bars without her. The sand was continually shifting around the wreck by the heave of the sea."

Now, when this testimony is connected with other established facts in the case, and especially with the season of the year, the imminent danger from any succeeding storms, the rareness of any successful efforts to get off any large vessels stranded on that shore; and the actual expenditure of a sum, fully equal to one half or more of the value of the brig, in order to refit her, and bring her to a suitable market for sale, it does seem to me difficult to resist the impression, that there was in the present case a moral necessity imposed upon the master to sell. I do not say, that the case is beyond all doubt; but it appears to me established by a weight of testimony and circumstances, which I am not at liberty to resist.

I feel the less difficulty in having arrived at this conclusion, because if I had felt it my duty to decree possession to the libellants, grounded upon the invalidity of the sale, the decree must have been upon the terms of making all due allowances to the claimants, for the expenditures of the original purchasers in getting off the vessel and repairing her. This is the case of a clear bona fide purchase, under circumstances calling for no inconsiderable indulgence, even if the strict law had been against the title. The general practice of the admiralty in all such cases is, to restore possession upon making compensation for all meliorations by the purchaser. See The Perseverance, 2 C. Rob. Adm. 239; Nostra de Conceicas, 5 C. Rob. Adm. 294. It is an equitable principle, analogous to that, which is constantly acted upon in courts of equity, and probably borrowed from the same common source, the civil law. And if meliorations ought to be decreed generally, a fortiori, the actual disbursements and expenses ought to be allowed, which were incurred to deliver the vessel from her peril; for they are in the nature of salvage. Where, indeed, the title is not only invalid, but the transaction is tainted with fraud or ill faith (which is not pretended in the present case), the rule would be different.

Upon the whole, my opinion is, that the decree of the district court, dismissing the libel, must be affirmed with costs.

[On appeal to the supreme court, the decree of this court was affirmed. 13 Pet. (38 U. S.) 387.]

Case No. 12,343.

The SARAH BERNICE.

[1 Hask. 78.] [1]

District Court, D. Maine. April, 1867.

FORFEITURE—LANDING GOODS WITHOUT PERMIT—IMPORTATION OF BRANDY—QUANTITY—ALLEGATIONS IN LIBEL.

1. To create a forfeiture of the vessel under section 50 of the act of 1799 [1 Stat. 665], for landing foreign goods without a permit, the goods must come from one cargo, and be landed from the same vessel, but not at the same time.

2. Allegations in the libel, as to the goods landed and their value, bind the government.

3. A forfeiture of the vessel is not created under the act of 1799 as modified by the act of 1827 [4 Stat. 235], prohibiting the importation of brandy in casks of less than fifteen gallons capacity, by a seaman landing about two gallons of brandy, all that remained of a purchase in a foreign port taken on board for his own use on the voyage home.

In admiralty. Libel in rem by the United States, claiming a forfeiture of the brig Sarah Bernice for landing foreign goods, subject to duty, of the value of $400, without a permit, and for importing brandy in a cask of less capacity than fifteen gallons. The claimant by answer denied the averments of the libel, and alleged that if any brandy was imported as charged in the libel, that it was in quantities allowed by law, and for the use of the crew.

Geo. F. Talbot, Dist. Atty., for the United States.

Bion Bradbury and L. D. M. Sweat, for claimant.

FOX, District Judge. This libel contains a number of counts. By the first, a forfeiture of the vessel is claimed for landing eight barrels of molasses of the value of $250, two barrels of sugar of the value of $150, and one thousand cigars of the value of one hundred dollars, brought in her from Cienfuegos, in the island of Cuba, and landed March 20, 1866, at Machiasport, not in open day, but in the night time and without the special license of the officers of the port, the articles being of the value of $400. The third count is for landing the same articles without any permit.

The second count is for landing five chests of tea, one box of tobacco, and ten gallons of brandy, brought in the vessel from St. John to Machiasport, and there landed in the night time on the 12th of April without a special permit. The fourth count is for landing those articles without any permit. The value of the articles landed is alleged to be over $400.

The fifth count claims a forfeiture for the importation from St. John, N. B., of brandy into Machiasport on the 12th of April, 1866, in a cask of less capacity than fifteen gallons. It appears that this brig was owned by the claimant, a resident of Machias; that she took on board as freight, a full cargo of molasses and two barrels of sugar at Cienfuegos bound for St. John; that by reason of bad weather on her voyage to St. John, her master found it convenient to make a harbor at Machiasport, and whilst there, in the night time landed three boat loads from the vessel, consisting of eight barrels of molasses, two of sugar, and ten boxes, each containing 100 cigars. There is no pretense that the molasses was purchased by the master or any of his crew, but it is claimed that this molasses so landed was saved by the crew from the deck where it had been spilled or foamed over from the casks in Cuba, and was gathered up, put into pork and beef barrels, and became a perquisite to be divided among the crew, being mixed with dirt and chips, and of little value. I do not find sufficient evidence to warrant such a conclusion. On the contrary, I am constrained to believe that all this molasses was purloined from the cargo by the officers and crew acting in concert, and that Machiasport was resorted to voluntarily for the purpose of landing it and defrauding its owner.

It appears that the cargo on its discharge at St. John fell short 1,000 gallons. This in itself would not be conclusive evidence of any plundering by the master and crew, as such an amount, I suppose is not unfrequently lost by ordinary leakage; but there is another circumstance testified to by the owner of the cargo, which satisfies me of the fraud of those on board, and that is, that a number of the hogsheads had been filled with salt water, a few gallons of molasses having been left in them to color the water; this must certainly have been done for a fraudulent purpose by those in charge of the vessel, and no explanation being given of it, I think I am fully justified in finding that the contents of the barrels were not of the poor, mixed description given to it by those participating in the robbery; and that I am justified in the conclusion, that as they had the pick of the cargo, they would probably take as good as they could find, and that the article in question was at least a good quality of Cienfuegos molasses uninjured.

After these goods were landed, the vessel proceeded to St. John, delivered her cargo and took on board a cargo of lumber destined for Philadelphia, together with a quantity of tea and a gallon or two of brandy. She again touched at Machiasport, landed in the night time the tea and so much of the brandy as had not been consumed, and also a barrel of molasses which was part of her Cuba car-

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

go, and which it is claimed, the owners at St. John gave to the captain on his representation that it was damaged.

The claimant contends that, as this vessel was destined for St. John, and did not intend to discharge her cargo at Machiasport, the landing of a portion of it at that place, would not work a forfeiture; and for this relies on the opinion of Washington, J., in U. S. v. The Hunter [Case No. 15,428], in which it was decided that a merchant vessel from which goods are unladen without a permit after her arrival within the limits of the United States, but before she has reached her port of destination, is not liable to forfeiture under the fiftieth section of the act of 1799. In that case the vessel was destined to a port of discharge in the United States, and unloaded part of her cargo before arriving there, whilst in the present case, the vessel was not destined to any port of discharge in this country, but was bound from one foreign port to another foreign port, and in the prosecution of that voyage landed in violation of law the goods in question in her home port.

The doctrine of that case however, has not been acknowledged in this circuit. Mr. Justice Story in The Industry [Case No. 7,028], and The Harmony [Id. 6,081], established a different doctrine, and held in the first case that this fiftieth section applies to all unlading of goods without a permit in any port or place within any collection district, whether such port or place be the port originally intended for the port of discharge or not.

It thus appears that of her cargo on board at Cuba, nine barrels of molasses, two of sugar and 1,000 cigars were landed in violation of law at Machiasport; and there is also evidence tending to show a landing of another barrel at Mt. Desert, but the same is not set forth in the libel. In order to work a forfeiture of the vessel, it must appear that the goods so landed were of the value of $400. In the first place, the claimant contends that the portion of the goods landed on her voyage from St. John to Philadelphia could not be united to those landed previously, in order to make up the requisite amount. I am however of opinion that the government has a right to insert and include in its estimate all the value of the cargo which was shipped from Cuba, and was on board when she first entered Machiasport, whether it was landed then, or at a subsequent time, provided it all the time remained on board as a part of the cargo. The language of the fifth section of the act of 1799, under which a forfeiture is claimed, is "No goods, &c., brought in any ship * * * from any foreign port or place shall be unloaded or delivered from such ship or vessel within the United States, but in open day, except by special license from the collector for such unloading or delivering, nor at any time without a permit; * * * and all goods, &c., so unladen shall become forfeited; and when the value thereof, according to the highest market prices of the same at the port or district when landed shall amount to $400, the vessel, &c., shall be subject to forfeiture."

These goods were all brought from a foreign port in this vessel; they constituted a portion of her cargo; were all loaded at the same time; belonged to the same person; were all destined to the same port; and the fact that a portion was landed at one time, on the passage to that port, and the residue remained on board and completed the voyage, and was afterwards brought back and landed at the same port where the other portion of the same cargo had been previously landed by the same crew, from the same vessel, without any unloading or unshipment, cannot save the case from the express letter of the act; although unladen on two different days, it was still an unloading of the cargo of this vessel, brought in her from a foreign port; and the interruption of these proceedings by sailing to an intermediate port, and afterwards returning with a portion of the same cargo, which was on board to enable its unlading and delivery, should not save it from forfeiture. A different construction would certainly go far to defeat this provision of the law; for a vessel might land from time to time, portions of her cargo in Passamaquoddy bay, taking care that the amount should be less than $400 at any time, and make a short trip to Campo Bello, complete her voyage, and then evade the forfeiture.

I think therefore the barrel landed in April, being a portion of the original cargo, should be included in fixing the value of the goods landed. I do not think that the tea and brandy can be so included and joined with the goods landed in March, and for the reason that they were not brought in this vessel from Cuba; they formed no part of the cargo on board when she made the first landing, and could not therefore have been landed at that time; they were not a part of what was then landed, and were in no way connected with it, and could not be. If they were so considered, I do not see but that a vessel might be liable to forfeiture, which should be running between here and the provinces, and should in the course of the season in violation of law, land goods aggregating the value of $400 during her several voyages, but of which not more than $50 in value was landed at one time, or constituted a part of any one cargo.

I think the cargo so landed must come from the foreign port together as a whole, at the same time, and be all landed from the vessel as a part of the foreign cargo, in order to create a forfeiture. If I understand the district attorney, he contends that this vessel, having sailed from the United States to Cuba, and there taken on board a cargo for a foreign port, if she illegally land foreign goods aggregating $400 in the whole, at various times, before she returns again openly to the United States, would be liable to for-

feiture; his theory is, that it is but a single voyage until her return. Such is not the evidence in this case; the cruise from Cuba ended at St. John. She did not then intend to return to her home port, but took freight for Philadelphia. That was certainly a new voyage, as much as if she had gone to Australia; and I cannot perceive but she would have been openly liable for forfeiture, if she had landed a quantity of goods when bound to Australia, as she would be in this case; the goods landed being required in such case, to be added to those landed on the voyage from Cuba, in order to make up the sum of $400.

The allegation in this libel is that eight barrels of molasses were landed; but the proof satisfies me that nine were in fact landed. As the libel now stands I am not justified in joining the ninth barrel to the other lot, so as to increase the amount apparently landed; the allegation and proof must conform, and this is a material variance. I must therefore hold the government to the charge of the eight barrels and reject the evidence in relation to the ninth.

But there is another serious objection in my view to joining the articles landed in April to those landed in March, so as to increase the value to $400; and that is, the libel does not charge them as being a part of one cargo, brought from a foreign port, and landed from the same vessel; they are in no way connected, and are not alleged as together constituting the offense of landing in violation of law, goods aggregating in value $400; but on the contrary they are distinctly averred and set forth to be entirely separate and independent transactions, each by itself, independent of the other, constituting such a violation of law as will create a forfeiture.

The government having fixed the value of the cigars by the averments in the libel, I am concluded by it; though if it had been omitted, I might have felt justified in finding the highest market value of Cuba cigars beyond the sum of $100 per M., but taking this as it is, with the count as framed I do not feel authorized in presuming that goods of the value of $400 were landed at either time from this vessel. The proof is, that the packages of tea were not full chests, but were halves and quarters, which are ordinarily spoken of as chests, being used rather as generic, than descriptive of the precise package. It is seldom at the present day, that whole chests of tea are seen; and when one of the crew speaks generally of five chests being brought on board at St. John, and another describes the chests as two half and three quarter chests, agreeing in number of packages, and the latter description being conformable to the custom of trade, I must adopt it as a true description of the packages.

The fifth count charges a forfeiture, by reason of the importation on board of said brig from St. John into Machiasport, of a quantity of brandy in a cask less than fifteen gallons. The act of 1799 as modified by act of 1827, prohibited importation of brandy in casks of less capacity than fifteen gallons; and declared that the liquor imported contrary to the provisions of the law, together with the ship or vessel on which it was imported, should be forfeited, and provided that nothing contained in the act shall be construed to forfeit any spirits imported or brought into the United States in other casks or vessels, or the ship or vessel in which they shall be brought, if such spirits shall be for the use of the seamen on board such ship or vessel, and shall not exceed the quantity of four gallons for each seaman.

It is in evidence that one of the seamen of this brig whilst at St. John purchased a quantity of brandy, took it on board the vessel, consumed a portion of it, and after arriving at Machiasport, landed the remainder, not exceeding two gallons. I am of opinion that by this a forfeiture was not created. The law in my view contemplates such a proceeding, and never intended that the vessel should incur a forfeiture thereby. This brandy was bought by one of the crew for his own use, and probably was to a great extent used up on the voyage; the original quantity did not exceed that allowed by the law, and it was on board for the use of the seamen, and at the time of its importation, there was no violation of the law; on the contrary it was within the very letter of the statute, imported for the use of the seamen. In my view, the law was founded on the supposition that there might be an overplus of spirits put on board at the place of departure for the use of the crew, and if on the vessel's arrival the overplus did not exceed the four gallons, no forfeiture was incurred of either the vessel or the article. But it is said it was landed at Machiasport, and was not therefore for the use of the seamen on the voyage. This objection would apply to any landing of spirits at the port of final discharge, when the spirits had been obtained for the use of the crew. It is not a long time since it was quite customary to furnish daily grog to the ship's crew. Suppose in such a case, a cask of rum had been purchased by the master at Cuba for the use of the crew, the whole of which would have been consumed on an ordinary voyage to Portland, but by reason of favorable winds the vessel arrives before the rum is consumed, having on board not exceeding a gallon for each of the crew, what is to be done with the article? According to the construction of the district attorney, if it is imported, or brought into the country in a cask less than that mentioned in the statute, it works a forfeiture of the vessel, notwithstanding it was clearly intended for the use of the crew. The only course that could be adopted would be to destroy it before its arrival, because it is not the landing, but the importation, bringing into the country, which creates the forfeiture. Hun-

dreds of such instances have occurred, where the surplus of spirits, procured in a foreign port for the use of the crew, and which remained at the end of the voyage, not being in excess of the statute quantity, has been landed without objection; and I cannot doubt, that if spirits are in good faith put on board for the use of the crew, never constituting any portion of the cargo, but used from by the crew in whole or in part until the arrival of the vessel, it is clearly within the proviso of the 105th section of the act of 1799, and that a subsequent landing of it, if less than four gallons for each seaman, without payment of duties, whilst it might subject the article itself to forfeiture, would not in any way affect the vessel from which it was landed.

In the case of The Governor Cushman [Case No. 5,646], Miller, district judge of Wisconsin, held the vessel not subject to forfeiture, where two of the crew had taken on board at Sarnia, without the knowledge of the captain, a quantity of distilled liquors in excess of that allowed the crew by law, the quantity being nine gallons at one time, and on the subsequent occasions three gallons each time. From the facts of the case as reported, it is manifest there was a landing in the States of a portion of these liquors, and that they were originally purchased by the crew for sale, rather than for their own use; and yet, the court decreed no forfeiture was thereby incurred. That case was much stronger for the government than the present, both in the quantity of liquors, and object of the purchase.

Libel dismissed. Certificate of probable cause.

Case No. 12,344.

The SARAH B. HARRIS.

[1 Hask. 52.] [1]

District Court, D. Maine, Dec., 1867.[2]

FORFEITURE—LANDING GOODS WITHOUT PERMIT—VERBAL ASSENT—PERMIT OBTAINED BY FRAUD.

1. A verbal assent from the customs officer to land goods brought from a foreign port is not a compliance with the 50th section of the act of 1799 [1 Stat. 665].

2. Such assent will not save the vessel from forfeiture for landing such goods without a permit.

3. The permit under that act must be in writing.

4. A permit obtained by fraud is no permit, and will not save a forfeiture of the vessel.

In admiralty. Libel in rem by the United States claiming a forfeiture of the schooner Sarah B. Harris, for landing at a domestic port without a permit, goods brought by her from a foreign port. The owners claimed the vessel, and made answer that the goods landed were fish caught in an American vessel by American fishermen and not subject to duty, and that the proper customs officer verbally assented to their being landed.

Geo. F. Talbot, Dist. Atty., for the United States.

Lewis Pierce, for claimants.

FOX, District Judge. This vessel is charged with a violation of the 50th section of the Act of 1799, by landing without a permit at Deer Isle, in Oct., 1866, one hundred barrels of mackerel of the value of ten thousand dollars, brought in said schooner from Port Mulgrave in the province of Nova Scotia.

It is shown that this schooner, Wilson master, being enrolled and licensed for mackerel fishing, with a license to touch and trade at any foreign port during the cruise, sailed from Deer Isle in the month of August on a mackerel trip in Bay of Chaleur. After having taken about 200 bbls., she went into Port Mulgrave and on the 15th of October, there took on board as freight one hundred barrels of mackerel and arrived at Green's landing about the 21st of the same month.

On the 22d of October the captain produced to Vincent J. Warren the deputy-collector for Deer Isle, an "inward foreign manifest," describing the cargo of the schooner as one hundred barrels of mackerel shipped by Chas. R. McDonald, of American fishing schooner Olivia Maria, taken on board at Port Mulgrave, N. S., and consigned to Davis & Co., at Green's landing, Deer Isle. The captain made oath that the manifest contained a just and true account of all the goods on board. There were in fact over 300 barrels on board the schooner, but all but 100 barrels were taken by the crew on the trip.

At the same time the master presented to the deputy-collector a certificate of Chas. R. McDonald under oath, setting forth that he as master of American schooner Olivia Maria had landed 100 barrels of mackerel at Port Mulgrave for transportation to the port of Deer Isle in the United States, and that the same were caught in said American vessel by American fishermen and shipped to the said port of Deer Isle by the schooner Sarah B. Harris of Deer Isle, John Wilson, master. This document was signed and sworn to before the comptroller of customs at Port Mulgrave, Oct. 15th, 1866. Accompanying this certificate was the sworn statement of same date of A. W. Hart and David Wild, who represent themselves as merchants at Port Mulgrave, and who declared on oath that the statements of McDonald in his certificate, are just and true and worthy of full faith and credit. Warren testifies that Capt. Wilson entered his vessel and made entry of the 100 bbls. of mackerel, and that he gave Wilson no written permit, but thinks he gave him a verbal one. That Wilson asked him if it was all right and he told him, "Yes, go ahead and land your mackerel," and therefore they were

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[2] [Affirmed in Case No. 16,223.]

unladen. It is quite manifest upon the statement, that the goods in question were brought to the knowledge of this deputy-collector. He was informed that they were a portion of the cargo of the Sarah B. Harris, taken by the crew of the Olivia Maria, transhipped from her in the province of Nova Scotia, and forwarded by the Sarah B. Harris to the United States.

The deputy-collector at Deer Isle believing these mackerel not to be dutiable goods, gave his assent to their being landed, but never granted any written permit for that purpose. The government claims that the permit required by the 50th section of the act of 1799 is a document duly authenticated by the proper officers, and that the verbal assent of the officers to the unloading of the cargo is not sufficient to save the vessel and cargo from forfeiture, and although both the collector and the master, in ignorance of the law, may have supposed a verbal assent was sufficient, yet that cannot alter the law as each party is said to know the law, and the ignorance of the officer of the customs as to the true construction of the law, cannot change the law and make an act legal and valid, which otherwise would be invalid. However harsh such a principle may apparently be, such is and must be the law. Everybody is presumed to know the law, to understand its effects, and must therefore comply with it; and any mistake of any executive officer of the government by which a party is led to violate it, cannot be used as a justification or excuse when he is called upon to answer for its violation. Mr. Justice Story, in U. S. v. Lyman [Case No. 15,647], well remarks, "The collector is but a mere ministerial officer. It may be his misfortune or the misfortune of the public, that he misinterprets the law, but certainly he cannot alter it. The collector had no authority to admit Lovejoy to enter the goods, or give bonds for the duties. The whole proceeding was irregular, and not binding on the United States. * * * The receipt of the bond by the collector was no estoppel to the United States, since no act of his, not within the scope of the law, could vary these rights." When the act therefore prohibits the landing of goods without a permit from the collector and naval officer of any of the ports, what did the law contemplate and intend by these words? Could it have intended thereby, merely the assent of these officers however manifested? Or did it not mean some documentary evidence manifesting their assent? I apprehend an examination of these provisions of the act will leave but little doubt in the mind of any one as to the true meaning of this clause.

The 45th section prohibits the landing of any ship-stores without a permit first obtained from the collector and naval officer; something is to be obtained, not the mere consent of these officers. So too, by the 46th section entry is required of the baggage and tools of a person arriving in the United States, and if he is not the owner of them, a bond is to be given, "and in compliance with the conditions aforesaid and not otherwise a permit shall and may be granted for landing said articles." This certainly indicates something more than a verbal assent to the landing. Something is to be granted by the officers which is here termed a permit. The same language is to be found in the 47th section regulating goods carried to and brought back from a foreign port. It enacts, that after certain formalities shall be complied with, "a permit shall be granted for landing the same." The law having thus in various sections declared "that a permit shall be granted for landing," the 49th section proceeds to declare the form of all permits.

The next section is that, under which a forfeiture is now claimed, which declares the vessel to be liable to forfeiture, if goods, wares, or merchandise of the value of $400 are brought from any foreign port and unladen from her without a permit from the collector and naval officer. Can there be any doubt that the permit so required is one required in the previous section, the form of which is prescribed to be authenticated by the signature of the collector and naval officer? I cannot entertain any doubt on this point, but for satisfactory reasons, I proceed to a further examination of the facts of the case, to ascertain the circumstances under which this verbal assent of the deputy-collector was procured by the master of this schooner.

Wilson represented to the deputy-collector that these mackerel were caught by an American vessel, and produced the certificate of the master of that vessel to substantiate his statement. The deputy-collector relying on this statement, and supposing that in such a case the goods were not subject to duty, admitted them to entry duty free, and gave his assent to their landing in the manner above stated. The government claims that in this a gross fraud was perpetrated, that the mackerel were not thus caught, but that on the contrary they were British mackerel, the property of John Morse a resident at Port Mulgrave; and from a careful examination of the testimony, I am of opinion that such was the fact, that McDonald had no interest in them, but that they belonged to Morse.

Two of the crew of the Sarah B. Harris have been examined; their testimony is, substantially, that on a Sunday morning, they went ashore at Port Mulgrave. One of them was acquainted with Morse, and Morse told him he had 100 bbls. of mackerel which he wanted sent to Green's landing, and wished to know if the Sarah B. Harris would take them. The witness introduced Capt. Wilson to Morse, and Morse informed him what he wanted; the freight to be paid was spoken of. Wilson wanted one dollar per barrel, which Morse thought high, said it was an extra rate, and that if he could not get them in clear of duty, he would rather not send

them. Wilson told him he had no doubt that he could get them in.

No trade was then completed. The next morning, Monday, Oct. 15th, they all met again at Morse's store. Morse and Wilson went out leaving the two witnesses in the store. Soon they returned with Chas. McDonald, master of schooner Olivia Maria, and Wilson then said he would not take Morse's mackerel, but he would take one hundred barrels for Chas. McDonald, at the same rate. The same day the mackerel were taken from the wharf and put on board the Sarah B. Harris by the aid of her boats and crew and of a couple of Englishmen with a boat loaded at Port Mulgrave. One of these witnesses says that McDonald's vessel was at anchor in the harbor one hundred and fifty yards off, but neither he nor his men in any way assisted in putting the mackerel on board the Sarah B. Harris, whilst Morse was present on the wharf helping put the mackerel in the boats.

Two more of the crew, Tyler and Smith, speak of the mackerel as being taken from Morse's wharf, and one of them says that they were shipped by Morse, but I think little reliance can be placed on the evidence of this witness on this point as he does not appear to have been present at any of the interviews with Morse.

The ship's-husband of the Olivia Maria testifies that "McDonald returned to Boston in her Nov. 1st, with 190 bbls. of mackerel only, her capacity being over 350 bbls. and that he never received any of the proceeds of the 100 barrels landed from the Sarah B. Harris, and never had any benefit from them. He heard something about one hundred barrels shipped by McDonald, but never could get any direct information about them. That McDonald made three trips that season and sent home by steamer to Boston 280 barrels of mackerel consigned to Clark & Woodward, which he obtained from them through terror of law suit."

What reason McDonald had for so shipping them, and what he intended to accomplish by so doing is not quite apparent, as it is manifest that he could not have expected to conceal from the crew the amount of fish taken on his first trip, after he had shipped them directly to his home port, where he had to return with his crew, all of whom were interested in this cargo on the trip, which had all to be adjusted with the ship's-husband; it would therefore have been an utter impossibility to conceal from the ship's-husband the amount of fish taken, and the same reasoning strikes me with great force in its application to the one hundred barrels in controversy.

If these had been caught by the crew of the Olivia Maria, it must have come to the knowledge of the ship's-husband, and he would have enforced his right, against all parties claiming the property, he owning 7-19 of the vessel. This he does not pretend to have done. If these were taken by the Olivia Maria, what has become of the crew's share of these 100 barrels? On their return to Boston, which was only nine days after the S. B. Harris arrived at Deer Isle, when they settled with the ship's-husband for their loss, would they not at once have called him to account for this one hundred barrels, more than one third of the whole catch of their trip? Would they not have claimed of him their share and insisted on his looking after them, and finding what had become of them or the proceeds? Every man was interested in this parcel to more than one-third of all his earnings on the trip, and each and all would have proclaimed the fact of the shipment of the one hundred barrels by the S. B. Harris, and their evidence would have been conclusive upon all parties.

For a different reason and one quite conclusive, it seems incredible that McDonald should have shipped these mackerel by the S. B. Harris. He had no occasion for doing it; the mackerel were shipped Oct. 22; his vessel was then at Port Mulgrave repairing as is alleged; he had 190 barrels more; his vessel was bound to Boston; she could carry 350 or 375 bbls. Why, if she had this one hundred to carry, did she not take them herself, instead of paying the extraordinary freight, as is admitted, of one dollar per barrel, when she was bound to her own home port, where her crew were to be discharged and settled with, and where mackerel are usually higher than at Green's landing, and would undoubtedly have brought something more than at this small fishing port. The crew of the Olivia Maria would never have allowed such a freight to be paid, and their property carried where it would not be worth as much as if it was to remain on board and complete the voyage home, nor would the master be so insane as to thus diminish his own share of the profits of the voyage.

There is the testimony of Sullivan Green which corroborates this view quite forcibly. He states that shortly after these mackerel were landed he was in Boston, and one of the present claimants directed him to "tell Charly," one of the consignees of the mackerel at Green's landing, "to make out the freight and the packing bills of the Maria J. Morse mackerel, that John Morse shipped to him by the Sarah B. Harris." It is claimed that Green is the informer and that his testimony on that account should not be credited. If the claimant, who was present in court and heard Green testify to these declarations, desired me to discredit it, he could at least have taken the stand and denied the statement of the witness. Not having so done, I cannot but think it was substantially true; his refusal is an admission that he cannot deny the statement, and if so, it is the express admission of one of the claimants that these mackerel were shipped by John Morse, and of the cargo of the Maria J. Morse as is alleged by the government.

The 71st section of the collection act de-

clares "that in all actions, suits or information to be brought where any seizure shall be made pursuant to this act, if the property be claimed by any person in every such case the onus probandi shall lie upon such claimant;" * * * but "only where probable cause is shown for such prosecution to be judged of by the court, before whom the prosecution is had."

Marshall, C. J., in Locke v. U. S., 7 Cranch [11 U. S.] 348, says: "Probable cause means less than evidence which would justify condemnation; and in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion."

With this burden on the claimants, I will examine the testimony offered by them to remove it. The first is that of Wilson, the master of the schooner; his testimony is in deposition and be in no part of it contradicts the statement of his own crew produced by the government. The excuse is, that the claimants' counsel were not advised that the government had such testimony in evidence and that it is not true, if so, it is extremely unfortunate for the claimants that in the deposition of Wilson as taken, there is not a more sharp and positive denial of Morse having been directly or indirectly concerned in the affair, when from the beginning it seems to have been well understood that the crew claimed that the mackerel were Morse's property. All that Wilson says touching this point is, that he took on board 100 barrels of mackerel shipped by Chas. McDonald, master of a vessel called the Olivia Maria, an American vessel. "Capt. McDonald did all the business with me, expressly himself. He took the mackerel from Sherman's wharf I think. McDonald told me that he landed these mackerel." On cross examination he states: "That he cannot tell how long the mackerel had been landed when he took them. The Olivia Maria was over to Ships' Harbor, Cape Breton, about two miles across from Port Mulgrave on the ways repairing. She had been ashore. I know John Morse; didn't know him to be a shipper of mackerel, but knew him occasionally to ship mackerel; have carried a cargo belonging to him and James Morse, this was subsequent to the present controversy."

I have no doubt that McDonald stated to Wilson all that Wilson says he did, and that the bargain was finally made with McDonald for the transportation of the mackerel, and yet, all that the government witnesses have stated may have taken place as related by them, and in this connection I cannot forget the statement of one of the witnesses "that Morse has gone to the provinces, having told him he was not willing to go to the state prison on account of his connection with this affair." The claimants have also produced certain documents from the custom house at Port Mulgrave, which they claim should have a controlling influence in the cause and exonerate this vessel from her seizure. These documents consist of the certificate of McDonald before recited, and of an "entry inward" of one hundred barrels of mackerel by the Olivia Maria, Chas. McDonald master, from Gulf of St. Lawrence, by Chas. McDonald, bearing date at Port Mulgrave, Oct. 15, 1866, for transportation from that port to the United States, duty free; on the back of this is the ordinary custom house oath of the importer, McDonald. There is also annexed the landing permit of the one hundred barrels of same date, and a "report outward," of the same date, of Wilson as master of the schooner Sarah B. Harris of the one hundred barrels of sea packed mackerel as shipped by Chas. R. McDonald as per certificate.

All these documents issued from the custom house on the same date, and as no duties were there payable on mackerel, and the customs authorities therefore had no particular reason for a diligent attention to the landing and reshipment, I believe them to have all been fictitious, made for the purpose of covering up the transaction, without in fact the customs officers having any knowledge or information about the property, excepting such as they derived from the parties who were engaged in the conspiracy to defraud the government. The entry in "report outwards" of "Chas. R. McDonald as shipper per certificate," if it has any meaning, so far as I can interpret it, means that McDonald has so certified, and not that the customs officers actually were personally cognizant of the fact.

Moreover, the landing permit bears date Oct. 15th, the entry of the mackerel having been made the same day. I cannot presume that diligent custom house officers allow goods to be landed in her majesty's provinces before entry, or a permit for landing. If so, were the mackerel in question landed on that day from the Olivia Maria? Most certainly not. Wilson, if he is to be credited, says she was then on the ways undergoing repairs at Cape Breton, two miles from Port Mulgrave, and that his crew took the 100 barrels from the wharf at Port Mulgrave. It is very certain therefore, that if Wilson's story is true, these barrels were not landed that day, they were on the wharf, and were not taken from the wharf by some of the crew of Olivia Maria, but by other parties. If they came from the Olivia Maria after the entry and landing permit on that day, they must have been brought by water from Cape Breton, and of course they would have been taken from the boats directly on board the Sarah B. Harris, instead of being carried to the wharf, there landed, and then put into boats and taken off to the S. B. Harris, making a great deal of unnecessary work and handling of the goods, without any possible advantage resulting therefrom. The Olivia Maria, Wilson says was then on the ways repairing. Of course her crew were not me-

chanics or shipwrights, and with a crew of 15 or 20 men unemployed, why did not McDonald set them at work in helping get the barrels on board the S. B. Harris if they were the property of the crew and owners, instead of employing men and a boat from the shore to do this work.

This entry and permit could not therefore cover and protect the goods in question, as they were previously on the wharf at Port Mulgrave. The documents can not apply to these goods, as the circumstances most manifestly show that they were not there in a situation and condition to need any entry or landing permit.

The clearance of the Sarah B. Harris from Port Mulgrave describes the one hundred barrels of mackerel as sea packed, and of course if they were the cargo of the Olivia Maria they could be none other, as they were secured by her to be carried to the United States, and it is not pretended they were repacked at Port Mulgrave; such must necessarily be the condition of fish transhipped from one vessel to another merely for transfer to the states; parties would have no inducement to have them repacked on shore in a foreign port, when they must subsequently be inspected and repacked after their arrival. Unfortunately for the theory of the claimants, the one hundred barrels which occasion the present controversy were not sea packed fish. The claimants have introduced the evidence of Wm. W. Folsom, originally taken by the government, in which he states "that as deputy-inspector of fish at Deer Isle, he inspected this cargo of the Sarah B. Harris. There were 200 barrels of sea packed mackerel, and she brought home one hundred not sea packed, which were reported to be Charles Mack's." The 200 or thereabouts was just the complement of the catch of the Sarah B. Harris on this trip, and there is no evidence of her having had any of her fare repacked before arriving at Deer Isle; the 100 barrels therefore could not have come from the Olivia Maria, as these were not sea packed according to the evidence, but were repacked, and all the testimony clearly demonstrates that none of the catch of the Olivia Maria had ever been repacked. The landing and clearing and entry having all been on the same day at Port Mulgrave, time would hardly have permitted of their being also repacked at the same time.

These fish, being foreign fish, were subject to a duty of five dollars per barrel on their entry at Deer Isle. By the fraud and misrepresentations of Mr. McDonald and Wilson, the deputy-collector was induced to believe they were taken by the crew of an American vessel and therefore not subject to duty, and without payment of any duty whatever he consented verbally to their being landed. Under such circumstances would a permit, if in legal form, according to the requirements of the statute have been of any validity? The collection act provides that goods subject to duty shall not be landed before the duties are paid or secured in some way, and that the permit required by the 50th section shall issue previously to the payment of the duties, or the receipt of security therefor. The permit in the present case, if it may be so described, was obtained from the government by the gross fraud of the pretended owner of the mackerel and of the master of this schooner; each of them was aware of the fraud and participated in it. If so, of what validity was this or any other permit? Whatever is done in fraud of the law is in violation of it, and the same rules apply to a fraud on the government as when practiced on an individual. Fraud vitiates every transaction. A deed when obtained by fraud is to be considered as a void contract as to the fraudulent party. Fraud will avoid even the most solemn proceedings of courts of justice. The force of a permit, under the 50th section of the collection act, obtained by fraud was well considered by Mr. Justice Story in Bottomley v. U. S. [Case No. 1,688], which was a proceeding under this section of the collection act, in which he decided that a permit obtained by fraud was no permit, and that goods landed under such a permit were liable to forfeiture, and that such forfeiture may be enforced under a general count similar to the present, charging that the goods were landed without a permit, for a void permit is no permit.

No explanatory evidence from the officers of the customs at Port Mulgrave, showing on their part a personal knowledge that this lot of mackerel arrived there on the Olivia Maria, or from Morse or McDonald, or the other owners of this schooner, who were the consignees of this portion of her cargo, is offered by the claimants to remove the more than probable cause of suspicion which exists against this vessel. Much of this explanatory testimony, if it exists, is within the control of the claimants, and might have been produced by them. Their failing to do so cannot but have an unfavorable impression upon the mind of the court. I do therefore order, pronounce and decree, that this schooner, Sarah B. Harris, with her tackle, apparel and furniture is forfeited to the United States.

[On appeal to the circuit court, the decree of this court was affirmed. Case No. 16,223.]

SARAH B. HARRIS, The (UNITED STATES v.). See Case No. 16,223.

SARAH E. BROWN, The (HOVEY v.). See Case No. 6,744.

Case No. 12,345.

The SARAH HARRIS.

[7 Ben. 28.] [1]

District Court, S. D. New York. Oct., 1873.[2]

MARITIME LIEN—SALE OF VESSEL BY MASTER—RATIFICATION.

1. A vessel, which had put into St. Thomas in distress, was there sold by her master. The purchasers at the sale put in one of themselves as master, and obtained advances from L. & Co., merchants there, to refit the vessel, which advances were made on the credit of the vessel. After the vessel had been repaired, she was sent to New York, where L. & Co. libelled her, in this court, for such advances. The former owners of the vessel, who had received their insurance on the vessel, and had also received from L. & Co. the net proceeds of the sale, filed a libel in this court, after the filing of L. & Co.'s libel, to recover possession of the vessel, which suit, by arrangement with the purchasers at the sale, resulted in a decree restoring the vessel to such former owners. They then contested the libel of L. & Co., claiming that the sale of the vessel was unauthorized, and that it gave the purchasers at it no power to bind the vessel: *Held*, that the question of the validity of the sale need not be considered, because the claimants were estopped, as against the libellants, from setting up its invalidity, they having ratified it by accepting the insurance, and by accepting the net proceeds of the sale when sent to them by the libellants, and by such arrangement with the purchasers.

2. The purchasers, therefore, were, so far as concerned this suit, lawfully in possession of the vessel; and that the libellants had a lien on her for the moneys advanced by them on her credit, to her then master, for necessary repairs to her.

[Cited in Nippert v. The Williams, 39 Fed. 826.]

This was a libel, filed June 5th, 1871, by Lamb & Co., merchants at St. Thomas, W. I., to recover $2,270, the balance of an amount of moneys advanced by them in January, 1871, as they alleged, on the request of Terence Cochran, master of the brig Sarah Harris, for the purpose of paying for repairs on the brig at St. Thomas, she being there a foreign vessel. John Harris, of Annapolis, Nova Scotia, answered the libel, alleging that he and one Jones were owners of the brig in 1870, and sent her to sea under the command of one Jollyman; that she put in at St. Thomas in distress, where a plan was devised, by Jollyman and others, for her sale there, and her purchase by the said Terence Cochran and two others; that she was so sold, and the purchasers agreed with the libellants that the latter should disburse the vessel; that she was sold without necessity, and bought by Cochran and the others, who put Cochran in as master, and had her fitted out and sent to sea, and she arrived in New York in June, 1871; that neither the sale nor the distress of the vessel was known to the former owners at the time, and the sale was unauthorized and void; that, after her arrival in New York, the former owners filed a possessory libel, in June, 1871, against her, and obtained a decree restoring her to them; and that the purchasers at the sale at St. Thomas had no authority to create a lien on the vessel. It appeared that Harris, the claimant, acting for the former owners, had not only collected insurance on the vessel as lost, but had received from the libellants the net proceeds of the sale of the vessel, and that the decree of restoration had been obtained by a compromise between him and the purchasers at the sale at St. Thomas.

John E. Burrill and C. Donohue, for libellants.

E. D. McCarthy, for claimant.

BLATCHFORD, District Judge. The answer sets up that the condemnation and sale of the brig at St. Thomas were fraudulent and without necessity, and are not binding on the claimant and do not affect his title to the vessel. It is not necessary to consider the question of the validity or invalidity of such sale, for the claimant is estopped, as against the libellants, from setting up its invalidity, because he ratified and affirmed it by his acceptance of the insurance money, and by his acceptance and retention of the entire net proceeds of the sale of the vessel, when such proceeds were sent to him by the libellants, and by his arrangement with those whom he now alleges to have been fraudulent purchasers of the vessel, at the time he obtained possession of her again. Regarding this vessel, then, as she must be regarded, as being, for the purposes of this suit, lawfully in the possession of those who actually controlled her at St. Thomas when the libellants furnished moneys there for supplies and repairs to her, it is manifest, on the testimony, that what supplies and repairs were furnished were, so far as they were necessary, furnished on the credit of the vessel, so as to create a lien therefor on the vessel, under the maritime law. That lien extended to the moneys the libellants advanced to pay for the necessary supplies and repairs, and was not displaced by the substitution therefor, either originally or afterwards, of any personal credit.

The proceeding taken in this court, by the claimant, to recover possession of the vessel, cannot affect the rights of the libellants in this suit. The libellants are entitled to an interlocutory decree establishing a lien in their favor on the vessel for the moneys they advanced or disbursed to her master, Terence Cochran, or otherwise, at St. Thomas, for repairing, supplying and refitting the vessel, so far as such moneys were necessarily disbursed to pay for repairs and supplies which were necessary and proper to enable the vessel to proceed to sea with safety; and there must be a reference to ascertain the amount of such moneys.

[On appeal to the circuit court, the decree of this court was affirmed. Case No. 12,347. For

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

[2] [Affirmed in Case No. 12,347.]

a hearing on exceptions to the commissioner's report, as ordered in the above decree, see Id. 12,346.]

Case No. 12,346.

The SARAH HARRIS.

[7 Ben. 177.] [1]

District Court, S. D. New York. Feb., 1874.

MARITIME LIEN—ADVANCES—CREDIT OF VESSEL—APPLICATION OF PAYMENT—COMMISSIONS—FREIGHT—COSTS.

1. A British vessel, in distress at St. Thomas, was sold there. One of the purchasers applied to L. & Co., to advance what was necessary to repair her, and put in their hands $2,000 on account of such advances. L. & Co., made advances, the account of which was signed by the master, amounting to $4,020 03. The vessel having gone to New York, was there libelled by L. & Co., and the court decreed that they recover the amount of moneys advanced or disbursed by them for repairing the vessel and to pay for necessary repairs or supplies. The commissioner, to whom it was referred to ascertain the amount, reported $2,648 67, being the said amount of $4,020 03, after deducting the $2,000, with interest, and $250, "commissions for disbursing same and sundries." The claimants excepted to the report. The evidence, as to items composing $1,654 13 of the $4,020 03, failed to show that they were paid for the repairs and refitting of the vessel. The libel stated that the vessel had carried freight, and prayed that it might be applied to the libellants' claim, but the libel was not filed against the freight, nor was it attached on process. *Held*, that, although the persons who were to be treated as owners of the vessel, were present and gave directions in person as to the advances, yet the fact that the vessel was foreign to St. Thomas, and that such owners and master did not belong to St. Thomas, made the case one of advances on the credit of the vessel.

[Cited in Stephenson v. The Francis, 21 Fed. 722.]

2. As the payment of the $2,000 was made towards the refitting and repairing of the vessel, it must all be applied as a payment on account of the $2,365 90 which was proved to have been paid for such refitting and repairs.

3. The libellants could not enforce in this suit any lien on the vessel, for advances for the purchase of the vessel.

4. Commissions on such advances as were made, when agreed on or shown to be customary in the trade, are proper items of allowance: but there was no evidence in this case to sustain the allowance of the $250.

5. The court could make no adjudication as to the freight.

6. The libellants were entitled to a decree for $365 90 gold, with interest at 6 per cent., but without costs.

In admiralty.

J. E. Burrill, for libellants.

E. D. McCarthy, for claimant.

BLATCHFORD, District Judge. The decision of the court in this case [Case No. 12,345], was, that the supplies and repairs furnished to the vessel at St. Thomas, were, so far as they were necessary, furnished on the credit of the vessel, so as to create a lien therefor on the vessel, under the maritime law; and that such lien extended to the moneys which the libellants advanced to pay for the necessary supplies and repairs, and was not displaced by the substitution therefor, either originally or afterwards, of any personal credit. The interlocutory decree was, that the libellants recover against the vessel "the amount of moneys advanced or disbursed by them at St. Thomas, to her master, Terence Cochran, or otherwise, for repairing, supplying or refitting the said vessel, so far as such moneys were necessarily disbursed to pay for repairs and supplies which were necessary and proper to enable the vessel to proceed to sea with safety," and it was referred to a commissioner "to ascertain the amount of such moneys," and to report thereon, and also "to ascertain and report what freight money, if any, came to the hands of Burdett & Pond, that may be applicable in payment of such advances," and the decree reserved all questions in regard to such freight moneys, and all other questions, until the coming in of such report.

The commissioner reports that he adopts the statement of account marked "L," annexed to the deposition of James D. Lamb, one of the libellants, taken on commission, as furnishing the correct amount of moneys advanced and disbursed by the libellants, at St. Thomas, to Terence Cochran, master of the vessel, or otherwise, "for repairing, supplying or refitting the said vessel, less a credit of two thousand dollars cash." He reports the amount of moneys so advanced and disbursed, as per such statement, at $4,020.03 gold. From this he deducts, as a cash payment, $2,000, leaving a balance of $2,020.03. To this balance he adds interest thereon from March 28th, 1871, to December 2d, 1873, $378.64, and also an item of $250 for "commission disbursing same and sundries since date of Statement L," making a total amount, exclusive of freight, of $2,648.67. He also reports, that the freight money collected by Burdett & Pond amounted to $1,520.67 gold.

The claimant has filed 22 exceptions to this report, and the libellants have filed 5. The main objection taken on the part of the claimant to the report is, that the commissioner, in allowing, as a whole, all the items contained in the statement L, has allowed items, which are not only not shown to have been items falling within the language of the interlocutory decree, as being for moneys necessarily disbursed to pay for repairs and supplies which were necessary and proper to enable the vessel to proceed to sea with safety, but are shown to have been items not falling within such language. An examination of the evidence shows that, of the $4,020.03, only items amounting to $2,365.90 are proved to be within the language of the decree, and that there are of unproved and unallowable items, $1,654.13.

It is contended, for the libellants, that, even if the libellants are not entitled, as against the vessel, to recover the $1,654.13, they are

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

entitled to apply sufficient of the $2,000 paid to them by Loren Cochran, to reimburse the $1,654.13, and then apply the rest of the $2,000 towards the $2,365.90. That would be, in effect, the same thing as allowing against the vessel the $4,020.03, and crediting the $2,000 generally, as a payment thereon. It is urged, that the claimant is not entitled to the benefit of that $2,000, because it was not paid by him, or by his agent, or out of the proceeds of any property of his. But the answer to this view is, that the testimony is explicit, that the $2,000 was deposited towards refitting and repairing the vessel. James D. Lamb says: "On account of the amount to be expended on the Sarah Harris." William C. Lamb says: "Towards refitting the Sarah Harris;" and the latter says, that the $4,020.03 was expended "in the purchase and refitting of the vessel." Having the $2,000 on hand for the express purpose of repairing and refitting the vessel, the libellants must be held to have acquired no lien on the vessel for repairs and supplies for any amount, except such as the $2,000 would not cover. They dealt with the vessel as being owned by Fullmore and the one or the other of the Cochrans, and were put in funds by them, to the extent of $2,000, for disbursing and advancing moneys for repairs and supplies, to be made and furnished. So far as the vessel is concerned, and on a question as to a lien on the vessel, the vessel and any claimant of her, as against such lien, is entitled to have the $2,000 applied to the repairs and supplies. If the libellants failed to take proper measures to be reimbursed their advances for the purchase of the vessel, they cannot enforce, in this suit, any lien on the vessel for such advances, nor can they, in this suit, apply, towards such advances, money which was put into their hands to be applied to pay for the repairs and supplies in respect of which a lien may be established in this suit.

Even though the vessel be regarded as having been the property of Fullmore, and of one or the other of the Cochrans, when the advances were made, and even though such owners were present, and gave directions in person for the advances, yet the fact that the vessel was all the time one foreign to St. Thomas, in her nationality and register, and that her owners and master did not belong at St. Thomas, taken in connection with all the evidence, make the case one of advances on the credit of the vessel. So far as I allow them, they were necessary, and were made at the request and with the approval of the master, and the presumption that the advances were made on the credit of the vessel is not repelled by satisfactory proof of the existence of funds for the purpose beyond the $2,000, or of any credit upon which funds could be raised. Nor was the lien displaced by the taking of anything in discharge or satisfaction of the sums advanced beyond the $2,000. The Grapeshot, 9 Wall. [76 U. S.] 129; The Lulu, 10 Wall. [77 U. S.] 192; The Kalorama, Id. 204; The Emily Souder, 17 Wall. [84 U. S.] 666.

The commissioner allowed $250, as a commission for disbursing the $4,020.03 "and sundries since date of Statement L." The $250 is claimed in the libel. It is not contained in Statement L, which bears the signature of Terence Cochran. Nor is it referred to as an item of claim in the testimony of either of the libellants. The testimony of each of them speaks of the claim as one for $4,020.03. Commissions on advances, such as those in this case, where agreed on or shown to be customary in the trade, are proper items of allowance. The Emily Souder, supra. But, in the present case, there is no evidence which can apply to the commission allowed. There is a witness who states that the usual commission at St. Thomas "for merchants making advances on freight" is 5 per cent. There was not here any advance on freight. Nor is there any evidence which can apply to the allowance of anything for "sundries."

The allowance to the libellants will, therefore, be $365.90 gold, with interest from March 28th, 1871, at 6 per cent. per annum. The libel states that the vessel has earned freight moneys, which should be applied to the payment of the libellants' claim, and prays that such freight moneys may be so applied, but the libel is not filed against them, and they have not been attached on process. The answer denies the right of the libellants to the freight moneys. I do not see how this court can make any adjudication in this suit as to the freight moneys.

I think this is a proper case for not allowing costs to either party. Shaw v. Thompson [Case No. 12,726].

[This cause was appealed to the circuit court, where the decree of this court, as rendered in Case No. 12,345, was affirmed. Id. 12,347.]

Case No. 12,347.

The SARAH HARRIS.

[13 Blatchf. 503.] [1]

Circuit Court, E. D. New York. Aug. 16, 1876.[2]

MARITIME LIEN — SALE BY MASTER — SUPPLIES — PURCHASER.

Where supplies are furnished to a vessel in a foreign port, on the order of a person who is in the actual command and possession of her, as master, by a person who has no notice of any circumstances to raise a suspicion as to the authority of such master, a lien on the vessel is created, even as against a former owner of the vessel who claims that she was sold in fraud of his rights, and that the purchaser at such sale placed such master in command of her.

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

In admiralty.

Goodrich & Wheeler, for libellant.

Edward D. McCarthy, for claimants.

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

[2] [Affirming Case No. 12,345.]

HUNT, Circuit Justice. On the 1st of December, 1870, the brig Sarah Harris sailed from Annapolis, Nova Scotia, on a voyage to Montevideo, South America. The brig was owned by John Harris and Richard Jones, who were residents of Annapolis aforesaid, and then living. On the 23d of January, 1871, the brig put into St. Thomas, in distress. Under judicial proceedings there had, the brig was condemned to be sold, was sold, and was purchased by Captain Fullmore and by Loran Cochran. If there was fraud in such proceedings, the libellant was not a party thereto, or cognizant of the same. Terence Cochran was put in command of the brig by such purchasers, and, at his request, as master, repairs were made upon her, and materials and supplies furnished to her, by the libellant, to the amount of $770, in gold. A portion of this was paid, but a portion, amounting to $340, has never been paid, and remains due to the libellant. Neither the said Fullmore, Terence Cochran, nor Loran Cochran were residents or citizens of St. Thomas, when the said materials and repairs were furnished, but were temporarily at St. Thomas.

The district judge ordered judgment in favor of the libellant for the amount of his claim, with interest and costs. [Case No. 12,345.] He held, that "the evidence presents all the facts necessary to give to the libellant a maritime lien upon the vessel proceeded against, for the repairs and supplies furnished by him." To this the appellants object, on the ground, that, at the time of making the repairs, the Sarah Harris was not in a foreign port. The lien claimed can only arise when that fact exists. The Lottawanna, 21 Wall. [88 U. S.] 558.

The libel alleges, that the brig was "a vessel foreign to the port of St. Thomas, and standing in need of repairs and supplies," when the supplies, &c., were furnished. In answer, Harris alleges himself to be of Nova Scotia, and to be the true owner of the brig, and that no other person is the owner thereof. In the amended answer, Harris and Jones, describing themselves as of Nova Scotia, and as "owners and claimants of the brig Sarah Harris," make various denials and allegations, not touching this point. When an allegation is made upon the one side, and expressly conceded upon the other, it is to be assumed to be true.

It is argued, again, that the evidence shows that the sale made of the vessel, under judicial proceedings, resulted in a purchase of her by Fullmore and Cochran; that Terence Cochran was appointed her master by these purchasers; and that the supplies and repairs furnished were upon his order, as such master. It is argued, further, that this sale was fraudulent as to Harris and Jones, that Terence was not their agent or representative, and, hence, that the vessel is not bound for such supplies. This argument would be cogent in a contest between Fullmore and Cochran, on the one side, and Harris and Jones personally, on the other. It is unsound when applied to the present libellant. The proof shows, that, if there was fraud, he was neither party nor privy to it. If there was collusion between Jollymore, the master appointed by Harris and Jones, and the board of surveyors and purchasers at St. Thomas, the libellant neither participated in it, nor had knowledge of it. He made the repairs to the vessel, and furnished the supplies and materials, upon the requisition of the person in command of her, without knowledge that his authority was or could be questioned. He gave credit to the vessel. Whether the vessel is still owned by the claimants, as they insist, or whether she is owned by the purchasers at St. Thomas, she was, at the time in question, a vessel in a foreign port, and the supplies furnished create a lien upon her for the payment of their value. One who repairs a vessel, or furnishes materials, may do so upon the order of the person in actual command and possession of the vessel, if there are no circumstances creating a suspicion of his right. To require a master to prove the title to his vessel, and his authority to command her, as a condition of credit to a ship, would often involve great difficulty, and would add an unnecessary embarrassment to the law of maritime liens. 2 Pars. Shipp. & Adm. pp. 7, 9, 329. Several cases from East's Reports are cited to the contrary. Upon examination, I find them all to be cases where a personal claim was made against the alleged owner of the vessel. In that case, actual ownership must be established. They furnish no authority as to the existence of a lien on the vessel. The judgment of the district court must be affirmed.

Case No. 12,348.

The SARAH JANE.

[1 Blatchf. & H. 401.] [1]

District Court, S. D. New York. Nov., 1833.

SEAMEN — STIPULATIONS IN ARTICLES — SHARES — COSTS — SETTLEMENT WITH SEAMAN — PROCTOR'S COSTS.

1. Courts of admiralty will not enforce, against seamen, stipulations in shipping articles which operate to their disadvantage, and are inserted in the articles in addition to the stipulations recognised by the act of July 20th, 1790 (1 Stat. 131), unless it appears, from evidence outside the articles, that the seamen fully understood the stipulations and received an adequate consideration therefor.

[Cited in M'Carty v. The City of New Bedford, 4 Fed. 827.]

[See The Australia, Case No. 667.]

2. A stipulation, that the seamen will prosecute their suits for wages in courts of common law only, amounts to a waiver of their lien upon the vessel, and is void, without it be proved that the matter was clearly explained to them before they entered into the stipulation, and that no prejudice to their rights would be incurred by them therefrom.

[1] [Reported by Samuel Blatchford Esq., and Francis Howland, Esq.]

3. Under a stipulation that all differences between the master or owners and the crew, shall be referred to arbitration: *Held*, that where the wages due were agreed upon and demanded, but payment of them was refused, there was no difference, within the meaning of the stipulation.

[Cited in The Grace Darling, Case No. 5,651; M'Carty v. The City of New Bedford, 4 Fed. 829; The International, 30 Fed. 377.]

4. Under an agreement, in regard to a sealing voyage, for shares of every article "procured by the crew," seamen cannot recover a share of freight earned by the transportation of merchandise.

5. An offer by a ship-owner, after wages to a seaman are due, and after a demand for them is made, but before suit is brought, to pay them at his counting-house, with a refusal to pay elsewhere, does not exonerate him from costs.

6. A settlement, after suit brought, with a seaman, whose name is continued afterwards as a party to the record, does not necessarily bar his proctor of his claim for costs.

[Cited in The Victory, Case No. 16,937; Peterson v. Watson, Id. 11,037; The Ontonagan, 19 Fed. 800.]

7. The rule stated, as to the circumstances under which costs will be denied to a seaman, after a settlement is made with him personally.

8. When the proctor for the seaman intends, after such a settlement, to continue the suit to recover costs, distinct notice should be given to the party sought to be charged.

This was a libel in rem, against the ship Sarah Jane, for seamen's wages, or shares of the proceeds of a sealing voyage. By the shipping articles, the seamen engaged themselves for a sealing voyage from New-York to the South Seas, Pacific Ocean or elsewhere, as the master might direct, and back to a port of discharge in the United States. The following written stipulations were subjoined to the ordinary printed form of the articles: "It is agreed, that one skin, or one gallon of oil, out of every hundred of which kind soever, shall be, and is hereby declared to be considered one share, and so on in like manner, tale or weight; by this proportion, the shares shall be estimated in and of the nett proceeds of every other article that may or shall be procured by the said crew, on the above voyage, and shall be brought to a port of discharge, or carried to any other market, either in the said schooner or in any other vessel or vessels which the said master may employ. And it is further understood and agreed, that all differences arising between the captain, officers, owners or crew, shall, at the completion of the voyage, be referred to the chamber of commerce; and, if the said chamber of commerce will not act upon and award a settlement, and suits at law are necessary, the court of common pleas for the city and county of New-York shall determine it, with the right of appeal to a higher tribunal." The vessel arrived at New-York, with a cargo of skins, on the 23d of April, 1832, and was discharged on that day and the day following. The nett proceeds of the sales, deducting various charges, were $11,337.87. The Sarah Jane also brought in, on freight for another vessel which fished in company with her, nine hundred skins, the freight for which, as agreed upon, was five skins in the hundred, or five per cent. of the proceeds. The libel was first filed in behalf of six of the crew, some of whom received their pay after the suit was brought, and released their demands. The libellants claimed to recover one per cent. of the proceeds of the skins, and one per cent. of the freight earned by the vessel. The claimants contended: 1st, that the libellants had, by their own agreement in the articles, selected other tribunals in which their claims were to be adjusted, and had thereby waived all right of action in this court, and that this court was barred of all jurisdiction in the matter; and, 2dly, that the claimants had been ready, since the 24th of May, to pay, at their counting-house, to the libellants, all to which they were entitled, and that the libellants were bound to demand it there, which they had not done, nor had they called there to receive it then, or at any subsequent time.

Edwin Burr and Erastus C. Benedict, for libellants.

William S. Sears, for claimants.

BETTS, District Judge. As regards the first point made by the claimants, that the agreement between the parties has ousted this court of jurisdiction, it cannot be doubted, as a general principle, that parties may provide for the adjustment of their controversies and claims between each other, without having recourse to courts of justice. An amicable tribunal may be designated by agreement of parties, and courts will uphold the determinations of such tribunals, without regard to the legality or equity of their decisions. Such method of disposing of differences is generally encouraged and upheld by courts of law. 1 Bac. Abr. tit. "Arbitrament"; 1 Com. Dig. tit. "Arbitrament." And, as parties in interest may wholly dispense with courts of law in the determination of their respective rights, it would seem to follow, that they may discriminate between different courts, and, by their agreement, select any one to the exclusion of all others. The principle is the same, whether the parties constitute a court for themselves, by naming referees or arbitrators, or submit themselves to some particular court or tribunal already existing. Neither does it detract from the efficacy of such submission, that the parties may thereby forego rights or privileges secured to them by law or in their contract. Persons of full age and legal capacity are allowed to deal with their own rights at their discretion. This principle is not opposed to the rule, that a man cannot contract in contravention of statutes or of the common law. A surrender, by an individual, of the advantages which the law would impart to him, is no violation of that rule. The consideration, therefore, that the law has secured a higher and more beneficial

remedy to sailors than that provided by these stipulations, would not, of itself, be sufficient to render the agreement void.

When a stipulation, of the character of the present one, has been fulfilled, so far as to submit the matter in controversy to the designated tribunal, courts of justice will not intermeddle with the proceeding or result, except upon grounds unconnected with the merits of the decision. The question in this case, however, is not, what would be the effect of an executed agreement of this kind, but whether the outstanding contract can be used in bar of an action prosecuted in a court having cognizance of the subject matter. Clearly, this would not be so in England (Thompson v. Charnock, 8 Term R. 139); and the same rule would, probably, prevail in this country. Still, there might be a remedy in damages for a breach of contract, against the party who should refuse to abide by it. Without, however, placing the decision in this case upon the incompetency of suitors to bar, by their own agreements, the usual jurisdiction of this court, and leaving that question open for decision when it shall be presented unmixed with other considerations, I deem it more fit to dispose of this point with reference to the peculiar character of the parties and that of the contract. Moreover, if this is a valid contract between the parties, although it should not oust the jurisdiction of the court, it might afford foundation for a claim of damages against the seamen, for a violation of its terms; and this court might well be called upon, in the exercise of its equity powers, to regard those damages, in measuring the compensation to be awarded the libellants for wages. The subject will, therefore, be considered in the broader view, whether, upon the case before the court, the libellants are, in any way, bound by the stipulation in question.

There are no facts in evidence in reference to this agreement, other than those which are disclosed by the contract itself. It will, then, be implied, that the seamen were of competent age and capacity to make the contract. The further inference would also follow, in the case of other parties, that they understood the terms of the contract, and the degree to which they bound themselves by it, and the consideration received by them in return; and the question is, whether the contracts of sailors with ship-masters and owners, in reference to services on voyages at sea, are subject to or exempt from the like implications and inferences. This description of contracts and undertakings by sailors, having relation to employment on ship-board, is regarded by courts of admiralty in a light widely different from agreements with ordinary parties. 3 Kent, Comm. 176; The Minerva, 1 Hagg. Adm. 347, 355; Harden v. Gordon [Case No. 6,047]; The Juliana, 2 Dod. 510. Seamen may possess capacity to bind themselves, in ordinary transactions, like other men; but, admiralty courts will intend, that in signing shipping articles, mariners do not mean to enter into any obligations beyond the simple and usual stipulations forming the essence of a shipping agreement, as recognised and sanctioned by the law maritime. Every stipulation binding a seaman, beyond the rate of wages, the time of their payment and the voyage to be performed, is, accordingly, looked upon with distrust, and is closely scrutinized before it is executed by those tribunals. The Minerva, 1 Hagg. Adm. 347, 352; Stat. at Large, 2 Geo. II. c. 36. This doctrine is venerable for its antiquity, and for the just philosophy upon which it is based. Chancellor Kent remarks (3 Kent, Comm. 176) that, in the codes of all commercial nations, seamen are objects of great solicitude and of paternal care. He characterizes them as usually a heedless, ignorant, audacious, but most useful class of men, exposed to constant hardships, perils and oppressions, and excluded, in a great degree, from the benefits of civilization. Lord Stowell observes of them, that they are, generally, ignorant and illiterate, notoriously and proverbially reckless and improvident, and, on all accounts, requiring protection, even against themselves. The Minerva, 1 Hagg. Adm. 355. Judge Story characterizes them as unprotected, and needing counsel; thoughtless, and requiring indulgence; credulous, complying and easily overreached, and requiring to be treated, in reference to their bargains, as courts of equity treat young heirs in dealing with their expectancies, wards with their guardians, cestui que trusts with their trustees. Harden v. Gordon [supra].

Whilst, then, it is not denied that seamen, in common with other men, are competent to make bargains in relation to their services or property, yet, because of their heedlessness and ignorance, courts of admiralty assume a species of guardianship in respect to compacts with them for professional services, and do not consider them concluded by agreements which are not palpably for their benefit, further than to the extent of the few stipulations which, with simplicity and distinctness, fix their compensation, the time of its payment, the voyage they are to perform and the period of their service. These they are supposed to comprehend, and to have nothing further in contemplation. All other agreements to which they may subscribe, in contracting for a voyage, are construed as subordinate to these, or to the rules of maritime law, and are held obligatory only so far as they are supported by that law, or are shown to be just and beneficial to the seamen, by proofs aliunde. Lord Stowell considers, that the mariner's contract contained, primarily, only two particulars; and that the reciprocal obligations of the parties resulting from the agreement were created and enforced by the general law, and did not depend on contract. A plain description of the

intended voyage, and the rate of wages to be paid, composed the whole agreement. The Minerva, 1 Hagg. Adm. 352. The act of parliament, passed in 1729 (2 Geo. II. c. 36), requiring masters of vessels to contract, in writing, with seamen, describes the particulars which are necessary constituents of the contract. To the like effect is the act of congress for the government and regulation of seamen in the merchant service. Act July 20, 1790, § 1 (1 Stat. 131). It enacts, that every master or commander of any ship or vessel bound from a port in the United States to any foreign port, &c., shall, before he proceeds on such voyage, make an agreement in writing, or in print, with every seaman or mariner on board such ship or vessel, (except such as shall be apprentice or servant to himself or owners,) declaring the voyage or voyages, term or terms of time for which such seaman or mariner shall be shipped, and the time the seaman shall go on board. The word "wages" is not used by congress in this clause; and, in that respect, and in the addition of the memorandum clause, it varies from the English statute. It is, however, manifest, that congress considered the provision as comprehending wages, because the same section compels the master, if he neglects to have such contract signed, to pay the highest wages which shall have been given for a like voyage at the port where the seaman shipped, within three months next preceding, besides subjecting him to a penalty for the omission. Hence, it is apparent, that the legislature deemed it of cardinal importance that the written agreement should secure seamen from all uncertainty and controversy as to the amount of wages they were entitled to receive. Still further, the 6th section of the same act declares, that the seaman shall be entitled, after the voyage is ended, &c., to the wages which shall be then due according to his contract, and shall be entitled to one-third part of his wages which shall be due to him at every port of discharge, unless the contrary be expressly stipulated in the contract. The supreme court of this state considers the act as enjoining that the rate of wages be specified, and holds that the mariner can recover no other wages than those described in the contract. Bartlett v. Wyman, 14 Johns. 260; Johnson v. Dalton, 1 Cow. 543. But whether, in American articles, the wages agreed upon are or are not required to be inserted, the 1st and 6th sections of the act of 1790 exact only those stipulations which it is palpable the sailor would clearly understand, and which must, of necessity, be expressed with plainness and simplicity—the time he is to render himself on board, the ports to which he is to sail and the period of his service. The practice with merchants and shipmasters, in this country and in England, has been to swell out the agreement with a mixed crowd of engagements on the part of the mariner. These are, in many particulars, engagements to perform what the law itself imposes as a duty on the seaman, and are in themselves superfluous and inoperative for good or evil. But obligations are sometimes inserted, which are not recognised by the law maritime, or by statute law, and the inquiry then arises as to the validity and effect of such undertakings.

The supreme court of New-York seems disposed to regard seamen merely as persons capable of making contracts, and to construe and enforce their agreements by the same rules which are applied to the contracts of other parties. Webb v. Duckingfield, 13 Johns. 390. So, the supreme court of Massachusetts decided, in an early case, that seamen, like other men, must be bound by their contracts when fairly made. Goodridge v. Peabody, 2 Dane, Abr. 462; Abb. Shipp. 434. In a prior case, however, in that court, the chief justice had ruled, that if seamen in any case were found to have signed an unreasonable contract, the court would relieve against it. Millot v. Lovett, 2 Dane, Abr. 461. Lord Stowell denies that there is any substantial difference as to this point between the courts of law and those of admiralty. The Juliana, 2 Dod. 516. Let the rule at law, however, be as it may, courts of admiralty proceed upon principles of liberal equity, when called upon to enforce bargains made by seamen, and hold that the party who sets up an agreement tending to the disadvantage of a seaman, is bound to produce satisfactory proofs outside of the contract, showing it to have been well understood by the mariner, and to be reasonable and just in itself. In relation to engagements which do not conform to the provisions of the statute, admiralty courts hold them to be utterly inefficacious and nugatory. Accordingly, contracts for a voyage specifically designated, "and elsewhere," have been held void for all beyond the ports particularly named. The Eliza, 1 Hagg. Adm. 182; The Countess of Harcourt, Id. 248; The Minerva, Id. 347; The George Home, Id. 377; 1 Hall, Law J. 209; Brown v. Jones [Case No. 2,017]; The Brutus [Id. 2,060]. The customary stipulation, that parol proof of misconduct, desertion, &c., may be given in evidence, any act, law or usage to the contrary thereof notwithstanding, has not been allowed to supersede the necessity of proving a desertion by an entry in the log-book, made as required by statute. Abb. Shipp. (by Story) 468, note; Malone v. Bell [Case No. 8,994]; Orne v. Townsend [Id. 10,583]; The Phœbe v. Dignum [Id. 11,110]; The Betsy v. Duncan [Id. 1,367]. So, a stipulation in the articles, that the seamen would pay for their own medicines, has been pronounced illegal, from its direct contravention of the policy of the act of congress. Harden v. Gordon [Id. 6,047]. Lord Stowell, speaking of the frame of the contract generally employed, says, that it would be difficult to point out half the impertinencies with which it is stuffed. The George Home, 1 Hagg. Adm. 378. And the general scope of his doctrines

with respect to these instruments is, that whatever is inserted in them beyond the requirements of the statute, is to be examined with care and jealousy, and is not to be enforced merely because it is the agreement of the party, but because of its propriety and fairness. The Juliana, 2 Dod. 504; The Minerva, 1 Hagg. Adm. 347; The George Home, Id. 370.

Seamen, in these extraneous agreements, are considered as under the pupilage of courts of admiralty, which, proceeding upon their knowledge of the want of prudence and discretion in this class of men, will not uphold such agreements, unless well satisfied that they were entered into with a clear knowledge of the obligations they imported, and upon a fair and adequate consideration. The will of the parties, as expressed in the agreement, is not received in those courts as absolutely the law of the contract. The eminent judge of the English court of admiralty expounds the principles governing the court in this respect, with a thorough understanding of the motives and purposes of the respective parties, and a fearless application of the dictates of elevated humanity and ethics. It will be borne in mind, that the English statute declares that the contract entered into by a seaman "shall be conclusive and binding on all parties, for and during the time so agreed and contracted for." But Lord Stowell says, in The Minerva, 1 Hagg. Adm. 355, that the act can hardly be conceived to apply to all engagements of a very special nature, which the ingenuity of later times may introduce into such contracts, not warranted by the general law, and imposing new obligations upon the mariner, and that such engagements cannot be considered binding, upon the general authority of private contracts executed by the parties, without taking into view what is the extreme disparity between the two parties to such special contracts—the shrewdness and experience of the one, and the heedlessness and ignorance of the other. He further remarks, that he thinks the known and uninterrupted rule of the admiralty court, founded on its equitable nature and constitution, would be interposed for the protection of that class of individuals against the danger of such undue advantage being taken of them. The Minerva, 1 Hagg. Adm. 358; The Juliana, 2 Dod. 504. Lord Tenterden, approving the doctrines of the admiralty court in this respect, adds his sanction and authority by observing, that admiralty, as a court of equity, will consider how far these special engagements are reasonable or not, and will bear in mind the general ignorance and improvidence of seamen, and their inability to appreciate the meaning and effect of a long and multifarious instrument. Abb. Shipp. 434. Judge Story, also, in Harden v. Gordon [supra], disapproves of special stipulations thrown into shipping articles, in language of great force and pertinency.

The principles pervading the authorities referred to have been frequently recognised and enforced in this court. In the application of the sentiments of those eminent jurists to the case under consideration, it is to be noticed, that the stipulation subscribed by the libellants deprives them of the peculiar privilege secured by the maritime law. They lose their lien on the vessel and on her freight. That privilege is of the highest importance to seamen. They can rarely, if ever, acquaint themselves with the responsibility of the master or of the owner, and the case scarcely occurs in which they make any inquiry on the subject. Besides, the personal obligation of the master would be deemed to continue only whilst he retained command of the vessel; and, as accident or the caprice of owners might take the command from him at the very commencement of the voyage, and he might be succeeded by one of no personal responsibility, it is obvious that a right of recourse to the master for the recovery of wages would be exceedingly precarious, even if the mariners ascertained his responsibility before shipping with him. An express bargain with seamen that they should look to the master alone for the payment of wages, would, upon every consideration applicable to the parties, be adjudged a palpable diminution of their rights, and unreasonable and overreaching in its character. If their remedy included, also, a right of recourse to the owner, and was limited to the personal responsibility of the master and of the owner, the same objections in principle would lie to such stipulation. The vessel might return, after a long absence, having secured a profitable adventure, and yet a change of proprietorship during her absence, or a loss of responsibility on the part of her owner and of her master, might leave the seamen without means to recover any of their earnings. The law will not permit the master to place them in that peril, by any direct and positive agreement obtained from them, unless their indemnity is made good in a way commensurate to the security they have foregone. Admiralty courts will withhold their sanction from such agreements, not only upon equitable considerations growing out of the improvidence and want of intelligence of seamen in their bargains, but also upon considerations of public policy, which urgently demand the encouragement of nautical services, both for the promotion of our vast commercial navigation and for the supply of the national marine. Had, then, the stipulation in the shipping articles expressly freed the vessel, and her freight and cargo, from a lien for wages, the stipulation would be disregarded in this court, unless there was unexceptionable evidence that it was fully understood by the seamen, and that they had been provided with a safe equivalent for the privilege surrendered by them. The compensation and wages of the crew must necessarily be understood to be embraced within the stipulation referred to, because that subject would be naturally the one out of which differences be-

tween the master or the owner and the crew would be anticipated as likely to arise. It is at least unnecessary to inquire what effect the agreement would have in cases of differences in respect to personal torts or other matters than wages or compensation for services on the voyage, as the defence under the agreement is interposed in a suit for wages. In such a suit, it is obvious that the stipulation would have the effect of an express bargain to relinquish the vessel and her cargo from a lien for wages, and to rely upon the personal responsibility of the master and owners. The suits to be brought in the court of common pleas, (a court of common law jurisdiction only,) in no way bind or charge the vessel, and are attended by a further disadvantage—that the crew cannot all join in one action, but each individual must prosecute his separate suit. It is also to be noticed, that by the laws of the state, a party who recovers less than $50 in that court, is charged with his own taxable costs in the suit, and with those of the adverse party, also, which, together, would rarely fall short of $30. In the present case, it is admitted by the claimants that each libellant is entitled to a certain balance of wages, amounting in no instance to quite the sum of $50. Suppose the payment of these sums is refused or unreasonably delayed, must the sailor lose them entirely? If he should sue for them in the common pleas, although judgment should be given in his favor, he would be subjected to costs equal to, if not greater than the whole amount of the debt, and the consequence would be that, under these shipping articles, it would be in the power of the master or owners to refuse payment of all balances under $50. As to those sums which are admitted to be due, the claimants can hardly expect to maintain their defence, that there is a difference between them and the libellants, which comes within the meaning of the engagement, and there would be nothing in that for the chamber of commerce or the court of common pleas to take cognizance of, under the supposed submission, particularly as there is evidence that the libellants offered, before suit brought, to accept those sums in full satisfaction.

Suppose, however, that the claim by the libellants to a share of the freight earned by the vessel should constitute a difference within the scope of the agreement, or that the seamen should deny the justness of the account, and refuse to submit to the adjustment made by the claimants, and demand a reference to the chamber of commerce, who is the party they must call to the arbitration? The master is the one with whom they directly contracted; but the proofs show that before the thirty days had elapsed and the seamen were entitled to their pay, he left this state, and has not since returned. They have, accordingly, no access to him, to call him to the reference; and he cannot be bound by an award without being a party to it, or receiving a personal notice to submit himself to the arbitrament of the chamber of commerce. The owner is not designated by the articles, and the seamen are not supplied with any convenient and sure means of recourse to him, to render him a party to the arbitration. The uncertainty and complexity of the agreement would, of themselves, be cogent objections to its justness and validity as against the seamen. Neither does the stipulation, by its terms, furnish the crew with any remedy upon the award, or with any redress for the refusal or neglect of the master or owners to submit to the arbitrament of the chamber of commerce. It only provides for a prosecution in the court of common pleas, if the chamber of commerce will not act upon and award a settlement, thus making the right of the seamen to sue at all, even in the court of common pleas, dependent upon the condition that the chamber of commerce refuses to act, and imposes on the libellants the obligation of invoking and properly carrying forward the action of that body, and of proving that proper notices were given to the master and owners to that end. The difficulties and entanglements into which sailors would be led by attempting to avail themselves of such an agreement, demonstrate, very clearly, that it is not one calculated for their benefit, and cannot, in its execution, but be prejudicial to their interests. For that cause, it ought to be regarded here with great distrust, and to be allowed to bind them only upon the clearest proof that this new and unusual engagement for the recovery of their earnings was one of their own choice, and that they stand, in all respects, as well protected by it in their rights as they would be under the rules of the law maritime which it was designed to supplant. There is no such proof before the court.

There are other objections to these stipulations, in respect to their want of mutuality and certainty. It appears that the mariners were mostly marksmen, and, therefore, undoubtedly unable to read writing; and there is no proof that the papers were read or explained to them. There is also an uncertainty as to what chamber of commerce was intended—that of New-York not being explicitly named. Moreover, the ship might discharge her cargo in any port of the United States, say New-Orleans, and be transferred to owners there, and yet the seamen be obliged to resort to the court of common pleas of New-York to recover their compensation, where, if the court had jurisdiction in the matter, and might otherwise afford them a remedy, there would be neither master nor owner to proceed against. But, without analyzing the agreement further, I am of opinion, for the causes before stated, that the shipping articles afford the claimants no bar to the action of the libellants in this court, nor any claim to damages for the non-observance of those articles by the seamen in the particulars referred to. The libellants

have a right, notwithstanding that agreement, to sue here directly, for the wages admitted to be due to them; and, in respect to that demand, the differences contemplated by the agreement, if it can be allowed to stand, do not exist. And, if the agreement applies to the demand for a share of the freight earned by the ship, it would be unavailing to the claimants, for reasons already assigned, and also because they cannot compel the libellants to divide their cause of action and pursue one part of it by arbitration or in a court of law, while the other belongs to the cognizance of this court, which is also competent to afford a full remedy upon both.

The libellants claim one per cent. of the freight received on the parcel of skins brought in by their vessel. This claim, in my opinion, cannot be supported. They are entitled to one per cent. of the proceeds of every article procured by the crew. The language of the agreement limits the right to a share of that which the services of the seamen should render the common property of the adventure. Transporting merchandise or freight does not fall within the description of proceeds "procured by the crew." The claim to a portion of this freight is supposed to be strengthened by the circumstance that the skins so brought in had been chiefly taken by this crew, but had, under an agreement of partnership between the masters of the two vessels, been allotted to the other vessel; and the libellants deny that they ever assented to or were consulted upon that arrangement. If this is so, they might, perhaps, maintain their suit for their shares of the nett proceeds of the nine hundred skins, as justly belonging to their own cargo. They do not now proceed against that property with that demand, and neither the frame of their libel, nor the parties in court, are such that the point can now be decided, whether they have any remedy in that respect. The claim for freight is rejected, and the libellants are entitled to recover the amounts due them by the ship's account, which they have admitted to be correct.

It is further proved, by the agent of the claimants, that after the accounts were made out on the 24th of May, the money was ready for all the crew at the claimants' counting-house, and every one who called for it received his pay there in full; and that these libellants would have been paid, also, if they had demanded their pay. Upon these facts it is insisted, on the part of the claimants, that they ought not to be charged with costs, but should have costs allowed them against the libellants. On the part of the libellants it is proved, that various demands were made for their wages after the sale of the skins; that they were put off by different excuses; that, after the claims were placed in the hands of proctors for collection, written notices of that fact were given to the claimants, and they were required to settle the demands with the proctors; and that, after a summons was taken out in behalf of the libellants, and a hearing thereon was had before the judge, the proctors for the libellants told the claimants' proctor and agent that the wages would be received without any charge of costs whatever, if he chose to pay them, but the offer was not complied with. It is plain that the dispute rested upon a mere punctilio, and the court would manifest its discountenance of a litigation for that cause, by compelling each party to bear his own costs, if its decision were not controlled by the clear right of the one party. The libellants were, on the 24th of May, entitled to their money. If it was not paid to them or to their agents, they had a right, by law, to sue for it instanter, and no other demand was necessary than that made by the action itself. Ernst v. Bartle, 1 Johns. Cas. 319. The duty of seeking the creditor and discharging the debt rested, therefore, on the debtor, and a readiness to pay is no acquittal of that obligation, unless the creditor is bound to seek payment at a particular place. Had the master remained with the vessel, and the money been there ready to be paid to the sailors when called for, the court would pointedly discourage bringing a suit for wages before a fair application for them on board. But, it seems to me, that when the master transfers his books and funds to the counting-house of his owners, the matter of right is clearly with the seamen to have their money offered to them personally. In this case, there was no difficulty in knowing where to make payment, as the claimants had written notice to pay to the libellants' proctors. As the libellants consented to receive the sum admitted to be due to them, without any charge of costs, after the court had authorized their taking out process against the vessel, and as the claimants, by their agent, refused to pay elsewhere than at their own place of business, the claimants put themselves manifestly in the wrong, and must take the consequences by discharging the costs which have accrued. The libellants, Bright and Warden, will, therefore, recover the respective sums before referred to, together with their costs to be taxed.

The agent of the claimants has settled with the other libellants since suit brought, and satisfied their demands. He deducted $10 from the wages of each, for the costs then incurred by their suit. No further costs will now be awarded against the claimants. If the names of those other libellants have continued to the proceedings, and further costs have accrued since such settlement, it is in a measure the fault of the claimants, as the court, on application by them, would have ordered the libel to be dismissed as to those parties, or have compelled them to give security for costs. It by no means follows, in this court, that a settlement with a seaman, out of court, after suit is brought, will bar his proctor of his claim for costs against the

respondent or claimant. A seaman may often be induced, for a pittance of ready money, to sacrifice his just rights, and the court must, therefore, be satisfied that such settlement was proper and fair before effect will be given to it. Nor will it ordinarily allow the officers of court to be deprived of their fees by an out-door settlement with a seaman, where his right is clear, and where he must have recovered debt and costs in the prosecution. Such settlement would be deemed a fraud on the seaman and on the officers of court. But as, in this case, there was a disputable point as to the jurisdiction of the court, which, if decided with the claimants, would have absorbed the libellants' whole demand, either in the costs of this court, or in those of the court of common pleas, to which they would then have been compelled to resort, I am not disposed to regard that settlement, although it may have extinguished the costs then accrued in favor of those libellants, as overreaching or inequitable. The continuance of the action before this court in the name of the other libellants enables the proctors to secure the greater part of their fees. I shall, therefore, allow the settlement to discharge the claimants from all costs which have accrued since that settlement to those of the libellants with whom they made the settlement.

When a proctor intends continuing a suit, to recover his costs, after the claim on which the suit is founded is satisfied to the mariner, it must be done on distinct notice to the party sought to be charged, that the suit is continued for the recovery of costs only. The court will judge of the reasonableness of the notice, in determining whether costs shall ultimately be decreed. Without such notice previous to further prosecution of the suit, all proceedings subsequent to the settlement will be at the responsibility of the libellant and his proctor; and, at the instance of the claimant or respondent, security could be required from those for whose benefit the action should be continued, adequate to the costs they might create. The court affords its protection to seamen against their proctors and advocates, as well as against masters and owners, and, if a suit is continued after notice of such settlement, upon grounds and reasons which are not ultimately sanctioned by the court, the expenses must be borne by the proctors personally, and will not be imposed on the seamen.

Case No. 12,349.

The SARAH JANE.

[1 Lowell, 203; [1] 2 Am. Law Rev. 455.]

District Court, D. Massachusetts. Feb., 1868.

ADMIRALTY—JURISDICTION—INLAND WATERS.

1. The admiralty has jurisdiction of a libel by mariners for their wages against a vessel plying on navigable waters, though these waters are entirely within one state.

[Cited in The Island City, Case No. 7,109; The General Cass, Id. 5,307; The Atlantic, 53 Fed. 609.]

2. Some cases on the subject of the jurisdiction in admiralty considered.

In admiralty.

L. S. Dabney, for libellants.

C. P. Curtis, for claimant.

LOWELL, District Judge. The libellants allege that they have served as mariners on board the sloop Sarah Jane, in voyages between Boston and Quincy. The jurisdiction of the court is called in question by the claimant, on the ground that the navigation was wholly within the internal waters of Massachusetts. In a case involving this question, and in which the present claimant was the libellant, Judge Sprague upheld the jurisdiction. The Canton [Case No. 2,388]. And see The May Queen [Id. 9,360]. The question has been argued anew, especially with reference to the bearing of more recent adjudications; and I have given it careful attention. I am well satisfied that the decisions above cited are right in principle, and shall only concern myself with the authorities.

Mr. Justice Story, in De Lovio v. Boit [Case No. 3,776], laid down the broad doctrine, that the grant of admiralty and maritime jurisdiction, in the constitution of the United States, was not to be limited by a regard to the bounds which the court of king's bench in England had succeeded in imposing upon the court of admiralty of that country. After the lapse of half a century, and after a contest scarcely less animated than that which the subject had excited in England some generations earlier, it has been established here that Judge Story was right. And even in England, parliament has found it convenient to restore to the admiralty the powers which a narrow construction of the statutes of Richard II. had taken away from that forum. In the United States, the jurisdiction in civil causes has been put upon the firm foundation that, in actions ex delicto, the place determines it, and in actions ex contractu, the subject-matter; and the place is not merely the high seas, but wherever navigable water is found, whether within or without the body of a state or county. Waring v. Clarke, 5 How. [46 U. S.] 441; New Jersey Steam Nav. Co. v. Merchants' Bank of Boston, 6 How. [47 U. S.] 344; The Genesee Chief, 12 How. [53 U. S.] 443; The New World v. King, 16 How. [57 U. S.] 469; The Magnolia, 20 How. [61 U. S.] 296; Nelson v. Leland, 22 How. [63 U. S.] 48.

The victory, indeed, has not been obtained without leaving some losses to be regretted. Upon the question, What is a maritime contract? the answer has not always been very liberal; and the very contract under consideration in De Lovio v. Boit [supra], that of insurance, is not yet universally recognized as being within the scope of the grant. Glou-

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

cester Ins. Co. v. Younger [Case No. 5,487]. So Judge Sprague's argument, that a contract to build a ship is maritime, has been overruled, though it can hardly be said to have been answered. The Richard Busteed [Id. 11,764]; Roach v. Chapman, 22 How. [63 U. S.] 129. And there are, possibly, some doubts yet unresolved concerning general average and some other matters. Cutler v. Rae, 7 How. [48 U. S.] 729; Dupont de Nemours v. Vance, 19 How. [60 U. S.] 162.

It is upon one of these doubtful points that this case is argued. It has been intimated by some of the learned judges, when delivering opinions in the supreme court, that perhaps the admiralty jurisdiction does not extend to contracts concerning the internal navigation of a single state. See Maguire v. Card, 21 How. [62 U. S.] 248; Bondies v. Sherwood, 22 How. [63 U. S.] 214; Allen v. Newberry, 21 How. [62 U. S.] 244; Nelson v. Leland, ubi supra; New Jersey Steam. Nav. Co. v. Merchants' Bank, ubi supra. None of these cases, except the first, is cited as an authority directly in point, and that case I will presently consider. But first, for the supposed reason for such a limitation. It is said that it may be derived by analogy from the limited grant to congress, by the eighth section of the first article of the constitution, of power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. Whether this clause does in fact restrict the powers of congress quite as closely as is sometimes thought, may perhaps be doubted. Certain it is, that the federal legislature has always exercised control over the building and navigation of vessels which were not intended for or engaged in commerce with foreign nations, or between different states. It has regulated the fisheries; the licensing, inspection, and navigation of yachts, tugs, and other vessels, which were not commercial in their character or occupation, or were destined only to navigate between ports of the same state. But whatever may be the just limits of the powers of congress over commerce and commercial contracts, I do not see any necessary connection between the two grants. There are strong reasons why the courts of admiralty should have cognizance of all maritime contracts, and by the constitution and laws they are granted it; and a contract is not the less maritime in its character because it relates to a navigation wholly within state boundaries. The cases of The Genesee Chief [supra], which uphold the admiralty jurisdiction of a collision within state boundaries as a maritime tort, decide, by necessary consequence, that a contract of affreightment between the same termini is a maritime contract. And the district courts have uniformly acted on this theory, and have taken jurisdiction of causes of salvage, towage, pilotage, and collision within the harbors of the several states, as well as upon the high seas. I am not prepared to say that the case of Maguire v. Card requires me to overrule these numerous precedents, and to deny to these libellants the name of mariner and the remedial process of the court of admiralty. That case decided that such a court would not enforce a lien given by the state law, for supplies and repairs furnished a domestic vessel employed in the navigation of the Sacramento river; and this decision appears to be rested in part upon the ground that the navigation was between ports of the same state. If that were the only point in the case, it must be held to overrule The New World v. King, 16 How. [57 U. S.] 469, which gave a remedy for breach of a passenger's contract on precisely such a voyage. But from the fact that this case is not alluded to, and that the point in question was not the most prominent, I am inclined to believe that the decision was intended merely to reassert the rule that, for supplies to a domestic vessel, there is no lien by the general maritime law; and that, if the state law gives one, the courts of the United States think it more convenient not to enforce it; as to which, see The St. Lawrence, 1 Black [66 U. S.] 522, which explains this doctrine fully. I am confirmed in this view by a decision made in the circuit court for this district, in 1861, by Mr. Justice Clifford, who took jurisdiction of a libel to enforce a contract of affreightment for a voyage between Boston and Chatham, in this state. Carpenter v. The Emma Johnson [Case No. 2,430], May term, 1861. A distinction was indeed taken, in the opinion, that the usual course of the voyage then under consideration would take the vessel out upon the high seas; but a doubt is thrown out, whether the language of the court, in Maguire v. Card, was intended to apply to bays and harbors generally; and this doubt is the more significant, because the language referred to concerning the purely internal navigation of a state, at page 251 of the report 21 How. [62 U. S.], does not mean internal by any territorial boundaries, as inter fauces terræ, but navigation between ports of the same state, as is abundantly evident from inspection of the whole opinion in that case; and if that dictum were a decision, or, at all events, if it were one of general application, the case of The Emma Johnson [supra], must have been decided adversely to the libellant. I am therefore of opinion that the weight of authority, as well as of principle, is in favor of the jurisdiction in this case.

Decree for the libellants.

Case No. 12,350.

The SARAH J. WEED.

[2 Lowell, 555.] [1]

District Court, D. Massachusetts. March, 1877.

MARITIME LIENS—MATERIAL-MEN—FOREIGN PORT—ASSIGNMENT—NOTES GIVEN—SHIP'S AGENT—SUBROGATION.

1. Jersey City is foreign to the city of New York, in the sense of the law governing supplies to ships.

2. The note of an agent of a ship taken by material-men does not affect their lien, unless so intended by both parties.

3. The lien of material-men is assignable; and the assignee should proceed in the admiralty in his own name, if the assignment is absolute. The case of Patchin v. The A. D. Patchin [Case No. 10,794], dissented from.

[Approved in Ross v. Bourne, 14 Fed. 861. Followed in The American Eagle, 19 Fed. 879. Cited in The M. Vandercook, 24 Fed. 474.]

[Cited in Murphy v. Adams, 71 Me. 118; Sibley v. Pine Co., 31 Minn. 202, 17 N. W. 338.]

4. The note of a third person, given as security for supplies to a ship, must be produced in court when a decree for the price is made against the ship, and the amount realized from the decree must be indorsed on the note.

5. Supplies furnished in Maine by a material-man in New York to a vessel belonging in New York, are foreign supplies, and give rise to a privilege.

[Cited in The Agnes Barton, 26 Fed. 543; The Vigilancia, 58 Fed. 700.]

6. This rule applied in favor of the ship's agent.

[Cited in The J. C. Williams, 15 Fed. 559; The Chelmsford, 34 Fed. 402.]

7. The general agent of a ship at her home port is not entitled to be subrogated to the lien of seamen whose wages he has paid in the regular course of his agency.

[Cited in The J. C. Williams, 15 Fed. 559; White v. $292,300, 19 Fed. 848; The Esteban De Antunano, 31 Fed. 923; The Amos D. Carver, 35 Fed. 667; The H. E. Willard, 53 Fed. 601; China Mut. Ins. Co. v. Ward, 8 C. C. A. 229, 59 Fed. 714; The Allianca, 63 Fed. 732.]

Supplies and repairs. The Sarah J. Weed was a steamboat built and owned in New York, and employed in and near the harbor of the city of New York in towing vessels and similar duty from October, 1874, when she was new, until (June, July) 1876. In that month the steamboat was sent to the Kennebec river in Maine, and was there employed during the remainder of the summer. She came to Boston in the latter part of 1876, where some repairs and supplies were furnished, and where she was afterwards arrested and sold at the suit of material-men, the owners having failed to stipulate for her. The sum of $6,897.13 now remains in the registry for distribution, and claims have been filed by material-men, mortgagees, and others against this fund. The various parties were heard upon the evidence produced by them respectively; and, as it was doubtful whether the fund would pay all in full, each was allowed to dispute the claim of the others.

E. Avery and G. M. Hobbs, for mortgagees.

R. D. Smith, for owners and agent.

F. Goodwin, for Donegan.

G. M. Reed, for Canfield and others.

F. Dodge, W. A. Herrick, and R. Thompson, for several petitioners.

LOWELL, District Judge. I will examine the disputed claims in their order on the docket.

Canfield & Quintard's claim: This firm claim a considerable balance of account for coal and wood supplied to the steamboat at their wharf at Jersey City. The custom was for the master to order and receive his supplies from time to time as he needed them, and once a month the bills were settled with the ship's agent, Mr. Weed, in New York. Weed occasionally paid cash, but more often gave his own notes to the order of Canfield & Quintard, which the latter would usually procure to be discounted.

1. Jersey City is foreign to New York, and therefore the material-men have a lien by the general maritime law, unless they have waived it. Thomas v. The Kosciusko [Case No. 13,901]; The John Lowe [Id. 7,356].

2. Taking a note is not a waiver of the lien, unless it was so intended by the parties. The Chusan [Id. 2,717]; The St. Lawrence, 1 Black [66 U. S.] 522; The Kimball, 3 Wall. [70 U. S.] 37; The Emily Souder, 17 Wall. [84 U. S.] 666. In this case no waiver was intended, for the material-men, when they received cash, receipted the account, and when they took a note, merely said, at the foot of their bill, "received a note," describing it.

3. It came out upon the examination of one of the petitioners that they had made some sort of an assignment of their property for the benefit of creditors, and that this petition is presented with the consent of the assignee. Thereupon the argument is made that a maritime lien is incapable of assignment.

That a debt secured by hypothecation may be assigned, together with the securities, would seem to be plain enough, but for some comparatively recent decisions in several district courts which have denied it, and which I will examine. But, first, I will show that many of the authorities which take the highest rank in the admiralty of this country have upheld such assignments.

In Thomas v. Osborn, 19 How. [60 U. S.] 22, a libel was brought against a ship by the assignee of a material-man, and Chief Justice Taney, at the circuit, made a decree in his favor. The supreme court reversed the decree, the chief justice dissenting. The arguments on both sides were on the merits

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of the case, and the simple point that the assignee had no standing in court which would have been decisive of the case was not alluded to by the bar or the bench. We have no report of the decision of the chief justice in the court below, but it is plain that he cannot have overlooked the point, because in Reppert v. Robinson [Case No. 11,703], his attention had been called to it; and he must have been satisfied that his dictum in that case could not be supported. Indeed, that dictum goes the length of intimating that a chose in action cannot be assigned in the admiralty, which no one will now contend for. "It is every day's practice in admiralty," said Nelson, J., "to allow suits to be brought in the name of the assignee of a chose in action." Cobb v. Howard [Id. 2,924]. Judge Sprague made a similar remark in Swett v. Black [Id. 13,690]; and the remarks in those cases were not dicta only, but were a necessary part of the decision.

In The Hull of a New Ship [Case No. 6,859], Judge Ware examined the point upon principle and authority, and held that the debt due a material-man could be assigned, and that the hypothecation went with it. A similar point was decided by Judge Betts, in The Panama [Id. 10,703]. In Judge Sprague's Reports there is a head-note which passed under his revision to the like effect in The General Jackson [Id. 5,314], though the case did not require, perhaps, a decision of the point, as the debt had been assigned only as security. A similar dictum by Judge Betts is found in The Boston [Id. 1,669]. In The Cabot [Id. 2,277], the holder of a bottomry bond bought the debts due the seamen, and took an assignment, and filed a separate libel for them. The learned judge upheld the assignment, and, of course, decided this point; but he informed the bottomry holder that he had caused unnecessary expense, because the law would have made the assignment for him, and that one libel would have sufficed for his bond and the assigned wages. The subrogation which the learned judge refers to is nothing but an assignment operated by the law itself, and is perfectly well established in the admiralty. See The Tangier [Id. 13,744], and the cases there cited.

"It is every day's practice" for underwriters who have paid a loss, or to whom an abandonment has been made, to sue in their own names in the admiralty, not only for damage against a vessel which has injured the ship which they have insured, but for general average, and other matters arising ex contractu or quasi ex contractu. The Monticello, 17 How. [58 U. S.] 152; Fretz v. Bull, 12 How. [53 U. S.] 466; Mutual Safety Ins. Co. v. The George [Case No. 9,981].

In The Wasp, L. R. 1 Adm. & Ecc. 367, a shipwright, who had assigned the debt, successfully maintained an action in rem for the benefit of his assignee. Our practice, as we have seen, permits the assignee to sue; but if the assignment has been of part of the debt only, the action may be maintained by the assignor for the benefit of himself and the assignee. Fretz v. Bull, 12 How. [53 U. S.] 466. In The John Cock, 17 Jur. 306, the assignee in insolvency of a master of a vessel applied for leave to prosecute in rem for the balance due the master, without the usual stipulation for costs, and we learn from 2 Pritch. Adm. Dig. p. 524, that leave was given.

The decisions on the other side to which I have referred begin with Patchin v. The A. D. Patchin [Case No. 10,794], in which Judge Conkling decided that the lien of a seaman could not be assigned. His reasons are singular. They are, that at common law liens upon chattels are closely limited and depend upon actual possession, and so from their very nature cannot be transferred; for the mechanic has no right to transfer the possession. He adds: "In the absence of any authority to the contrary, the mariner's lien ought in like manner to be considered as restricted in its design, and as merely personal." Now, nothing can be more different than a lien at common law and one in the admiralty, and especially in the necessity for possession; and to reason from one to the other, upon the very point upon which they differ the most strikingly, is not sound reasoning. Then, the absence of authority might properly lead to the conclusion, one would say, that a court of admiralty, which is equitable in its modes of dealing, would uphold assignments of choses in action; because, if it differed in this respect from other courts of equity, there would be no lack of cases in which those differences would be pointed out and explained. Authorities were not wholly wanting, since Judge Ware's decision and two of Judge Betts's had been made before this time, though I am not sure that any of them had been published. Judge Conkling's case was cited and followed by Judge McCaleb, in Sturtevant v. The George Nicholaus [Id. 13,578];[2] Judge Leavitt, in Logan v. The Aeolian [Id. 8,465]; and Judge Longyear, in The Champion [Id. 2,583]. Only in the last of these cases is there any examination of authorities, and Judge Longyear regrets that he has not had time to make a more careful search for the decisions. He does not cite Thomas v. Osborn [supra], nor the decision of Judge Ware, nor the more important of those of Judge Betts. I have found but one other dictum in this matter: Judge Magrath, of the district court for South Carolina, decided that taking a note would not discharge the lien of a material-man, but added, by way of dictum, that negotiating the note would discharge it. The

[2] The same learned judge admitted an assignment by subrogation in Carroll v. The T. P. Leathers [Id. 2,455].

Kensington [Case No. 6,122]. He says that Judge Story says that Emerigon says that such a lien is a "personal privilege." He had been citing The Nestor [Id. 10,126], and the opinion in that case does contain such a statement. But Judge Story does not mean that it is not transferable: to use his expression in that sense is to make a bad pun or quibble. What he means is, that it is a personal, as distinguished from a real, privilege, according to the classification of the civil law, which has nothing whatever to do with its being assignable or otherwise.

Judge Longyear refers to some decisions under the mechanic's lien laws of the several states, relating to land and buildings. The analogy is not very close, because those liens are imposed by positive law upon the land of persons who have in some respects less opportunity to protect themselves than a ship-owner has, and in favor of persons whose means of protecting themselves are much better than those of persons who supply a ship; and more especially, because land is not a ship, and the commercial law does not resemble the law of landed property. There is, undoubtedly, much difference of opinion and decision on this matter under those laws, and I do not think it worth while to examine the cases. The general rule of equity is clear, that what a man has he may assign, excepting damages for wrongs of a personal nature, such as slander or assault. The convincing reason is that given by Judge Ware, in the case cited, that the debtor cannot be injured by an assignment, while the creditor will lose part of the benefit of his security, if he cannot assign it.

The assignment here is said to be for creditors; and I have no doubt that all debts due and all securities for those debts are, and always have been, assignable for that purpose. Our bankrupt act expressly says, in section 5046, that there shall vest in the assignee all debts due the bankrupt, and all liens and securities therefor. This is only declaratory of the law as it has been held under all bankrupt and insolvent statutes; and admiralty liens have been repeatedly upheld in favor of assignees in bankruptcy and insolvency. I am of opinion that the general law of the admiralty is that debts due material-men are capable of assignment, together with the liens and securities therefor, and that this would be the law of assignment for creditors in bankruptcy or insolvency in any event.

As it is our practice for the assignee to sue in his own name, the petition must be amended by joining the assignee. Any notes that are outstanding must be produced to the clerk. As they were the notes of Mr. Weed, a third person, they need not be cancelled, unless the money holds out to pay them in full; but the amount paid under the decree must be indorsed on them.

Donegan's claim: Donegan was to furnish a condenser made of copper tubes for a given price at New York; but the vessel left the port before the articles were ready, and the contract was varied, so that the tubes were sent to Portland in charge of the claimant's foreman, who delivered them on board the vessel; but the master left that port before they were put into place, and took them with him. If this debt comes under the law of New York, giving a lien for work and materials upon domestic vessels, it is not barred, because the required notice may be recorded at any time within ten days after the vessel returns to the port where the debt was contracted; and this ship had not returned to New York when this petition was filed. But it is plain, upon inspection of the statute, that, in order to hold a lien, the contract must be made and the work and materials must be actually furnished within the state of New York. 3 Rev. St. 1875, p. 782; and so are the cases Moores v. Lunt, 4 Thomp. & C. 154; Phillips v. Myers, 30 How. Prac. 184; Crawford v. Collins, 45 Barb. 269.

Hence the question arises whether these materials were furnished in the home port in the sense of the general maritime law, or, in other words, whether there is an intermediate case between the foreign and domestic laws where there will be no lien. The Massachusetts lien law evidently proceeds on the same theory that the supplies must be actually furnished within the state to create a domestic lien. Gen. St. c. 151, § 12 et seq. I think the maritime law agrees with this theory, and holds that supplies furnished in a foreign port, though by a citizen of the state to which the vessel belongs, are foreign supplies. I have not had time to examine all the cases, but have a strong impression that there are such, and think I have once decided so myself. The converse has been held in two cases, that supplies furnished in the home port by a foreigner will be domestic supplies. Thomas v. The Kosciusko [Case No. 13,901]; The Eliza Jane [Id. 4,363]. I feel safe in deciding, without a more exhaustive examination of the authorities, that the law is so.

Weed's case: Upon the ground just mentioned, I think Mr. Weed may have a lien for the money he furnished to the master in Maine. It is always a question of fact of some difficulty whether the agent of a vessel does not look to the personal credit of the owners, or to his equitable lien on the freight. But upon the evidence of the state of credit of these owners and of the situation of the vessel, I think I may hold that for supplies furnished after the vessel left New York the agent may have a lien.

He asks for a charge, by subrogation, for wages which he paid seamen in New York. But here he stands very differently. Those were disbursements made in the usual course of his agency, like those made by the master of a vessel in a foreign port, in which Mr. Justice Curtis refused subrogation in The Larch [Case No. 8,087]. Much of the reasoning of the learned judge in that case seems to me to

put bounds to the doctrine of subrogation, which cannot be submitted to, as I have shown in The Tangier [Id. 13,744]; but the decision in The Larch [supra], which is binding upon me, denies the agent this right; and so is The Louisa, 6 Notes of Cas. 531. Subrogation is an equitable assignment, operated by the law itself, when justice requires it; as, for instance, when a surety pays the debt of his principal, not when an agent pays it; or when one having an interest in the property or res, or honestly believing himself to have an interest, pays an earlier incumbrance. None of these considerations apply to an agent, and I am not aware that the rule has ever been extended to such a person.

The claims, respectively, of Heather and Jarrard were for supplies furnished in New York, when the boat was in her home port; and the time for recording notice was suffered to expire without record. They are rejected.

Three mortgagees have made claims, which are admitted to be valid; but their payment must be deferred until those of material-men are paid in full. I am aware that in some recent cases it has been held that mortgages and the liens of material-men rank alike; and in other cases the opposite rule has been applied, which I now apply. But these were all cases of domestic liens, and their rank must depend on the law which gives them their existence; and I dare say all those cases may be reconciled by study of the several statutes. These are general liens in this case, and there is no sort of doubt that they take precedence of a mortgage, unless they have become stale. The material-men are to share pro rata, if there is not enough for all. In the case of a sea-going ship, the liens rank in the inverse order of their dates, if a voyage or voyages have intervened between them; but I see no reason to apply that rule to supplies furnished to a boat from week to week, as she goes about her ordinary work in harbor, nor to draw a line between such supplies and those furnished in Maine or Boston, because it does not appear that the material-men in New York had any sufficient notice that she was to be employed in a new service, and therefore they had no particular occasion or opportunity to enforce their rights before she left that port.

Let a decree be drawn in conformity with this opinion.

Case No. 12,351.

The SARAH M. NEWHALL.

[Blatchf. Pr. Cas. 629.] [1]

District Court, S. D. New York, July 24, 1865.

PRIZE—VIOLATION OF BLOCKADE—RELEASE.

Vessel and cargo released and restored to the claimants.

In admiralty.

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

BETTS, District Judge. The above vessel and cargo were libeled in this court June 5, 1865. The claimants on the record filed separate answers to the libel by different proctors, June 13th thereafter. The libel does not specify any belligerent acts committed by the vessel. The only averment is that "the goods, wares, and merchandise laden in the vessel were captured, as lawful prize, on or about the 23d day of May, 1865, in Tybee Sound, Georgia, at the entrance of the Savannah river, Georgia, by the United States steamer Azalea." The vessel and cargo seem to be owned in Nova Scotia. The cargo was shipped from various islands in the West Indies, and the consignment appears to have been generally through the port of New York to its general destination in Nova Scotia. It is alleged, in the test oaths to the answers, and in replies to interrogatories in preparatories, that the vessel turned from her course on the passage to New York, into the port of Savannah to obtain fresh water, the vessel being in distress for want of it. Savannah had then come into the military possession of the United States, and it is not made to appear that the original blockade of the port of Savannah was continued after its capture and occupation by the United States. The vessel and cargo, having been sent into this port, after capture, for adjudication, and the issue being perfected upon pleadings, the counsel for the claimants heretofore called upon the libelants to proceed to the hearing of the cause. But the United States attorney having, up to this term, delayed and declined to put the cause on trial in court according to the usual course of procedure in prize causes, and the proctors for the claimants now, at this term, in open court, praying that judgment be rendered in favor of the defense, pronouncing the prize action to be virtually abandoned by the libelants in neglecting to seek a final decree in the case, or to voluntarily withdraw it from the court, and surrender the prize property held in arrest under the process of the court, it is considered by the court that, as the libelants forbear to act, and thus tacitly decline to say anything in support of the action brought and yet formally pending in court, and thus intimate that they stand apprised of no legal cause upon which to ask the condemnation of the captured property, and as they ask no further action in court upon the cause, this suit no longer remains actively subsisting in court upon its minutes, and within the power of its processes, and that an appropriate decree be entered therein, directing the marshal to deliver up and restore to the claimants, or their proctors, the aforesaid brig Sarah M. Newhall, and her cargo, arrested and held in custody for proceedings in this prize suit.

SARAH SANDS, The (O'CONNOR v.). See Case No. 3,115.

Case No. 12,352.

The SARAH STARR.

The AIGBURTH.

[Blatchf. Pr. Cas. 69.] [1]

District Court, S. D. New York. Nov., 1861.[2]

PRIZE — LAWFUL MEANS OF WAR — BLOCKADE — ENEMY PROPERTY — DOMICILE OF OWNER — NEUTRALS — CONFISCATION — CLEARANCE PAPERS ISSUED BY ENEMY.

1. The hostilities commenced against the United States by the seceded states have produced a state of war between the two communities, as consequent to which the United States are authorized to employ against their enemies the means of resistance and attack, by land or naval forces, which are justifiable under the law of nations.

2. A blockade of the ports of their enemy is one of such lawful means, and is incident to the war power, and may be imposed by the president flagrante bello, without any act of the legislature declaring it.

3. Property belonging to a neutral who is domiciled and carrying on trade at an enemy port is enemy property. Traffic with the enemy is forbidden by public law. A sale of property during hostilities in an enemy port, by a person domiciled and trading there, to a neutral, does not pass the title, and the property still remains subject to capture as prize.

4. A neutral domiciled and trading in a belligerent port can neither hold title to property acquired there during the war, nor confer it upon others, against the interests imparted by capture at sea to the adversary belligerent.

5. There is nothing in the treaties of November 19, 1794 (8 Stat. 116), December 24, 1814 (Id. 218), and July 3, 1815 (Id. 228), between the United States and Great Britain, which gives to a British merchant, resident in a port of the seceded states during the war, an immunity from the general principles of public law applicable to resident neutral merchants.

6. The act of July 3, 1861 (12 Stat. 255), does not restrict the war powers of the United States. The confiscations provided for by the 6th section of that act, and by the act of August 6, 1861 (Id. 319), can be carried into effect by the prize courts of the United States, as respects property captured at sea.

7. The fact that a vessel carries clearance papers issued by the enemy, does not constitute, of itself, justifiable cause for her capture.

8. To constitute a blockade of a port, an adequate force must be stationed to render the entrance or departure of vessels into or from the port dangerous.

9. Further proof allowed to be given by the libellants on the question of violation of blockade.

10. Vessels and cargoes condemned as enemy property.

In admiralty.

BETTS, District Judge. No facts brought into discussion in the first suit, or in that against the schooner Aigburth, heard concurrently with it, are made subjects of controversy, other than those relating to the existence and efficacy of the blockade of the ports of Wilmington or Newbern, or other ports of the Atlantic coast south of Cape Henry, at the times the captures were made. Both vessels and cargoes were seized and libelled by the libellants as enemy property, and also for having committed, or attempted to commit, a violation of the blockade of the above ports. The vessels are claimed as the property of Cowlan Gravely, a subject of the queen of Great Britain, and a neutral in the pending war between the Southern or Confederate States and the United States. Various rights and titles to the cargoes of the respective vessels are set up, and sought to be maintained by the proofs given on the hearing of the causes. The facts in relation to the acts of the two vessels and the cargoes shipped on board were substantially these:

The brig Sarah Starr, with her cargo, was arrested by the United States ship-of-war Wabash, twenty-five or thirty miles from the bar at Cape Fear river, on the 3d of August last, the day she left port from Wilmington, in North Carolina, bound to Liverpool. The schooner Aigburth was arrested forty miles off the coast of Florida, opposite Fernandina, by the United States ship-of-war Falmouth, on the 31st of August last, bound from Matanzas, Cuba, to New Brunswick, Nova Scotia. Gravely claimed to be sole owner of the two vessels, and to be also the sole owner of the cargo of the Aigburth, and interested in that of the Sarah Starr; he asserting his sole ownership of one-fourth part thereof. The Aigburth was laden at the port of Newbern, North Carolina, in the month of July last, with cargo the product of that country, and sailed from Hatteras Inlet the 28th day of July aforesaid on a voyage to Cuba, and back to a port in the United States or British provinces. The formal paper titles in proof are sufficient, prima facie, to vest the ownership of two vessels in Gravely, the claimant.

It appears, from the register of the Sarah Starr, granted at Newport, Rhode Island, December 21, 1859, that the vessel was owned, in equal one-third parts, by Charles B. Eddy, of Fall River, Massachusetts, William J. Munro, of Charleston, South Carolina, and George C. Munro, of Newport, Rhode Island; that she was named the Sarah Starr, of Charleston; and that a permanent register was issued to the owners at the port of Charleston, South Carolina, June 17, 1859. On the 10th of May, 1861, two of the above part owners conveyed their entire two-thirds interest in the vessel for the consideration of $100 to their co-owner, George C. Munro, who, on the first day of July thereafter, describing himself to be of Wilmington, state of North Carolina, by bill of sale, with warranty, sold and conveyed the vessel by the name of the Sarah Starr, of Charleston, South Carolina, to the claimant, Cowlan Gravely, for the consideration of $10,000; and duly acknowledged such conveyance, upon the same day, before a notary public at Wilmington. The claimant was then a British subject, resident at Charleston, and carrying on a business at that place as a merchant. The consideration

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

[2] [The Aigburth affirmed in Case No. 106. The Sarah Starr affirmed in part and reversed in part in Id. 12,353.]

money was to be paid, $3,000 in cash, for which a note of the purchaser, at a short credit, was accepted, the "residue out of the freight to be earned by the brig upon her arrival at Liverpool," to which port she was to be forthwith dispatched with a cargo. The personal responsibility of the claimant, and the freight money to be earned, was asserted in the bill of sale to be adequate security for the purchase-money, and, for that reason, that no lien or incumbrance on the vessel, by mortgage or other express pledge, was reserved. On his examination, on the 19th of August last, in preparatorio, George C. Munro testified that no portion of the consideration money had been paid by the purchaser to the vendor. The agent of the claimant, however, states, in an affidavit made on the 11th of September, 1861, before the British consul in Charleston, outside the suit, that the note had been paid since its execution. Gravely alleges, in his claim and answer, that, as between him and George C. and William J. Munro, he has rights in one-fourth of the cargo, and, generally, that he is owner of the brig and interested in her cargo.

The brig was laden with naval stores, the products of that region of country, consisting, upon the manifest, of spirits of turpentine, resin, crude turpentine, and beeswax, all claimed by the two Munros, (except fifty barrels laden by Thomas Evans). The personal residence of Eddy and William J. Munro still remains as it was when they assigned the vessel to their co-owner, George C. Munro; and that of Evans was at Wilmington, North Carolina. George C. Munro was born in the state of Rhode Island, and is married, and a householder in Newport, in that state, where his wife and family reside; but he and his brother have carried on trade and mercantile business in copartnership for four or five years past in and from Wilmington, North Carolina, and Charleston, South Carolina, by remaining in those states superintending and conducting such business personally, during the healthy season of the year, and returning thence and remaining, with their families, in Rhode Island, through other portions of the year. George C. Munro was in Wilmington, so transacting the business of the firm, before and at the time the cargo in question was purchased and laden on board the Sarah Starr, and he came out of that port with the cargo in this suit, and as a passenger to Liverpool on this vessel. The two Munros claim that part of the cargo as joint owners. George C. Munro was examined on the standing interrogatories in the cause as such passenger; and both claimants set up the same facts in their test affidavits appended to their claims, and accepted by the libellants as evidence in the suit.

On or about the 23d of July last, the claimant George C. Munro heard a rumor at Wilmington that a vessel-of-war of the United States had notified the officer in command of the Confederate fort at the mouth of the port that it was blockaded by the United States, and the vessels therein had fifteen days from the time of its blockade to depart thence with their cargoes. The Munros knew, before the sale of the vessel to Gravely, that war existed between North Carolina and the United States, but George C. Munro testifies that he did not know that the port was blockaded in fact.

The schooner Charlotte Anne, of North Carolina, was owned by James E. Howland, of that state, and Stephen D. Doar, of South Carolina, and, on the 8th of July, 1861, was sold and conveyed by them, for the consideration of $2,500, to the same Cowlan Gravely, of Charleston, South Carolina, who took possession of her as his own property, and had her laden at Newbern, North Carolina, with a cargo of produce purchased there, to go thence to Cuba, and back to a port in the United States or British provinces. She proceeded to sea on the 28th of July, then under the name of Aigburth; made her outward voyage to Cuba, and, returning thence, when off Fernandina, on the coast of Florida, was captured, on the 31st of August last, by a ship-of-war of the United States, and was sent to this port with a prize crew, and libelled in this court on the 13th of September as prize of war. The only claim interposed to this vessel and cargo is that put in on part of Gravely.

It remains equivocal, upon the evidence, whether any other consideration, on the purchase of the Sarah Starr, passed from her claimant Gravely to Munro than his promissory note for $3,000 on a term of credit, and bills of exchange drawn by him on her freight, or whether a payment of any sum whatever has been made on such alleged sale; as George C. Munro, on his examination in preparatorio, denies having knowledge of it, and the payment is only averred generally in an ex parte affidavit made by an agent of Gravely two months or more subsequent to the sale. The purchase money on the sale of the Aigburth to the claimant is receipted in full to him by the venders on the day of sale. No proofs are before the court of other titles to the cargoes in either vessel than what is asserted in the claims of the Munros, Eddy, and the claimant Gravely.

Some of the cardinal propositions of law upon which these suits and defences depend are involved in other actions which have already been passed upon by this court, and are now on review in the supreme court upon appeal. The conclusions embraced in those decisions declared by this court will, accordingly, be maintained until they shall be changed by the judgment of the supreme court.

The hostilities commenced upon the United States by the seceded or Confederate States of the South have produced a state of war between the two communities, as consequent

to which the United States are authorized to employ against their enemies the means of resistance and attack which are justifiable under the law of nations, by land or naval forces. A blockade of the ports of their enemy is one of such lawful means, and is incident to the war power, and may be imposed by the president flagrante bello, without any act of the legislature declaring it (The Rolla, 6 C. Rob. Adm. 364; 3 Phillim. Int. Law, p. 383, § 288); a blockade and a siege being equivalent acts for a like object, that of the reduction of an enemy by force of arms (Wheat. Hist. Law Nat. 137, 138; Wheat. Int. Law, 539, 540).

Both of these vessels and their cargoes, so far as claimed, were enemy property within the principles of public law. The sale of the Sarah Starr was negotiated and made by George C. Munro, when he was a merchant trading in an enemy port, to Gravely, also domiciled and carrying on trade in such place. That sale was unlawful as to Munro, even if, as he contends, he was then a resident of a loyal state, because it was in fraud of his obligations and duties towards his own government. Traffic with the enemy was forbidden by public law. Deponceau, War, 24; Chit. Law Nat. 1; 1 Kent, Comm. 66. The cargo claimed by the Munros was purchased in a like port, and consisted of enemy products. The remainder of the cargo, shipped by Evans, was obtained at the same place, and he was also a resident there. If Gravely had an interest in any of the cargo, it is not proved that he had acquired a vested property, or more than an optional privilege to take it on its arrival at Liverpool; and at all events, it must have been obtained, if any vested interest passed, through purchase or trade, from George C. Munro, a domiciled dealer in the enemy country at the time, and, as such, himself an enemy. Westl. Priv. Int. Law, 101; Law Lib. p. 49. The property would not pass out of Munro by such sale, and it remained, notwithstanding, liable to seizure in transitu at sea. The vessel is confiscable, because, in the eye of the law, business intercourse with an enemy, inconsistent with actual hostility, is equivalent to trading with such enemy. The Rapid, 8 Cranch [12 U. S.] 162, 163. These reasons all concur to bring the present case within the doctrine laid down in the antecedent decisions, that loyal citizens or neutrals who trade with an enemy, or have a mercantile domicile in an enemy country, are regarded, in the prize courts, in their commercial dealings and transactions there, as enemies, in relation to vessels and cargoes owned by them and captured at sea.

With respect to George C. Munro, the direct vender of the vessel, and the purchaser, in North Carolina, of the cargo claimed by him and his partner, and to Gravely, who claims the vessel, each had, indubitably, a trading or mercantile domicile in the enemy's country, at the period of the transaction in question, and other and further than in the special occurrence of the sale of this vessel and the lading of cargo on her for the voyage in question. William J. Munro was, likewise, a resident in the Confederate States for commercial purposes, both partners, apparently, upon the proofs, having their sole business domicile, in carrying on their copartnership operations, for a period of years prior to the insurrection and since, within those states. According to a brief but comprehensive summary of the law of prize relative to inhabitancies of that character, drawn up by Judge Story, with ample support of authority from the ancient and modern books, "persons who reside in a foreign country for purposes of trade are deemed inhabitants of that country by foreign nations, and the character of each changes with that of his country; in peace he is deemed a neutral, in war an enemy; and his property is dealt with accordingly in prize courts." 4 Am. & Eng. Enc. Law, Append. 615, art. "Domicile." Thus, in Hogsheads of Sugar v. Boyle, 9 Cranch [13 U. S.] 191, the supreme court decided, in a prize case, that the claimant, a neutral, by his actual residence in Denmark, yet had a national character of trade by means of his relationship to the procurement of the cargo captured, which was shipped from an enemy port; and the cargo was, accordingly, condemned.

Furthermore, the sale of the Sarah Starr by Munro to Grady was, under the proofs, manifestly colorable, and resorted to for the purpose of enabling the Munros, under that cover, to ship their property from an enemy country to a neutral market, in avoidance of the rules of public law which inhibit such commerce to either belligerent. 3 Phillim. Int. Law, p. 603, § 484, and notes. That offence on the part of the Munros, if their true residence and citizenship was, at the time, out of the Confederate States, and in Rhode Island, subjected the property to seizure and confiscation. The cases are unequivocal to this proposition, coming from an early source in English jurisprudence, and fully confirmed in the American courts.

The Bernon, 1 C. Rob. Adm. 102, was the case of a vessel purchased in France, during the war with England, by an American then resident in France. Sir William Scott regarded those circumstances as so suspicious that he required clear proof of the bona fides of the dealing, and that the vessel was not to be employed to the advantage of an enemy, and, for want of such evidence, he condemned the vessel. A series of decisions reiterated the doctrine, before the same judge, and applied it rigidly to American neutrals, under varying phases of facts, all upholding the principle that a residence by a trading person, for commercial purposes, in an enemy country, constitutes a domicile, imparting a national character to the residence, although it be fluctuating and temporary in its duration, and quasi incorporeal

and not personal. The Harmony, 2 C. Rob. Adm. 322; The Indian Chief, 3 C. Rob. Adm. 17; The Dree Gebroeders, 4 C. Rob. Adm. 233; The Danous, Id. 255, note 2; The Diana, 5 C. Rob. Adm. 60; The President, Id. 277. Many of the cases proceed upon the recognition of the doctrine, "that commerce by a citizen or subject with an enemy, is a criminal transaction, on the common principle that it is illegal in any person owing an allegiance, though temporary, to trade with the public enemy." These doctrines are maintained by the successors of that eminent jurist in the English prize court, and applied with undiminished vigor in cases of dealing and trade in ships and merchandise, equally in cases directly preceding the commencement of hostilities and in transactions during actual war; and no distinction is made, in their application, between domiciled neutrals and natural subjects. The Abo, Spinks, Prize Cas. 42; The Johanna Emilie, Id. 16; The Ernst Merck, Id. 98; The Christine, Id. 82. So, if a neutral makes purchase of a vessel in an enemy country, just prior to the breaking out of war, the bona fides of the transaction must be made out by indisputable proof, in order to protect her from capture (The Rapid, Id. 80), particularly when the purchase has been made upon the personal credit of the buyer, to be satisfied on the arrival of the vessel in the neutral country (The Christine, Id. 82); and the onus of proving the actual payment of the consideration money is in such case laid on the claimant (The Ernst Merck, Id. 101). A sale of a vessel to a neutral, flagrante bello, leaving a portion of the purchase money charged upon the vessel, or unpaid by the vendee, leaves the property in the belligerent, and subject to condemnation in a prize court, as enemy property. The Baltica, Id. 273, 274. The American authorities are equally explicit, that a neutral, even enjoying the privileges of consul, domiciled and trading in a belligerent country, is, in war, deemed a belligerent, and his acts are clothed with the character of one of its subjects; and he can neither hold title to property acquired in such country during war, nor confer it upon others, against the interests imparted, by capture at sea, to adversary belligerents. The Venus, 8 Cranch [12 U. S.] 253; Hogsheads of Sugar v. Boyle, 9 Cranch [13 U. S.] 191; The Ann Green [Case No. 414]; The San Jose Indians [Id. 12,322]; The Mary & Susan, 1 Wheat. [14 U. S.] 54, note f; 1 Kent, Comm. 72, 75; Wheat. Int. Law, c. 1, § 17. See, also, Mann. Law Nat. 7.

So far, then, as the proofs disclose the actual facts attending the acquisition of the cargo placed on board the Sarah Starr in North Carolina, it was wholly the property of the Munros, acquired by them there jointly during the war, and is lawful prize of war on both considerations,—that they purchased it in the enemy country, and that they, at the same time, had a commercial domicile there. The vessel, on general principles, is placed in the same predicament. It was sold to Gravely, all parties being disqualified by their relations to this country to sell or purchase in a belligerent state, for the purpose of covering property from the operations of the law of war; and the transaction thus became, between them, one in fraud of the United States.

These observations apply equally to the title set up by Gravely to the schooner Aigburth. She was sold to him by resident enemies, and he acquired her and loaded her for foreign trade whilst he was a domiciled trader in the enemy country; and his position as a neutral was evidently employed as a cover to an illegitimate trade. The cases above cited stamp such a procedure as a fraud upon the belligerent rights of the United States and as constituting good cause of forfeiture of the vessel, and of the property on board of her, owned by him. His being a native British subject affords no protection against these consequences. He was mixed personally, and in his responsibilities, with the people with whom he maintained a commercial domicile. In his claim he represents himself to be of "England, merchant, but temporarily residing in Charleston, and a subject of her Brittannic majesty, and being the true and lawful and sole owner of the said schooner, her tackle, apparel, and furniture, and also owner of all the cargo on board said vessel." No other claim is interposed to the cargo, than that of Gravely, and the bills of lading, noting the cargo as shipped to its owners, and being indorsed in blank, import the ownership of the cargo to be according to the claim.

The papers taken with the vessel show that the transaction of the outward cargo and the return one was made through the intermediation of the house of Fraser & Co., of Charleston, as agents of the claimant; and thus far the outside evidence supports the claim of ownership of this claimant in the cargo captured, because a prize court regards merchandise to be the property of the shipper or consignor, and not of the consignee, unless there be clear proof to the contrary. The Abo, Spinks, Prize Cas. 42. Certainly this will be the rule when no other supposed owner litigates the right of property. The return cargo, then, simply as enemy property, is liable to arrest at sea as prize, whether its destination be to the enemy port, or to one in a neutral and friendly country. No distinction is marked, in the cases, between the liability of property taken at sea, owned by a neutral who is stamped with the character of an enemy by his commercial residence and dealing in the enemy's country, and the native residents thereof. Dr. Lushington comments upon the character of a neutral commercially domiciled in an enemy country in these terms: "There is no principle, I apprehend, so well laid down, no principle so generally true, as this: that whatever country a gentleman may belong to,

if he is resident in and carries on trade for a period of time in another country, he must be taken, for the purpose of trade, to belong to that other country, and not to his original domicile." The Johanna Emilie, Id. 16. That vessel was owned by Rucker, a neutral, and the Hanoverian consul, resident in Riga, and was sold by his authority at Newcastle, and purchased by another Hanoverian, previous to a declaration of war; but the court held her to belong to Rucker, who, by his domicile, was an enemy, and condemned her as good prize.

It appears to me, therefore, in view of the rules of law applicable to the question, that the claimant Gravely, in the character of a neutral and a British subject by birth, was, within the purview of the public law, in her mercantile relations, an enemy of the United States at the time the two above-named vessels were captured; and that they, together with so much of their respective cargoes as belonged to him, are lawful prizes. The manifest principle of that jurisprudence divests the man acting in promotion of the interests of one belligerent, in its commercial, military, or fiscal operations, of all protection against the other, under the shield of foreign birth or allegiance, and stamps him with the character of the party whose ends his conduct subserves; and his planting himself as a resident within the dominions of an enemy, and there carrying on a traffic in vessels or merchandise tending to the benefit of the belligerent with whom he is domiciled, constitutes him an enemy of the other, and renders his property so acquired or used just prize of war.

A ground of defence and immunity in behalf of his claimant is, however, interposed, which, it is contended, gives him pre-eminent protection in both these suits. It is that by the treaty regulations between the British government and the United States, of November 19, 1794 (8 Stat. 116), the contingency in this case is provided for and remedied. The provision in that treaty is as follows (page 128): "If at any time a rupture should take place between his majesty and the United States, the merchants and others of each of the two nations residing in the dominions of the other shall have the privilege of remaining, and continuing their trade, so long as they behave peaceably, and commit no offence against the laws." The further terms of the stipulation do not come in question, as the government has not assumed to direct the removal of the claimant from its dominions by any express order or mandate. Other articles in that treaty and the subsequent ones of December 24, 1814, and July 3, 1815 (8 Stat. 218, 228), stipulate mutually the privilege to merchants to come and depart on their business freely from the territories of each nation. These arrangements are also insisted upon as securing to the claimant an entire immunity in every port of the United States as a resident British merchant. The material stipulations above quoted form the main basis of the argument. They are, in terms, framed to meet cases of hostilities existing between the contracting powers themselves, and no way look to disturbances in places not governed by their respective laws. The dominions to which the treaties refer, in reason, must be territories subject to the control and regulations of the respective parties; for it is not to be intended that nations, any more than individuals, assume to stipulate in their compacts, in respect to individuals' privileges against natural or physical impossibilities.

It is not only matter of notoriety, but the fact is verified by the official proclamation of the president of the United States, that, at the time the transactions occurred on the part of the claimant within these states, both of them were in open insurrection and revolt against the government and laws of the United States, and were united with the Confederate States of the South in flagrant war against the United States and its government. The territories of the two were occupied by armed forces, naval and military, in their service; and the authorities of the United States and its laws were arrested and resisted, and could not be enforced by the civil power of the government. The seceded states assumed, by their public acts and declarations, to be a government independent of the constitution and laws of the United States, and were endeavoring to maintain such independency by public hostilities and organized war. These incidents were notorious in North and South Carolina, and it is in proof in these suits that such condition of hostilities and public war on the part of those states was well known to the claimant. It must, accordingly, be presumed that he voluntarily continued his commercial domicile in that locality; and it is, moreover, to be implied from these proofs that the purchase of the vessels and shipment of the cargoes in question were negotiated and made with the claimant under full knowledge of those facts, as well as that the United States had declared the ports of these states to be in a state of belligerent blockade. He is legally chargeable, under such circumstances, with knowledge that he had lost by his domicile there the character of a neutral, and become a portion of the enemy population, as well as that he had thus placed himself, and continued voluntarily, outside of territories then under the authority or dominion of the United States. He was as a citizen of the United States would be who should have taken a commercial residence in an Irish port, and there carried on his trade, knowing that such kingdom had revolted against Great Britain, and, by force of arms, prevented the home government regaining possession and control of her former dominion therein. The British authorities would, unquestionably, regard the claim of an American citizen, under the terms of the treaty, in such case, as rescinded, or suspended, so long

as the place of residence continued to be forcibly wrested by hostile power from the actual authority of the mother government by acts of open war.

It seems to follow, plainly, from these considerations, that the exemption argued by the claimant, in his capacity as a British subject, and under the provisions of the treaties referred to, affords no protection to him in either of these suits. The privilege he sets up under the 26th article of the treaty of 1794 is outside of the casus fœderis, which relates solely to the existence of mutual hostilities between Great Britain and the United States. The other stipulations in the respective treaties referred to are limited to a reciprocal liberty of commerce between the two nations and their subjects, and impart nothing beyond the mutual enjoyment, within the laws and territories of each, of the rights of peaceful intercourse and trade between two neutral and friendly communities. The compacts afford no shadow of color to the merchants of either party to disrobe themselves of their neutrality towards the other whilst enjoying such residence, and to employ themselves in the service and aid of belligerent powers who are carrying on hostilities against the one whose guarantee of free domicile is invoked. The treaties, in words, grant the reciprocal privileges of residence and commerce, "subject always to the laws and statutes of the two countries respectively." 8 Stat. 124, art. 14; Id. 228, art. 1. The natural sense of the arrangements would be regarded as conveying no higher advantage or immunities to alien friends than native subjects and citizens possess within the territories of the contracting parties. The alien friend clearly could not, under the reservation expressed in the treaties, carry on a trade interdicted by the local law. He could not smuggle cargoes, or engage in the slave trade, or fit out or arm, within the country, vessels-of-war against friendly nations. The public law inhibits alike native citizens and friendly neutrals there domiciled from trading with the enemies of their own country, or with a friendly belligerent, in ports of such enemies, and from affording them aid or comfort there. 3 Phillim. Int. Law, c. 6, §§ 68, 74, 85; The Hoop, 1 C. Rob. Adm. 196.

The grounds of defence considered and passed upon in previous decisions in this court will also govern in these suits. The seceded states and their inhabitants, during the prosecution of the war by them, are regarded as enemies of the United States, and neither in relation to the doctrines of public law nor the relevancy of municipal regulations are they now within territories under the dominion of the laws of the United States. The right of sovereignty in the general government continues unaffected over the seceded states, although it may fail in being enforced, except according to the rights of war, while the interruption of the powers of the civil magistracy shall continue.

A bar is also raised on the argument by the claimants to the jurisdiction of the court in these suits, because of the provisions of the act of congress passed July 13, 1861 (12 Stat. 255). It is insisted that this statute supersedes the rules of national law, and constitutes the sole law which supplies authority to the government to seize vessels or property belonging to insurgents in the seceding or Confederate States, and that, by just implication it also establishes the doctrine that no power to arrest or confiscate such property is possessed by government except under the provisions of that act.

In the judgments of the court heretofore rendered in the various prize cases, and now under review before the supreme court, it was held, in effect, that the war subsisting between the United States and the Confederate States entitled the United States, under the rule of the law of nations, to prosecute it with all the authority and means lawful to be employed in a war between nations foreign to each other, and that the act of congress above cited did not rescind or curtail that authority in respect to the inhabitants or property of the enemy state. Those judgments do not, in terms, cover the objections made in both of these suits, as the Sarah Starr was captured before the provisions of the law went into effect. She was taken on the 3d of August, and the president's proclamation to give full effect to the statute was issued on the 16th of the month; and therefore, if the notice given by the proclamation of the president was necessary to render commercial intercourse attempted to be carried on by this vessel or her owners unlawful, and subject her and her cargo to forfeiture, a legal cause of arrest and condemnation would not be furnished at the time she was seized. But, in my opinion, the law in question was not intended to restrict or interfere with the war powers of the government. Its main purpose, disclosed by its title, is to provide for the collection of duties, and the other "purposes" will naturally be such as assimilate with or aid in effecting that end. U. S. v. Fisher, 2 Cranch [6 U. S.] 386; Beard v. Rowan, 9 Pet. [50 U. S.] 301; 1 Kent, Comm. 461. The first four sections of the act relate to securing duties on foreign commerce; the seventh section authorizes the president to employ other vessels than revenue cutters in enforcing the revenue laws; the eighth section places petitions for remission or mitigation of penalties or forfeiture under the like discretion of the secretary of the treasury as is given in the act of March 3, 1797 [1 Stat. 506]; the ninth section enlarges the jurisdiction of the United States courts over proceedings for forfeiture as to places where the proceedings therefor may be instituted; the fifth and sixth sections designate the subjects of forfeiture and the places where seizures may be made. Thus the scope and manifest purpose of these enactments aim to break up commercial intercourse by and between loyal citizens and insurgents; and to cause all merchandise coming or going by land or water between the residents of these opposite sections of the United

States to be forfeited, together with the vehicles conveying them. Obviously these regulations are sovereign in character, and essentially municipal and inland, and intended to be limited in operation to the territorial authority of the government over property within that authority, or in transit between places therein, with the exception of vessels and property made liable to seizure when found at sea. Section 6. The enactment in the sixth section, however read, cannot be understood simply as a municipal regulation, but is one also connected with a state of war with rebels, and in that sense is capable of being carried into effect also by the prize court, because extending to seizures at sea. The decision in Rose v. Himely, 4 Cranch [8 U. S.] 241, left that proposition unsettled by the court (Id. 281); a majority of the court reserving their opinion on the point whether a seizure of property on the high seas, under a municipal forfeiture, is invalid provided the property seized be immediately proceeded against regularly by the country in which the capturing vessel belongs. See, also, the opinion of Johnson, J., dissenting, in the main case, and his judgment in the circuit court in the same case (4 Cranch [8 U. S.] Append., 509), and the opinion of Chief Justice Tilghman, delivering the judgment of the court in Cheriot v. Foussat, 3 Bin. 220–254. The prize courts of Great Britain condemn property of its own subjects, being belligerents, whenever taken in a trade prohibited by the law of England. Wheat. Mar. Capt. 225. And the English government sanctioned as lawful a capture at sea by a Russian ship-of-war of an English merchant vessel which was attempting to violate a municipal law of Russia. The Vixen, 1 Dod. 136; (A. D. 1857) 54 Parliamentary Blue Book.

In opinion of the court in Rose v. Himely, 4 Cranch [8 U. S.] 272, delivered by Chief Justice Marshall, the doctrine is declared that a sovereign endeavoring to reduce revolted subjects to obedience possesses both sovereign and belligerent rights, and is capable of acting in either capacity, and that if, as legislator, he ordains a law imposing punishments for certain offences, which law is to be applied by courts, the nature of the law and the proceedings under it will determine whether it is an exercise of belligerent rights or exclusively of his sovereign power, as also whether the court, in applying this law to particular cases, acts as a prize court, or as a court enforcing municipal regulations. In the case of Hudson v. Guestier, 4 Cranch [8 U. S.] 293, the seizure, under like edicts, having been made by the parent government within the territorial jurisdiction of St. Domingo, but the property having been taken into a Spanish port, and tried and condemned in a French port, the court held that the French prize court had lawful jurisdiction, and that the condemnation could not be questioned in the United States courts. In my judgment, the act of July 13, 1861, is an exercise of the sovereign authority of the government over its own citizens in insurrection and rebellion, and their property acquired and owned within the United States, and over those, also, remaining loyal to the constitution, and is not intended as a declaration or establishment of the belligerent rights or powers of the government in that respect; nor is the statute to be construed as revoking or impairing any war rights possessed by the government in that behalf under the law of nations. Instead of these municipal regulations overriding or rescinding the powers of the government under public law, the contrary consequence follows, in case of a conflict between a right to the forfeiture of property under municipal regulations and its confiscability under the jus gentium.

The brig Sally, an American vessel, was captured by a privateer, and condemned as lawful prize, in the Massachusetts district, for trading with the enemy. The United States intervened and claimed the vessel as forfeited to them under the provisions of the non-intercourse acts. The cause was taken by appeal to the supreme court. The court, in giving judgment, say that, by the general law of prize property engaged in an illegal intercourse with the enemy is deemed enemy property; that it is of no consequence whether it belongs to an ally or citizen; that the illegal traffic stamps it with the hostile character, and attaches to it all the penal consequences of enemy ownership; and that, in conformity with this rule, the property must be condemned to the captors. The claim interposed by the United States to the property, on the ground of an antecedent forfeiture to the United States because of a violation of the non-intercourse act of March 1, 1809, was disallowed. The court further say: "We are of opinion that this claim of the United States ought not to prevail. The municipal forfeiture under the non-intercourse act was absorbed in the more general operation of the law of war." The Sally, 8 Cranch [12 U. S.] 382.

I am of opinion, therefore, that no sound objection to the jurisdiction of the court in prize, in respect to the Aigburth, arises on the ground of the act of July 13, 1861. The jurisdiction clearly exists, as against both vessels and their cargoes, on general principles; and the Aigburth may be also amenable to condemnation under the sixth section of this act, or under the act of August 6, 1861, as property owned by inhabitants of the Confederate States, commercially domiciled there, or as property acquired and used, after the passage of the last act, for the purpose of aiding or promoting the insurrection in the Confederate States. The statutory provisions may be acted on by the court directly, or the functions of the court as previously existing may be exercised to the same end; there being no incompatibility in enforcing the forfeiture through the powers of the court under its process in

prize, or in proceedings for condemnation on the instance side of the court, on motion of the district attorney, in the same suit. Act Aug. 6, 1861 (12 Stat. 319). In my judgment, therefore, the defences set up in the pleadings and on the proofs by the claimants in these suits are inadequate to their acquittal, and decrees of condemnation must pass in both cases against the vessels and their cargoes.

Other questions are also involved in both suits, which the court has been invoked to decide, in order that the United States, in case of appeal from these decrees, may have the opportunity of presenting to the courts above the entire grounds upon which the forfeitures are claimed in both actions.

It is insisted that both vessels were possessed of illegal documents, obtained from the enemy, giving them the privilege of making their voyages from the enemy's ports. These consist of custom house clearances in those ports, and permits to pass the fortifications or limits of the same, both granted by rebel authorities. These were not papers professing to clothe the vessel with any protection from arrest at sea. They were only permits to navigate within and from the waters of the enemy, and were not designed or taken as covers against the rights of the United States as a belligerent. The acceptance and use of an enemy's license, whether efficacious or not, is ordinarily regarded as illegal, and as subjecting the vessel using it to confiscation. The Aurora, 8 Cranch [12 U. S.] 203; The Fanny's Cargo, 9 Cranch [13 U. S.] 181; The Ariadne, 2 Wheat. [15 U. S.] 143. The passes so taken by these vessels import (as would the rebel flag) that they were rebel property, which might require explanatory proof (Wheat. Mar. Capt. 158) if their confiscability was placed on that charge; but the testimony as to their being such is fully made out on other proofs. Those documents were no way calculated to mislead or deceive the captors, and need not be regarded as illegal in the sense of clothing the vessels with false semblances, and composing of themselves justifiable cause of capture. They would only serve as protections against rebel cruisers, and would be valueless as means of safety if exhibited to any other power, the Confederate States not being acknowledged as a legal government.

Another charge affecting both vessels is, that they intentionally evaded the blockade imposed, at the time they sailed, on the ports of North Carolina. The proclamation of the president of April 27, 1861, declared that the ports of the states of Virginia and North Carolina would be put under blockade, in addition to the blockades ordered to be established, on the 19th of the same month, of the ports of South Carolina, Georgia, Florida, Alabama, Louisiana, Mississippi, and Texas. Commodore Pendergrast, by his proclamation of April 30, 1861, at Hampton Roads, gave notice that he possessed adequate forces to make such blockade efficient. The Sarah Starr left the port of Wilmington, North Carolina, for Liverpool, England, on the 3d of August, 1861, and was captured by the United States ship-of-war Wabash twenty-five or thirty miles out from the bar. She had been delayed leaving the port by a heavy gale of wind blowing off it for some days. It appears, from the proofs in preparatorio, that the master and some of the crew and one of the owners of the cargo on board knew, when the vessel sailed, that North Carolina was at war with the United States, and had heard a report current that the ports of North Carolina were under blockade at the time, but did not know the latter fact, or that United States vessels were stationed there to enforce a blockade.

It appears from the proofs in preparatorio, that the schooner Aigburth was captured on the 31st of August, 1861, by the United States ship-of-war Jamestown, about forty miles off Fernandina, east of the Florida coast, on a voyage from Matanzas, Cuba, to New Brunswick, Nova Scotia, which was in continuation of her voyage out from Newbern. The outward cargo of rice from Newbern, and the return cargo of molasses, laden on board at Matanzas, were the property of Gravely, the owner of the vessel. The vessel, when captured, was fifteen to eighteen miles further west, and nearer the Florida coast, than her true course. The master was engaged to sail the vessel from Newbern to Matanzas, and thence, with a cargo, to the United States or British provinces, on wages of ninety-five dollars a month and five per cent. upon the net proceeds. He knew that North Carolina was at war with the United States, but did not know Newbern was blockaded. But he was told by the British consul at Charleston, on the 22d or 24th of July, that he had that day received notice from one of the commodores of the United States that the port of Newbern was blockaded from the 13th of that month, and that he, the master, must get to sea by the 28th of that month; and he did get to sea the morning of the 28th.

These proofs manifest that on board of both vessels there was a clear notice that the ports of Wilmington and Newbern, at the respective times those vessels departed therefrom, were claimed by the United States to be held under blockade. The documents in evidence show that the blockade had been authoritatively imposed on the 30th of April upon those ports. The capture of the Sarah Starr, on the day of her departure (August 3) by a United States ship-of-war, is prima facie proof that she was empowered to enforce the blockade. It is, however, imperfect evidence of the fact that she was a force adequate to maintain the blockade, or was stationed there for that purpose; because the accompanying testimony shows that the capturing vessel was at the time moving past the port, en route for Hampton Roads, from Charleston, where she had been previously stationed.

There is no direct evidence that any vessel was at the time stationed off North Carolina in maintenance of the blockade of those ports. The proofs are that the Aigburth went out of the port of Newbern on the morning of the 28th of July, without any vessel being seen or known to be off that port supporting its blockade. There can be no doubt that it is incumbent on the United States to establish the fact that an adequate force was assigned and stationed off these ports at the time of the egress from them of the above-named vessels, so as to render the ingress or departure of the vessels to or from the ports dangerous. There need not be a closed cordon of vessels surrounding the places at all times, so as absolutely to command all approaches to the ports from without, or departure from them from within. The blockade must, however, be so sustained by competent forces as to render it efficient to all ordinary intent and apprehension. This, of course, admits of the accidental absence of blockading vessels, from stress of weather or other contingencies, and will also dispense with the employment of the more active and rapid services of steam vessels in such accumulation of watchful forces as is sometimes exacted when ships moved by canvas only are used. What the law demands is the allotment and stationing of that amount of force for the service which shall render it physically hazardous for other craft to evade the blockade. To that end the blockading forces must be such as to constitute an actual investment of the place blockaded. The English and American cases concur in all essentials as to the lawful constituents of a blockade in modern times, and the manner in which it shall be enforced. 1 Kent, Comm. 144–161; 3 Phillim. Int. Law, p. 387, art. 294; The Nornen, Spinks, Prize Cas. 171; The Franciska, Id. 111. A cluster of suits were embraced within one decision in the last case. The doctrines of blockade were largely discussed by the court. It is stated, in a note, that the general decision was reversed on appeal; but it does not appear on what points. The case is, however, instructive as to the general application of the law of blockade.

The testimony upon the preparatory interrogatories is very full and positive that no vessels-of-war were placed off those ports, within view or knowledge of these vessels, when either of them came out; and it is made equivocal whether the blockade was actually set on foot fifteen days before the egress of either of them from the ports. It is made sufficiently certain, upon the proofs, that notice of the blockade had reached both vessels previous to their sailing from the ports. In this state of the case it is incumbent on the libellants to give evidence of the time the blockade was actually imposed, and that it was made efficient by forces stationed there adequate to prevent vessels from going in or leaving without the knowledge and interposition of the blockading force to prevent it. Although the evidence raises a suspicion that the Aigburth might be seeking an opportunity to enter a blockaded port, yet it is not sufficiently direct and impressive to justify her condemnation on that proof alone.

The usage in the United States courts of prize is to allow further proof to be given by either party upon reasonable cause appearing in the progress of the suit for its reception, or on such cause being afterwards shown; and, in the English practice, the libellants are allowed, of course, to put in all cases when the claimants elect to proceed, on their part, by plea and proof. The Maria, Spinks, Prize Cas. 321. Here the claimants make full defence on the record by their claims and answers, and would, in that manner, fall within the rule. A certificate from the navy department furnished in another suit, of the allotment of vessels to the maintenance of the blockade of the North Carolina ports, was offered in evidence by the libellants, to be applied in this trial; but, not being assented to by the advocate for the claimants, it cannot be considered as legally in evidence in these suits.

Upon the points of the efficiency of the blockade, and the time it was set on foot by the government, and of the supposed attempt of the Aigburth, at the time of her capture, to violate the blockade, the libellants are allowed to furnish further proofs on giving ten days' previous notice to the proctor for the claimants. Upon the other points in issue and litigation between the parties, it is ordered, first, that a judgment and decree be entered, declaring that the brig Sarah Starr and her cargo were both, at the time of their capture, enemy property, and subject to condemnation and forfeiture to the libellants as such; second, that the schooner Aigburth and her cargo, at the time of her capture, were both enemy property, and subject to condemnation and forfeiture to the United States as such, and that they be so declared and adjudged; and, third, that the masters and owners of both vessels, and of their cargoes, had notice and knowledge, at the time of their egress from the ports of North Carolina, that those ports were in a state of blockade by the ships-of-war of the United States; but it does not appear by the proofs that such blockade was efficiently supported and enforced on the part of the government; nor does it appear that actual notice thereof was given to those vessels, or that it was imposed fifteen days prior to the departure of the said vessels from those ports; nor does it appear that the said schooner Aigburth was, when captured, attempting to violate any blockade of ports on the coast, set on foot by the proclamations of the president of the United States; and, accordingly, as to these three points, the libellants are allowed, as above directed, to give further proofs.

If no further proofs are offered, pursuant to the terms above mentioned, then a final decree is to be entered in favor of the libel-

lants for the condemnation and forfeiture of both of the aforesaid vessels and their cargoes as enemy property, and in favor of the claimants, acquitting the said vessels of the charge of having violated the blockade aforesaid in leaving the said ports, and the schooner Aigburth of attempting a violation of such blockade at the time of her capture.

NOTE. In the case of The Sarah Starr the circuit court, on appeal, July 17, 1863, affirmed this decree as to the vessel and the cargo claimed by Evans, and reversed it as to the cargo claimed by the Munros. [Case No. 12,353.] A further appeal to the supreme court was taken by the claimant of the vessel, but none as to the cargo. [Unreported]. In the case of The Aigburth this decree was affirmed by the circuit court, on appeal, July 17, 1863. [Case No. 106].

[For opinion on question of marshal's fees after bonding for appeal, see Case No. 105.]

Case No. 12,353.

The SARAH STARR.[1]

[1 Blatchf. Pr. Cas. 650.] [2]

Circuit Court, S. D. New York. July 17, 1863.

PRIZE—ENEMY PROPERTY—VIOLATION OF BLOCKADE—RESIDENCE IN ENEMY COUNTRY.

1. Decree of the district court, acquitting the vessel and cargo on the charge of violating the blockade, and condemning the vessel and cargo as enemy property, affirmed as to the non-violation of the blockade, and as to the vessel and a part of the cargo, they being enemy property, and reversed as to the residue of the cargo, it not being enemy property.

2. The claimants of such residue of the cargo were not citizens or residents of the enemy's country, and left it as soon after the breaking out of hostilities as they could convert their property into funds which could be conveniently carried with them; and they were entitled to a reasonable time to withdraw from their business connections in the enemy's country after the breaking out of the war.

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

In admiralty.

NELSON, Circuit Justice. The Sarah Starr, with her cargo, was captured on the 3d day of August, 1861, by the United States steamer Wabash, at sea, some thirty miles off Wilmington, North Carolina. The vessel was owned by Cowlan Gravely, a British subject, resident in Charleston, South Carolina. The cargo, consisting of spirits of turpentine and resin, was the property of G. C. & W. J. Munro, citizens of the state of Rhode Island, and residents there, with the exception of 50 barrels of turpentine, which belonged to D. Evans, a citizen and resident of Washington, North Carolina. The Sarah Starr was purchased from C. B. Eddy by the Munros in March, 1859, and was sold and transferred by them to C. Gravely on the 1st of July, 1861. The cargo was put on board of her during the same month, to be shipped to Liverpool. The vessel entered the port of Wilmington in March, 1861, and remained there till she sailed on her present voyage, about the 26th of July. The port of Wilmington was not in a state of actual blockade at the time of the egress of the vessel from that port. The vessel and cargo were condemned as enemy property, and acquitted upon the charge of violating the blockade.

I concur in the condemnation of the vessel, for, although Gravely is a British subject, yet he is a resident of Charleston, South Carolina, and engaged in business there, and, for aught that appears, continued in business there since the breaking out of the war. But the portion of the cargo belonging to G. C. & W. J. Munro stands on a different footing, and, in my judgment, is not liable to condemnation. The test oaths of those persons show the following facts, which are not in any way contradicted or impaired: They are, both of them, natives of Newport, Rhode Island,—one born in the year 1812; the time of the other's birth not being stated. They have always resided in that state. They, both of them, have families residing there, and they own the residences in which they live. Since the commencement of their business as partners, which was about 1830, they have been in the habit, during each winter, of going, one of them, to Georgetown, South Carolina, and the other to Wilmington, North Carolina, and elsewhere in the South, making sales of goods, and re-investing the proceeds, and returning, at the end of each business season, to their homes at Newport. During their visits South on business their families remain and reside at their homes. The cargo in question was bought from time to time in the months of May, June, and July, 1861, with the proceeds of goods sold by the firm, and with collections; and the purpose of the investment was to enable them to transfer the funds from the South to New York, or some Northern state. The test oaths also detail the difficulties they encountered by opposition from the authorities at Wilmington in their endeavors to ship the goods North, and the necessity they were under of adopting the expedient of selling the vessel to C. Gravely, with a condition that he should carry the cargo to Liverpool, in order to get the goods out of the country. It does not appear from the proofs that these parties did not leave the South after the breaking out of the disturbances. Indeed, it appears affirmatively that they did leave the country as soon after the disturbances as they could convert their property into funds which could conveniently be carried with them.

Under these circumstances I am of opinion that the decree against the portion of the cargo which belongs to the Munros is erroneous, and should be reversed. The domiciles of the owners were in Newport, Rhode Island, and they were entitled to a reasonable time to withdraw from their business connections in the enemy's country after the breaking out of the war. The San José Indiano [Case No. 12,322]. The barrels of turpentine belonging

[1] [Affirming in part and reversing in part The Sarah Starr, Case No. 12,352.]

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

to Evans, a resident and citizen of North Carolina, were enemy property.

The decree below is affirmed as to the vessel and the cargo belonging to Evans, and is reversed as to the cargo belonging to the Munros.

Case No. 12,354.

The SARAH STARR.

[1 Spr. 453.] [1]

District Court, D. Massachusetts. Feb., 1859.

MARITIME LIENS—HOME PORT—CREDIT OF OWNER—COSTS.

1. A vessel was built in Connecticut, and sold to a merchant in New York, the purchase-money to be paid by instalments, and the builders to hold the title until full payment. She went into the possession and control of the purchaser, was documented in the name of the builders, and the port painted on her stern was in Connecticut, and a ship chandler in the city of New York furnished necessaries for her in that port, not knowing of any interest, or possession of the purchaser: *Held*, that he might have a lien as on a foreign vessel.

[Cited in Harney v. The Sydney L. Wright, Case No. 6082a; The Jennie B. Gilkey, 19 Fed. 129; Blowers v. One Wire Rope Cable, Id. 448.]

2. By the case of Pratt v. Reed, 19 How. [60 U. S.] 359, a purchaser of supplies necessary to a foreign vessel can assert no lien therefor, unless he prove that they could not have been obtained, without such lien, upon the personal credit of the owner.

[Cited in The A. R. Dunlap, Case No. 513; The Lulu, 10 Wall. (77 U. S.) 201.]

3. In obedience to this authority, the libel was dismissed; but as the law had previously been otherwise understood and administered here, costs were refused.

H. W. Paine, for libellant, cited The Fortitude [Case No. 4,953]; Thomas v. Osborn, 19 How. [60 U. S.] 22; The Chusan [Case No. 2,717]; The Nestor [Id. 10,126]; Tree v. The Indiana [Id. 14,165]; Hill v. The Golden Gate [Id. 6,492]; St. Jago De Cuba, 9 Wheat. [22 U. S.] 409.

R. H. Dana, Jr., for claimant, cited Pratt v. Reed, 19 How. [60 U. S.] 359; Thomas v. Osborn, Id. 22; The Coernine [Case No. 2,944]; St. Jago De Cuba, 9 Wheat. [22 U. S.] 409; The Golden Gate [supra], and cases there referred to; Abb. Shipp. 40, notes, and cases cited; Webb v. Peirce [Case No. 17,320]; 9 Stat. 635, § 5; Abb. Shipp. 57, notes; The Fortitude [supra]; Jac. Sea Laws, 359; The Alexander, 1 Dods. 279; Ross v. The Active [Case No. 12,071]; The Aurora, 1 Wheat. [14 U. S.] 106.

SPRAGUE, District Judge. This is a libel by Van Winkle and others, ship chandlers of New York, to enforce a lien for cordage furnished to the bark Sarah Starr, in that port.

There is no doubt that the cordage was necessary to enable this vessel to enter upon a contemplated voyage, upon which she soon after sailed; and the articles were furnished upon the credit of the vessel. It is insisted in the defence, that no lien was created under the maritime law, for two reasons; first, that the Sarah Starr was not a foreign vessel, and second, that there is no evidence that the cordage could not have been obtained upon the personal credit of the owners, and without security upon the vessel. As to the first objection, the facts are that this vessel was built by Messrs. Sheffields of Stonington, Connecticut, who made a contract with one Morgan, to sell her to him, upon an agreement that he should pay a small part of the purchase-money in cash, and the residue by numerous instalments; and that upon the payment of the whole, he should have a bill of sale. The title was to remain in the Sheffields, until full payment of all the instalments, but Morgan was to have the possession and control of the vessel, until he made default of some payment. Under this agreement, possession was delivered to Morgan, who continued to run her nearly three years, without having paid the whole purchase-money, although all the instalments had become due. Previously to April, 1858, Morgan had let the vessel on shares to Bunnell, the master, who obtained the supplies sued for by the libellants. Morgan resided in New Jersey, but had a place of business in the city of New York. The vessel was enrolled and licensed at the custom house in Stonington, as owned by the Sheffields, and she hailed from that place. The libellants had no knowledge of Morgan, or that he had any connection with the vessel, nor did they know that the master had taken her upon shares. They trusted the bark as a foreign vessel, upon the request of the master, acting, so far as they knew, only in that capacity; and I am satisfied that they had a right to consider her as belonging to the state of Connecticut, and therefore foreign, while in the port of New York. The legal title was in the Sheffields. All the custom house documents declared her to belong to Stonington, and such also was the representation by the vessel herself, by the home-port painted upon her stern. The first objection cannot prevail.

The second objection is that there is no evidence that these supplies could not have been obtained upon the personal credit of the owner. It is not contended that there was no necessity for obtaining these supplies upon credit, for there is no pretence that the master had funds, or means, wherewith to pay for them; but the precise objection is, that although it was necessary that they should be obtained on credit, yet there is no evidence that they could not have been obtained upon the personal responsibility of the owners, without security on the vessel. The case of Pratt v. Reed, 19 How. [60 U. S.] 359, has been cited in support of this objection. Before that case, the law, as understood and administered here, was as follows: That the

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

master of a vessel was not authorized, as between himself and the owner, to purchase supplies, unless they were necessary; and if necessary for the vessel, still he was not authorized to obtain them on the credit either of the owner or vessel, if he had funds at his command wherewith to pay for them. To justify the master, therefore, in obtaining supplies for his vessel upon credit, there must have been a twofold necessity. The supplies must have been necessary, and the credit must have been necessary. But where such twofold necessity existed, and the master might rightfully obtain the supplies on credit, he could do so upon the credit of the vessel, as well as of the owners. Thus far as to the authority of the master.

As to the rights of material men; in order to authorize them to trust to the vessel, and create a lien upon her, it was requisite, first, that the vessel should need the supplies, or that after reasonable inquiry she should appear to need them; and secondly, that in giving credit to the vessel and owners, the material man should act in good faith, and he would not be deemed to act in good faith, if he knew that the master had funds wherewith to pay for the supplies, or, if facts were known to him, which should create suspicion, and put him upon inquiry, when such inquiry would have led to the knowledge that the master had funds, and had no right, therefore, to obtain supplies on credit. That is, if the material man had knowledge that the master was acting in bad faith toward his employers, or knew of circumstances which ought to admonish him to make inquiry that would have led to such knowledge, then he would be affected with bad faith, as colluding with the master, and aiding him in violating his duty to his owner. But if the material man had no reason to suppose that the master was violating his duty in obtaining a credit, he might, upon request of the master, trust to the vessel and owners, and a lien would thereby be created. The further inquiry, whether, if credit were necessary, it would not be practicable to obtain the supplies upon the mere personal responsibility of the owner, was never required or even suggested. The right to trust to a vessel, where credit was properly given, was a matter of course. This was for the benefit of the owners; for the greater the security where credit is given, the better the terms, and to a foreign owner this would rarely be unimportant, however good his personal credit might be, for some apprehensions as to the continued solvency of persons engaged in commerce, are never absent from the prudent seller.

But the case of Pratt v. Reed [supra], fully sustains the second objection made by the respondent's counsel. It is directly in point. It is useless to inquire whether, from the facts of that case, the court might have arrived at the same result upon other grounds, because they expressly place their decision upon the want of evidence that the supplies could not have been obtained, without security upon the vessel. Assuming that the coal furnished was necessary for the steamer, and that the master had no means wherewith to pay for it, that is, that a credit was necessary, still the court held, that in the absence of all evidence as to the personal credit of the owner, no lien could be created. The decision did not turn upon the question, whether credit was in fact given to the vessel, but solely upon the question, whether the seller had a right to give credit to the vessel, and obtain a lien, without proving that the owner had no personal credit, upon which the supplies might have been obtained. By that decision all subordinate tribunals are bound, and in submission thereto, my decree in the present case must be against the libellant.

But to enable me to perform my duty in awarding or refusing costs, I have thought proper to look at the grounds of the decision of Pratt v. Reed. Two authorities are cited. The first is the case of The Alexander, 1 W. Rob. Adm. 336, but found on pages 288 and 346. There must be some mistake in the citation. I have read that case more than once, and cannot find one word in it that gives countenance to the opinion, in support of which it is invoked. Its whole aspect is adverse. That case was twice before the court. First, on a question of jurisdiction, and subsequently on its merits. The claim was the price of a cable and anchor furnished to a Norwegian vessel by a ship chandler in the port of London. Two grounds of defence were relied upon. First, the cable and anchor were not furnished for the use of the ship, but sold to the master, as his own adventure, and upon his credit. The second, that the articles were not necessary. The case was vigorously contested, fully argued, and an elaborate judgment was pronounced by the court. The whole proceeded upon the assumption, that there was a lien to be enforced by the court, unless the defence was sustained. No proof was adduced that the articles could not have been obtained upon the personal credit of the owner; and it was not suggested, either in the pleadings, arguments, or judgment, that such proof was necessary. And yet, if the action could not have been sustained, without such proof, a long and laborious examination of the evidence, both by counsel and by the court, might have been wholly dispensed with. Not only was there no evidence that the supplies could not have been obtained upon the sole responsibility of the owner, but the presumption is violent that personal credit was alone relied upon. The purchase was made in 1835. At that time no tribunal in England could enforce any lien for a material man. Such liens, therefore, had practically no efficacy, and could hardly have been relied upon as security. It was not until four or five years afterwards, by act of 3 & 4 Vict., that the court of admiralty was

authorized to take jurisdiction of claims for necessaries furnished to foreign vessels. That act did not create a lien, it is true, but it brought into activity maritime liens, which for a long time had been in a state of suspended animation, under the pressure of prohibitions from the common law courts. The act merely restored an ancient jurisdiction of the admiralty. 1 W. Rob. Adm. 293, 360. In the case of The Alexander, the libel did not allege that the supplies could not have been obtained upon the personal credit of the owner. And if that fact was necessary, in order to sustain the action, the want of such an allegation was fatal. Yet upon such a libel the court takes jurisdiction, to enforce the asserted lien, and requires the claimant to put in his defence. In the course of his opinion, Dr. Lushington says, "In the present case . . . by the general maritime law of Europe, the ship would be liable for the necessaries supplied." Yet the case then before the court was only that made by the libel, no answer or proof having been put in. Page 295. And it is upon this statement of facts, containing no assertion, or intimation that the supplies could not have been obtained upon personal credit, that Dr. Lushington asserts that a lien would arise by the general maritime law. The same doctrine is stated, as if unquestionable, in The Virgin, 8 Pet. [33 U. S.] 550; and by Judge Story, in The Fortitude [Case No. 4,953]; and by Judge Ware, in The Phebe [Case No. 11,064].

Indeed, it is laid down in [The Virgin] 8 Pet. [33 U. S.] 550, that even in case of bottomry bond, the burden is not upon the lender, to prove that the money could not have been obtained upon the personal credit of the owner. The court say, "The necessity of the supplies and advances being once made out, it is incumbent upon the owners, who assert that they could have been obtained upon their personal credit, to establish that fact by competent proofs."

The only other authority referred to by the court, in Pratt v. Reed, is their own decision in Thomas v. Osborn, at the same term, reported in 19 How. [60 U. S.] 22. It is not cited as a decision in point, but only as having laid down a principle, embracing a question then before the court. In that case there was a difference of opinion among the judges, as to the effect of the evidence, but a majority of the court came to the conclusion that the master had deserted his duty, by leaving the personal command of the vessel, and employing her in conveying his own property between Rio Janeiro and San Francisco, and by misappropriating earnings of the vessel to a large amount, all of which was well known to the lender, or furnisher, in that case, who had, indeed, actively aided the master in all these transactions. The principle, therefore, involved in the decision was merely that of good faith. What was intended to be referred to, I presume, must have been the following remarks in the opinion of the court, in Thomas v. Osborn, on page 30 of 19 How. [60 U. S.] viz: "But the limitation of the authority of the master to cases of necessity, not only of repairs and supplies, but of credit to obtain them, and the requirement that the lender, or furnisher, should see to it that apparently such a case of necessity exists, are as ancient and well established as the authority itself."

Upon this quotation it may be observed, that the rule therein laid down is merely that there must be a necessity for the credit. It does not touch the question whether, if the master be without funds, and if he must purchase on credit, a lien may be created on the vessel. No doubt, in that respect, is even suggested. Taking those remarks, therefore, in their fullest extent, and without qualification, they by no means reach or affect the question decided in Pratt v. Reed. But those remarks ought not to be taken alone, and without explanation. What is said about the duty of the lender, or furnisher, must mean that he must not know that credit was unnecessary, and that when admonished by circumstances, he must make inquiry; that is, he must act in good faith. If the remarks are not to be so understood, but are to be understood as asserting that the lender, or furnisher, is bound to show that he has made inquiry, although he had no reason to suspect that the master had funds, or was violating his duty, it would be supported by no authority. Yet the assertion is rested wholly upon authority; indeed it is laid down as being ancient and well established, and numerous citations to prove this immediately follow. These citations, and the observations of the court thereon, go no further than to show that the lender, or furnisher, is bound to diligence as to the necessities of the vessel, and good faith as to the necessity for the credit. See pages 30 and 31. As the result of the authorities, the law is laid down on page 31, in the following words: "To constitute a case of apparent necessity, not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit, to procure them. If the master has funds of his own, which he ought to apply to purchase the supplies which he is bound, by the contract of hiring, to furnish himself, and if he has funds of the owners, which he ought to apply to pay for the repairs, then no case of actual necessity to have a credit exists. And if the lender knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit; and the act of the master, in procuring a credit, does not bind the interest of the general owners in the vessel." Here is not even a suggestion, that if there be a necessity for credit, the vessel may not be bound as much as the owner. It goes only to this,—that if the master has funds, he has no right to obtain credit; but if he has not, he may obtain it

on the liability of the vessel, as well as of the owner. So much for the two authorities.

The court, in Pratt v. Reed, do not go into any argument, or discussion of principle, in support or elucidation of their decree. It is, indeed, said, toward the close of the opinion, that these liens should be strictly limited to the necessities of commerce which created them, and that any relaxation of the law in this respect, will tend to perplex and embarrass business. But this does not aid us, and could not have been intended to aid us, in determining what are the necessities which create liens, or what would be a relaxation of the law. I believe it may be safely said, that those who have been practically engaged in commerce and navigation, and those who have been most frequently called upon to administer the commercial law, have always thought that the power of a master to give a lien upon his vessel, when a necessity for supplies, and of credit, existed, in a foreign port, as heretofore understood, was highly beneficial. They have never experienced, nor heard of, embarrassments therefrom, and they would feel a change of the law as more than a misfortune. The law protects the rights of bona fide purchasers, by requiring that, as against them, these liens should be enforced with reasonable diligence. Intelligent owners are well aware that the mere personal responsibility of men engaged in trade, in a distant place, is not trusted with the same readiness as if accompanied by security upon property; and that whatever risk the lender, or furnisher, thinks he takes, must be paid for in the enhanced price of the articles. And to this it may be added, that if the furnisher is hereafter to be held to prove, in all cases, that the master could not have obtained supplies upon the personal responsibility of his owners, he must also be indemnified, in some way, for taking this hazard, which will not be inconsiderable; for it is the hazard of what may be the after-thoughts or competitors in business, and what they may swear, at a future day, with regard to their willingness to have trusted. And it may be asked, what degree of credit will be required? Must it be the highest or the lowest, or what intermediate grade? Will a lien be excluded, if the supplies can be otherwise obtained upon any terms, or will it be allowed, if the discount be ten, twenty, or what other per cent.?

There is another feature of the case now before me, which I am compelled to notice. There is not, either in the libel or answer, any allegation as to the personal credit of the owners, or as to the ability of the master to obtain the supplies on such credit merely. Such allegations, indeed, would be new in this court, and I am not aware of any precedent for them elsewhere. Now the inquiry presents itself,—how can I decide against the libellant, merely because there is no evidence that the owner had not sufficient personal credit, when that fact was not in issue; when the pleadings nowhere either assert or deny it? How can I hold the libellant to prove what is not alleged by either party? To this I can only reply, what indeed is entirely sufficient, that here again the case of Pratt v. Reed is directly in point. In that case there was no allegation, and no issue, as to the personal credit of the owner; and the court decided against the libellant, because he had introduced no evidence to show that security upon the vessel was necessary, and that the supplies could not have been had upon the mere personal responsibility of the owner.

The difficulty arising from the pleadings, which seemed to have been in the common form, is not noticed by the court; but I cannot assume that it was overlooked. In the case now before me, the answer alleges that credit was not, in fact, given to the vessel; and in Pratt v. Reed, there was the same allegation. But no notice was taken of that issue, it being superseded by the point upon which the cause was decided. The court held, that in the absence of evidence as to the personal credit of the owner, the furnisher had no right to trust to the vessel; and this, of course, rendered it wholly immaterial whether he did so or not.

Being instructed and governed by the case of Pratt v. Reed, I must decide that the libellant never had any lien upon this vessel, and the libel must be dismissed. But I think it must be without costs, they being within the discretion of the court. And it has been with reference to the exercise of this discretion, that I have been obliged to consider how the law was understood prior to that case, and whether the libellant had good grounds to expect to prevail, before it was known to him. I think he had, and that he ought not, therefore, to be subjected to the payment of costs.

Libel dismissed without costs.

NOTE. Mr. Justice Story, who was declared by Lord Campbell (2 Story's Life of Story, 429) to be the first jurist of the age, and whose exhaustive research and thoroughness of learning, especially in admiralty law, have scarcely been equalled, seems never to have heard of the doctrine promulgated in Pratt v. Reed. In his elaborate judgment in the case of The Fortitude [supra], he laid down the law as to tacit hypothecations, in the same manner as did Dr. Lushington, as above quoted. In the same opinion, Judge Story declares that there must be a different necessity, in order to uphold a bottomry bond; that if the money can be obtained upon the credit of the owner, he is not at liberty to subject the ship to the expensive and disadvantageous lien of an hypothecatory instrument. That most learned and accomplished admiralty lawyer, Judge Ware, in The Phebe [supra], says: "All the contracts of the master, with the mariners for their wages, with material men for repairs and supplies of rigging, or for provisions, or other necessaries for the vessel, involved a tacit hypothecation of the ship and freight." In what Judges Story, Lushington and Ware have said of resulting liens, they have but followed the common language of the books.

SARAH STARR, The. See Cases Nos. 105 and 106.

Case No. 12,355.

The SARATOGA.

[2 Gall. 164, 6 Hall, Law J. 12.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1814.

SEAMEN—WAGES—CAPTURE—VOYAGE BROKEN UP—RE-ENGAGEMENT—FREIGHT EARNED—QUITTING SHIP.

1. A capture, unless followed by condemnation, does not dissolve the contract for mariners' wages. See Abb. Shipp. (Story's Ed. 1629) pt. 2, c. 4, § 2, note 1, where the cases may be found; Id. (7th London Ed., by Sergeant Shee) pp. 167–181. During the prize proceedings it is suspended, and upon a decree of restoration it revives.

[Cited in Emerson v. Howland, Case No. 4,441; Willard v. Dorr, Id. 17,680; Brown v. Lull, Id. 2,018; Pitman v. Hooper, Id. 11,186; The Ocean Spray, Id. 10,412.]

2. If, pending the voyage, there be an interdiction of commerce with the port of destination, by war or otherwise, and in consequence the voyage is broken up, no wages are due.

[Cited in The Two Catherines, Case No. 14,288; Wells v. Meldrun, Id. 17,402; Bork v. Norton, Id. 1,659; Henop v. Tucker, Id. 6,368.]

3. But if the mariners be subsequently retained by the master to refit and preserve the ship, they are entitled to a reasonable compensation in the nature of wages. Abb. Shipp. (Story's Ed. 1829) pt. 4, c. 2, § 2, note 2; Id. § 5, note 2; Id. pt. 4, c. 3, § 2, note 1.

[Cited in The Niphon's Crew, case No. 10,277.]

[Cited in Wilson v. Borstel, 73 Me. 276.]

[See Adams v. The Sophia, Case No. 65.]

4. If afterwards discharged in a foreign port, the mariners are entitled to the two months' pay provided by the act of congress of February 28, 1803, c. 62, and may recover it, if unpaid, by a suit in the admiralty.

[Cited in Wells v. Meldrun, Case No. 17,402; The Dawn, Id. 3,665; The Niphon's Crew, Id. 10,277; Thompson v. The Oakland, Id. 13,971; Joy v. Allen, Id. 7,552.]

5. At what time, after a capture, seamen may lawfully quit the ship.

6. There are some exceptions to the rule, that, to entitle to wages, freight must be earned.

[Cited in The Two Catherines, Case No. 14,288; Pitman v. Hooper, Id. 11,185; The Niphon's Crew, Id. 10,277.]

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

The libellants shipped, as mariners, on board of the ship Saratoga, on a voyage from Boston for Amelia Island, at and from thence to port or ports in Europe, and at and from thence to her port of discharge in the United States. The ship sailed from Boston in October, 1811, for St. Mary's, where she took in a cargo, and thence proceeded to Portsmouth in England, where her cargo was discharged. The agents of the owners having engaged a cargo on freight, at Londonderry in Ireland for the United States, the ship sailed in ballast for that port on the 23d of April, 1812, and, on the 26th of the same month, was captured by the French privateer Espadon, and carried into Roscoff in France for adjudication. Prize proceedings were here instituted against the ship and her hatches sealed, and all the crew, except the mates, who were permitted to remain on board, were sent to Morlaix as prisoners. In August, 1812, the captain came down from Morlaix with all the crew excepting three, and by permission, they were there employed fifteen days in tarring the rigging and other ship's duty, and at the end of that time the crew returned to Morlaix. The ship was restored to the captain by order of the court, and taken possession of by him, on or about the first of January, 1813. On the 4th of the same month, the crew came on board, and went to work graving and painting the ship; and on the 7th of the ensuing February, the ship sailed for Morlaix, and arrived in the roads there on the same day; but did not get up to the town until the 1st of March following. The crew remained and slept on board until about the middle of July, in the same year, doing duty as required by the officers, and then left the ship, with the consent of the captain and the American consul, and sailed in a cartel for the United States. During the time of detention under the prize proceedings, the crew were principally maintained by the French government, and the expense, at the restitution, was made a charge on the ship. The crew, frequently during their residence in France, applied to the captain for their wages and discharge. The captain as often told them, that they might go where they pleased, but he had no money to pay them their wages, and they might, if they pleased, arrest the ship, and he would not oppose them. But they did not choose to leave the ship without payment of their wages, and the captain from time to time permitted them to go on shore and work, whenever they could get employment. He seemed, however, to have exercised his control over them, and declared, that if they worked on board of the cartel before their discharge, their wages would be forfeited. After the discharge of the crew, the Saratoga was finally made a cartel, to carry prisoners to England at a stipulated price; and from England she came with prisoners to the United States, where she arrived on or about the 2d of September, 1813. For this last voyage no compensation had as yet been received. The libellants had been paid their full wages up to the time of the ship's departure from Portsmouth, and now claimed wages from that time to the time of their discharge in France, and, in addition, the two months' pay provided by statute of February 28, 1803, c. 62, § 3, in cases of the discharge of seamen in foreign ports.

Mr. Selfridge, for libellants.

This case is similar in principle to that of Brooks v. Dorr, 2 Mass. 39, and the cases

[1] [Reported by John Gallison, Esq. 6 Hall, Law J. 12, contains only a partial report.]

there cited, the ship having been restored, and having returned in safety to the United States. That the capture occasioned the loss of freight is not an objection to the right of the libellants to wages, for (1) the legal presumption is, that the Saratoga, sailing from Portsmouth to Londonderry, would not have been captured by a friendly power, unless for some illegal act, which must have been committed by the owner or master, and by which the seamen ought not to suffer; (2) but, if the capture was wanton and without cause, then compensation is to be looked for from the French government, whose courts will give damages in lieu and in the nature of freight; (3) if compensation should be unjustly refused by the French courts, then it becomes the duty of the government of the United States to furnish a complete indemnity to its citizens, whom it is bound to protect.

Many cases show, that the maxim, "Freight is the mother of wages" must be taken with considerable allowance. The seamen are entitled to their wages in many instances, though no freight be earned, if they stay by the ship and do their duty; as, in this case, if after the arrival of the ship at Londonderry the passengers had refused to go on board; or if, at Amelia Island, she could not have obtained a cargo; and in the cases not unfrequently happening, where ships seek a freight abroad, and in consequence of short crops, or some other cause, obtain none. So in case of wreck, the freight is lost; but the seamen are entitled to wages, if there is enough saved to pay them. Frothingham v. Prince, 3 Mass. Append. 563. And this is not by way of salvage. Seamen can in no case be considered as salvors. See [The Blaireau] 2 Cranch [6 U. S.] 240.

But if the seamen are not entitled to wages for the whole time, they are at least entitled to the two months' pay claimed in the supplemental libel, by virtue of the statute of the United States. Act February 28, 1803, c. 62. The mere capture did not dissolve the contract between the master and mariners. The latter remained attached to the ship, and being voluntarily discharged in a foreign country, the captain was by that act bound to pay three months' wages to the consul or agent of the United States at that port, of which, on their taking passage to return to the United States, they are to have two thirds, and the remainder is to be left as a fund. This sum having been due in France, and not having been paid, the libellants have a right to recover it here.

Mr. Hubbard, for claimant Keating.

(1) The contract for wages is contingent. Abb. Shipp. 507 (444); [Howland v. The Lavinia, Case No. 6,797]; 3 Johns. 154. It is a rule, to which, however it may appear in some few cases to have been controlled, it will be safest for the court to adhere, that if the freight is lost, no wages are earned. To produce the loss of wages, it is not necessary that the ship itself be lost. Whenever the voyage is destroyed, there is no title to wages. Beale v. Thompson, 4 East, 562, 3 Bos. & P. 428; The Friends, 4 C. Rob. Adm. 143; Curling v. Long, 1 Bos. & P. 637. It is true that a temporary suspension will not have this effect, but in all cases the specific voyage, for which the seamen engaged, must be ultimately performed. It was to mitigate this rule, considered as in many instances a hard one, that courts apportioned the voyage, and allowed wages, whenever the ship has arrived at a port in the course of her voyage, and has delivered, or might have delivered, a cargo.

(STORY, Circuit Justice. This is a part of the general rule, and contemporary with it. It results from the general law, by which wages are to be paid, wherever freight might have been earned; the mariners not being affected by any special contract of the owner.)

It is impossible to conceive a stronger case than the present, in which the vessel was captured and detained until a war broke out between her country, and that to which she was bound; thereby rendering it impossible and unlawful for her to proceed thither. No services have been rendered by the seamen, from which any benefit has resulted to the owners.

(2) In case of capture and recapture, the wages of the sailors must contribute to the salvage paid. Abb. Shipp. 508 (444); Beale v. Thompson, 3 Bos. & P. 405. Upon the same principle they must contribute to expenses, when a restoration is obtained by judicial decision. If this position is true, and if the seamen were entitled to wages in France, and to receive them out of the ship, then their proportion of expenses would absorb all their wages; the whole expenses having exceeded the value of the ship in France. The seamen are not to profit by the increased value here, which is not owing to their exertions; they are to be in the same condition, in which they would have been, had the ship been sold in France, in which case the whole would have been consumed.

(3) The seamen have no title to the two months' wages provided by the statute of the United States referred to, that statute being necessarily confined to cases where wages are actually due, and not intended to give them in cases, in which they would not otherwise be recoverable. Nor was this such a voluntary discharge, as is contemplated in the act; the master was compelled to permit the departure of the seamen, in consequence of his want of funds.

Mr. Prescott, on the same side.

Though a blockade is not of itself a cause of abandonment, yet if the vessel be detained by a cause within the policy until a blockade takes place, the voyage is considered as defeated by the original cause of detention, and it is a total loss upon an abandonment. Barker v. Blakes, 9 East, 294; Richardson v. Maine Ins. Co., 6 Mass. 120. So in this case, the ship having been detained by the capture

until the war broke out, the voyage must be considered as defeated by the capture. This is an inequitable attempt of the seamen to throw upon the owners the whole loss incurred in an adventure, in which all were alike embarked. The wages to the time of sailing from Portsmouth have been paid. If no voyage has been performed since that time, no wages are due. The ship sailed on a voyage from Portsmouth to Londonderry, and thence to the United States. If this voyage has been performed, and the seamen have remained by the ship, and done their duty, they are entitled to wages. Otherwise, they are not.

(1) If a ship is captured, and carried in for trial, the seamen are not entitled to wages, unless they remain by the ship to the completion of the voyage. The immediate effect of a capture in regard to the rights and duties of sailors is not perfectly settled, the decisions in some measure conflicting with each other. The general position is, that by capture and carrying into a place of safety all contracts are dissolved. But this perhaps is rather too strong; the contract is only placed in a situation to be dissolved. Ships are often detained, one, two, or three years. The seamen cannot be required to stay longer, than is necessary to give their depositions, and to prepare for the defence of the ship. Lemon v. Walker, 9 Mass. 404. If then the sailors have an option to quit the ship, and determine the contract, the master must have the same. The contract cannot be suspended on one side only. If the seamen may quit, the master may dismiss. Beale v. Thompson, 3 Bos. & P. 405. If the contract be once suspended, and the seaman leaves the ship, it may be revived again by his returning and resuming his duty, and the ship's being finally released. But what has here been done, to revive the contract? In order to do this, the seamen must return, be received, and perform duty to the end of the voyage. From the time of the ship's arrival in France to January, the contract was suspended, and it was in the power of either party to dissolve it. The master's deposition shows that he did dissolve it. After the restoration of the ship, was any thing done to revive the contract? The ship could not perform the voyage intended. The master was the only judge of the propriety of leaving France. To entitle themselves to wages, therefore, the seamen must remain by the ship till the end of the war, or till the master should judge it prudent to leave France, and complete the voyage. But they had an option to leave the ship, and they did so. Nor can they claim wages to the time of their leaving the ship. Had the incapacity, existing at the time of their departure, been afterwards removed, and the voyage performed by the help of a new crew, what was thus done by the services of the new crew could not give the old a title to wages, which they would otherwise have lost.

(2) The voyage being defeated by a vis major, the seamen lose their wages. This results from the general maxim, that "freight is the mother of wages." This is a reasonable provision in itself. It would be a hardship upon the owner to be compelled to pay wages for a voyage, in which he has lost his freight, and which has been broken up by a misfortune, that should be common to all engaged in the adventure. All the cases, that have been supposed on the other side, are where the voyage is performed, and the freight not prevented from being earned by a vis major, but by some other cause. In every case, where the ship arrives and performs her voyage, but from accident or vis major earns no frieght, (as if the cargo be destroyed by tempest,) no wages are due. It is true, that if the seamen by their exertions save the ship, and bring her into port, they are entitled to salvage. This is often, but incorrectly, called wages. Chief Justice Kent's Opinion, 3 Johns. 154; Frothingham v. Prince, 3 Mass. Append. 563. The stipulated wages may be the measure of compensation, but they are not given as wages.

The facts in the case abundantly show, that this voyage was defeated. The ship was captured on her passage for Londonderry, and carried into France. Here was a vis major. When she was liberated, a war had commenced between the United States, and the country to which she was bound. The ship then could not be in a capacity to perform the voyage. And even had she been so; had she been a neutral ship, and the captain willing to go; still the seamen, being Americans, could not lawfully have gone. This case has been compared to the doctrine of insurance, adopted both in England and in this state, that even a war does not, as respects insurers, justify a breaking up of the voyage. But this will not apply to seamen, who have a contract to perform, of which the performance has by war become unlawful. This however is a case of a different kind. The voyage was defeated by an accident out of the control of the master or crew; by capture and detention. The subsequent incapacity, arising from hostilities, must, according to the English cases, be ascribed to the original detention.

(3) Great expenses have been incurred, to effect the liberation of the ship and cargo. For the same reason, that in cases of capture and recapture, the seamen must contribute to the salvage, in the proportion that the sum paid bears to the whole; they must contribute in this case, in which expenses have been incurred for the common benefit, and to prevent a condemnation, which they were interested to prevent. These expenses amounted to the whole value of the vessel in France.

(4) As to the supplemental libel; the intention of the law of the United States, on which it is founded, was to secure sailors against the effects of their own improvidence, as they might often consent to be dis-

charged to their great injury. It is therefore provided, that the master shall pay to the consul three months' wages. It is a thing, over which the seamen have no control. The consul only can claim this sum. There is no contract with the seaman to pay him the two months' wages. This law was also intended to deter the master from selling his vessel, or discharging his sailors, in a foreign port. It cannot apply to a case of necessary discharge, but only to those of a voluntary discharge, not produced by any accident or vis major. Poth. Du Louage des Matelots, Nos. 1:0, 182.

Mr. Selfridge, in reply.

This is a strong case of equity in behalf of the seamen, since their conduct has been faithful. The general policy of the government having been to protect this class of men, and to exercise a sort of guardianship over them, the court will adhere to this policy, whenever no particular objection appears against it.

(1) To the general doctrine, that "freight is the mother of wages," there are exceptions. Suppose, for instance, an American ship, before the war, bound to England and laden with enemy's property, is carried into France and condemned, the freight however being allowed; that while there detained a war takes place between this country and England; the ship then cannot earn a freight home from England, as intended; yet the seamen are entitled to their wages, if the ship returns home in safety. In the case of Frothingham v. Prince, the seamen received their wages out of the remnant of the wreck, after paying the salvors. Admitting that, when the ship was carried into Roscoff, it was, after a reasonable time, at the option of the seamen or master to dissolve the contract, of which it was the duty of the master to inform the seamen; still this has not been done. Many circumstances in the case show, that the master, so far from dismissing the seamen, still required their services, and considered them attached to the ship. He even prohibited their leaving him to go on board an American privateer, or the American cartel. The case of Brooks v. Dorr shows, that a dissolution is not so easily effected between the master and seamen, as between underwriters and insured. There may be a right to abandon, and seamen still have a right to recover their wages.

(2) If the voyage has been broken up or defeated, it was by the fault of the owners. Going from port to port of the enemy's country was the suspicious cause, which induced the capture. Had this been known to the seamen, they would not have gone.

(3) If the seamen would have been entitled to full wages in case of their remaining on board, and performing the voyage, they must, on the same principle, be entitled to wages pro rata to the time of their discharge by mutual consent. At any rate, they are entitled to wages from the 1st of January, when the captain ordered them to go to Morlaix to work, to the time of their discharge.

(4) As to salvage; the seamen are not liable to contribution, in case of a capture or detention by a friendly power, or if the capture be caused by the fault of the owners.

(5) As to the two months' wages claimed by the supplemental libel; the object of the law was, to encourage the return of seamen by a bounty. It is said, there is no contract; but to this it may be answered, that the law itself raises a contract.

STORY, Circuit Justice, (after reciting the facts). The question for the consideration of the court is, whether the libellants are entitled, under all the circumstances of the case, to any wages beyond what they have already received; and if so entitled, for what period wages are to be allowed? It is argued, on behalf of the respondents, that the libellants have no further claim for wages, no freight having been earned, and the voyage having been, by the capture and subsequent declaration of war between Great Britain and the United States, completely broken up and defeated. The general rule is often asserted, that to entitle the seamen to wages, freight should be earned on the specific voyage, for which they engage; and that if, by any disaster happening in the course of the voyage, the owners lose their freight, the seamen also lose their wages. Abb. Shipp. pt. 4, c. 3, § 1; Hoyt v. Wildfire, 3 Johns. 518; Dunnett v. Tomhagen, Id. 154. The reason or policy of the rule is alleged, in 1 Sid. 179, to be, that if, in case of the loss of the ship by tempest, enemies, &c. the mariners were to receive their wages, they would not hazard their lives for the safety of the ship. The rule itself also is not without exceptions; if the voyage or freight be lost by the negligence, fraud or misconduct, of the owner or master, or voluntarily abandoned by them; if the owner have contracted for freight upon terms or contingencies differing from the general rules of maritime law; or if he have chartered his ship to take a freight at a foreign port, and none is to be earned on the outward voyage; in all these cases the mariners are entitled to wages, notwithstanding no freight has accrued. Hoyt v. Wildfire, 3 Johns. 518; Hindman v. Shaw [Case No. 6,514]; Giles v. The Cynthia [Id. 5,424]; Relf v. The Maria [Id. 11,692]; Abb. Shipp. pt. 4, c. 2, § 5; Maylne, 105; Moll. De J. Mar. bk. 2, c. 3, § 7; Moran v. Baudin [Case No. 9,785]; Roccus, De Nav. note 43. Reasonable however as the rule may seem to be, under these limitations, to those who are conversant with the maritime law of England, it does not seem to have obtained the universal sanction of the commercial world, though it has the weight of the authority of Bynkershoek (Quæst. Pub. Jur. c. 13) to support it. Roccus (De Nav. note

43) holds, that wages are due, notwithstanding the voyage is not performed, if it happen from any fortuitous occurrence, and the mariner is not in fault. Cleirac seems silently to adopt the regulations of the ordinance of Philip II. as reasonable (Cleirac, Jugemens d'Oleron, art. 19, § 3), and Pothier considers that maritime contracts, subject to few exceptions connected with the French ordinances, are governed by the same principles as other contracts of hire, and consequently that if, after its commencement, a voyage be defeated by accident, or superior force, the mariners are entitled pro rata for their term of service (Poth. Du Louage des Matelots, 179, etc., 198, 203). See, also, Abb. Shipp. pt. 4, c. 2, § 6.

It has been argued, that the capture put an end to the contract for wages, and therefore that no services, performed afterwards, can entitle the libellants to recover wages upon the footing of that contract. Admitting that capture, followed up by condemnation, would extinguish such contract, still such effect cannot be attributed to a capture, where there has been a recapture or restitution. And notwithstanding some contrariety of opinion, it may be safely affirmed, that such capture operates, at most, but to suspend the contract, and that by restitution or recapture, the parties are remitted to their former rights in the same manner, as if no such interruption had occurred. Beale v. Thompson, 4 East, 546; Brooks v. Dorr, 2 Mass. 39. See Weskett, Ins. tit. "Wages," art. 11.

It has been further argued, that by the capture the relation between the owners and mariners ceases; so that the latter are not bound to remain by the ship, but are at liberty, without the imputation of desertion, to abandon the voyage. Without deciding, whether the rule assumed in some of our own courts be not more reasonable, that the mariners are bound to remain by the ship until a first adjudication (Bordman v. The Elizabeth [Case No. 1,657]. And see Lemon v. Walker, 9 Mass. 404; Weskett, Ins. tit. "Wages," 11; 1 Strange, 405; 1 Term R. 73), it is clear, that the mariner is not bound to leave the ship. He has a right to remain by her, and wait the event. If restored, he is entitled to his wages, if the ship proceed and earn a freight; if condemned, he may lose his wages, though perhaps, under circumstances, with a recompense for his actual services, pending the prize proceedings. And this doctrine seems founded in the interests of all parties. It would, indeed be highly injurious to commerce, to establish, that in every case of capture, upon whatever pretence, or however unfounded, the mariners were obliged immediately, without waiting the event, to quit the ship in a foreign port.[2] It would often expose the owner to a loss of the voyage, from the difficulty of obtaining a new crew, or to extraordinary expense in securing his property. On the other hand, the mariners would be no less exposed to inconvenience. They might be turned ashore without money or credit, in a foreign country, against the manifest policy of our laws. It would seem fit, therefore, to hold, that a contract entered into by mutual consent should not be dissolved unless by that consent, until such proceedings were had, as left no ordinary hope of recovery in the original tribunal of prize.

Upon the principles, then, which have been stated, the capture did not dissolve the contract for wages; at most, it was but suspended during the prize proceedings, the event of which the parties had a right to await; and by the subsequent restoration of the ship, the contract revived in its full force, and remitted the parties to their former character and rights. If the ship had then been in a condition to perform her voyage, and had actually performed it, there can be no doubt, that they would have been entitled to their full wages during the whole time of service. Beale v. Thompson, 4 East, 546. But at the time of the restoration of the ship, war existed between Great Britain and the United States; and the further prosecution of the voyage was not only impracticable, but highly criminal in both parties. The legal effect, therefore, of such an interdiction of commerce, was to absolve both parties from any further performance of the contract. Abb. Shipp. pt. 3, c. 1, § 3; Scott v. Libby, 2 Johns. 336; The Tutela, 6 C. Rob. Adm. 177. The question then arises, whether a loss of the voyage, in consequence of an interdiction of commerce after its commencement, deprives the owner of his freight or the mariners of their wages?

It seems to be a doctrine of our law, that if a voyage be broken up, by an interdiction of commerce with the port of destination, after its commencement, no freight is payable. And the same rule is applied to cases, where the voyage is lost by accident or superior force. Osgood v. Groning, 2 Camp. 466; Liddard v. Lopes, 10 East, 526; Scott v. Libby, 2 Johns. 336; Abb. Shipp. pt. 3, c. 7, § 5; Id. c. 11, § 3; The Hiram, 3 C. Rob. Adm. 180. In short, the principle seems to be, that there must be an actual delivery of the cargo at the port of destination, to entitle the party to his full freight. Richardson v. Maine Ins. Co., 6 Mass. 102–118. If indeed, there be a

[2] In the Ordinances of the Hanseatic Towns, art. 49, we find the following provision in relation to this subject: "If the ship is arrested in a foreign country, or the master is obliged to wait for his freight, or to tarry from any other cause; during all such delay, the seamen shall be nourished as usual, but without having any pretence or demand for extraordinary wages; and if they are entitled to any thing, they shall be paid at the port, where the ship shall discharge, according to the award of experienced men and common friends. But if any seaman shall be so bold, as to abandon the ship upon this pretext, he shall suffer a corporal punishment, according to the exigency of the case."

voluntary acceptance of the cargo at an intermediate port, and a dispensation of proceeding further, then a pro rata freight is due. Luke v. Lyde, 2 Burrows, 883; Liddard v. Lopes, 10 East, 526; Osgood v. Groning, 2 Camp. 466. In these respects our law appears to differ from the maritime law of other countries. Roccus (De Nav. note 54; Id. note 81) declares, that if the ship has begun her voyage, and from accident is prevented from completing it, freight is payable for the part of the voyage actually performed. This also is the opinion of Straccha (De Nav. pt. 3, § 24), and seems, with some distinctions, to be adopted in the maritime regulations of France (Poth. Charte Partie, notes 68, 69; 1 Emer. 544; 1 Valin, Comm. 656). Indeed, in the case of an interdiction of commerce after the voyage is begun, the full freight for the outward voyage is allowed. Emerig, 544; 1 Valin, Comm. 656; Poth. Charte Partie, note 69. If we pass from the consideration of freight to that of wages, we shall find, as I have already stated, that foreign writers do not consider that wages are wholly lost, but recoverable pro rata itineris, where the voyage has been in part performed, and its further accomplishment has been prevented by inevitable casualty or superior force.

As to an interdiction of commerce with the port of destination, occurring in the voyage, Cleirac (Jugemens d'Oleron, art. 19, §§ 3, 4) adopts, with apparent approbation, as conformable to the civil law, the regulation of Philip II., that the mariners shall, in such case, receive a quarter part of the wages agreed upon for the whole voyage (Dig. lib. 19, tit. 2, l. 15, § 5). The French ordinance (Des Loyers des Matelots, art. 4) declares, that, in the like case, the mariners shall be paid in proportion to the time they have been in service, and this, Pothier says, is conformable with the general rules of the contract of hire (Poth. Du Louage des Matelots, 180; 1 Valin, Comm. 688). No case has been cited, in which this point has been settled in our own courts; and, as far as I have been able to ascertain, after a pretty diligent search, it yet remains for a decision in our maritime law. But if the doctrines already settled in relation to freight are to apply, and it seems impossible to distinguish them, the interdiction of commerce must be deemed to dissolve the contract, and leave the mariner without any title to wages pro rata itineris peracti. Indeed, the moment it is held, that, where freight by the general law is not earned, wages are not due, the case falls directly within the authorities, which have been already examined.

My opinion as to this point, therefore, is, that war existing at the time of the restoration of the ship, and the further prosecution of the voyage being illegal, the original contract was completely dissolved, and up to that time no further wages were due. If the case had rested here, the claim for wages must have been repudiated. But the mariners, with the consent of the master, came on board, and did duty from the time of the restoration of the ship, until their final discharge. It was clearly competent for the master to hire and employ a crew for the preservation and equipment of the ship, and the services so performed cannot, by any reasonable construction, be referred back to a contract, which then had no legal existence. The libellants then must be deemed to have gone on board, and to have done duty, under an implied contract to receive a reasonable recompense, in the nature of wages, pro opere et labore. Upon the footing of this new contract, I have no difficulty in sustaining their claim for wages, during the time of their connexion with the ship after restoration. Full wages, however, ought not to be given for this period, because the services performed or required were not equal to the usual services in the progress of the voyage. In case of detention, under the arrest of a sovereign, the French ordinance (Des Loyers des Matelots, art. 5; Valin, Comm. 6, 190) provides, that the mariners hired by the month, shall be entitled to a moiety only of their wages during such detention. Under all the circumstances of this case, I shall adopt this as an equitable rule, and shall decree wages accordingly.

The next question that arises is, whether the libellants are entitled to the two months pay under the act of the 28th of February, 1803, c. 62? The third section provides, that whenever an American ship shall be sold in a foreign country, or an American seaman shall, with his own consent, be discharged in a foreign country, the master of the ship shall pay to the commercial agent of the United States, for every seaman so discharged, three months' pay, over and above the wages due to such seaman, two thirds thereof to be paid to such seaman on his engagement on board of any vessel to return to the United States, and the remaining third to be retained for a fund to relieve destitute American seamen. I agree with the counsel for the respondents, that the cases here alluded to are cases of voluntary discharge, and not cases, where the discharge has resulted from inevitable necessity or superior force, such as a total loss by capture, tempest, or other fortuitous occurrence. But I can, by no means, admit, that the present case comes within the exception. The ship was in a capacity to return home, or perform any lawful voyage, and, at the time of the discharge, the libellants were attached to her service. The case falls, therefore, within the words and the mischiefs of the statute; and though the money is required to be paid into the hands of a public agent for the use of the libellants, yet as they did all the acts, which gave them a perfect title to it, and it was not paid, this court will enforce their title directly against those, who were circuitously compellable to pay it. The two months' wages, however, are to be calculated, not on the

original wages; but on the wages growing out of the new contract of hire.

Before I close this opinion, I will advert to one or two considerations, which have been thrown out in the argument. It has been argued, that if the seamen were entitled to wages, they were bound to contribute towards the expenses of procuring the release of the ship, as a general average. But I know of no rule of law, which subjects the seamen to contribution in such a case. The general doctrine is, that they do not contribute to general average. The only admitted exception is in case of ransom, and, perhaps, by parity of reasoning, of recapture. Abb. Shipp. pt. 3, c. 8, § 14; Id. pt. 4, c. 3, § 2; The Friends, 4 C. Rob. Adm. 143; 1 Emer. 642; 1 Valin, Comm. 752, 701. If the doctrine were otherwise, it would not apply to the present case; for the wages to contribute must be those, which are saved by the expenses incurred; and not the wages accruing under another contract. Here the very subject matter for contribution was totally lost. It has been argued, on the other side, that a capture of a neutral by a belligerent differs from capture by an enemy as to its effects; that it either affords prima facie evidence of illegal conduct in the neutral, which subjects him to condemnation, and such conduct ought not to affect seamen, who are innocent parties; or such capture is wrongful, and the owners are entitled to damages equivalent to the freight. It might be a sufficient answer to this argument, that no such distinction, as to legal effects, has as yet been recognised; and so far as authorities proceed, they indiscriminately apply to neutral, as well as enemy's captures; and further, that if the voyage be not performed, and freight be not in fact allowed, by way of damages, upon restitution, which may arise without any default of the owner, he would be compelled to pay wages, where the general law had, as a case of the vis major, exempted him. The case also of Frothingham v. Prince, 3 Mass. 563 (same case cited 2 Dane, Abr. c. 57, § 3, p. 462), has been pressed upon the court, as a direct authority to prove, that the payment of wages does not depend upon the earning of freight, if the ship, or any of her materials equal to the wages, remain after the voyage. That case is very imperfectly reported. I have, however, examined the original record, and from a memorandum on it, I find the full wages for the homeward voyage were allowed, although the cargo was totally lost by shipwreck, and the ship herself was so much injured, that the materials sold for little more than the wages. No reasons are given for this decision, and, perhaps, it may have turned, as the defendant's counsel have suggested, upon the ground, that under the circumstances, the seamen were entitled to a salvage equal to their wages. Coffin v. Storer, 5 Mass. 252; Abb. Shipp. pt. 4, c. 2, § 6. If, however, it be incapable of this explanation, as I confess, from the examination of the record, I think may admit of question, the most that can be said is, that it is a single case standing alone against the current of authority. Decree of the district court reversed.

See The Two Catherines [Case No. 14,288]. See, also, The Neptune, 1 Hagg. Adm. 227.

Case No. 12,356.

The SARATOGA v. FOUR HUNDRED AND THIRTY-EIGHT BALES OF COTTON.

[1 Woods, 75.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1870.

AFFREIGHTMENT — WITHOUT CONSENT OF OWNER —CAPTURED PROPERTY—ADMIRALTY—APPEAL—COSTS.

1. Where a treasury agent seized a lot of cotton as captured or abandoned property, and the same was transported to New Orleans: *Held*, that the claimant of the cotton could not be required to pay the freight and charges on the same if the cotton was taken from his possession against his will and was not in fact captured or abandoned.

2. In the admiralty an appeal supersedes altogether the decree of the court below, and the case is to be tried in the appellate court as if no decree had been passed in the court from which the appeal is taken.

[Cited in The Hesper, 122 U. S. 267, 7 Sup. Ct. 1182; The Philadelphian, 9 C. C. A. 54, 60 Fed. 426.]

3. Where the libellant claimed $27,000 and got a decree for $900 in the district court, and appealed, the circuit court being of opinion that the libellant ought to recover nothing, could dismiss the libel at libellant's costs, although no appeal had been taken by claimant from the decree of the district court.

[Cited in The Cassius, 41 Fed. 368.]

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

This was an admiralty appeal. The case was this: The cotton was on the plantation of W. H. Gill, the claimant, in Red River county, Texas, who had an agent employed to guard it. In March, 1866, one Turnbull an agent of the treasury, had the cotton seized as captured or abandoned property and, against the protest of Gill, conveyed in wagons to Shreveport, Texas, and there stored. In April the master of the steamer Saratoga, against the express wishes of Gill, paid the charges on the cotton for transportation to Shreveport and for storage there amounting to $26,052.97, and took the cotton on board the steamer and conveyed it to New Orleans. The freight from Shreveport to New Orleans amounted to $1,095. Gill followed the cotton to New Orleans and recovered it. The owners of the Saratoga, however, filed this libel against the cotton, seeking a lien for the charges paid by them upon the cotton, and for the freight from Shreveport to New Orleans.

E. C. Billings and R. De Gray, for libellants.
S. R. Walker, for claimant.

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

WOODS, Circuit Judge. The claimant by way of defense to the libel, answers: (1) That the cotton was shipped without his consent, but when he learned he could not prevent its shipment, he consented that it might be shipped, provided libellants would not pay the charges claimed thereon. (2) That the charges claimed to have been advanced, if they were in fact advanced, were incurred without the knowledge or consent of claimant. (3) That the cotton was forcibly and illegally and without consent of claimant, taken from the possession and plantation of claimant, in Red River county, Texas, and removed to Shreveport, La. (4) That libellants were notified by claimant before paying said charges that the cotton belonged to claimant, and not to pay the charges thereon because they were illegal and exorbitant, and were informed how the cotton was taken from claimant's possession.

The proof clearly establishes these facts: That the cotton claimed by Gill was his property, that it was taken forcibly and without his consent, and transported to Shreveport. There is an utter failure to show that the cotton was or ever had been in any manner or form the property of the Confederate States. It is difficult to see how one man can enter upon the premises of another, carry off his property against his will by force, and subject it to charges for carriage or storage, which the owner is compelled to pay. But it is claimed for libellants, that this property was seized by Turnbull, as treasury agent, under authority of section 1 of the act of March 12, 1863 (12 Stat. 820), and conveyed to Shreveport and thence to New Orleans by virtue of the 2d section of said act. The first section provides that the special agents of the treasury department shall receive and collect all abandoned or captured property, in any state or territory or any portion thereof, designated as in insurrection. Section 2 provides that the property so received and collected shall be forwarded to such place within the loyal states as the public interest may require. To authorize the seizure or transportation of this property by the agent of the treasury it must have been either abandoned or captured. This property was not abandoned, for it was on the premises of the owner, who was then present either by his agent or in person, claiming the property and protesting against its seizure or removal. It was not captured unless taken flagrante bello or surrendered as the property of the Confederate States at the close of the war. There is no proof that it ever was so captured or surrendered. We find, therefore, that after the actual close of the war, after hostilities had for sometime ceased, this property of the private citizen was taken forcibly from his possession, against his will, by a person having no claim, or color of a claim, to it; and who, to state his character in the mildest words the transaction will admit, was a naked trespasser. Such a trespasser could no more subject property to charges which the owner would be under obligation to pay, than if he had stolen it. The charges which the owner, when following up his property, can be required to pay, are such and such only, as he has agreed to pay.

I am unable to find any competent proof in this record to establish the promise of the claimant, to pay either charges or freight. Gill, in his deposition, denies that he made any promise to pay the freight. In his answer he says he did not wish to ship his cotton on the Saratoga, but finding that he could not prevent the shipping of it on the Saratoga, he consented that libellants should take the same, provided they would not pay the charges claimed thereon. He consented, therefore, on condition. That condition, if what libellants assert is true, was broken. They say they did pay these charges; they are now suing for their recovery. How then can Gill be held to his implied promise to pay freight, when the terms on which the promise was to be binding have not been kept? It is claimed that there is proof to show that Gill agreed to pay the warehouse charges of Griffin & Co., at Shreveport, amounting to $3,000. The only proof upon this point is found in the testimony of R. A. Phelps, who professes to give the contents of a letter from Gill to Dowty, master of the Saratoga, from which the promise may be implied. The letter is not produced, nor is any foundation laid for secondary evidence of its contents. The testimony was objected to. It is clearly incompetent, and the objection is sustained. This leaves the libellant without any proof whatever of a promise by Gill to pay any of these charges or freight. Without such promise there is no reason in law or equity why Gill should be required to pay any expenses incurred in transporting his cotton to New Orleans. It turns out that the wrong doers carried his property to a place where Gill could sell it to advantage. That is his good fortune. But suppose they had conveyed this cotton to some point where cotton was of no value, where there was no market, with what face could they ask him, on the recovery of his property, to pay the expenses incurred by them in the running away with it? Their right to do so would be just as clear in that case as this.

I am satisfied from an inspection of this record, that the cotton of claimant was not seized in good faith by the treasury agents. It was an attempt but too common in those times to take the property of the citizen, under the pretext of seizing it as government property, in order that it might be bought at a price below its real value. The persons engaged in this enterprise failed. They cannot charge the expenses of their unlawful acts upon the owner of the property, nor can any one who pays such expenses, either with or without notice of their unjust and unlawful character, be allowed to recover them of the owner of the property. This libel must be dismissed at the costs of libellant.

THE COURT having rendered this decision, proctors for libellants stated, that the district

court had rendered a decree in favor of libellants for $900 and costs of suit, that libellants only appealed from this decree, and the claimant not having appealed, the decree of the district court for $900 in favor of libellants must stand, and this court could not interfere with it.

WOODS, Circuit Judge. I think otherwise. When libellants appealed, the appeal opened the whole case. They cannot be allowed to claim the benefit of the decree below, and standing secure on that, try their fortunes in this court. In admiralty cases an appeal suspends the decree altogether. It is not res adjudicata until the final sentence of the appellate court is pronounced. The Roarer [Case No. 11,876]; Yeaton v. U. S., 5 Cranch [9 U. S.] 281. The cause in the appellate court is to be heard de novo as if no decree had been passed. We do not find these views opposed to the authorities cited by libellants. In fact, those authorities do not seem to touch the question at all. The libel, therefore, must be dismissed at the costs of the libellant. Decree accordingly.

Case No. 12,357.

SARCHET v. The GENERAL ISAAC DAVIS.

[Crabbe, 185; 1 Liv. Law Mag. 594.] [1]

District Court, E. D. Pennsylvania. Oct. 2, 1837, Jan. 27, 1838.

JUDGMENT — FOREIGN — RES JUDICATA — UPON MERITS—MARITIME LIENS—SUPPLIES —FOREIGN VESSEL.

1. It is perfectly settled that, under the constitution and laws of the United States, a judgment or decree, rendered in any of the United States, by a court of competent jurisdiction, between the same parties, on the same subject-matter, has all the force and effect, in any other state, of a domestic judgment.

2. A judgment for dismissal of a bill, in order to be a bar of a second suit, must have been ordered upon a hearing of the parties, or on the merits of the cause.

3. A dismissal for want of appearance is not a conclusive judgment.

4. Where a libel is dismissed, in one of the United States, for want of prosecution, such dismissal is not a bar of a subsequent proceeding, for the same cause of action, in another state.

5. Where a chain cable is loaned, by its maker, to a master, for the use of his vessel, under an agreement to be returned when another chain has been made and delivered on board; and, on such delivery of the second chain, the first is promised to be returned at a fixed time, before which the vessel sails, and the chain is never afterwards returned; the vessel is properly chargeable with the price of both chains.

6. By the general maritime law, a lien, for materials furnished, exists against foreign ships, and those of other states of the Union, which may be enforced in the admiralty independently of any bottomry bond.

[Cited in Thomas v. Osborn, 19 How. (60 U. S.) 28; The Rapid Transit, 11 Fed. 325.]

[7. Cited in The Regulator, Case No. 11,660, to the point that no implied lien is created by the general maritime law, when the owner himself is present and makes the contract. In such case, the work and materials are presumed to be furnished, not on the credit of the vessel, but on that of the owner.]

This was a libel for materials. The libel was filed on the 7th August, 1837, and set forth that the libellant [John F. Sarchet] was a chain and anchor maker; that on the 8th December, 1833, he furnished two chain cables for the sloop [General Isaac Davis, Errixson, master], then at Philadelphia; that the price of them, as appeared by the schedule attached to the libel, was $188 15; that he had never obtained payment therefor; and concluding with the usual prayer for process. On the 17th August, Perry R. McNeill and John S. Lambdin filed an answer, stating themselves to be the owners of the sloop by recent purchase; that Errixson was no longer her master; that, since her purchase by them, she had made several voyages; that they were ignorant of all the transactions as stated in the libel; that on the 30th September, 1834, the libellant filed his libel against the sloop, in the district court of the United States for the Delaware district; that the said libel was filed for the same cause of action and for the same amount, with the exception of a charge of seventy-five cents for porterage; that the said court proceeded to hear and determine the matters in the said libel set forth, and decreed that the same should be dismissed; and these facts they pleaded in bar to the present libel. The libellant replied, that certain proceedings in admiralty had been instituted, in the district court of the United States for the Delaware district, against the said sloop by other parties; that by a decree of the said court therein, the said sloop was condemned to be sold; that the libellant authorized a proctor of said court to take measures to secure his claim on the proceeds of the sloop; that his said proctor filed a libel and took out process of attachment, proceedings on which were stayed; that no further steps were taken therein to his knowledge; that the libellant's said proctor had died long before the order of dismissal set forth in the respondents' plea in bar; that no new proctor was appointed; that the libellant had no notice of any further proceedings; and that he verily believed the said libel to have been dismissed for want of prosecution. To this the respondents demurred, on the ground that the decree of dismissal was the decree of a court of competent jurisdiction upon the same subject-matter, and, as such, could not be averred against or its regularity questioned or impeached, but that it should be received as final and conclusive. They also rejoined generally. A transcript of the proceedings in Delaware, properly authenticated, was affixed to the respondents' answer and plea in bar. It appeared from the transcript that a libel had been filed, for the same cause of

[1] [Reported by William H. Crabbe, Esq. 1 Liv. Law Mag. 594, contains only a partial report.]

action, on 30th September, 1834; that process had been stayed thereon by order of the libellant's proctor; that on the 13th January, 1835, Isaas Davis, Esquire, of Smyrna, appeared in his proper person, gratis, claiming to be the owner of the sloop; that he consented that the cause should be proceeded in as if the process had been duly served, and the sloop delivered to him on his claim and stipulation, no objection to be made because Thomas Clark, named in the process, was not regularly a party on the record; and that he bound himself in $375 to abide and meet the result of the suit; that the suit was continued for nine terms; and that at June term, 1837, it was "ordered by the court, that the libel filed in that cause be dismissed, and that each party pay his own costs."

On the 22d September, 1837, the case came on before Judge HOPKINSON, upon the demurrer.

Mr. Budd, for respondents.

It is too late to attack the decree in Delaware; for, if there was any irregularity in that proceeding, the libellant might have taken a writ of error. Serg. Const. Law, 390-392; 2 Kent, Comm. 118-120; Harrod v. Barretto, 1 Hall, 155; Story, Confl. Laws, 494-502, 506 (sections 589, 590, et seq.); Penhallow v. Doane's Ex'rs, 3 Dall. [3 U. S.] 103; The Palmyra, 10 Wheat. [23 U. S.] 502.

O. Hopkinson, for libellant.

We do not impeach the validity of the decree in Delaware, so far as it goes; but it is not conclusive on us. To render it final, it must have been upon a hearing, or on the merits, which it was not. 2 Madd. 311; Pickett v. Loggon, 14 Ves. 232; Coop. Eq. Pl. 270, 290.

Mr. Emlen, on the same side, cited, to the same point, Brandlyn v. Ord, 1 Atk. 571; Harvey v. Richards [Case No. 6,182].

HOPKINSON, District Judge. The libellant alleges that in December, 1833, he furnished and delivered to the sloop General Isaac Davis two chain cables, for which he claims the sum of $188 15, as per an account annexed to his libel. An answer is put in by Perry R. McNeill and John S. Lambdin, claiming to be the owners of the sloop. After setting out their defence on the merits of the libellant's demand, the respondents further answer that on the 30th September, 1834, the libellant filed his libel in the district court of Delaware against the said sloop for the same amount now claimed, with the exception of seventy-five cents porterage, for certain iron chain cables alleged to have been furnished for the sloop; that the said libel was for the same matters and to the same effect as the libel in this court; and they further say that the said district court of Delaware did proceed to hear and determine the matters in the said libel set forth, and decreed that the same should be dismissed, all of which appears by a copy of the proceedings annexed, and therefore they plead the said decree in bar of the libellant's libel. The libellant replies to this answer and plea by denials and averments against the matters alleged on the merits; and to the plea in bar he sets forth certain allegations to show that he had abandoned or stayed the proceedings on his libel in the district court of Delaware; that he was not actually or legally in court when the decree dismissing his libel was pronounced; that his proctor had died long before; that he had no knowledge of any of the proceedings in the suit after he had ordered the service of his process to be stayed; and that the said libel was dismissed for want of prosecution, without any examination or hearing of the merits. To this replication the respondents have demurred.

If the plea in bar is sufficient in law to conclude the libellant from a recovery in this case. it will be needless to go into the evidence or merits of the cause.

What is the effect of the decree in Delaware, as it appears on the record annexed to the answer? It is not the case of a foreign judgment, and it is therefore not necessary to examine the law upon the effect of such judgments. It is now perfectly settled that, under the constitution and laws of the United States, a judgment or decree, rendered in any of the United States, by a court of competent jurisdiction, between the same parties, on the same matter, has all the force and effect, in any other state, of a domestic judgment; that is, of a judgment rendered in a court of the same state in which the second suit is brought. Upon this question the cases decided in England should be attended to; and we may inquire what is the effect, there, of a prior judgment or decree upon a second suit brought for the same cause of action. The cases cited by the counsel for the libellant from 2 Madd. 311, 14 Ves. 232, Coop. Eq. Pl. 270, 290, and 1 Atk. 571, are clear and full to the principle that the judgment or dismissal of a bill pleaded in bar of a second suit must have been ordered upon a hearing of the parties, or the merits of the cause; and that a dismissal for want of appearance is not a conclusive judgment. In 1 Atk. 571, Brandlyn v. Ord,—a high authority,—the lord chancellor "laid it down as a rule, that when the defendants plead a former suit, that the court implied there was no title when they dismissed the bill is not sufficient; they must show it was res adjudicata, an absolute determination in the court that the plaintiff had no title." We must observe how directly this authority meets the argument of the respondents, which is, that although there is no direct allegation on the record that the cause was heard or determined on the merits, we must presume that it was so, or the court would not have dismissed the libel, and ordered each party to pay his own costs; that the

terms of the order or decree imply or import a hearing and decision on the merits.

Let us see if the law on this question, under the constitution and acts of congress of the United States, is different from what appears to be thus settled in the English courts. In Story, Confl. Laws, p. 506, the learned author, in sustaining the policy and reasonableness of the principle that foreign judgments should be conclusive, proceeds altogether on the ground that they have been rendered on the merits, and on the whole evidence. In speaking of the law, under the constitution and laws of the United States, as to the judicial proceedings, public acts, and records, of every other state, he says they are put upon the same footing as domestic judgments. In the same author's Commentaries on the Constitution of the United States, in volume 3, pp. 178, 179, he examines the constitution and acts of congress, and the decisions that have been made upon them, and maintains truly that more effect is to be given to the judgments in a sister state than to foreign judgments; that in confederate states, that in states united under one national government, a more favorable attention should be given to their judgments than to those of foreign states; that a higher security and confidence, a superior sanctity and conclusiveness, should be accorded to public acts and judicial proceedings under the authority of the federal individuals. With these broad and liberal views of the subject, with this disposition to give "full faith and credit" to the judicial proceedings of every state, he comes to this conclusion: "Under such circumstances, it could scarcely consist with the peace of society, or with the interest or security of individuals, with the public or with private good, that questions and titles, once deliberately tried and decided in one state, should be open to litigation again and again, as often as either of the parties, or their privies, should choose to remove from one jurisdiction to another. It would occasion infinite injustice, after such trial and decision, again to open and re-examine all the merits of the case." The same argument, and in nearly the same language, is found to be used by Judge Washington in the case of Green v. Sarmiento [Case No. 5,760]. In page 180 of the Commentaries, the author pursues the subject in the same strain of argument, always speaking of the evils of a re-examination of the judicial proceedings of each state. His conclusion as to the meaning of the clause of the constitution is that the "full faith and credit" to be given to records, &c., is to attribute to them absolute verity, so that they cannot be contradicted, or the truth of them denied, any more than in the state where they originated. In Wright v. Decklyne [Id. 18,076], Judge Washington says the decree of dismission is not conclusive. The rule is admitted that the decision of a court of competent jurisdiction, directly upon the same point, is conclusive when the same point comes again in controversy directly or collaterally. Other adjudications have been referred to, but it is not necessary further to examine them in detail; it is enough to refer to Wilson v. Speed, 3 Cranch [7 U. S.] 283; Hopkins v. Lee, 6 Wheat. [19 U. S.] 109; Harvey v. Richards [Case No. 6,182], and 1 Brown (Pa.) Append. 1.

It remains to look at the record now produced from the district court of Delaware, and I shall deny nothing, contradict nothing that it contains, but only inquire whether from that record it appears that the decree dismissing the libel from that court was made on a hearing of the parties, or on a fair and legal opportunity afforded to the libellant for a hearing, or an examination of the evidence and merits of the case, or indeed whether the contrary of this is not manifest from the record itself, and without taking into consideration the allegations of the libellant's replication; upon which I would however remark, that it is not in contradiction or denial of the record, but in direct answer to one of the allegations of the plea in bar.

In the first place, it must be observed that the plea expressly avers, after setting out that the libel filed in the district court of Delaware was for the same matters as the present libel, "that the said district court of the district of Delaware did proceed to hear and determine the matters in the said libel set forth, and decreed that the said libel should be dismissed, all of which appears by the copy of the record of the said proceedings hereunto annexed." If this allegation is maintained by the record and evidence referred to, that is, if it does appear by that record that the court did proceed to hear and determine the matters in the said libel set forth, then the respondent has maintained his plea in bar of the present suit, and will be entitled to a judgment accordingly; but if all this does not appear by the record, he seems to have admitted that he has failed to support his plea in an averment essential to its validity. The decree itself does not aver or purport to have been made after hearing, which is the usual form; nor is there in any part of the record any allegation, suggestion, or intimation that any such hearing was had, or any notice given to the libellant of the admission of a new party to the suit, not named or known in his libel, or of any of the proceedings of the new party, or of any motion or intention to ask of the court an order of dismissal of the libel, or of any other motion, order, or decree respecting the libel or the matters contained in it. Nor is there any decree or judgment rendered against the libellant upon the matters contained in his libel, and intended by that to be brought into controversy before the court. Nor was any answer filed to the libel, or any issue depending before the court, so that they could judicially know what were the matters in controversy, or render a decree thereon. The court knew nothing about the case, except that there was a libel which was

not prosecuted. Can we then fail to know, without relying on the allegations of the libellant's replication, that the dismissal of the libel must have been because the libellant did not appear to prosecute it? for there was nothing before the court but the libel upon which they could act, and they could act upon that only by dismissing it for a default of the libellant in prosecuting it, or on some objection to form which does not appear. No answer, no plea, no issue to bring the merits before the court; nothing which the court could, in the language of the plea in bar, "proceed to hear and determine." No evidence could have been heard, or trial had, in the state in which the case stood. There was nothing before the court to be tried. In the case of Gettings v. Burch, 9 Cranch [13 U. S.] 372, it was decided to be error in an orphans' court to decide a cause against the answer of the defendant, if the answer had not been denied by a replication, and if there be no evidence on the record contradicting the answer. The same principle would make it error in the court in Delaware to have decided this cause against the uncontradicted libel; as we must not presume error in the judgment of a court, we must say that the order or decree in this case did not intend to decide the matters contained in the libel, but merely to dismiss it for want of prosecution, that being the only order the court could legally make.

The libel in Delaware was filed against the vessel called the General Isaac Davis, and one Thomas Clark is stated to be the master and owner of the vessel. Process of attachment was ordered against the sloop, returnable on the 22d October, 1834; and on that day the marshal returned the process, stating that it was "stayed by order of George Reed, Esq., attorney for the plaintiff." So the case remained, the original process extinct by a return of it to the court, and no further proceeding against the vessel could have been had upon it. The libel only was in court, and if the libellant had desired to proceed with his suit he must have asked for new process, as the service of the first had been prevented by his own order, and the marshal having returned it could not have resumed or acted upon it. The case remained abandoned, or at least suspended, by the libellant, until the 13th January, 1835, nearly three months, when Isaac Davis, Esquire, who was not named or known in the libel, upon whom no summons or monition had been prayed or served; whose property, supposing him to have been the owner of the vessel, was under no restraint or attachment by process, comes in and claims to be the owner of the sloop "mentioned in the process aforesaid;" appears, as the record says, "gratis," that is, without any legal call or obligation upon him to do so, and claims to be the owner of the sloop; he consents that the cause shall proceed as if the process (which had not been served at all), had been duly served, and as if the vessel had been attached and afterwards delivered to him upon his claim and stipulation (all of which was a pure fiction), and he also consents that he will make no objection because Thomas Clark, named in the record, is not regularly a party in the suit. This is all very extraordinary. Mr. Davis consents to all this. Now consent implies an agreement with some other party; with whom did Mr. Davis make this agreement? Not with the libellant, for he knew nothing of it, nor with Clark, for he was not in court. He consents that the name of Thomas Clark shall be expunged as a party to the suit, and that his name shall be substituted for that of Clark. But did the libellant ever consent to this? And could it be done without his consent, or an order of court on due notice, and hearing of both parties. Again, Mr. Davis, on the same system of acting on his own consent, and making agreements with himself, binds himself to Mr. Sarchet, in three hundred dollars, to pay whatever shall be decreed in the cause to be paid by the vessel. Now a stipulation of this kind, in a suit in rem, is taken as a substitute for the thing attached and in the custody of the law; but here nothing had been attached, nothing was in the custody of the law, there was nothing for which the stipulation was or could be a substitute. These things are adverted to, not as being irregularities to be corrected here, but as showing the nature of the whole transaction, and tending to the conclusion that the libellant was not heard on the merits of his case, nor had any opportunity to be heard, that he had no notice or knowledge of these steps, but that the whole proceeding was ex parte, and the libel dismissed without hearing, and with one of the parties only, in court; if we can consider Mr. Davis as a party in court after the extraordinary manner in which he put himself there. In the mean time, all the libellant knew of the suit, or any proceeding in it, was that he filed his libel; that he had put his process into the hands of the marshal, but had forbidden any proceeding upon it; and that his suit was against the sloop and her owner and master, one Thomas Clark. He was ignorant that a stranger to him and his process had come in "gratis;" had consented to put aside Thomas Clark, and placed himself as defendant in the suit; and that this stranger was proceeding to dismiss his libel, to be a bar to any future suit for the recovering of his debt. No notice was given to him of any of these proceedings. Can I hesitate to believe that the libellant, having stopped the service of his process and suffered the vessel to be at large, considered that his suit was abandoned, or required no further attention from him; or that it was possible he could suppose that a stranger could come in, without any notice to him or the original defendant, and carry on the suit to a termination. Isaac Davis, Esquire, having thus placed himself, "gratis," on the record as the defendant in the suit, remains at rest for eighteen months, that is from the 13th January, 1835, to June, 1837. In June, 1837,

still without any notice to the libellant, an order is given by the court that the libel be dismissed.

On this review of the proceedings in the court in Delaware, taken entirely from the record, it is manifest that the order for the dismissal of the libellant's libel in the court, was not a judgment or decree on the merits of the case, or after a hearing of the parties on any of the points in controversy between them, and therefore it is not conclusive upon the rights of the libellant. The demurrer is overruled, and the cause will proceed to be heard on the merits.

On the 13th January, 1838, the cause came on before Judge HOPKINSON, on the merits; and was argued by the same counsel as before. After the evidence—

O. Hopkinson, for libellant, urged:

1st, that the contract was made on the credit of the vessel. The General Smith, 4 Wheat. [17 U. S.] 443; The St. Jago de Cuba, 9 Wheat. [22 U. S.] 443; Abb. Shipp. 116 (148, Ed. 1846). 2d, that it was in evidence that the articles had been supplied according to the contract. 3d, that the vessel belonged to another state, and was liable to the lien. Act Cong. Dec. 31, 1792 (1 Story's Laws, 268 [1 Stat. 287]). 4th, that there was no evidence of any waiver of the lien or remedy, either express or implied.

Mr. Budd, for respondent.

Mr. Sarchet had security in Delaware, and relied upon that from 1834 to 1836, and waived all claim upon the vessel. The act of assembly of Pennsylvania ought to govern this case: that law relates to all vessels, foreign or domestic, and was the maritime law of Pennsylvania before this court came into existence.

Mr. Emlen, for libellant, in reply.

There is no doubt that the chains were delivered, and the price of them is not contested. The defence made is, 1st, that no lien exists, and, 2d, that, if it does, it has been waived. The lien is given by the general maritime law, the principles of which are not disputed; when a vessel is furnished with articles in a port to which she does not belong, and by the order of her master, the maritime law gives a lien upon her for the price of such articles. The waiver of this lien must be made out clearly on the part of those alleging it, which has not been done here. As to the security in Delaware, a stipulation to come in, answer, and abide by a judgment is not such a security as discharges a lien.

HOPKINSON, District Judge. The libel in this case is filed to recover the price of two chain cables furnished to the sloop General Isaac Davis in the months of November and December, 1833. In November the vessel was lying in the Schuylkill, under the command of John Errixson. She was built at Frederica, in the district of Delaware, where her owner, Thomas Clark, resided. The master applied to the libellant for a new cable for the sloop, and the libellant, not having a new one on hand, delivered to the master an old one, to be used until the new one could be made. Upon the delivery of the new chain, the old one was to be returned to the libellant. The new one was delivered, but the old one has never been returned, and both are now charged to the sloop, and she has been attached by the process of this court for the recovery of the value or price of both. At the time of the contract for these chains, and of their delivery on board the sloop, she was owned by one Thomas Clark. She has now passed, by regular sales, into the possession of the respondents, Perry R. McNeill and John V. Lambdin, who appear and take defence against the claim of the libellant. They allege that they purchased the sloop from Isaac Davis, on the 18th of February, 1837; that on the 15th of April, 1834, Thomas Clark, the first owner, sold her to Rhoda Hill and John Clark, who, in the same year, sold her to Isaac Davis. The answer then states the decree of the circuit court of the district of Delaware, which part of the defence has been passed upon by this court in a decision unfavorable to the respondents. Another defence, as to a part of the claim, has arisen upon the evidence, to wit, that the old cable was not purchased by the master of the sloop, but borrowed of the libellant, and, therefore, created no debt chargeable on the vessel; that by the agreement between the libellant and the master the old chain was to be returned by the latter and received by the former, and there was no contract of sale. In addition to these matters of fact, a question of law is presented upon the jurisdiction of the court, or, in other words, the existence of a lien on the vessel, for the payment of the claim is denied.

Upon the facts:

1. It is not to be doubted that these two chains were delivered on board of this sloop at the request of the master, who made the contract for them with the libellant, not only in virtue of his general authority as master, but by especial order of the owner. And no objection is made to the price.

2. As to the old chain, the facts are, that it was delivered by the libellant to Captain Errixson, for the use of the vessel until the new one should be ready for delivery, and that on the delivery of the new one, the old chain was to be returned to the libellant. The sloop made one or more voyages with the old chain; she then came into the Schuylkill, when the libellant sent the new chain to her and demanded the return of the old one. It was not returned; the persons on board, under whose direction we are not informed, refused to give their assistance to the porter to put it on the dray, and it was not in his power to do it himself; the porter was told, however, that if it was sent for on

the next day it would be returned. The next day J. Sarchet went to the Schuylkill, but the vessel was gone with both chains, not even taking the care to put either of them on the wharf. From that day the libellant has never seen either of the chains, had any opportunity of getting the old one, nor had any offer to return it, with the exception of a conversation at Wilmington, in the month of June or July, 1834, between Thomas Clark and John Sarchet, when Clark says he offered to return it; but this offer was made after Clark had sold the sloop, and at a place —and, perhaps, after a lapse of time—when the libellant was not bound to receive it. I think, then, that the old chain is properly chargeable to the sloop, either as a conversion, by the owners, of the original loan into a sale, which may be inferred from their acts, or as damages for retaining and converting it to their own use.

3. The question of delay in bringing this suit has been made. Such delay ought not to be indefinite, especially in the case of new owners, but there has been no delay here that was not caused by the owner of the vessel, or the trade in which she was employed, taking her from place to place with but short stoppages at any of them. There is no proof that the libellant had any knowledge of her being at this port after she left it with his chains for the first time.

4. There remains the question of jurisdiction. The law in the courts of the United States is unquestionable that, in the language of Judge Story, "as to foreign ships, there seems to be no doubt, that by the general maritime law a lien exists for them, which may be enforced in the admiralty, independently of any bottomry bond." Such is the doctrine of the supreme court of the United States in the cases referred to at the bar; and a ship belonging to another state of the Union is deemed a foreign ship for this purpose. In Judge Story's last edition of Abbott, in a note on pages 115 and 116, the whole doctrine of liens in such cases is examined by the learned editor, and all the leading authorities cited.

In the libels filed and tried in the district and circuit courts of Delaware against this same vessel for certain work and materials furnished to her in this port, Chief Justice Taney gives a very clear and condensed view of the law of the case in full conformity with the doctrines of Judge Story, and it will probably be a satisfactory manner of examining the case now before us to take the opinion of the chief justice for our text, and apply it to the circumstances now in evidence. The libel and claim adjudged by the chief justice are stated by him to have been "to recover the amount due to the libellants respectively for work done, and materials furnished in rigging the sloop in the port of Philadelphia." From this general statement, as well as from other parts of the opinion it is manifest that the claim of the present libellant was not brought before that court or adjudicated by the decision given. The general facts of that case were substantially the same as they appear here; they are thus stated by the chief justice. "The sloop was built at Frederica, in the state of Delaware, where Thomas Clark, her then owner, resided. The hull was completed and launched about the last of July, 1833, and having neither masts nor sails, was towed" up to this city for the purpose of being here rigged. John Errixson, who was to be employed as her master, came in her to Philadelphia and remained here, giving directions while she was being rigged. But Clark, the owner, was also here during the whole time, and made the contracts for rigging her with the workmen and material men. In applying the legal principles of the chief justice to this case, we must particularly remark these two circumstances: (1) That the sloop came to this port in an incomplete state, without masts or rigging, for the purpose of procuring them and putting her in a condition to make voyages, and that coming here in this condition, and for this purpose, she could not in any sense be said in her passage from Frederica to Philadelphia to have sailed on a voyage from the one to the other port. It does not even appear that she had any crew on board, and as she was towed up, it was not likely she had any. (2) That the owner of the sloop was here the whole time the work was going on and the materials furnished, and made the contracts himself. It seems that the rigging was finished on Saturday evening, and on Sunday morning following, the sloop, with her owner and master, was gone, and proceeded to Wilmington, in the state of Delaware, without any payment being made to the workmen and material men. At Wilmington she was enrolled, and took a coasting license on the —— day of September, 1833, and then commenced her business or employment as a coasting vessel, sailing to and from Frederica, Philadelphia, and New York. These are the facts upon which the judgment of the circuit court in Delaware was given. The points of law decided are these: (1) That the libellants had lost the benefit of the lien given by the act of assembly of Pennsylvania. Of this there can be no doubt. The only ground, then, on which the libel could be supported was that an implied lien was created by the general maritime law. It is true, as the chief justice said, that the principles laid down by the supreme court in the case of The St. Jago de Cuba—9 Wheat. [22 U. S.] 416—must decide the point against the libellants. And why? Because in that case it was decided that the lien given by the general maritime law, is confined to contracts made by the ship master in a foreign port, in the absence of the owner, and that no lien is implied when the owner himself is present and makes the contract; and that in such a case the work and materials are presumed to be furnished, not on the credit of the vessel, but

on that of the owner. This was sufficient for dismissing the claim in Delaware, as the owner was present and himself made the contracts attempted to be enforced by an implied lien on the vessel. The chief justice having thus disposed of the case before him on undoubted principles of maritime law, none of which affect the case now to be decided, offers a remark upon the case of The General Smith,—4 Wheat. [17 U. S.] 438,—in which, he says, no distinction is taken between contracts made by the owner when the vessel is in a foreign port, or in the port of a state to which she does not belong. The chief justice confesses that the distinction is not very clear or satisfactory to him, but he adheres to it because it is expressly recognised in the case of The St. Jago de Cuba [supra]. The distinction alluded to is certainly established by other adjudications, going even so far as to say that when the owner has an agent with funds where the contracts are made and the work done, they are considered to be on the personal credit of the owner and not of the vessel.

The case in Delaware was, then, decided on the ground I have mentioned, but to prevent misapprehension of the opinion of the court in relation to other parts of the case, the chief justice proceeded to give his views or impressions of some of the circumstances, which are more immediately presented to our consideration. He says, "the court must not be understood to decide that there would have been the implied lien on the vessel if the contracts had been made by the master in the absence of the owner." He thinks "there would have been strong objections to it," for he doubted whether the mere hull, without masts and spars, and not documented by any custom-house, when at Philadelphia for the purpose of being finished as a vessel, would be said to have its legal home in Delaware, merely because Delaware was the home of the owner. Nor was he prepared to say that the rigging of a new vessel, in order to fit her for the first time for sea, comes within the views or language of the maritime law, which gives the lien to workmen and material men for repairs. I think the doubt is a reasonable one. But reasonable as this doubt is, it will not be found to affect the claim of the libellant in this case. A general reference to the evidence of this case will show not only how different it is from that decided in Delaware, but how entirely it is clear of the objections and doubts suggested by the chief justice in the conclusion of his decree.

1. The contract was made by the libellant with the master of the vessel, and not with the owner, nor was the owner present at the port at the time the contract was made and the cables furnished.

2. The vessel did not come to this port to be fitted out at the time the cables were supplied, but was fully and completely equipped and actually employed in the coasting trade for which she was designed, having before performed other similar voyages. Her fitting and equipment was completed in September, 1833, after which she was taken to the Delaware district, where her owner resided, and made voyages from and to that district, the chains in question not being furnished for a considerable time. They were contracted for in November, when the old chain was delivered, and the new one in the December following. The sloop was then taking in coal to go to New York, and was lying in the Schuylkill, where it is not pretended the original equipment was made.

3. The sloop was regularly documented, enrolled, and licensed as a coaster at the custom-house of the Delaware district. This was done at Wilmington, immediately on her return to Delaware, when her fitting out was completed, in September, and between that period and the months of November and December, she had been employed in her regular business voyages.

4. She did not get these cables for the first time, so as to take from the supply the character of repairs and give them the character of an original fitting out. It is clearly in proof that the first cables furnished to this sloop were purchased of one B. J. Pearson, and she had sailed with this chain, and the anchors got at the same time from the same person, from September until the others were obtained from the libellant.

In all these material points the case before us differs from that decided by the chief justice, and the lien claimed by the libellant is fully maintained by the principles of maritime law adopted by the chief justice in conformity with the settled doctrines of the supreme court as well as the English authorities.

Decree for the libellant for the sum of $188 15, but without interest.

SARCHET (UNITED STATES v.). See Case No. 16,224.

SARDO (BESTOR v.). See Case No. 1,363.

Case No. 12,358.

SARDO v. FONGERES.

[3 Cranch, C. C. 655.] [1]

Circuit Court, District of Columbia. Dec. Term, 1829.

GAMING—BILLIARDS—ACTION TO RECOVER MONEY WON.

Money won at billiards is money won at play, within the 5th section of 9 Anne, c. 14, and cannot be recovered if more than £10 be won at one time; which section of that statute is in force in the county of Washington.

Appeal from the judgment of a justice of the peace for $50, of which $48 were won at billiards at one time, and $2 were for the

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

use of the billiard-table, the plaintiff [Michael Sardo] below being the owner of the table.

Mr. Marbury, for appellant [Lewis Fongeres], contended that the debt was void by the 5th section of the English statute of 9 Anne, c. 14, which was in force in Maryland, on the 27th February, 1801, and adopted as a part of the law of Maryland, as they then existed; the amount won at one time being more than £10. 1 Com. Cont. 41.

Mr. Wallach, and Mr. Elkins, for appellee, contended that, as the Maryland act of 1797 (chapter 110), respecting gaming-tables, excepted billiard-tables, all gaming at billiards was lawful; and that money won at billiards was not within the English statute of 9 Anne, c. 14; and they cited —— v. Bland, 3 Burrows, —, and Earl of March v. Pigot, 5 Burrows, 2802, and Act Md. 1797, c. 110.

THE COURT (THRUSTON, Circuit Judge, absent) reversed the judgment, with costs of this court, and entered judgment for the appellee for $1, for the use of the table, he being the owner thereof.

Case No. 12,359.

SARGEANT et al. v. FIRST NAT. BANK.

[7 Reporter, 231;[1] 6 Wkly. Notes Cas. 370; 26 Pittsb. Leg. J. 191.]

Circuit Court, E. D. Pennsylvania. Jan. 25, 1879.

PRACTICE IN EQUITY—DISMISSAL FOR WANT OF PROSECUTION.

1. Where a plaintiff has not taken testimony in support of his bill within the three months after issue formed, as allowed by rule 69, the court will not on that account dismiss the bill for want of prosecution.

2. That the plaintiff in such case will merely be deprived of the testimony with which diligence would have supplied him, he will forfeit no other right.

Motion to dismiss bill for want of prosecution. In this case after the bill had been filed, an answer was put in, and on October 3, 1878, a replication. No testimony had been taken prior to the filing of the motion to dismiss.

G. T. Bispham, for the motion. Equity rule 69, Sup. Ct. Rules (Ed. 1866), allows "three months and no more" for taking of testimony after the cause is at issue, unless the time is enlarged on cause shown. Here more than that time has elapsed. The plaintiffs should be forced to go on, or their bill be dismissed.

A. Sydney Biddle, contra. The rule gives no power to the court to dismiss a bill.

McKENNAN, Circuit Judge. The court has no power to make the order asked for. The rule which is binding upon this court provides that no more time than three months shall be allowed for taking testimony without a special order. But suppose the testimony had been taken, the case must take the usual course and wait for its turn on the regular argument list. All that the rule requires is that the evidence shall be in within a fixed time, if not it is at the complainant's peril, but he is then only deprived of the testimony which diligence would have supplied him with and loses none of his other rights. Motion denied.

[1] [Reprinted from 7 Reporter, 231, by permission.]

SARGEANT (HART, B. & M. MANUF'G CO. v.). See Case No. 6,156.

Case No. 12,360.

SARGEANT v. STATE BANK OF INDIANA.

[4 McLean, 339.][1]

Circuit Court, D. Indiana. May Term, 1848.[2]

DEDICATION—BOND TO CONVEY — PROCEEDINGS — STATUTE—LAPSE OF TIME.

1. By certain statutes, provision is made for establishing seats of justice in Indiana. Commissioners were appointed, and other officers, who were to receive donations of land, or purchase the same, etc.

2 In establishing the seat of justice for Tippecanoe county, certain proceedings were had, under the law, and a bond was taken from Samuel Sargeant, "to the board of justices of Tippecanoe county," to convey to them, when they should be organized, certain lots for public purposes.

3. The seat of justice being established at Lafayette, in a summary mode provided, suit was brought against the heirs of Sargeant, for a title to the property which their ancestor agreed to convey. A decree of conveyance was entered, and the conveyance, in pursuance thereof, was executed.

4. The property thus conveyed has become very valuable, and the heirs have brought an ejectment to recover it, on the ground that the proceedings were illegal and void by which a decree of title was obtained.

5. The bond, though it bound the obligor to convey to a board not in esse, is not void or inoperative.

6. It is fairly within the statute.

7. The court held, that notice was given to the heirs, and this is conclusive in the case. The fact of notice can not collaterally be denied.

8. But the dedication is good at common law, if the statute had not been technically complied with.

9. The property thus donated, by improvements has become immensely valuable.

10. And after the lapse of many years enjoyed by the public, the title must be held good.

[This was an action of ejectment brought by Phineas O. Nabby, Jabez and Benjamin B. Sargeant, heirs of Samuel Sargeant, against the State Bank of Indiana.]

Smith & Lockwood, for plaintiffs.

White & Baird, for defendant.

OPINION OF THE COURT. The plaintiffs, heirs of Samuel Sargeant, who claimed under the patentee by deed, claim the lots in controversy, and also other grounds with-

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

[2] [Affirmed in 12 How. (53 U. S.) 371.]

in the town plat of Lafayette. The lot and the improvements thereon are proved to be worth from twelve to fifteen thousand dollars. The patent and deed are in evidence, and also proof of the heirship of the lessors of the plaintiff. To understand the defense, it is necessary to refer to the statutes under which it is made.

By the act of the 20th of January, 1826, the county of Tippecanoe was established, and certain commissioners were named to fix the seat of justice. They were to meet the first Monday of May ensuing. The qualified voters, at the time of electing a clerk, recorder, etc., were authorized and required to elect five justices of the peace, who were to constitute a county board, etc. The act of the 14th of January, 1824, provided for the appointment of five commissioners to fix on the seat of justice for a new county. "And it shall be the duty of the commissioners to receive donations in lands from any person or persons owning lands in such county, and offering donations for the use of the same," etc. "The said commissioners shall inquire and ascertain whether any land on which they may be inclined to fix the seat of justice, can be obtained by donation, or by purchase at a reasonable rate," etc.; "and the commissioners shall take a bond, or bonds, of any person or persons proposing to give or sell any such land payable to the board of county commissioners, and their successors in office, conditioned for the conveyance of such tract or tracts of land so given or sold, to such person as the county commissioners shall appoint as agent to receive the same, which bond or bonds the commissioners shall deliver to the county commissioners, together with a plain and correct report of their proceedings, containing a particular description of the land so selected, which shall be considered the permanent seat of justice for such county." By the 2d section, the agent is required to give bond, "and the county commissioners and said agents, are hereby vested with all further powers necessary to carry this law into full and complete operation, according to the true intent and meaning thereof." Section 4 provides, that the county commissioners, after receiving the report, are required "to appoint some suitable person, a resident of such county, as agent, whose duty it shall be," after giving security, "to receive good and sufficient deeds of conveyance, for any land which may have been given for the use of the county as above provided, and to lay off the same into town lots, etc., as the county commissioners may direct; he shall proceed also, from time to time, to sell the said lots, or so many of them as the said commissioners may deem proper, on such terms as the county commissioners may consider most advantageous to the county; and to collect all moneys for the sale of said lots, and pay the same into the county treasury; he shall also make conveyances to the purchasers of such lots, and after the payment of certain expenses out of such moneys, the balance shall be applied for the construction of public buildings, etc."

By the act of the 3d Jan'y, 1824, a county board of justices are established, with corporate powers. The justices, by the 4th sec., are required to meet on the first Mondays of January, March, May, July, September and November, in each year; appoint a president, etc., and if the circuit court shall sit on any of said days, the county board of justices shall meet on the Monday succeeding such term. The 5th section, required the clerk of the circuit court to attend the meetings of the county board of justices, and keep a record of their proceedings. All powers possessed by the commissioners of the county, are vested in the justices of the county board. On the 4th of May, 1826, Samuel Sargeant, with others, entered into a bond in the sum of ten thousand dollars, conditioned "that they shall well and truly convey, or cause to be conveyed, unto the board of justices of Tippecanoe county that may hereafter be organized, and their successors in office, by way of general warranty deed, certain lots of ground designated." This bond was filed in the clerk's office, 7th November, 1827, and recorded. On the same 4th of May, 1826, the commissioners appointed made their report, establishing the seat of justice at Lafayette, and they state that "they have received as donations from the proprietors and others, for the benefit of said county, the following described property, viz: All the even numbered lots in said town, amounting to seventy, and other grounds for which a title bond is herewith transmitted, together with a plan of said town as recorded in the recorder's office at Crawfordsville, reserving, for the use of a county library, ten per cent." On the 5th day of July, 1826, the Tippecanoe county court of justices met, as appears from their record, being duly commissioned and organized. They received the return from the commissioners appointed to locate the seat of justice, etc., received a bond from Samuel Sargeant for ten acres of land, east and adjoining the town, etc., and also other donations, etc. The record of the circuit court of Tippecanoe county of May term, 1828, was given in evidence. From this record it appears that at November term, 1827, Peter Hughs, agent for the county of Tippecanoe, by Curry, his attorney, appeared and moved the court to appoint a commissioner to convey real estate in conformity to a title bond, given by Samuel Sargeant, dec'd, and others therein named, to the board of justices, and which bond he now here files for the conveyance of certain town lots, and also a bond by himself for the conveyance of ten acres, etc.; "and it appearing to the satisfaction of the court that proper and legal notices have been given of this motion, R. Johnson was appointed commissioner to make the conveyance, and the deed was executed by the commissioner under the decree of the 7th of June, 1827."

It is objected that the bond given by Sargeant and others is a nullity: (1) For want of parties. (2) For want of delivery. To make a good deed parties capable of contracting are indispensable. At the date of this bond, it appears from its face that the obligees were not in esse. The obligors bound themselves "well and truly to convey, or cause to be conveyed, unto the board of justices of Tippecanoe county, that may hereafter be organized and their successors in office." This bond, it is contended, is void at common law, as there was no obligee at the time it was executed and delivered. Shep. Touch. 235, 367, 368; 1 Cruise, Dig. 415; 8 Johns. 310; 9 Johns. 73; 2 Bl. Comm. 276, 304. And that it is also void as a statutory bond, because it was not taken under the provisions of the statute. The statute requires the bond to be taken "to the board of county commissioners of such county and their successors in office," and the bond was taken "unto the board of justices of Tippecanoe county that may hereafter be organized, and their successors in office." 4 Ohio, 169.

A bond, it is insisted, not good at common law, is also void under the statute, as the statute does not attempt to create obligees not in esse, and a doubt is suggested whether the legislature had power to make such a provision. There can be no doubt that they have such power, but it seems no special provision to that effect was made in this case. The bond being void when delivered to the commissioners, could not be made good by any subsequent delivery as it was not, in the first instance, delivered as an escrow. At the time the bond was handed to the commissioners, from the conditions expressed upon its face and the nature of the transaction, it was not to bind the obligors unless the seat of justice should be established at the place designated; that was the consideration on which the instrument was executed. Under the law the commissioners were required to "inquire and ascertain whether any land where they may be inclined to fix the seat of justice by donation or purchase," etc. This was preparatory to their establishing the seat of justice. After the execution of the bond the commissioners were not absolutely bound to fix the seat of justice at the place designated in the bond. The bond was then given on the condition that the seat of justice should be established as contemplated by the obligors. The condition of the bond was, that "the obligors would convey such tract or tracts of land so given or sold, to such person as the county commissioners shall appoint as agent to receive the same." Suppose that this land had been purchased of Sargeant and others, and the money paid, could they in a court of chancery contend, with success, that the bond was void? This may be admitted as a question at common law. There being no obligee, no action at law could be brought on, the bond, for a breach of its conditions. That a deed takes effect from its delivery is admitted; and also if it be delivered as an escrow, it does not take effect until the condition happens. The authorities read by the plaintiffs' counsel, are recognized as good law; but the question is repeated, could such a defense be sustained in a court of chancery, had the ground been purchased? The answer must be in the negative.

There is no want of certainty in the terms of the contract, there could be no impeachment of the consideration. No court of equity could permit the obligors to withhold the money, and the land also. And if this would be the result in a case of purchase, the donation occupies stronger ground. In selling, the vendor may have parted with all the land he owned—in making the donation his object always must be, to enhance the value of the remaining tracts. And by an enhancement of the value of these, by the establishment of the seat of justice, he has a greater compensation than by a sale of the land. If this action, therefore, were a bill filed by the person appointed by the commissioners, or their successors, the board of justices, to receive the conveyance of the lands in question, I should be inclined to decree a conveyance. But this is an action at law and it is supposed that it presents the question, whether an action at law could be maintained on the bond. This is not the view of the court. The action is not on the bond, nor is it necessary to decide the questions raised, as to the validity of this bond at common law. If the decree of the circuit court shall be sustained, the questions in regard to the bond are not open for discussion. The bond has become merged in the decree. If the circuit court had jurisdiction of the case, we can not supervise the proceeding as would be proper on a writ of error or bill of review.

It is objected to the record of the circuit court that it had jurisdiction of neither the parties, nor the subject matter of the proceeding. The circuit courts of Indiana have general jurisdiction, as well in chancery as at common law. But it is contended that this was a special proceeding not in accordance with the common law, and that the provisions of the statute must have been strictly complied with. And it is argued that the bond being void, afforded no ground of action for a court of law or chancery. The remarks already made will answer this objection. If there be enough on the face of the bond, as already suggested, to enable a court of chancery to decree a specific execution of the contract, the name in which the suit was brought might be a matter of error, but it would not render the proceeding void. The suit in the circuit court was brought against the heirs of Sargeant, and it is objected that this is too vague and indefinite, and not within the law. It seems Sargeant, the ancestor, died without a will, and it may be,

though it does not so appear in the proceeding, that the given names of the heirs were unknown to the party suing. Where such is the fact and is made known to the court by the affidavit of the complainant, the court are authorized to make such order in regard to notice as it may deem proper.

In regard to notice to the parties, in their record, the circuit court say: "And it appearing to the satisfaction of the court, that proper and legal notices have been given," etc., and this presents the question, whether such an entry upon the record can be controverted. In Dixon v. Boyer, 7 Blackf. 547, a suit was brought by notice and motion, under the act of 1838, against a sheriff for not returning an execution. There was judgment by default, damages were assessed by a jury and final judgment was entered for the plaintiff. In the judgment, the court stated, that it appeared to their satisfaction that notice of the motion had been served ten days, etc., it was held that there was no error in the proceedings. The court say, "the decisions of this court heretofore made, are to the effect, that, in a judgment by default, it must appear by the record that the defendant had notice of the suit, otherwise the judgment against him will be erroneous. 4 Blackf. 165; 5 Blackf. 332. But we do not think it material, whether the fact appear from the return to the writ, or notice set in hoc verba in the record, or whether it appear from the substance of it set out in the judgment of the court." Where a court has stated in its judgment, as in this case, that a legal notice has been served on the defendant, that fact can no more be controverted than any and every other part of the record. Where no appearance is stated in the record, or an appearance by an attorney, the defendant may not be precluded from showing that he had no notice. In the case of ——— v. ———, where suit was brought against two persons in Louisiana, one of whom resided in Missouri, and consequently no process was served upon him, but an attorney who appeared for the other party filed a general answer for both the defendants. And a decree being entered against both defendants, on which a valuable plantation was sold which belonged to the defendant in Missouri, on whom process was not served. The judgment was brought before the supreme court for revision, and the court held, on the affidavit of the counsel, that he was not authorized to appear for the absent defendants, and, by mistake, included him in the defense made, that, as to him, the judgment was a nullity. And in that opinion, the court say, if the appearance of the absent defendant had been stated on the record, by the express sanction of the court, the fact could not be controverted. In one of the New York decisions it is suggested, that the fact of the appearance being on the record does not preclude a court, when the record comes collaterally before it, from inquiring into the fact. As before remarked, if the court, under such circumstances, may controvert the fact of appearance, there is no other fact on the record which it may not controvert. If any effect is to be given to the act of congress, a record must be held conclusive between the parties, as to all matters decided by the court, when received as evidence.

The writ or notice is not a part of the record, unless made so by statute. In this case the notice was the act of the party, and not the act of the court. It had only to look at the notice and judge of its sufficiency. This the court did, and held the notice sufficient. Can the judgment of the court be shown to be erroneous, by an exhibition of the notice? If the notice had been copied into the record, however defective it might have been, yet, in the judgment of the court it was good, the proceeding therefore could only be reversible by an appellate tribunal, it would not have been void.

The proceedings in this case were special and summary, but in regard to jurisdiction, the question rests upon general principles. It would seem, that in making the order for the deed, the court exercised chancery powers, rather than the functions of a common law court. The deed has been executed under the order of the court, and the heirs have realized all the advantages contemplated by their ancestor when he made the donation, now, by reason of the alleged defects in the proceeding, seek to recover the property, which, with the improvements on it, is of immense value. It includes a considerable proportion of the city of Lafayette, a populous and growing town. There has been acquiescence of more than twenty years, and now, under the circumstances, it is too late to urge merely technical objections.

But independently of any of the grounds above stated, there would be no question, it would seem, that the act of Sargeant and others is good as a dedication to public use. This is a higher and a broader ground than has been assumed in the argument. Under the common law, such a dedication could be sustained. The legislature have regulated the mode by which this dedication shall be made, and if it should appear that some of the forms of the law had not been observed, the act would not be void. The proceedings, as far as they have been enacted by the parties, could be looked at as evidence of their intention, and this, beyond all controversy, would establish a dedication at common law. This doctrine necessarily exists in all the states. In Louisiana, where the forms of the civil law prevail, the same principle exists. It is applicable to innumerable cases of highways, streets, alleys, and public grounds, in all our cities, towns, and villages. This doctrine is almost as old as the common law, and is sanctioned by a policy essential to the welfare of a civilized country. The principle, that where a special mode is pointed out by statute, in which a thing may be done, it can be done in no other form, does not apply. Real estate can only be conveyed by a deed duly witnessed and

acknowledged; and yet the courts have holden that a right may be dedicated to the public, regarded as a fee, when the persons making the dedication had only an equitable interest. The Indiana statute does not change the character of the act. It is a dedication for public use, to be appropriated for that use, as the statute provides.

In the case of City of Cincinnati v. Lessee of White, 6 Pet. [31 U. S.] 432, the defendant set up a title by legal conveyances from John Symmes, the patentee, to himself, for the lot of ground in controversy. The city claimed the lot as part of a dedication for a common, made by the original proprietors of the town, when they had only the equitable title. The patent was not issued to Symmes until many years after the dedication, and the proprietors were never vested with the legal title. The court said: "Dedications of lands for public purposes have frequently come under the consideration of this court; and the objections which have generally been raised against their validity, have been the want of a grantee to take the title; applying to them the rule which prevails in private grants, that there must be a grantee as well as a grantor. But this is not the light in which this court has considered such dedications for public use. The law applies to them rules adapted to the nature and circumstances of the case, and to carry into execution the intention of the object of the grantor, and secure the public the benefit held out and expected to be derived from and enjoyed by the dedication." That case was an action of ejectment, brought by the claimant to recover possession of ground, which, as in the case before us, had been dedicated to the public; and the defense by the city was set up, as in this case, a dedication. This is a sufficient answer to the objection that, if it were a dedication, it could not be made a defense at law, but in equity. Upon the whole, there seems to be no legal ground on which the lessors of the plaintiffs can recover. And the jury were so instructed, if they believe the facts proved.

Verdict, not guilty.

[This judgment was affirmed by the supreme court, where it was carried by writ of error. 12 How. (53 U. S.) 371.]

SARGEANT, The D. See Case No. 4,098.

Case No. 12,361.

In re SARGENT.

[13 N. B. R. 144;[1] 1 N. Y. Wkly. Dig. 435.]

District Court, N. D. Ohio. Dec., 1875.

BANKRUPTCY—PETITION—RIGHT OF CREDITOR TO WITHDRAW—AGENT—REFERENCE TO REGISTER.

1. A creditor who has in good faith joined in an involuntary petition cannot withdraw.

[Cited in Re Western Sav. & T. Co., Case No. 17,442; Re Sheffer, Id. 12,742.]

[Cited in Re Hawkes, 70 Me. 215.]

2. If a creditor was induced to join an involuntary petition by misrepresentation, he may be allowed to withdraw at any time before adjudication.

3. An affidavit to an involuntary petition may be amended.

4. A creditor who has joined in an involuntary petition cannot afterwards object to an amendment thereof, which is necessary to the prosecution of the same to final effect.

5. If an agent verifies a petition or deposition, he must show his authority.

6. Where a question is made as to whether a sufficient number of creditors have joined in an involuntary petition, the case may be referred to a register or commissioner to examine the proofs and report thereon.

[In the matter of Edward Sargent, a bankrupt.]

WELKER, District Judge. Held: First. That where creditors in good faith join in petition in bankruptcy, they cannot afterwards withdraw so as to leave a less number and amount of the creditors than is required by law, and deprive the court of jurisdiction as to the matter of adjudication.

Second. That where assent to join in petition is obtained by misrepresentation or misunderstanding by the creditor, upon the same being shown to the court, such creditor will be allowed to withdraw at any time before adjudication.

Third. That the affidavit to the petition being defective in form, it may, on motion, be amended so as to conform to law.

Fourth. That a creditor who has in good faith joined in the petition, cannot afterwards object to amendments thereof which appear necessary to the prosecution of the same to final effect.

Fifth. That where an attorney verifies the petition, the affidavit thereto, or other proof, he must show his authority for making such verification.

Sixth. That where a question is made as to whether a sufficient number and amount of creditors have joined in the petition, it is proper and the better practice to refer to a register or United States commissioner to examine the proofs, and report whether the required number and amount have joined therein.

Case No. 12,362.

SARGENT et al. v. CARTER.

[1 Fish. Pat. Cas. 277;[1] 21 Law Rep. 651; 11 Month. Law Rep. 651.]

Circuit Court, D. Massachusetts. May, 1857.

PATENTS—PROVISIONAL INJUNCTION—IDENTITY OF PATENTS—SPECIFICATIONS—AFFIDAVITS OF EXPERTS.

1. A provisional injunction will not be granted when the defendant has letters patent for the same invention as the plaintiffs', which are prima facie valid.

[1] [Reprinted from 13 N. B. R. 144, by permission.]

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

2. But the court will compare the two specifications, to ascertain if they really cover the same thing.

3. It is the duty of an inventor to describe in his specification each substantially different modification of his invention which he has made.

4. The ex parte affidavits of experts considered.

5. Possession as a ground for a provisional injunction before a trial at law.

In equity. This was an application [by James Sargent and others] for a provisional injunction to restrain the defendant [Charles P. Carter] from infringing upon letters patent for "improvement in apple-paring machines," granted to James Sargent and D. P. Foster, as assignees of Ephraim L. Pratt, October 4, 1853 [No. 10,078].

C. Devens and G. T. Curtis, for complainants.

Causten Browne, for defendant.

CURTIS, Circuit Justice. This is an application for a temporary injunction to restrain the defendant from making and selling machines for paring apples and other vegetables, containing an improvement for which letters patent were granted to the complainants, bearing date October 4, 1863.

It is proved, and not denied, that the defendant has made a considerable number of machines like the one produced at the hearing, and marked P; and that he is under a contract with a wholesale dealer in such articles, to make and sell to him a large number of them. So far as respects the improvement patented to the complainants, this machine maked P is not distinguishable from those, the sales of which were held by me to be infringements of the complainants' patent, in the two cases of Sargent v. Larned [Case No. 12,364], in this district, and Sargent v. Seagrave [Id. 12,365], in Rhode Island. I see no cause to change the opinion then formed; and I accordingly hold that machines like that marked P, made by the defendant, contain in substance the improvement described and claimed by the complainants in their specification; and that the making or selling thereof is an infringement of the exclusive right which their letters patent purport to grant.

But it is insisted by the defendant that he was himself the original and first inventor of the improvement patented to the complainants; that letters patent were granted to him, for an apple-paring machine, on the 16th of October, 1849, which should have specified and claimed the particular improvement now in question; that by accident it failed to do so; but that on the 12th day of August, 1856, those letters having been surrendered, new letters were issued, in which the mistake was corrected, and the same improvement patented to the complainants was described and claimed, and the exclusive right thereto granted to him.

If this be so the motion must be denied. Whether it be so, can be ascertained by comparison of the complainants' specification and claim with the corrected specification and claim of the defendant. To make this comparison we must first determine with precision what was the thing patented by the complainants.

The claim of the complainants is as follows: "Hanging or connecting the block, which carries the knife, to the rod which carries said block, so that the block and knife can vibrate in one or either direction (by means substantially such as are herein described, or their equivalents), so as to allow the knife to vibrate and accommodate itself to any irregularity in the surface of the apple or vegetable pared, substantially as described."

It has been argued that this is either a claim for the precise devices described, or a claim for producing so much of this oscillating movement of the knife as is essential to produce the desired effect.

I do not adopt either of these views. I do not consider it a claim for a motion of the knife, but for described means, whereby an oscillating movement is produced by the action on the knife of the varying surfaces of the fruit; and I do not consider the patent limited to the identical means described, but that its language extends it and the law permits its language to extend it, to such other devices as are, within the meaning of the patent law, substantially the same as those described.

Thus construed, the thing patented by the complainants is such a connection, between the knife-block and its carrying arm, as permits the knife to oscillate in either direction, according to the pressure which the knife receives from the varying surfaces of the fruit, and all other devices which, though different in form, accomplish the same end by the use of substantially the same means.

Turning to the defendant's specification, it appears that so much of it as relates to this subject is as follows: "In order that the knife may accommodate itself to the uneven surface of the apple or other article to be pared, more easily and exactly than could take place were it held rigidly, and only permitted to move as it was guided by the rack bar P, and sector O, it is necessary that it be capable of a slight play around its axis, independent of the motion imparted to it by the machinery which actuates it. This I accomplish in the following manner." He then directs that two projections or ears on the rack bar are to be wider apart than the width of a lever inserted between them to give motion to the rack bar, so that the lever may have some play between the ears; and further, that the cogs on the rack bar and on a sector attached to the socket of the knife arm should be made smaller than the spaces in which they play, and thus the knife arm may be allowed some motion independent

,of the sector; and the claim is, "giving to the knife a slight play around its axis, independent of the mechanism which vibrates it, for the purpose herein set forth."

The question is, whether what is here described and claimed does accomplish the same end as the complainants' improvement, by the use of substantially the same means. The means described and claimed by the complainants are such that the knife vibrates on its mathematical axis, in either direction, according to the pressure received from the varying surface of the fruit.

Do the defendant's devices accomplish this end? It is manifest on inspection of the machine, that though the looseness of gearing described by the defendant permits an oscillation of the knife arm when the machine is not in action, yet, when power is applied, the play of the lever between the ears, and of the cogs on the rack bar and sector, is taken up at the moment when the parts of the machine are brought to their respective bearings so as to transmit force and produce motion; and that while the force is thus transmitted and the machine is in motion, there can be no backward play against that force. These devices, therefore, allow no movement of the knife arm in one direction, against what is termed the feed of the machine. Nor am I able, after an attentive examination, to perceive any force generated while the machine is in action, to give motion to the knife arm in advance of the feed. It is sworn positively by Mr. Renwick, an expert, whose affidavit has been read by the complainants, and who testifies not only from an inspection of the structure of the machine, but from experimental trials of it, that there is not, and can not be, any movement of the knife arm in advance of the feed while the machine is in action.

The defendant has produced the affidavits of two experts, who testify that, in their opinion, the devices described and claimed in the defendant's patent, are substantially the same as those of the plaintiffs'; but they do not seem to have had their attention directed to the points adverted to by Mr. Renwick. If they had been informed what was the true meaning of the plaintiffs' claim as now construed by the court, and had been asked whether the knife in the defendant's machine could vibrate against as well as in advance of the feed when the parts were in motion, I can not, as now informed, suppose they would have differed materially from the opinions given by Mr. Renwick. Widely as experts differ in opinion in the trial of patent causes, those differences are almost always traceable to the assumption of different postulates; their opinions differ because they are given on substantially different cases. When their minds can be drawn to the same points, and they use the same words in the same sense, they rarely differ, so far as my experience extends. When their opinions are expressed in ex parte affidavits, and there is no opportunity for the court to ascertain in what sense they use important words, nor what facts they take into view, nor what standards of comparison they assume, their opinions are of comparatively little use in guiding the court to a safe conclusion.

The result at which I have arrived on this part of the case is, that the defendant has failed to satisfy me that what is described and claimed in his letters patent is substantially the thing patented by the complainants. A more full investigation, such as can be had when the experts are produced on the stand, may produce a different result. This opportunity the defendant will have.

Besides what is described and claimed in his specification, the defendant insists he also invented and reduced to practice several modifications of the machine, the object of which was the same as the plaintiffs attained, by the means patented by them, and that these modifications were, in substance, the thing patented by the plaintiffs. One of these was, to make the arm which carried the knife, sufficiently flexible to admit of tortion; and the allegation is that the irregular surfaces of the fruit, when pressed on by the knife, caused the arm to be twisted, and thus the knife oscillated in either direction. It is controverted by the affidavit of Mr. Renwick, that such is the effect produced on the knife; and he swears he speaks not only from his knowledge of the forces applied, and the resistance made to those forces, but from actual and repeated experimental trials.

There are facts in the case which tend to support his statement. The defendant has described no such device in his reissued letters patent, the specification whereof was prepared since the litigation under the plaintiffs' patent was begun. It would seem that if he was the inventor of a device which secured a sufficiently free oscillation of the knife in either direction, he would have there described it. He was under a positive duty to do so. The sixth section of the patent act of March 3, 1836, requires the patentee of a machine to "fully explain the principle, and the several modes in which he has contemplated the application of that principle, or character, by which it may be distinguished from other inventions." One distinctive feature of the machine patented by the defendant, as he himself declares in the specification, was the means by which the knife might accommodate itself to the uneven surface of the apple.

He describes two devices. If he was then possessed of a third, he was bound to describe that also. Having failed to do so, though I do not doubt he had made machines with a flexible arm before he applied for his first patent, I have strong reason to doubt whether it was capable of effecting the object proposed. It is a circumstance of some weight, also, that in the machines now built by the defendant, he has used, not the flexible arm, but a moveable or rotating arm.

If he first invented a flexible arm, as appears from the evidence in this case, and it accomplished the desired end, why does he not continue to use it?

The other modification relied on is, placing one end of the arm in loose socket where it is held by a pin, which, being smaller than the aperture through the arm in which the pin is inserted, allows some play of the arm. But this modification was tried before he took his original patent, and not being therein alluded to, nor described and claimed in the reissued patent, the same observation applies to this as to the flexible knife arm.

Respecting this device, also, Mr. Renwick says: "In the action of these machines, the socket does not commence to turn or drive the knife arm until one of its sides touches the end of that arm, and the spring pressing the arm down, and the surface of the apple forcing the rod upward, jam the pivot pin in its containing aperture; hence, whatever play there may be is taken up the instant the machine begins to move," etc. This difficulty is not met by the defendant. It does not appear that the attention of either of the experts produced by him was called to it. Though ingenious suggestions were made by counsel at the hearing, they have not relieved my mind from the very serious doubt I entertain whether this device is capable of accomplishing, or in any material degree aiding in the accomplishment, of what is effected by the plaintiffs' improvement.

Not being satisfied that the defendant was the earlier inventor of the thing patented by the plaintiffs, or that the thing patented by the defendant is the same, in substance, as the thing patented by the plaintiffs, this ground of defense to the motion fails.

In the case of Sargent v. Seagrave, in Rhode Island, I had occasion to state my views concerning the prima facie title of the plaintiffs, founded on their exclusive possession of the thing patented. I have heard nothing in this case which has changed those views, or shown them to be inapplicable to this patent.

Within a period of less than five years, the plaintiffs have made and sold upward of one hundred and eighty thousand machines containing this patented improvement, at a profit of about thirty-five cents on each machine. This must be a very large profit. Though some attempts have been made to interrupt their exclusive possession, they have been successfully resisted. It appears that some person who had a contract under which he might become interested in the defendant's patent, gave notice to a person who was selling some of the machines made by the plaintiffs, that they infringed the defendant's patent; but the notice was in no way followed up, and when the defendant himself began to use the plaintiffs' improvement, these proceedings were promptly commenced.

It has been argued that the consumer of an article bought at so small a price, does not really acquiesce in the title of the patentee, though he pays him more than another could afford to sell for; because the difference which goes to the patentee as a premium for his exclusive right, is too small, in each instance, to be a matter of any importance to the consumer. I am not satisfied that this is true; for I believe a diminution of ten, or even five per cent. in the cost of an article like this, would very soon drive all other competitors out of the market, or compel them to reduce their price; consumers being more attentive than is supposed, to even small differences of cost.

But however this may be, I can not doubt that there are very many makers, and wholesale vendors of similar things in New England, whose interest would be substantially promoted by participating in this business, and whose acquiescence in the plaintiffs' title is of as much weight as in any case with which I have been acquainted.

My opinion is that the plaintiffs are entitled to a temporary injunction, to be continued until the action at law can be tried, or until the further order of the court; but I shall hold the plaintiffs to the utmost diligence in bringing the action at law to trial at the October term of the court.

I should have preferred to have reserved all my views touching any matters of fact involved in this motion, until after the trial at law; and I did so in the case in Rhode Island. But the parties having chosen to bring the whole matter of fact again before me, and to have it elaborately heard, I have considered it necessary to explain to some extent, the views I have taken of what must ultimately be submitted to a jury.

Let an injunction issue, to be continued until the further order of the court.

[For other cases involving this patent, see Cases Nos. 12,364 and 12,365.]

Case No. 12,363.

SARGENT v. INHABITANTS OF BRISTOL.

[2 Hask. 112.] [1]

Circuit Court, D. Maine. Dec., 1876.

TOWNS—SERVICES OF DETECTIVE—COMPENSATION.

A detective employed by a town agent to ascertain what individuals composed a mob that destroyed property for which the town was liable to make compensation, may recover of the town reasonable compensation for his services, with interest from the time he demanded payment for the same.

Assumpsit to recover reasonable compensation for services rendered as a detective on employment by a town agent. The case was tried upon the general issue, and a verdict was rendered for the plaintiff [Moses Sargent], whereupon the defendants moved for a new trial for misdirection by the court.

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

Almon A. Strout and Nathan Webb, for plaintiff.

Bion Bradbury, for defendants.

FOX, District Judge. By the law of Maine, towns are made liable to the owners of any buildings injured or destroyed by a mob, for three-fourths of the injury if it exceeds fifty dollars, if the owner uses all reasonable diligence to prevent such injuries and to procure the conviction of the offenders; and the town paying such sum may recover it in an action of the case against the person doing the injury.

In April, 1848, Breitman & Sons were the owners of a porgy oil factory in the town of Bristol, which was destroyed under such circumstances that the town was responsible to the owners for three-fourths of the injury, as they claimed, and they accordingly notified Arnold Blaney, chairman of the selectmen of the town of Bristol and also town agent, that they intended to hold the town accountable, and after protracted litigation, their claim was eventually sustained, and they recovered damages for a large amount in an action brought by the Breitmans against the town. The plaintiff, a well known detective, was engaged by the Breitmans to assist them in discovering the offenders and to procure their conviction; he was employed by them in this duty for twenty-five days; at the end of that time, Blaney was notified by the Breitmans that they no longer had occasion for Sargent's services and should then discharge him. The plaintiff contended that after this, he was employed by Blaney as town agent, in the town's behalf, to continue his investigations and aid in discovering the guilty parties; and to recover his compensation for his services so rendered, this action was instituted May 13, 1873, Sargent having before that commenced an action against Blaney, in which he claimed to hold him personally accountable to him for the payment of those services. After the suit was brought against Blaney, the town of Bristol at a meeting held in March, 1872, voted that Thomas Nichols confer with Moses Sargent and make the "best settlement he can." At the April term, 1873, the action of Sargent v. Blaney was entered neither party, and the present suit was instituted.

The jury were instructed that, "if Arnold Blaney, as town agent of Bristol, was notified by the Breitmans that they should claim to hold the town of Bristol responsible to them under Rev. St. 1857, c. 123, for the damages sustained from the alleged mob, and thereafterward, Blaney, as town agent and in behalf of the town, employed the plaintiff as a detective to discover the guilty parties that the town might obtain indemnity therefrom, and afterwards the town at a meeting duly called and held, March, 1872, passed the vote read from the record of the meeting," they would be authorized to find the town responsible to the plaintiff for his services for the time so employed. A verdict having been rendered for the plaintiff, the defendants move for a new trial, on the ground that this instruction was erroneous. By Rev. St. 1871, c. 3, § 1, it was enacted, "the inhabitants of each town, are a body corporate, capable of suing and being sued and of appointing agents and attorneys;" and the same language is found in Rev. St. 1841 and 1857. The act of 1821 (chapter 113, § 7) was more precise and definite in this behalf, as it in terms authorized towns to commence and prosecute any suit and to defend suits or actions commenced against them; and it provides that the "said inhabitants qualified and convened in manner aforesaid may nominate and appoint one or more agents or attorneys;" and this is the precise language of the act of Massachusetts of 1786.

Although the language of our Revised Statutes is general, indefinite and vague, in thus authorizing towns to appoint agents and attorneys without any restriction or limitation as to the purposes and extent of such agency, we are of the opinion that it was not the intention of the legislature in any degree to vary or extend the law from what it had always been in Massachusetts and this state, or to confer on the agents thus appointed other, or greater authority than they had previously possessed; and that agents so chosen can not be deemed general agents of the town in all its matters, with authority on all occasions to act for and in the town's behalf, but they are the rather to be deemed special agents of the town, selected "for the purpose of commencing and prosecuting suits in behalf of the town and of defending the town in actions instituted against it." Such person is the agent of the town relative to its legal controversies in all such matters, to act as and for the town in representing and protecting its legal rights, with all the requisite power and authority conferred by the town upon him to accomplish the object and purpose of his agency; and that such agent has authority to employ counsel to defend an action brought against the town was decided by the supreme court in Knowlton v. Plantation No. 4, 14 Me. 20, thus recognizing his authority without the concurrence of the other town officers, to incur liabilities in behalf of the town in defense of a suit already commenced.

In Pittston v. Clark, 15 Me. 460, it was claimed by the town that a town agent being appointed according to the provisions of the statute becomes an officer of the law and bound to perform his duties in prosecuting and defending suits according to law, whether in so doing he conforms to or disobeys the instructions of his principal; but this claim was not sanctioned by the supreme court. Mr. Justice Shepley in the opinion says: "The statute providing for their appointment does not prescribe their duties or define their powers. It only gives them the right to represent their town and perform such acts as their principal might perform by

any other agency which would legally represent them; and to ascertain the relative rights and duties of towns and town agents, reference must necessarily be had as in other cases to the laws of the land." This view is sustained by the language of Parker, C. J., in Inhabitants of Buckland v. Inhabitants of Conway, 16 Mass. 395. "A vote to choose agents and a choice in conformity thereto is equivalent to a full power of attorney. Agents thus appointed have the power of substitution or delegation, &c." In Fletcher v. City of Lowell, 15 Gray, 103, it was held, that a vote of the city council referring to the mayor a petition for a jury to assess damages, &c., and authorizing the mayor to employ such counsel as might be deemed expedient, "conferred on the mayor full power to retain counsel for the purpose of procuring evidence, preparing the case for trial and for doing any act usual and proper in the conduct and management of the suit in all its stages." In Augusta v. Leadbetter, 16 Me. 45, it was decided, that a town agent with the assent of the selectmen might purchase a negotiable note for the purpose of meeting an expected claim upon the town by the payee. Shepley, J., says: "The powers of the agent are limited only by the capacities of the corporation and by the nature of his employment." Whether an authority of an agent be general or special, it is declared by Story in his work on Agency, "as always considered to include all the necessary and usual means of executing it with effect."

In the present instance, the law having authorized the appointment of an agent by a town for the purpose of commencing and prosecuting suits in the town's behalf, as well as to defend those commenced against it, such agent is to be considered as having conferred upon him all means usual and necessary for the proper discharge of the duties of such agency. It will be observed his authority is not restricted to the defense of the town in suits instituted against the town, but he may and should commence and prosecute in the town's behalf all such actions as he shall judge proper for the protection of the town; and whatever steps he may deem judicious and reasonable for him to adopt, relative to such claims and prior to any suit, we think by implication he is authorized to pursue, although by so doing some expenses may be incurred for which the town will be chargeable. His authority is like that of any other agent to whom is entrusted by his principal the care and protection of his legal rights in his absence; and it must be held broad enough to accomplish the object intended. Such an agent may not only employ an attorney to commence the suit for his principal if he shall deem it expedient so to do, but any preliminary proceedings he may deem requisite and proper, he may first initiate in order to ascertain whether a cause of action exists and against whom the suit should be brought; and to this end, he may employ a detective in behalf of the town in a case like that now presented for our determination. Such authority we hold is ample from the very purpose and nature of the agency. The rights of the principal in many cases could not be ascertained and understood without such assistance; it is the duty, most certainly, of a party to make due inquiries and satisfy himself that he has good reasons for instituting his suit before he commences the same, and any agent he may employ to act in his behalf in the matter is bound to exercise the same prudence and discretion and make all proper investigations before he involves his principal in a suit at law.

Many instances may be suggested in which it would be manifestly the duty of such an agent to adopt measures in such investigations before commencing an action for his principal, and which would be likely to be attended with considerable expense; and if without such investigation, he should commence the action, and for want thereof fail to sustain the same, he might well be held accountable to his principal for all damages occasioned by such neglect and inattention on his part; for instance, an important witness for his principal might be about to leave the state, would it not be the duty of the agent, if put upon inquiry by being advised generally as to such witness, to take active measures to ascertain all the facts relative to the witness and the nature and effect of his evidence, and to perpetuate his testimony, if he should find it of material importance? The expenses thus incurred most certainly must be borne by the principal, his agent having exercised a reasonable prudence and discretion in his proceedings.

The instruction as given was restricted to the authority of the agent thus to incur expense relative to a suit proposed to be instituted by him in behalf of the town. But we are well satisfied that it equally exists for the proper investigation of claims against the town before suit is instituted. Suppose a claim to be presented against the town for damages occasioned by a defect in a highway; can it be questioned that it would be the duty of the town agent to make due inquiry and careful investigation as to such defect, its nature, extent and duration, and that for his time so devoted to the investigation he would be entitled to demand of the town a reasonable remuneration? If doubts arose as to the location of the highway, and whether the defect was or not within its limits, would it not be the duty of the agent to ascertain and determine this question, and if necessary for this purpose could he not cause a survey to be had at the town's expense? Perhaps no stronger case can be presented than the present in illustration of the propriety of recognizing and sustaining the implied power and authority of a town agent, at the charge of the town, to incur reasonable expense in investigating an alleged liability, and the town's right to demand indemnity from oth-

ers, although suit had not then been commenced.

The statutes of this state rendered the town of Bristol accountable, under certain conditions, to a party whose buildings were destroyed by a mob, for three-fourths of their value; and by the same statutes the town was entitled to recover from the offenders the amount thus paid. The party injured notified the town authorities that he intended to hold the town accountable to him. Under such circumstances it would seem to be the imperative duty of the agent to adopt all necessary precautionary measures, not only to ascertain whether the town could successfully resist the demand, but also to seek out the offenders, and discover whether they could respond to the claim of the town against them for an indemnity. Such investigations, ordinarily, could not be judiciously prosecuted by a town agent without aid from other sources; for the detection of criminals, the services of those experienced in such matters are frequently of great assistance; and the judicial investigations, in this state, of more than one offense, have made very manifest the skill and experience of the plaintiff in his calling, and that through his aid notorious offenders have been brought to justice. Under the instructions, the jury must have found that, the Breitmans having made their claim against Bristol, its town agent employed the plaintiff to assist in detecting the offenders, that indemnity might be had from them; and for his services so rendered we think the town was responsible.

The effect of the vote of the town at the meeting in March, 1872, upon the town's liability, it is not necessary for us to determine, as we are of opinion that excluding such vote, upon the other testimony in the cause, the defendants are liable to the plaintiff for the value of his services.

It is said the damages are excessive. The claim in the writ is for $555.40 for personal services, at the rate of $10 per day and expenses. In this amount is included services for seven days, from July 23, which it is manifest should not be charged, amounting to $70, and also $42 for board and horse hire for sixty-five days, which includes the twenty-five days plaintiff was in the employ of the Breitmans that should be charged to the Breitmans, leaving a balance of $86.15 due from the town. It is also said that for his time and expenses, attending before the grand jury, amounting to $65.50, the defendants are not liable. Plaintiff was recognized to appear before the grand jury to testify against the parties bound over for this offense, and he swears that he has always been paid for his time on such occasions, and we think it could hardly be expected that he would attend before the jury without being compensated at the usual rate by his employer. The only deduction we should make from his claim would be the $86.15, leaving a principal of $469.42.

A demand was made on Blaney by plaintiff in the fall of 1868, and again in the spring of 1869, and we are of the opinion that the jury were authorized to allow interest from the demand if they saw fit. Their verdict, $645.80, indicates that they probably deducted the entire $42 from the claim, instead of a proportionate part thereof, but allowed interest from the demand in the spring of 1869, or for something over seven years. On the whole, therefore, we are of opinion that the defendants have no cause to complain of the amount. Motion overruled. Judgment on the verdict.

Case No. 12,364.

SARGENT et al. v. LARNED et al.

[2 Curt. 340.] [1]

Circuit Court, D. Massachusetts. May Term, 1855.

PATENTS — COMPROMISE — AGREEMENT NOT TO INFRINGE—CHANGE OF FORM—INJUNCTION—PLEADING—SUFFICIENCY OF ANSWER.

1. If a defendant, for a valuable consideration, covenants not further to infringe an existing patent, he will be enjoined by a court of equity from further infringing, unless he shows some equitable reason why he should not be bound by his covenant.

[Cited in Morse v. Davis, Case No. 9,855; Brooks v. Moorhouse, Id. 1,956.]

2. Where a bill alleged that an agreement of compromise was made, and the answer goes into a history of the dispute compromised, it is not responsive to the bill.

3. An agreement of compromise fairly made, must be executed, without regard to the merits of the dispute compromised.

4. A change of form merely, or of mechanical structure, which produces no new, or materially improved result, is not the subject of a patent, and is an infringement of a patent.

[Cited in Sargent v. Seagrave, Case No. 12,365; Pearl v. Ocean Mills, Id. 10,876; Mann's Boudoir Car Co. v. Monarch Parlor Sleeping Car Co., 34 Fed. 134; P. P. Mast & Co. v. Rude Bros. Manuf'g Co., 3 C. C. A. 477, 53 Fed. 124; Mudgett v. Thomas, 55 Fed. 647; Beach v. American Box-Mach. Co., 63 Fed. 606.]

[This was a bill in equity by James Sargent and others against Pitts A. Larned and others for the infringement of letters patent No. 10,078 granted to James Sargent and D. P. Foster, as assignees of Ephraim L. Pratt, October 3, 1853.]

Geo. T. Curtis and C. Devens, for complainants.

Whiting & Russell, contra.

CURTIS, Circuit Justice. This is a suit in equity, founded on letters patent for "a new and useful improvement in machines for paring apples," granted to the complainants as the assignees of Ephraim L. Pratt, and bearing date October 4, 1853. The counsel for the complainants insisted, that the respondent Seagrave is estopped by his covenant, which will

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

hereafter be referred to, from disputing the validity of the patent; but the question to which most of the evidence, and the arguments of the counsel at the hearing, were directed, was whether Pratt was the original and first inventor of the thing patented, and so whether the letters patent were valid. I am of opinion, that upon the pleadings and evidence in this case, this question is not open.

The bill, after stating the grant of the patent, alleges that in May, 1854, the defendant Seagrave being engaged in the manufacture of machines in violation of the patent, for certain valuable considerations entered into a covenant with the complainants, that he would desist from the construction of the same, and would wholly abstain from the violation of the aforesaid exclusive rights of the complainants. That the instrument containing this covenant was executed in duplicate by the parties, and each party had one part thereof; that the part belonging to the complainants has been lost or destroyed by accident, and they have applied to the defendant Seagrave, through their solicitor, to be permitted to inspect the part in his possession; but liberty was refused, and the complainants cannot state the contents of the instrument with precision, but pray that the defendants may discover a copy thereof.

The defendants produce and annex a copy of the instrument, which is as follows: "Know all men by these presents, that we, Sargent & Foster, of Shelburne, and John D. Seagrave, of Worcester, for divers good and valuable considerations, passing from each party to the other, and of the covenants herein made from each to the other, do make the following agreement: The said Seagrave hereby agrees to relinquish all right or claim hereafter to make any apple paring machines, by virtue of the contract of the date of September 6, A. D. 1853, signed by said Sargent & Foster, and covenants to make no more of said machines after this date. The said Sargent & Foster agree to take of said Seagrave certain castings, now in the possession of said Seagrave (which have been already packed up), and pay him therefor the sum of $117. It is further agreed hereby, that said Seagrave may be entitled to sell the machines which he now has actually completed, which are understood to be in number about 1,500 in the city of Worcester, and from five to seven hundred in addition in other places; provided, however, that Seagrave shall sell said machines at the market prices of said Sargent & Foster; and provided, also, that said Seagrave shall sell said machines, within eight months from the date hereof, and after the expiration of said time, shall have no right to sell the machines aforesaid, except as hereafter agreed. At the expiration of said eight months, it shall be at the option of the said Sargent & Foster to allow said Seagrave eight months in addition, to dispose of said machines, or they shall be entitled to take the balance of said machines, at the appraisal of three disinterested men, one to be chosen by each party, and those so chosen shall select a third; and if said Sargent & Foster shall elect to take said machines, they shall pay therefor, on the terms appointed by said appraisers; and if they elect to allow said Seagrave eight months, in addition to the first eight months, then the said Seagrave shall be entitled to sell said machines, which are now constructed, during said second eight months, but at no time thereafter. In witness whereof we have hereunto set our hands and seals, this 26th day of May, A. D. 1854. Sargent & Foster. (Seal.) J. D. Seagrave. (Seal.) Witness: Charles Devens, Jr."

A copy of the contract of September 6, 1852, referred to in this instrument, is also produced and is as follows: "Know all men, that whereas John D. Seagrave, of Worcester, formerly of Milford, in the county of Worcester and commonwealth of Massachusetts, is, and has been engaged in the manufacture of certain paring machines, which include in their construction a certain alleged improvement for which E. L. Pratt has made an application for a patent, of which we are assignees, now, for value received, we, Sargent & Foster, of Shelburne, in the county of Franklin and commonwealth aforesaid, hereby agree that said Seagrave shall have the privilege to finish, complete, and sell all machines actually commenced by him, (the number to be determined by the number of castings now on hand or completed for said Seagrave at this date,) without objection, claim, or hinderance by us, our heirs, executors, administrators, or assigns, against him the said Seagrave or any one claiming by or under him. It being understood and agreed on the part of said Seagrave, that said machines are to be sold as nearly as possible at the market price of said Sargent & Foster; that is, he is to be governed in his sales to the wholesale and retail trade, by the prices of the Sargent & Foster machines. In witness whereof, the said Sargent & Foster have hereunto subscribed our names, this 6th day of September, A. D. 1853. Sargent & Foster."

Taking the two instruments together, it appears that on the 6th of September, 1853, Seagrave received from the complainants, a qualified license to complete and sell certain machines, including the improvement for which these letters patent issued; and that in May following, this license was relinquished, and another and different license to sell certain of the said machines, was substituted; and Seagrave expressly "covenanted to make no more of said machines after this date." If this was a valid contract, a court of equity will not allow Seagrave to violate his covenant, and defend himself by attacking the validity of the patent. He must keep his covenant to desist from the manufacture, unless he shows some equitable reason why its performance should not be decreed. It is open to the defendants to allege and prove any facts, which render

a specific performance of the covenant inequitable, and great latitude is allowed to the covenantor who resists performance. The defendants have stated in their answer, some circumstances which are relied on by their counsel, as furnishing equitable reasons for preventing the interposition of the court. That part of the answer which relates to this subject, is as follows:

"Said Seagrave's machine was completed and put in use, about nine or ten months, before the date when the said Sargent & Foster's or Pratt's patent was issued. And said Seagrave had no belief, that any patent would or could be granted to said Pratt, for anything contained in his said machine, and went on to manufacture his machines in good faith, and believing that no one except Mr. Carter could have any claim upon him for so doing. Said Seagrave had procured certain castings, and the malleable iron-work, for about five or six hundred of these machines, and had completed a few, whereupon one of the complainants, Mr. Foster, informed him that Pratt had applied for a patent for the mode of uniting the knife-holder to the rod. Thereupon the said Seagrave replied, that said Pratt had no right to a patent for that thing. And said Seagrave told said Foster that if he should finally succeed in obtaining a patent, which should be valid in law, for that particular mode of uniting the knife-stock to the rod, and if he should continue to use it, he would make him a fair allowance therefor. But no definite arrangement was at that time effected between the parties. Meantime said Seagrave had received several orders for machines of a description similar to those of Sargent & Foster; the form of these machines being such, that they could be built slightly cheaper, than the improved machine of said Seagrave; whereupon said Seagrave, believing then, as he now believes, that he had a perfect right to build said machines, went on to make them to supply these orders, leaving the castings of his own improved machines unfinished in his shop, to be used, whenever this improved machine should be called for. While affairs were in this situation, neither Pratt's nor Seagrave's patent having been granted, an interference was declared by the patent office, between the claims of the respective applicants. Upon this interference the said Sargent & Foster and Seagrave met together, and made an arrangement, set forth and embodied in contract or paper dated September 6, 1853, in part, and in part verbal; said paper is hereunto annexed, and marked 'A.' By said arrangement and agreement, it was mutually agreed, that said Seagrave should withdraw all opposition to said Pratt's claim for his peculiar mode of uniting the knife-stock to the end of the rod, and should petition the patent-office to grant the said claim, which said Seagrave accordingly did, and the patent to said Pratt issued immediately after. On the other hand, the paper marked 'A,' dated September 6, 1853, was executed and delivered, giving the said Seagrave the right to use said alleged improvements upon as many machines as he had castings for. And for the consideration of said Seagrave withdrawing his opposition, as aforesaid, it was further agreed, that if he should receive a patent for his improvements, that said Sargent & Foster and Seagrave might use each other's improvements. And if a patent should not be granted, he should have a right to use said Pratt's improvement, paying to Sargent & Foster, a part of their expense in getting out the patent. Upon these terms the arrangement of September was made, and the reason assigned by said Sargent, for not putting this arrangement in writing at the time, was because, he said that such a contract, if in writing, might endanger the safety of the patent. All three of us took legal advice at Worcester, and were so advised by our counsel. And said Seagrave and the complainants, believing the advice to be correct, did not have the agreement reduced to writing, the respondents trusting to the honor of the complainants, but they received the paper dated September 6, 1853, at the time, and agreed to wait for the remaining writings until the issue of the patent. After this arrangement, said Seagrave went on making these machines. Soon after, as said Seagrave believes, said Sargent & Foster received the patent of Pratt, and said Seagrave applied to the complainants, to have the verbal agreement above stated reduced to writing. They refused to do it, and said Seagrave went on to finish up said machines, according to said paper A. While at work on these machines, said Seagrave's patent was issued, dated April 18, 1854. A short time after this, and before said Seagrave had completed the machines mentioned in said paper marked 'A,' said complainants commenced a suit against said Seagrave, for an alleged violation of said Pratt's patent. Upon investigating the facts, said complainants being satisfied that they had commenced the action wrongfully, and had attached the property of said Seagrave without cause, withdrew the action and paid their costs. The complainants then offered to buy out said Seagrave's patent, and all his stock in trade, but the parties could not agree upon the price. Failing to make a bargain, and the complainants refusing to carry out their verbal arrangement with said Seagrave, a new contract was entered into, marked 'B,' dated May 26, 1854, whereby in consideration of complainants' buying for $117, all the odds and ends and parts of the machines which said Seagrave then had on hand, of the description mentioned in paper marked 'A' (a sample of which is marked 'S. H. B.'), it being a machine containing the knife-holder loose upon the knife-rod, in other words, containing Pratt's alleged im-

provement; said Seagrave agreed to give up all rights acquired by him under and by virtue of paper marked 'A.' And in pursuance of this agreement, said Seagrave sold and delivered to said complainants, all the parts of such machines he then had on hand (these being separated by the complainants and said Seagrave in person, from the parts of the other apple paring machines, then on hand and mentioned above). And from and after that time said Seagrave ceased wholly from making such machines as contained in said Pratt's alleged improvement, and resumed the manufacture of machines previously patented by said Seagrave, adding other and further improvements, for which he applied for a patent, one of which is the mode of connecting the spring which draws the knife-rod towards the apple, with the knife-rod itself. In no instance has said Seagrave made a machine since said last-mentioned agreement, having a knife-holder united to the knife-rod in the manner described in said Pratt's patent."

It will be perceived that the defendants do not here claim the right to continue the manufacture, notwithstanding the covenant. On the contrary the defence is a denial that the covenant has been violated. And my opinion is, that if the facts alleged in the answer were proved, they would not affect the validity of the final agreement of May 26, 1854, which contains the covenant in question. If those facts were true, there was, at the date of that agreement, a controversy between the complainants and Seagrave, in which Seagrave was equitably right, and in the course of which the conduct of the complainants had been unfair; but, assuming this to be so, Seagrave, with a knowledge of all the facts and under no duress, made the agreement for a compromise, of May 26th, and the complainants executed it on their part, and bought the machines and parts of machines, and paid for them as agreed. The answer does not show any reason to suppose that the agreement was unconscientious or unreasonable. Seagrave cannot be allowed to go behind this agreement, especially while he retains the fruits of it. Moreover there is no evidence of the facts alleged in the answer respecting these negotiations. The bill alleges, that the agreement of May 26th, was entered into by the complainants for the sake of avoiding litigation, and because Seagrave was not pecuniarily responsible. The answer does not deny either of these allegations. So far as the motives of the complainants for entering into the contract are concerned, and so far as respects the pecuniary responsibility of Seagrave, the answer is silent; and as to the motive of Seagrave the bill charges nothing. The answer goes into a history of negotiations and agreements which it alleges preceded this agreement. But this is responsive to nothing in the bill, which contains no allegations concerning any such negotiations or agreements, nor respecting the state of the controversy between the parties, further than to say, what the answer in substance admits, that the complainants requested Seagrave to desist from making machines which violated their patent.

Shortly stated, the case is this. The bill alleges that a controversy existed, concerning the violation of a patent, and that an agreement of compromise was made by the complainants, to avoid litigation, and because the defendant was not pecuniarily responsible. The answer says nothing on either of these points, but goes into a history of the controversy which was compromised. I am of opinion it is not responsive to the bill and is not evidence, and that no sufficient reason appears, why the compromise should not be executed on Seagrave's part.

As to the other question, whether the machines made by Seagrave do include in substance, the improvement for which the complainants' letters patent were granted, I am of opinion that the infringement is made out. The improvement patented consists in so attaching the knife block to the rod which moves it, as to allow it to rotate round the rod at right angles therewith, and thus the knife accommodates itself to any irregularity in the surface of the vegetable to be pared. The defendants, instead of making the knife thus movable on the rod, have made the rod movable in its socket. The knife block has the same motion; but in one, it is around the rod, in the other, it is with the rod. The change is so obvious and slight, and its practical effect so small, if it be any thing, that I cannot consider it introduces a substantially new mode of operation, within the meaning of the patent law. [5 Stat. 117.] See Winans v. Denmead, 15 How. [56 U. S.] 330. It is one of those changes of form merely, or of mechanical structure, which would not be the subject of a patent, without showing that some new or materially improved result is obtained by it, which is not made out in this case. As against Seagrave, I think the complainants entitled to a decree for an injunction and an account. But Larned, the other defendant, is merely a workman in the employment of Seagrave. No decree for an account can be had as against him, for he has nothing to do with any profits; and upon the facts of this case, I entertain doubt whether he ought to be enjoined, upon the footing of Seagrave's covenant. I observe also, that the prayer for an injunction and an account is directed against one defendant only. Probably this was by inadvertence; but unless the complainants elect to dismiss their bill, as against Larned, and to take a decree against Seagrave alone, I must consider what is to be the effect of thus joining Larned.

[For other cases involving this patent, see Cases Nos. 12,362 and 12,365.]

SARGENT (MASON v.). See Case No. 9,253.

SARGENT (ROGERS v.). See Case No. 12,020.

SARGENT (SANGER v.). See Case No. 12,319.

Case No. 12,365.

SARGENT et al. v. SEAGRAVE.

[2 Curt. 553.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1855.

PATENTS—PRELIMINARY INJUNCTION—PUBLIC ACQUIESCENCE—REQUISITES—POSSESSION—DOUBT OF VALIDITY.

1. Though strictly speaking, there can be no possession of the exclusive right to an invention, until the letters-patent therefor are granted, yet under out patent laws, the inventor may make and sell, and the public may acquiesce in his claim of right, for two years before his application for letters-patent; and such acquiescence may be entitled to weight, in considering his title to a preliminary injunction.

[Cited in Tappan v. National Bank Note Co., Case No. 14,100; Andrews v. Hovey, 124 U. S. 705, 8 Sup. Ct. 679; Blount v. Societe Anonyme Du Filtre, 53 Fed. 103; Thomson Electric Welding Co. v. Two Rivers Manuf'g Co., 63 Fed. 122.]

2. To make a prima facie title, without a judgment at law, the patentee must have had such an exclusive possession with the acquiescence of the public, as lays a reasonable foundation for the presumption of the validity of his patent. No precise length of time can be prescribed, during which the possession must have continued. It depends on the extent as well as the duration of the use or sales of the patentee, the degree of utility of the invention, the number of persons whose interest it is, to question the exclusive right, and the completeness of the acquiescence in it.

[Cited in Rein v. Clayton, 37 Fed. 357; Carter & Co. v. Wollschlaeger, 53 Fed. 576; Corbin Cabinet Lock Co. v. Yale & Towne Manuf'g Co., 58 Fed. 565.]

3. An unsuccessful attempt to interrupt the patentee's possession, strengthens the presumption in his favor.

[Cited in Hat-Sweat Manuf'g Co. v. Davis Sewing-Mach. Co., 32 Fed. 402.]

4. Where sufficient possession is made out, a doubt as to the validity of the patent will not necessarily prevent an injunction. The court will look to the circumstances, and the comparative inconvenience or loss to be occasioned by granting or withholding it.

[Cited in Earth Closet Co. v. Fenner, Case No. 4,249; Hat-Sweat Manuf'g Co. v. Davis Sewing-Mach. Co., 32 Fed. 403.]

[This was a bill in equity by James Sargent and others against Joseph D. Seagrave.]

This was an application for a preliminary injunction, before a trial at law, to protect the exclusive right of the complainants under letters-patent for an improvement in a machine for paring apples, and other vegetables. The letters-patent [No. 10,078] bore date on the fourth day of October, 1853, and this motion was heard on the —— day of November, 1855. The bill alleged, and the affidavits showed a claim and exercise of the exclusive inchoate right, before the date of the letters-patent for nearly two years before the date of the patent, as well as subsequent to their date, in the manner and to the extent stated in the opinion of the court.

Geo. T. Curtis (with whom was Mr. Devens), for the motion.

Jenckes & Hayes, contra.

CURTIS, Circuit Justice. This is a motion for a preliminary injunction to restrain the defendant from violating the exclusive right of the complainants to make, use, and sell an improvement in a machine for paring fruit and vegetables. Under a former decision of this court,—Sargent v. Larned [Case No. 12,364],—machines, like those now produced and admitted to have been made and sold by this defendant, were held to infringe this patent; and no question on that point is made, at this time.

No answer has yet been filed, but the validity of the letters-patent is denied by an affidavit of the defendant. He produces several machines, in respect to which, there is evidence that they existed before the invention, on which these letters-patent are founded. On the former hearing above referred to, I had occasion to examine each of these machines, and I then arrived at the conclusion, that it was so far doubtful whether these, or either of them embraced the complainants' improvement, that it was proper the defendant should have opportunity to try that question by a jury, before a perpetual injunction should go.

I do not state here the precise grounds of that doubt, because I am not willing in any degree to prejudge the question the jury must try, and I prefer to reserve my views till the witnesses shall have been examined.

But I will indicate generally, that though I thought others had approached more or less nearly to the complainants' invention, yet I was not satisfied, that his improvement had been so far perfected, and reduced to practice by them, or either of them, that the ground was preoccupied.

Still, I thought a more full investigation, with the aid of a jury, might produce that result, and therefore, that it was proper to allow the defendant, if he should so elect, to make the attempt before he should be finally enjoined.

In this state of my views on this subject, I am asked to grant a temporary injunction until the right can be tried at law.

The ground upon which the plaintiffs rest their claim, is an exclusive possession of the right, and the acquiescence of the public therein since the issue of the letters-patent, a period of about two years, and also the acquiescence of the public in their claim of a right under a caveat, for about two years before the date of the patent.

I have stated the position in this form, because it is quite plain, that, strictly speaking, there can be no possession of the exclusive

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

right before the date of the patent; because the patent grants that right. But it is equally clear, that, both before and since the patent act of 1839 (5 Stat. 353), an inventor might exercise a claim to an inchoate right, which was capable of being perfected into a complete exclusive right, by obtaining letters-patent; and that the public may acquiesce in this last-mentioned claim. Thus before the act of 1839, the inventor might, in the course of experimental trials of his invention, bring it to the knowledge of the public, and at the same time make known, that he was about to apply for a patent, to secure to him the exclusive right therein. This would be a claim to such inchoate right on his part; and if no one should construct the machine, that would be evidence of an acquiescence, by the public, in his claim. And since the act of 1839, he may sell any number of his machines to the public, during any period less than two years, accompanied by a claim to the inchoate right, sufficient to show an intention not to abandon it to the public. This would be evidence that he made such a claim; and so far as the public should purchase of him, and not construct themselves, it is evidence of the public acquiescence in his inchoate right, more or less strong according to the number of instances of such sales, and the importance of the machine to the public. And, although this is evidence of claim and acquiescence only in the inchoate right, and not in the completed legal right upon which the complainants rely here, yet, in my judgment, it is not without weight. In Gayler v. Wilder, 10 How. [51 U. S.] 477, it was held, that where an inventor assigned his invention, and then took letters-patent in his own name, the legal title under the patent enured, by force of the assignment, to the assignee. Because the right granted by the patent was the same, in a complete state, as the assignment conveyed in an inchoate state. And when the inventor asserts this inchoate right, and the public acquiesces in it, the claim, and the acquiescence therein, relate to the same right afterwards perfected by the patent. Not that I think such a claim and acquiescence would alone be sufficient, in any case which has occurred to me. But it must be taken along with the other facts respecting possession, and may have a tendency to fortify the prima facie title of the patentee.

It appears that during the period which elapsed between the invention, and the date of the patent, the complainants made and sold about 11,000 of these machines; and that, since that date, they have made and sold 105,000, at an average profit of about thirty-five cents each; and there is evidence tending to prove that large dealers have bought of the complainants, great numbers of these machines, paying them what was considered by them a high price, having reference only to the labor and materials necessary to build them. Nor is there any evidence of such an interruption of the exclusive possession of the complainants, as has any tendency to weaken the presumption in favor of their title, arising from their enjoyment, and the acquiescence of the public therein. An unsuccessful attempt to interrupt a possession strengthens the presumption which arises from it. It tends to show that persons have found it for their interest to question the right, that they have questioned it, and for a time have refused to submit to it; but on inquiry have submitted. Such submission is the most persuasive kind of acquiescence. There can be no doubt that the evidence of acquiescence by the public, in the exclusive enjoyment of this right by the complainants, is ample, provided it has been of sufficient duration in point of time. In Foster v. Moore [Case No. 4,978], I had occasion to consider a similar question, and came to the conclusion that it was not possible to fix any term of years, during which the exclusive possession must have continued; but that each case must depend on its own circumstances. Those circumstances being the extent of the use or sales by the patentee, the degree of utility of the invention, and the number of persons whose business is affected by it, and who are interested to question the exclusive right, and the completeness of the acquiescence in it. In Orr v. Littlefield [Id. 10,590], my predecessor came to the same conclusion. The cases he has collected fully support the position.

Considering the circumstances of this case, I think the duration of the possession sufficient. The number of persons who have purchased these machines of the complainants, is far greater than it has been, in any other case with which I am acquainted. The profit of manufacturing them, and the consequent inducement to deny their exclusive right are also great. Nor do I disregard some other special circumstances. The plaintiffs obtained a final decree in equity against the brother of the defendant, perpetually enjoining him from further infringement of the patent. It is true, this was on the footing of a covenant, by which he had estopped himself from making the machines. It is true also, that it was and is open to the defendant, to contest the validity of the complainants' title. But, of several persons, who have a right to contest a title, one may have a better defence to an application for a preliminary injunction than another. The court looks to the particular circumstances, to see what degree of inconvenience would be occasioned to one party or the other, by granting or withholding the injunction; and whether the defendant has voluntarily placed himself in the position to be subject to that inconvenience. Now it is admitted, that the defendant began to manufacture these machines, after he knew his brother had been enjoined, and that the court had decided that to make them was an infringement of the complainants' patent. He voluntarily assumed the position of infringing an existing patent, in the validity of which, his brother had so far acquiesced as to be enjoined, and in the validity of which great numbers of other persons had acquiesced. This does not prevent him from contesting its

validity. But it does prevent him from alleging that any particular hardship attends his case, when the court decides that the apparent title of the plaintiffs is such, that he must refrain from further infringing, until he has proved the invalidity of the patent on a trial at law.

It was argued, that inasmuch as the court, upon an examination of the defendant's evidence, has some doubt concerning the validity of the patent, there should be no injunction. But I take it to be settled, that sufficient possession, such as I consider to be proved in this case, will outweigh graver doubts than I entertain. Lord Eldon, in Harmet v. Plane, 14 Ves. 130, said, possession would warrant an injunction even where great doubt was felt, whether the patent was valid; and if I understand his views of that case correctly, he had quite a decided opinion that the specification must prove defective on the trial which he ordered. Yet he retained the injunction.

Let an injunction issue till the further order of the court. But it will be dissolved, unless the complainants bring the action at law to trial at the next term, or then show sufficient cause for not doing so.

[For other cases involving this patent, see Cases Nos. 12,362 and 12,364.]

SARGENT (STANLEY WORKS v.). See Case No. 13,289.

Case No. 12,366.

SARGENT v. YALE LOCK MANUF'G CO.

[17 Blatchf. 244;[1] 4 Ban. & A. 574; 17 O. G. 105.]

Circuit Court, S. D. New York. Oct. 29, 1879.

PATENTS—DAMAGES—REDUCTION OF PRICES—TITLE TO RECOVER.

1. Reduction of prices and consequent loss of profits, caused to a patentee by the competition of an infringer, is a proper ground for awarding damages against the infringer.

2. In this case, on the evidence, it was held, that the reduction of prices by the plaintiff on safe locks containing his patented invention, was directly and solely caused by the defendant's infringement, after allowing a proper sum for any other patented device contained in the defendant's locks, and for any other causes which gave to the defendant an advantage in selling his locks.

[Cited in Fitch v. Bragg, 16 Fed. 247.]

3. The plaintiff, as owner of the patent, was held to be entitled to recover the damages, although he might be accountable to a copartner for a part of them, as the copartner could not sue for them.

[This was a bill in equity by James Sargent against the Yale Lock Manufacturing Company for the infringement of reissued letters patent No. 4,696, granted to plaintiff Jan. 2, 1872, the original letters patent having been granted August 28, 1866 (No. 57,574). After a hearing on pleadings and proof, an interlocutory decree was entered, finding the reissued patent to be valid, and to have been infringed, and awarding a perpetual injunction and an account for profits and damages. A reference was made to a master, who reported $7,771 damages in favor of plaintiff. The cause is now heard on exceptions to the master's report.]

Edmund Wetmore and George T. Curtis, for plaintiff.

Frederic H. Betts, for defendant.

BLATCHFORD, Circuit Judge. The master reports, that there is no basis, from the proofs adduced before him, to find what profits have been made by the defendant by the use of the "turning bolt," (the infringing device,) in the locks made and sold by it; and that, therefore, on the testimony before him, he cannot find what profits, if any, are due from the defendant for the use of the "turning bolt."

The patent on which this suit is brought is a re-issue granted January 2d, 1872. The master reports that, after that time, and in 1873, in consequence of the defendant's offering and selling to the plaintiff's principal customers, and to the trade generally, locks containing the infringing device, at a less price than the plaintiff was obtaining, a reduction of prices was enforced on the plaintiff, such reduction being, in round numbers, $1 on each No. 5 lock, and $2 on each No. 3 lock. Exception one of the defendant is to such finding and report, and alleges that the master should have reported that no such reduction was enforced, and that there was no proof of the amount of any reduction caused by the defendant's infringement, and that there was no method of computing such reduction, even if it actually existed.

The master also reports, that it is in evidence, that, during the period covered by the accounting, the plaintiff could have manufactured, in addition to the locks he did manufacture, and without materially increasing his manufacturing facilities, all the locks manufactured and sold by the defendant. Exception two of the defendant is to such finding and report, and alleges that the master should have reported that no such additional manufacture by the plaintiff was possible, or that it was impossible without a very great extension of his facilities.

The master also reports, that it is in evidence, that, during the period covered by the accounting, the plaintiff would have made sales to many of the persons who were induced to purchase from the defendant, at his own established prices, had not the defendant offered its locks at lower prices. Exception three of the defendant is to that part of the report, and alleges that the master should have found and reported that no such sales would have been made, or that, even if made, they would not have been at the plaintiff's own established prices.

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

The master also reports, that the plaintiff has suffered damage in respect to the matters to which exceptions two and three relate. Exception four of the defendant is to that part of the report, and alleges that the master should have found and reported no damage whatever from the competition of the defendant.

The master further reports, that the locks sold by the defendant contained, in addition to the "turning bolt," a device patented by the Rosner patent, for which infringement a claim is made against the defendant, in another suit; that, as to the proportion of the reduction of prices above set forth, which should be allowed to the device claimed under the Rosner patent, it is claimed by the plaintiff, and nowhere effectually disputed by the defendant, "that, in computing the profits on these locks, one-third belonged to and was charged by him to the Rosner patent;" and that, admitting this proportion, and allowing, in addition thereto, for any superior external attractions of the defendant's locks, and for the number of combinations which they had over those of the plaintiff, and for the shape of the case of the lock, and for the commercial success of the defendant in effecting sales, where the plaintiff would have failed, the master is of opinion that the plaintiff is entitled to recover from the defendant, as damages, one-half of the amount of the reduction in prices caused by the defendant since January 2d, 1872, that is, on 1,009 No. 3 locks, $1 per lock, being $1,009, and on 13,524 No. 5 locks, at 50c. per lock, $6,762, being a total of $7,771. Exception five of the defendant excepts to the finding and report, that the plaintiff is entitled to recover from the defendant, as damages, one-half of the amount of the reduction in prices caused by the defendant since January 2d, 1872, and alleges that the master should have reported "no reduction in prices, or no proof of such," caused by any infringement by the defendant since said date, and "hence no damages" to the plaintiff, "and, consequently, no method of calculating them." Exception six of the defendant excepts to the report for that the master erred in making the apportionment of the alleged reduction in the plaintiff's prices, charging one-half thereof to the alleged infringement of the "turning-bolt" patent, and alleges that no basis existed, in the proof or in law, for such or for any apportionment, or for any award of damages. Exception seven of the defendant excepts to the report for that the master erred in assessing damages which are not the damages suffered by the plaintiff, but are those suffered by the firm of Sargent & Greenleaf, and alleges that the master should have reported, that the damage, if any, found to have been suffered by said firm, is not the damage of the plaintiff, who is only one member of said firm, but that the plaintiff's damage is merely a portion thereof. Exception eight of the defendant excepts to the report for that the master erred in finding and reporting, as damages, the sum mentioned in his report, or any damages whatsoever, and in not reporting that there was no proof of any actual damage suffered by the plaintiff from the alleged infringement.

The defendant contends that the competition of the defendant was not the sole cause of the reduction of the plaintiff's prices, and that the proportionate effect of the defendant's competition is not attempted to be estimated or ascertained by the proofs. It alleges that the defendant is not responsible for the reduction made in 1873; that there were many other causes which contributed to this reduction; and that the lowering of prices was caused principally by the competition of other fire-proof safe lock makers, and, notably, the New Britain Lock Co., by the fact that safe makers were making and threatening to make their own safe locks, and by the general lowering of the prices of material and labor and the depression of business. Reduction of prices and consequent loss of profits, enforced by infringing competition, is a proper ground for awarding damages. The only question is as to the character and sufficiency of the evidence, in the particular case. I think, that, on the whole evidence, the reduction of prices by the plaintiff, after January 2d, 1872, on safe locks containing his invention, is shown to have been directly and solely caused by the defendant's infringement.

The master, in his report, allows damages only for the reduction of prices on the locks sold by the plaintiff, that is, 1,009 No. 3 locks and 13,524 No. 5 locks. Although the master states that the plaintiff suffered damage in losing the sale of locks sold by the defendant, he awards no damages for that cause. He confines his award to the loss on the locks which the plaintiff sold.

The defendant also contends, that the plaintiff is not entitled to recover from the defendant, as damages, the entire amount of the reduction enforced by the defendant's competition, but only the damages occasioned by the effect of the presence of the infringement; that the burden of proof is on the plaintiff to fix the value of, and to separate the effect of, the infringing devices; that he failed to do so by any proper proof; and that no basis was afforded to the master on which such damages could be computed. But, as the master allowed damages only for the reduction of prices on the locks sold by the plaintiff, and as the essential feature of those locks was the "turning bolt" device, and as an essential feature of the infringing locks was the infringing "turning bolt" device in them, and as the plaintiff could not sell his "turning bolt" device unless it was embodied in a lock, and as he was thereby enabled to make his profit on the entire lock, and as he was deprived, by the acts of the defendant in selling at low prices locks containing the patented "turning bolt" device, of the profit he would otherwise have made on the locks

which he actually sold containing the "turning bolt" device, it seems plain that the defendant's infringement must be held to have caused the entire loss of the plaintiff by the reduction of prices, after allowing a proper sum for any other patented device contained in the defendant's locks and for any other causes which gave to the defendant an advantage in selling its locks. This is the basis on which the master proceeded, and it seems to me, on a consideration of the evidence, that the master has made all proper allowances and has arrived at a correct conclusion in fixing, as damages, one-half of the amount of reduction in prices.

The plaintiff, as the owner of the patent, is entitled to recover the damages in this case. He may be accountable to his copartner for a part of them, but the copartner could not sue, on the patent, for such damages or any part of them.

Exceptions 2, 3 and 4 are overruled, as immaterial. The other exceptions are overruled on the merits.

[NOTE. A final decree was entered for the plaintiff for $7,771 damages and $650.17 costs. The defendant then appealed to the supreme court, where the decree of the circuit court was reversed as to the award of costs, and affirmed in all other respects, with interest until paid. The cause was remanded to the circuit court, with a direction to modify the decree. Each party was to pay his own costs in the supreme court, and one-half of the expense of printing the record. 117 U. S. 536, 6 Sup. Ct. 934.]

Case No. 12,367.

SARGENT v. YALE LOCK MANUF'G CO.

[17 Blatchf. 249;[1] 17 O. G. 106; 4 Ban. & A. 579.]

Circuit Court, S. D. New York. Oct. 29, 1879.

PATENTS—ACCOUNT—PROFITS—SAVING FROM LOSS—ESTIMATES—MANNER OF FIXING DAMAGES.

1. The interlocutory decree in a suit in equity for the infringement of a patent, referred it to a master to take an account of the plaintiff's damages and of the defendant's profits. The master reported that there were no damages and no profits, but that the plaintiff was entitled to a compensation for the use of his patent by the defendant. It appeared that the use of the patent restored the salable character of the article the defendant made, and thus saved the defendant from loss: *Held*, that the money value of such advantage could be recovered, as compensation.

2. Opinions and estimates as to such value are not competent evidence.

3. The amount paid by the defendant for a license to use another patented invention, which he used after he ceased to infringe the plaintiff's patent and in substitution for the plaintiff's device, was held to be the proper measure of the value of the invention to the defendant.

[This was a bill in equity by James Sargent against the Yale Lock Manufacturing Company for an injunction to restrain the infringement of letters patent No. 98,622, granted to plaintiff January 4, 1870.]

Edmund Wetmore and George T. Curtis, for plaintiff.

Frederic H. Betts, for defendant.

BLATCHFORD, Circuit Judge. By the interlocutory decree in this case, it was referred to the master "to ascertain, and take and state and report to the court, an account of the damage sustained by the complainant, and of the gains, profits and advantages which the said defendant has received, or which have arisen or accrued to it, since the 4th day of January, 1870, from infringing the said exclusive rights of the complainant by the manufacture, use or sale of the said improvements set forth and described in said letters patent."

The master reports, that, in the summer of 1869, the plaintiff had picked a lock of the defendant's in a safe; that this made it necessary to discover a device to protect such lock; that the plaintiff then invented, for such purpose, the device covered by the patent in suit; that this accounting is upon such patent; that the device so patented was of no use or benefit to the plaintiff in the manufacture of his own locks, and was of no use or benefit to any manufacturers of locks other than the defendant; that the plaintiff never parted with his patent, or any interest in it, or granted any license under it; that it is not a question of damages, for the plaintiff did not make, or sell, or license others to use, his invention; that it is not a question of profits, because none have been shown, as such; and that it is a question of compensation to the plaintiff, for the benefit derived by the defendant from the use of his invention. The master then sets forth, that a witness, Munger, estimated the value of the plaintiff's device to the defendant at $10 per lock, for the double dial and No. 2 locks, and $5 for No. 3; and he also sets forth the testimony of a witness, Cady, as to the value of the plaintiff's device to the defendant; and he adds, that the testimony of those two witnesses does not form a basis upon which the master can make a computation of the money value of the device, which the defendant should pay to the plaintiff, it being the opinion and estimate only of those witnesses. The master then proceeds to say: "The defendant, however, offers a method for calculating the value of Sargent's device; for, in 1872, it abandoned the use of Sargent's invention, and adopted the devices claimed in a patent granted to Emory Stockwell, dated July 25th, 1871, and for which it pays royalty as follows: On the double-dial lock, per lock, $1; on the No. 1, (old No. 2,) 75 cents; on the No. 3, 50 cents. It is fair to believe, that the patentee, Stockwell, in accepting these royalties, was induced thereto by other considerations than the actual value of his invention. He had been, for a long time prior to his in-

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

vention, was then, and still is, in the employment of the defendant company. His time, paid for by the company, had been frequently employed in experimenting for its benefit. His relations with, and continued employment by, the defendant company, must have controlled the bargain made with it for its use of his said invention. What value or what amount should be added to the royalty paid Stockwell, to represent these considerations? We have two factors, one known, i. e., the money value paid Stockwell; the other unknown, i. e., the consideration inducing Stockwell to accept the same. Judge McKennan, of the Third circuit, in his opinion on the coming in of the master's report, in the case of Wetherill v. The New Jersey Zinc Co. [Case No. 17,464], said, in substance, that, where there were two factors, the value or proportion of one of which was known, and the other unknown, and which coöperated with each other, they must necessarily be treated as coequal in their contribution to the joint result. Following this principle, I am of the opinion, that, to the royalties paid to Stockwell, (a known factor,) there should be added an equal amount to represent the considerations (an unknown factor) which caused him to accept those royalties, to determine the fair value of his (Stockwell's) invention. As the defendant company used the invention of the complainant until the discovery of Stockwell, it seems equitable to allow complainant, for the use of his patented device, an amount equal to the value, above shown, of Stockwell's subsequent invention, during the period his device was used by the defendant. I, therefore, find, that the complainant should recover from the defendant company, as follows: On 250 double-dial locks, $2 per lock, $500; on 31 No. 1 locks, $1 50 per lock, $46 50; on 255 No. 3 locks, $1 per lock, $255; total, $801 50."

The plaintiff excepts to the finding of the master, that the testimony of the witnesses Munger and Cady does not form a basis upon which the master can make a computation of the money value of the device, which the defendant should pay to the plaintiff, for the reason that the estimate and opinion of experts is competent evidence of value in cases like the present. The plaintiff also excepts, in that the master bases his finding of the amount due the plaintiff on the royalty allowed Emory Stockwell, and the circumstance of Stockwell's employment by the defendant, as set forth in the report, and does not take into consideration not only the said circumstance, but the opinions of the witnesses Munger and Cady, and the other circumstantial evidence in the case relating to the requirements of the market, the effect of the plaintiff's picking of the defendant's lock, the impossibility of substituting any other device, except the patented device, to serve the same purpose, during the period when said patented device was used by the defendant, and all the other evidence introduced by the plaintiff. The plaintiff also excepts to the finding of the master, that the compensation due to the plaintiff is $801 50, for the aforesaid reason, and because it is calculated without taking into consideration all the evidence and circumstances tending to prove and establish the actual amount due from the defendant to the plaintiff.

The defendant excepts to the finding and report of the master awarding any "compensation" to the plaintiff, because the master had reported that the plaintiff "did not suffer any damage," and that no profits on the part of the defendant were shown, and because the interlocutory decree only authorized the master to assess damages and take an account of profits, and the master had no jurisdiction or power to estimate, find or report what he deemed a compensation to the plaintiff. The defendant also excepts because the master reports that any compensation to the plaintiff could be measured by the amount of royalty paid by the defendant to Stockwell for the use of his patented device. It also excepts to so much of the report as states that any amount or value should be added to the royalty paid to Stockwell; and to so much of the report as states that there were any considerations inducing Stockwell to accept the royalty specified as paid to him, other than the mere payment thereof; and to the finding, that the plaintiff should recover from the defendant the sum reported, or any sum.

The master was right in reporting a compensation to the plaintiff. Such compensation was either damages to the plaintiff or advantage to the defendant. It was the value of the use of the invention to the defendant. The defendant's lock became unsalable, and the use of the plaintiff's patented device restored its salable character. By using such device the defendant was saved from loss. This was an advantage which, on proper evidence, may be measured by a money value, and recovered. Cawood Patent, 94 U. S. 695, 710.

I think the master was right in rejecting the estimate of the witness Munger, and the general evidence of the witness Cady. I also think, that, under the circumstances of this case, the proper measure of the value of the invention to the defendant was the amount it paid Stockwell for a license under his patent, and that there is no sufficient ground, in the evidence, for adding anything to that amount. The amount of the plaintiff's recovery must be limited to $400.75. The plaintiff's exceptions are disallowed. Exceptions one, two and five of the defendant are disallowed, and exceptions three and four of the defendant are allowed.

[NOTE. On final hearing, on bill, answer, replication, and proofs, there was a decree for the complainant for an injunction, and for $400.75 damages and costs. From this decree defendant appealed to the supreme court, where the decree of this court was reversed, and the cause remanded, with directions to dismiss the bill. 117 U. S. 373, 6 Sup. Ct. 931.]

Case No. 12,368.

SARGENT MANUF'G CO. v. WOODRUFF et al.

[5 Biss. 444.] [1]

Circuit Court, W. D. Wisconsin. Oct., 1873.

PATENTS — PRELIMINARY INJUNCTION — PRESUMPTION FROM ISSUANCE OF LETTERS PATENT.

1. The ruling of a federal court in one circuit on a motion in a patent case is not a sufficient decision upon the merits to warrant another court in issuing a preliminary injunction where the infringement is positively denied.

[Cited in Cornell v. Littlejohn, Case No. 3,238.]

2. Where the defendant is manufacturing under letters patent, the presumption is that he is not infringing, and unless the court can see, from an inspection alone of the patent, that it is an infringement, the court will not issue an injunction until after a full hearing.

[Cited in Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co., 54 Fed. 679.]

This was a bill for an injunction to restrain the defendants [Henry S. Woodruff and others] from infringing letters-patent for an improved buckle, granted to A. H. Cole, October 10, 1865, and of letters-patent for an improvement in buckles, re-issued to one John W. Mashmyer, assignee of Samuel S. Sargent, dated the 13th day of April, 1873.

E. W. Stoughton, for complainant.

J. A. B. Cassoday, for defendant Woodruff.

HOPKINS, District Judge. The complainant moves for a preliminary injunction on the bill and affidavits in support thereof. The defendant Woodruff has answered, and presented and read with his answer, in opposition to the motion, divers affidavits of parties skilled in the business, to the effect that the buckle manufactured and sold by him is not an infringement of the complainant's patents above mentioned or either of them. The defendant also sets up in his answer that on the 9th day of January, 1872, he obtained letters-patent for an improved buckle, under which he is manufacturing and selling the buckles complained of. His buckle is known in the trade as the "Champion" buckle, and has met with very general approval and is extensively used. On the argument the complainant's counsel based the right to an injunction principally upon the Cole patent, which buckle is known commonly by the trade as the "Cole Wedge" buckle. The complainant sets out in his bill that in a case pending and tried in the circuit court for the Northern district of New York, before Judge Woodruff, brought by one William L. Starr, deceased, against Frazer and Burns, the validity of the complainant's patents was established, and an injunction was therein granted restraining those defendants from manufacturing and selling a buckle known as the "Eureka" buckle, which was the invention alleged in that case to infringe upon the Cole Wedge patent buckle, and that a decree was entered therein perpetually enjoining those defendants from the manufacture and sale of the Eureka buckle; that the defendants in that suit then refrained from manufacturing the Eureka, but continued to manufacture the Champion under an agreement with this defendant; that afterwards an application was made to that court, Judge Woodruff presiding, for an attachment against the defendants therein for violating the injunction in manufacturing and selling the Champion buckle, and that after hearing the parties on that motion the court adjudged the defendants guilty, holding that the Champion infringed upon the Cole Wedge patent. It does not appear, nor is it alleged, that the question of infringement involved in this suit has ever been tried in any other manner than on that motion. The papers in this case show that at the trial of that case the defendants therein were manufacturing the Champion as well as the Eureka, notwithstanding which, however, there was no charge or claim then made, that this defendant's invention, the Champion buckle, was an infringement of the Cole Wedge buckle. If that court had tried the question of infringement involved in this suit, in the usual and formal mode of trying such questions, I should regard the decree as sufficient, prima facie, to authorize the granting of the preliminary injunction prayed for herein. For after one fair trial of the question on its merits in one court, other courts should presume the decision to be right, and follow it, so far, at least, as to restrain all parties preliminarily from manufacturing or selling the illegal or piratical article in another suit, founded upon the same right and involving the same question. But I do not think the decision of the learned judge on that motion sufficient to warrant another court, in a suit where the infringement is positively denied, in granting a preliminary injunction without reference to the facts proven in the case before it.

The defendant's counsel contended, with a good deal of force and reason, that the plaintiff therein, the assignee of the Cole Wedge patent, did not then consider the Champion as an infringement of the Cole patent, for if he had he would have raised the question on the trial, as the defendants therein were manufacturing the Champion at that time, as well as the Eureka. This position of the defendants is not easily answered. It, at least, tends to show that the infringement is not so manifest as the complainant's counsel now pronounce it. I cannot, therefore, regard the decision of his honor, Judge Woodruff, as conclusive, or as sufficient authority upon the question of infringement, without reference to the facts appearing on this motion, to grant the injunction asked for, but must look into the motion papers and see

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

how the question appears from them. In examining this question it must be borne in mind that the defendants are not pirating upon the rights of the complainant. They have obtained and are acting under letters-patent from the proper authority, and the same presumption follows from their letters as from the complainant's. The presumption is that the buckle is not an infringement, and a party acting in good faith under such letters-patent is entitled, on an application of this character, to claim with great force the presumption springing from the issuance of the letters. This consideration on the final hearing may not be entitled to as great weight as now, for it is clear that the decision of the commissioners of patents is not conclusive or binding upon the courts. They may annul and vacate a patent unquestionably, but until the claimant has had a full and fair opportunity to try that question of fact before a court, he should not be enjoined, unless an inspection alone of the invention should most clearly convince the court of the infringement. This is the well-settled doctrine of the courts on this question. Winans v. Eaton [Case No. 17,861]; Parker v. Sears [Id. 10,748]; Goodyear v. Dunbar [Id. 5,570]; American Nicholson Pavement Co. v. City of Elizabeth [Id. 312]. In the latter case Justice Strong, who delivered the opinion of the court, says: "The grant of the letters-patent was virtually a decision of the patent office that there is a substantial difference between the inventions. It raises the presumption, that, according to the claims of the latter patentees, this invention is not an infringement of the earlier patent. This presumption, although it may be overcome, is not to be disregarded in considering a motion for a preliminary injunction." The granting of an injunction in patent cases is discretionary as in other equity cases; and where the equity of the bill is fully denied it is not usual to grant one. In this case the fact of infringement is fully denied by defendant's answer under oath, and in support of which he has filed the affidavits of eleven persons, who profess to be skilled in such matters, to the effect that the Champion is not an infringement of either the Cole Wedge or Mashmyer patents. The respective parties have also presented to the court their several letters-patent, and specimens of their buckles, and have made various experiments, to test the quality and operation of each, the one to show their identity and the other their dissimilarity, from which I do not see the infringement sufficiently clear to warrant me in granting the complainant's motion. I think it better to let the parties continue to manufacture their respective articles at their peril until the question can be determined upon evidence taken in the ordinary way, rather than to express any decisive opinion upon the question at this time, based upon the ex-parte affidavits of the parties themselves and of other witnesses, claimed to be interested in this matter.

The motion is therefore denied.

NOTE. Preliminary injunctions are addressed to the discretion of the court, and in cases of new patents will not ordinarily be granted until the patent has been established by an action at law. But if it has been in long use, "which may fairly create the presumption of an exclusive right, the court will in such a case ordinarily interfere by preliminary injunction." 2 Story, Eq. Jur. § 934; Goodyear v. Day [Case No. 5,569.]

SARMIENTO (GREEN v.). See Case No. 5,760.

SARMIENTO (POST v.). See Case No. 11,301.

Case No. 12,369.

SARVEN v. HALL et al.

[9 Blatchf. 524; 5 Fish. Pat. Cas. 415; 1 O. G. 437; Merw. Pat. Inv. 435.] [1]

Circuit Court, D. Connecticut. April 23, 1872.

PATENTS—REISSUE—CARRIAGE WHEEL—SPECIFICATIONS—AGGREGATION OF DEVICES.

1. A reissued patent cannot be sustained by extrinsic proof that the patentee was the inventor of all that is claimed in it, if what is so claimed was not shown or suggested in the original specification, drawings, or model.

[Cited in Giant Powder Co. v. California Powder Works, Case No. 5,379.]

2. Defects or insufficiencies in the description of anything which is found in any form in the original specification, drawings, or model, may be supplied in the reissue.

3. The specification of the original letters patent granted to J. D. Sarven, June 9th, 1857, for an improved carriage wheel discloses two devices—one consisting of spokes, whereof a part are tenoned into a wooden hub, and a part are in wedge form, not thus tenoned; the other consisting of flanged collars applied to the hub and the spokes therein, whether the spokes are constructed in the manner last named, or in any other manner, the specification pointing out the application of flanged collars to a wheel containing the ordinary number of spokes, in which it is probable, at least, that the extra or increased number of spokes not tenoned into the hub are omitted.

4. The reissued letters patent granted to said Sarven, September 6th, 1870, on the surrender of said original patent of 1857, in declaring that the invention embraces the combination of the flanged collars with a wooden hub into which the spokes are tenoned, without including the wedge-form spokes, or the solid bearing of the spokes upon each other exterior to the hub, do not embrace a device not found in the record of the original patent.

5. The first claim of said reissued patent, namely, "A carriage wheel constructed with the spokes combined with a wooden hub by tenons entering mortises in said hub, and with each other, in such manner that a solid belt is formed around the said hub, substantially as before set

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 9 Blatchf. 524, and the statement is from 9 Fish. Pat. Cas. 415. Merw. Pat. Inv. 435, contains only a partial report.]

forth," is limited to a solid belt formed by alternating tenoned spokes with wedge-formed spokes not tenoned, and is not infringed by a wheel in which all the spokes are tenoned into the hub.

[Cited in Matteson v. Caine, 17 Fed. 527.]

6. A mere aggregation of parts, whereof the patentee has not the exclusive right to either, and in which the parts have no new operation, and produce no result which is due to the combination itself, is not patentable.

[Cited in Russell & Erwin Manuf'g Co. v. Mallory, Case No. 12,166; Reckendorfer v. Faber, Id. 11,625.]

7. The second claim of said reissued patent, namely, "A carriage wheel constructed with a mortised wooden hub, with tenoned spokes, and with flanges which embrace the faces of the spokes in the immediate vicinity of the hub, and are connected together so as to form a metallic band, through which the spokes extend into the mortises in the wooden hub, substantially as before set forth," is valid.

8. Such claim is not a claim for a mere aggregation of devices.

9. Such claim is infringed by a wheel having tenoned spokes, and a wooden hub, and a mortised collar, cast in one piece, with divisions between the mortises for the several spokes, and with tapering sides formed to receive the spokes driven tightly therein, and give them endwise bearings.

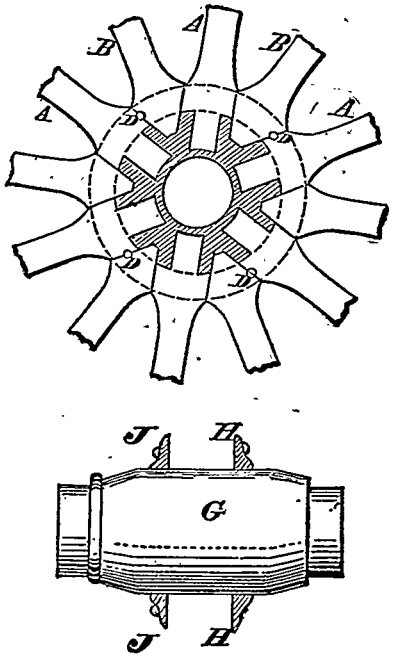
10. As the mortised collar performs, both mechanically and practically, in the combination, the same office that is performed by the flanges of the plaintiff's wheel, it is none the less an equivalent therefor, in the combination, because it performs an additional office, not performed by such flanges.

[Cited in Wheeler v. Clipper Mower, etc., Co., Case No. 17,493; Converse v. Cannon, Id. 3,144; Carstaedt v. United States Corset Co., Id. 2,468.]

[11. Cited in Untermeyer v. Freund, 7 C. C. A. 183, 58 Fed. 212, as a decision based upon the language of section 111 of the act of July 8, 1870, which limited the remedial provisions of the act to suits and proceedings commenced after its passage.]

[This was a bill in equity by James D. Sarven against Elihu Hall & Co.]

[2] [Final hearing upon pleadings and proofs. Suit brought on letters patent No. 17,520, for an "improved carriage-wheel," granted to complainant June 9, 1857; reissued August 11, 1868; and again reissued September 6, 1870 (No. 4,116); and extended for seven years from June 9, 1871. The defendant's wheel was made under letters patent No. 61,900, granted to Almon Warner, February 5, 1867, and reissued April 22, 1873 (No. 5,366). The Sarven wheel is shown in the accompanying engraving. It consisted, in the form shown in the patent, of a mortised hub, with six tenoned spokes, A, placed in line. Between each pair of these spokes was inserted another spoke, B, having a wedge-shaped foot, so that the lower end of the spokes were brought in contact just outside of the hub, thus forming a solid ring of wood. Metallic flanges, H and J, were then placed around the hub and on each side of this wooden ring, so as to bear against both the spokes and the hub, and were bolted together by rivets, D, passing through the flanges and lower part of the spokes.

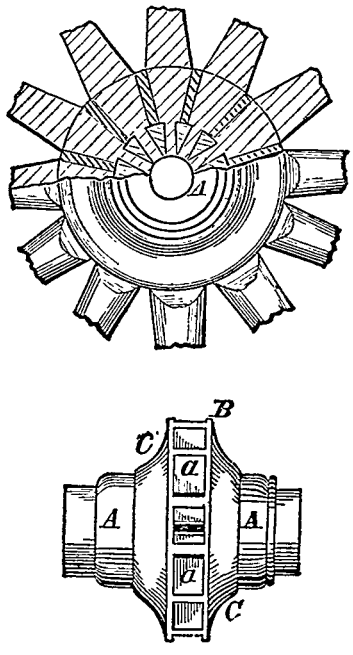


Sarven.

[The claims were as follows: "A carriage-wheel constructed with the spokes combined with the wooden hub, by tenons entering mortises in said hub, and with each other, in such manner that a solid belt is formed around the said hub, substantially as before set forth. Also, a carriage-wheel, constructed with a mortised wooden hub, with tenoned spokes and with flanges, which embrace the faces of the spokes in the immediate vicinity of the hub, and are connected together so as to form a metallic band, through which the spokes extend into the mortises in the wooden hub, substantially as before set forth. Also, a carriage-wheel constructed with a mortised wooden hub, with tenoned spokes combined with each other, so that a solid belt is formed around the hub, and with metallic flanges, which embrace the faces of the spokes in the immediate vicinity of the hub, and are connected together so as to form a metallic band, through which the spokes extend into the mortises in the wooden hub, substantially as set forth."

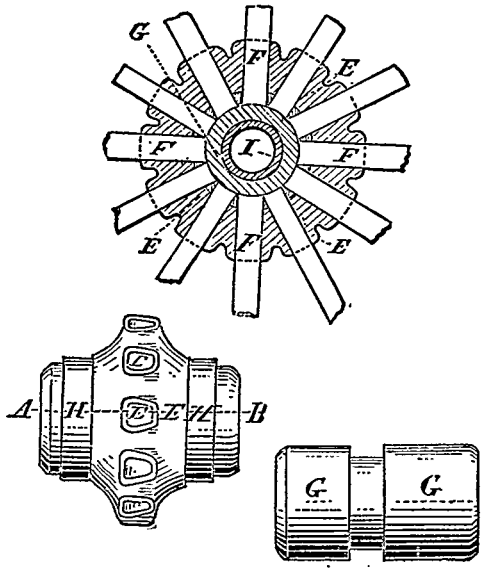
[The first engraving on the next page represents the Warner wheel, made by the defendants. A metallic mortised collar, a, was placed round the hub, A, which was also mortised, so that each spoke was driven through the metallic collar, and then by its tenon into the mortise in the wooden hub. The metallic collar formed a bearing against the sides of the spoke and also against the hub.

[2] [From 5 Fish. Pat. Cas. 415.]



Warner.

[The following engraving represents the Smith & Parfrey wheel, in which the hub, G, was not mortised, but channeled, and the spokes, F, were not provided with tenons, but after passing through a mortised metallic collar, E, substantially the same as that used by the defendants, passed into the channel in the hub, without diminution.



Smith & Parfrey.] [3]

[3] [From 5 Fish. Pat. Cas. 415.]

F. S. Beach, S. S. Fisher, and C. M. Keller, for complainant.

C. R. Ingersoll and B. F. Thurston, for defendants.

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

WOODRUFF, Circuit Judge. The defence relied upon herein is of a mixed or two-fold character, namely, a want of novelty in those features of the complainant's alleged invention which have been used by the defendants, and a denial that the defendants have infringed the patent granted to the complainant, in any feature which can be lawfully claimed to be secured to him. This mixed defence begets the claim, that no right which was due to the complainant in virtue of the original invention described in his patent, specification, drawings, or model, has been violated by the defendants; and that, if the invention, as described and claimed in the reissued patent, purports to cover any broader ground, upon which the defendants can be said to have trespassed, then the reissue is, pro tanto, void.

These grounds of defence require an examination not only of the state of the art when the complainant's invention is alleged to have been made, but an examination of the complainant's original patent, specification, drawings, and model, to learn therefrom what invention by the complainant is disclosed thereby; for, it was conceded by the counsel for the complainant, on the hearing, that, in their opinion, at least, nothing can be legally claimed in the reissue, which does not appear either in the specification annexed to the original patent, or in the drawings, or in the model, even though it was, in fact, the invention of the patentee, and its use was contemplated by him when the patent was applied for, and that, the reissue could not, in that respect, be sustained by extrinsic proof that the patentee was, in truth, the inventor of all that was included in it, if neither the original specifications, drawings, nor model, showed or suggested the device in question. This is in accordance with the object of a reissue, and with the license therefor given by the law. It is where a patent is inoperative or invalid by reason of a defective or insufficient description, specification, or claim, and not where the device is not described or specified at all, that permission is given to reissue the patent. Devices not described or specified may, if they are the invention of the patentee, be the subject of a patent, subject to all other rules governing the inventor's right; but it is not the office of a reissue to embrace them. Seymour v. Osborne, 11 Wall. [78 U. S.] 516, 544. It is true, that an observation of the court, in Hussey v. Bradley [Case No. 6,946], gives a broader scope to the right of reissue, and an intimation in Doughty v. West [Id. 4,029], is in the same direction. But, in the

subsequent case of Doughty v. West [Id. 4,028], founded on a reissue of the same patent, the reissue was sustained on grounds entirely consistent with the doctrine above stated, and the rule is, in my judgment, not only clearly correct in principle, but settled by the authority of the supreme court in the case first-above named.

(1.) This view of the law renders it necessary to inquire what invention is disclosed by the original record—the original patent, specification, drawings, and model—and, in that inquiry, the right of the complainant must be conceded, to supply any defects or insufficiencies in the description of anything which is found therein in any form.

In the original specification, the patentee declares that the object of his invention is, "to provide a wheel with a wooden hub, that will admit of a greater number of spokes in each wheel than can be used by the old method, on account of the hub being cut away, by mortises, to receive a number of spokes, that would be sufficiently near together at the rim of the wheel to prevent it from being flattened between the spokes by fast driving * * *; it also consists in giving greater strength to the spokes at and near the hub, and to the hub itself." A twofold, or, perhaps, a threefold object is thus announced: First, strengthening the nave of the wheel, by increasing the number of spokes; second, giving greater strength to the spokes at the hub, and, at the same time, strengthening the hub itself. Obviously, each of these objects was desirable, and, obviously, each would be useful, whether they were combined or not. If the proposed devices, or either of them, could be used separately from the others, so that either object was effected, a useful result would follow, which is actually mentioned and avowed to be within the scope of the invention.

The nature of the invention is then declared to consist in the employment of flanged collars of metal, to be used in combination with a wooden hub, as follows: "I use, in general, a very small hub of wood, much smaller than in the old style of wheel, and, instead of making sixteen mortises, as is common for spokes, I make, in general, nine or ten for the tenons, somewhat larger than in the ordinary way, and, between each of these spokes, I make a mortise in the hub, about three-eighths of an inch deep, and insert spokes wedge-shape, as shown by the drawing accompanying this specification." This, it will be seen, explains the device which the patentee declares he generally employs for increasing the number of spokes, to strengthen and sustain the nave of the wheel, without unduly cutting away the hub by mortises; and the drawing shows, that, in this arrangement, the spokes have a firm bearing against each other at and for a short distance exterior to the wooden hub, so as to form a solid bearing around and exterior thereto.

Next he describes his device for giving greater strength to the spokes at the hub, and to the hub itself: "After the spokes are all fitted, I put the flanged collar on the back part of the hub, the collar fitting closely to the hub, and serves to strengthen and support the same, while the flange fits closely to the back of the spokes. I, in general, make three screw-holes in the collar next the hub, into which I insert screws, so that the collar will retain its position, in case the hub should shrink. In the flange that fits against the spokes, I, in general, make five one-fourth inch holes, in which I cut a thread to receive screws. After the back flange collar is secure, I put on the front flanged collar on the front of the hub, it fitting closely to the hub, but it is not screwed thereto, the flange fitting closely to the front of the spokes. In these flanges there are five holes, opposite those in the back flange. I now bore five one-fourth inch holes through the spokes, and insert screws, drawing both flanges firmly against the spokes, thereby securing all the spokes firmly in their proper place." This part of the specification discloses the device by which the object secondly named, which the patentee had in view, is secured, namely, giving greater strength to the spokes at the hub, and at the same time strengthening the hub.

The specification then proceeds to state the dimensions of the hub and spokes ordinarily used, and the gain in effective strength in the smaller hub, with spokes fitted as first described, and the greater power of resistance resulting from the bearing of the spokes on the flanges on either side thereof; and it then adds, that "this arrangement can also be applied to a wheel with the ordinary number of spokes, thereby preventing the tenons at the hub from being broken off." This imports, in connection with what precedes, that, although the inventor, "in general," uses the greater number of spokes, some of which are inserted in the hub by tenons, and the others, in wedge form, enter very slightly into the hub, yet his arrangement can also be applied to a wheel with the ordinary number of spokes; and its effect in "preventing the tenons from being broken" indicates, that, in such case, the spokes are tenoned into the hub—that is to say, it can be applied to a wheel with the ordinary number of spokes inserted by tenons into the hub, which describes the ordinary wheel. It contemplates, as a practicable use of the flanged collars, their application to a wheel not containing the additional number of spokes before described as being without tenons. It, therefore, contemplates the application of those collars to an ordinary wheel, or, possibly, to a wheel in which, although the ordinary number of spokes are used, their shoulders between the flanges are so enlarged as to bear against each other. This latter mode of fitting the spokes to a bearing is certainly not expressed, and it seems, therefore, most in accordance with the terms, to regard it as a suggestion that such flanged col-

lars may be applied to an ordinary wheel with tenoned spokes, and that, when so applied, they strengthen the hub and strengthen the spokes and "prevent the tenons at the hub from being broken off."

The specification then points out the special advantage of the flanges and the importance of securing the back collar to the hub, with the capacity of tightening the front collar on the spokes, if they shrink, in view of the custom of giving a light wheel a dish form, in which there is great strain upon the tenons of the spokes, and also in view of the necessity at times of resetting the tire.

In the drawings annexed to the specification, and in the description of the drawings contained in the specification, he gives only one kind of wheel, and that embraces both features or devices before mentioned, combined—that is to say, a wheel with the flanged collars and with the increased number of spokes, of which a part are not tenoned, but are wedge-shaped and enter but slightly into a small mortise in the hub. This, however, is not material to the validity of the reissue, if, in fact, what was already in the specification embraces the application of either of his devices to a wheel with the ordinary number of spokes tenoned into the hub.

The statement of the claims of the patentee may properly be referred to as an aid to the same point of inquiry—what is described as the invention of the patentee. The first claim is: "The employment of flanged metallic collars, as described, or other equivalent devices, in combination with a wooden hub, and these in combination with the arrangement of the spokes at the hub, as described, by which means strength and support is given both to the hub and to the spokes at and near the hub, and by which means I am enabled to use any desired number of spokes in each wheel * * * and a much smaller hub than those in general use, and at the same time retain a sufficient degree of strength at the hub, the whole being constructed and arranged substantially as and for the purpose set forth." This claim manifestly points to and includes both of the devices, as shown in the drawings and model, and contains no suggestion or hint of any construction of a wheel except by making a part of the spokes with tenons and a part in a wedge form without tenons, so fitted that the spokes at the hub bear upon each other.

But the second claim has manifest reference to the other arrangement of spokes, already named in the specification, as follows: "I also claim the flanged collars, as described, or other equivalent devices, when used in combination with a wooden hub, if the spokes are arranged as herein set forth, or in any other manner." That is to say, he claims the flanged collars in combination with a wooden hub, although the spokes are all tenoned into the hub. Read in connection with the specification, which declares that his arrangement "can be applied to a wheel with the ordinary number of spokes, thereby preventing the tenons at the hub from being broken off"—in which case it is obvious, from the whole specification, that there will be none which are not thus tenoned—this claim is comprehensive enough to embrace flanged collars applied to a wheel in which there are tenoned spokes only; and, so read, it is specific enough to refer to the application thereof to the ordinary number of spokes, previously mentioned.

Be it here observed, that this review of the original specification and claims is not for the purpose of testing their sufficiency or validity. If insufficient or defective, their defects and insufficiencies might be cured by the reissues. This review is for the single purpose of seeing what inventions or devices are found therein; and it leads to this conclusion, that the patentee has therein disclosed two devices—one consisting of spokes, whereof a part are tenoned into a wooden hub, and a part are in wedge form not thus tenoned; the other consisting of flanged collars applied to the hub and the spokes therein, whether the spokes are constructed in the manner last named or in any other manner. And the preceding specification points out the application of flanged collars to a wheel containing the ordinary number of spokes, in which it is probable, at least, that the extra or increased number of spokes not tenoned into the hub are omitted.

The reissued patent, while it retains the drawings of the original patent, which show the device of metallic flanges applied to a wheel having a part only of the spokes tenoned into the hub, is more specific in declaring that the invention embraces the combination of the metallic flanges with a wooden hub into which the spokes are tenoned, without including the wedge-form spokes or the solid bearing of the spokes upon each other exterior to the hub. The review of the original patent already given shows, I think, that this is not an extension of the patent to a device not found in the record of the original. If so, then one advance has been made in the investigation of the questions raised by the defence—that is to say, the reissued patent is not, on its face, void, in this feature, as embracing an invention not found in the original patent, specification, drawings, or model.

(2.) The reissue also declares, that the invention, in another part, "consists in the construction of a wheel in which the spokes are combined with a wooden hub by tenons, and with each other, in such a manner that they afford mutual support in the vicinity of the hub, or so that the strain applied to any one spoke in the direction of the length of the felly of the wheel is propagated to the adjacent spokes in the vicinity of the hub, and through them to the tenons that enter the hub, whereby such strain is distributed among all the tenons that enter the hub, instead of being borne by that one only of the spokes to which the strain is applied." And the third

part of his invention is declared to be, a wheel combining both of the foregoing characteristics, namely, the mortised wooden hub with spokes having tenons, and so combined as to form the solid belt outside the hub, and also the metallic flanges embracing the sides of the spokes. Although, in this part of the specification, the use of spokes not entering the hub by tenons is not mentioned, the drawing exhibits them as in the original patent, and the detailed explanation of the drawings distinctly recognizes the fact, that a part only of the spokes enter the hub by tenons.

The result is, that the device of strengthening the spokes at the hub by making them bear upon each other, so as to form a solid belt of wood around and exterior to the hub, is, by the introduction of wedge-shaped spokes between the tenoned spokes which are not made wedge-shaped, the giving to the tenoned spokes a somewhat larger tenon than usual, which, by the omission of the tenons on the intermediate spokes, is rendered practicable, without injuriously cutting away the hub. No other mode of constructing this device, or of securing the solid bearing of each spoke upon the others, is shown, suggested, or hinted at, either in the original patent or in the reissue.

This mode of giving to the spokes a bearing upon each other, the defendants have not adopted. In the defendants' wheel, there is no spoke not tenoned into the hub, the spokes do not bear against each other, and their form near the hub is not the same as described in the complainant's patent. Whether, in this respect, the defendants use a mere equivalent, will, if necessary or material, be hereafter considered.

This mode of giving support to the spokes by their bearing on each other is not new; and, if we were compelled to construe the plaintiff's patent and claim as so broad as to include, as a distinct device, every mode of constructing the spokes so as to give them a solid bearing around the hub, we should be also compelled to say, that, so construed, the patent is, in that particular, void. The wheel known and designated, on the trial, as the Woodruff and Beach wheel contains that device. The contact of each spoke with another on either side formed a solid belt of wood around the hub, operating in reference to resistance of strain in the direction of the plane of the wheel, precisely as the like arrangement in the plaintiff's wheel. It was suggested, that, in that wheel, such contact was not exterior to the hub. But that suggestion is not warranted; for, the distance from the centre to which that contact should be carried in the Woodruff and Beach wheel, is matter of mere judgment and not of invention; and, besides, in that wheel, such contact was carried to a distance exterior to the hub, unless the flanges applied on each side to resist the lateral strain be regarded as part of the hub; and, if that be claimed, the same must be no less true of the plaintiff's flanges; and, in neither of them, is the contact or bearing of the spokes upon each other carried outward beyond the edge of the flanges. It follows, that, in respect to the use of spokes bearing on each other at and near the hub, as a separate device, the plaintiff's patent can only be sustained by giving the specification and claim the construction above already stated. It must be confined to the specific mode of effecting the result which the patentee has described, and which alone he has described, and that mode of construction the defendants have not used.

(3.) As to the lateral support given to the plaintiff's wheel by flanges, viewed as a distinct and separate device, the defendants cannot be charged, for several reasons: First. Flanges had been used before on an iron hub in the Woodruff and Beach wheel, and their application differed in no wise from the plaintiff's, except that the inner flange on the plaintiff's wheel, as described by the patentee, is made fast to the hub by being screwed thereto; and, in the Woodruff and Beach wheel, it was attached to the hub firmly by being cast with it. In both, the outer or front flange was adjustable, and was made fast to the other by bolts passing from one to the other. The transfer of flanges from an iron hub to a wooden hub would not be patentable, unless it required some ingenuity or contrivance to adapt it to use in its new position. Second. The defendants have not used flanges constructed or applied in the manner devised or used by the plaintiff, but have used, and only used, mortised collars. Third. The use of mortised collars on a wooden hub is found in the Smith and Parfrey patent, long before the invention of the plaintiff's wheel. Fourth. If, then, the mortised collar is to be deemed an equivalent to the flanged collars claimed by the plaintiff, the latter has no exclusive right to use them, because the mortised collar was an old device; and, on the other hand, if such mortised collar is not an equivalent to the flanged collar, the defendants have invaded no right of the plaintiff in this respect, because the defendants have not used the flanged collars, and have a perfect right to use the mortised collar.

(4.) It follows, from these views, that the defendants have violated no right of the plaintiff in respect to the several parts of the wheel, viewed separately, as distinct devices. The right to construct a wheel having spokes tenoned into a wooden hub was not vested exclusively in the plaintiff. That was found in what is conceded to have been the ordinary wheel long in use. The right to construct a wheel wherein the spokes are in contact, and bear upon or against each other at or near the hub, was not vested exclusively in the plaintiff, except when constructed in the confessedly novel mode which alone is suggested in his patent, namely, by introducing between the tenoned spokes other spokes or pieces of wood in a wedge-form, to fill the intermediate spaces, but not tenoned into the hub. The

right to use the mortised collar is not vested exclusively in the plaintiff, whether it be regarded as equivalent to his flanged collars or a different device, and the defendants have used the mortised collar only. If, therefore, the defendants were sought to be charged as infringers by reason only of their use of the plaintiff's devices viewed separately, or separately patented, or as merely connected with a wooden hub, the plaintiff must fail. Each of these separately the defendants have a right to use.

(5.) It follows, that, if the plaintiff is entitled to charge the defendants at all, it is in virtue of some combination of these devices, claimed and secured to him by his patent. Upon this point the case is a very close one, and is not without embarrassment.

The rules of law applicable to the subject of combinations are free from difficulty. The counsel for the parties respectively do not appear to differ in relation to those rules, so far as they bear upon the present case. First. A patent for a combination, where neither part is patented as new, is not infringed by one who uses one, or some, but not all, of the parts. Second. A mere aggregration of parts, whereof the patentee has not the exclusive right to either, and in which the parts have no new operation and produce no result which is due to the combination itself, is not patentable. Hailes v. Van Wormer [Case No. 5,904]. And see an analogous principle in cases which hold that the mere appropriation of an old device to a new use is not patentable. Stimpson v. Woodman, 10 Wall. [77 U. S.] 117; cases collected in Curtis, Pat. § 33, and note; Bean v. Smallwood [Case No. 1,173]; Winans v. Boston & P. R. Co. [Id. 17,858]; Hotchkiss v. Greenwood, 11 How. [52 U. S.] 248.

The first claim in the reissued patent is: "A carriage wheel constructed with the spokes combined with the wooden hub by tenons entering mortises in said hub, and with each other, in such manner that a solid belt is formed around the said hub, substantially as before set forth." Recurring now to the specification and to what has already been said on the subject, it will be seen, that this is not a combination of tenoned spokes with any and every manner of connecting the spokes at or near the hub, so that they shall bear against or upon each other, but a combination of tenoned spokes with the construction alone described in the specification, to wit, the alternation of tenoned spokes with spokes in a wedge-form not tenoned into the hub. This combination the defendants have not used.

The second claim is: "A carriage wheel constructed with a mortised wooden hub, with tenoned spokes, and with flanges which embrace the faces of the spokes in the immediate vicinity of the hub, and are connected together so as to form a metallic band through which the spokes extend into the mortises in the wooden hub, substantially as before set forth." This claim, construed by the aid of the specification, is for the combination of the two flanges with tenoned spokes, the two flanges being connected together so as to give lateral support to the spokes.

This second claim raises three questions involved in the present case, which may be most intelligibly discussed in the following order: First. Have the defendants used this combination? and if so, then, second, is such combination patentable, or is it a mere aggregation of devices not involving patentable invention? and, third, is it a new combination?

The defendants have not used—it is not claimed that they have used—flanged collars, constructed separately, to be separately applied and bolted or screwed together. The mechanical construction of the mortised collar, cast in one piece, with divisions between the mortises for the several spokes, and with tapering sides, formed to receive the spokes driven tightly therein and give them endwise bearings, is not the same as the plaintiff's flanged collars. They perform a different office in the particular last named, which the plaintiff's flanged collars do not and cannot perform. The defendants' mortised collar and the plaintiff's flanged collars are, therefore, not identical, either in mechanical construction or in the office which they perform. It is, nevertheless, claimed, that, in the particular construction and office which is embraced within the plaintiff's second claim, they are the precise equivalent of the plaintiff's flanged collars. This claim suggests a question of some interest: Is a device which, both mechanically and practically, performs the same precise office of another device, in substantially the same manner, any less an equivalent of the latter, because it also performs another office or offices, by reason of a difference in its mechanical construction?

The mortised collar used by the defendants has its two sides in the same form as the two flanged collars of the plaintiff. In reference to the purpose for which the plaintiff's two flanged collars are used—to wit, to strengthen the hub, and to sustain the spokes against lateral pressure or strain, and to cooperate with the tenons in giving firm support to the spokes—they perform identically the same office as the plaintiff's flanged collars, and in the same way. The circumstance that they are held together by connecting cross-pieces, made solid therewith, instead of by bolts or screws, has no effect on the manner of their operation in this respect. Are they, then, to be deemed any less the equivalent of the flanged collars because, by reason of the greater number of cross-pieces, they are stronger, or because the cross-pieces between each two spokes and the sides of the mortise are tapered, so as to give an endwise bearing to the spokes, and enable the spokes to be driven in and be

grasped firmly and held therein? I think not. In the use, and for the purpose, for which the plaintiff's flanged collars are useful, they are identical in the office they perform, to wit, to sustain the spokes against lateral strain. The mechanical construction, in the parts which perform this office, is substantially the same. The crosswise partitions and form of tapering mortises may be improvements upon the plaintiff's flanged collars, but the mortised collars do, nevertheless, operate, for all the purposes for which the flanged collars are used, in precisely the same way. If the question was between a single patented device, conceded to be new, and a device claimed to infringe, because an equivalent, the alleged infringer could not protect himself by showing that, although his device was an equivalent of the patented device, in all its functions, and in its construction and mode of operation, yet, by other or additional features, it possessed other and further useful functions. Such a device would, perhaps, be an improvement upon the patented device, but must be, nevertheless, deemed an appropriation of the former.

This view of the subject of equivalents is not stated in order to a conclusion that, as separate devices, either of these parties has the exclusive right to the flanged collars or to the mortised collar. Both, as hereinbefore stated, are old. It does not follow that the plaintiff's combination of flanged collars with tenoned spokes is old; and the question discussed is, whether, in the combination of flanged collars with the tenoned spokes, the substitution of the mortised collar is not, within the meaning of the law, the substitution of an equivalent in the combination, although such device (being equivalent for the purposes, and in all the functions, of the flanged collars) also contains other and additional functions due to its peculiar construction. In this view, the combination of a mortised collar and tenoned spokes with a wooden hub must be regarded as embracing the combination of the flanged collars and tenoned spokes with a wooden hub, claimed in the plaintiff's patent; and, if that patent is valid in respect of that claim, the defendants must be held to infringe it, notwithstanding the combination used by the defendants may also include other functions and produce effects not attainable by the plaintiff's combination.

(6.) The plaintiff's combination referred to in his second claim is distinguished from a mere aggregation of devices in this, that there is a reciprocal action or operation of the parts upon each other and conjointly upon the entire wheel, each part giving to the other increased support and efficiency, and the two co-operating to make a stronger and more durable wheel than is produced by the use of either without the other—that is to say, the tenoned spokes are strengthened and sustained in position by the flanged collars, and the flanged collars, bound to the spokes by the connecting-bolts or screws, are more firmly held in position by the tenons of the spokes. Combined, they unite hub and spokes, enabling the wheel better to resist a blow or strain either laterally or in the direction of its plane. It must be conceded, within the rule on this subject, that a combination of devices would not necessarily be patentable from the mere fact that their union produced a better wheel. If the superiority arose from the fact that the two devices were intrinsically better than others and the wheel combined both—each, however, operating independently of the other—the combination would be but the exercise of judgment in the choice of parts, and not invention in discovering new means to produce useful or better results. For illustration, one mode of securing the tire to the felly, or the felly to the spokes, may be better than any other in use. One form of axle-box, or a mode of securing the axle-box to the hub, may be better than any other in use; and it might so happen that both or all had never been used together in the construction of a carriage wheel; and yet, both being old, one who should adopt both in the construction of a wheel, without other change in its construction, would not be an inventor, and his wheel would have no patentable quality. Each device is complete in itself, it performs the same functions and in the same way, in whatever wheel it is used, and without being influenced or affected by the other. This distinction may often be very nice, and sometimes may, for its application, require very close and careful discrimination; but the distinction is itself a substantial one. It reduces the basis of the second claim in the plaintiff's patent to somewhat narrow grounds, but it is sufficient to sustain it. A new relation is established between the efficient means of strengthening and supporting the parts of the wheel in question, and a new and greater efficiency is given to each, which is due not to their inherent quality but due to the combination itself.

(7.) If, then, this combination embraced in the second claim was new when the plaintiff received his patent, or, in other words, if he was the inventor, his suit against these defendants must be sustained; for, if that second claim is valid, the defendants' wheel, under the interpretation above given to the rights of the plaintiff in other respects, is a clear infringement.

The patent is itself prima facie evidence that the combination was new. The patents and models or specimens, given in evidence by the defendants, none of them contain the combination. Neither the Smith and Parfrey wheel, nor the Woodruff and Beach wheel, contain the tenoned spokes; and the last named contains no wooden hub. The others which have tenoned spokes have neither the flanged collars, nor the mortised collar. In

short, there is no evidence of a prior use of this combination, except certain oral testimony to the application of hoops or bands around the hub, to increase its strength; the use, in perhaps a few instances, of rings, or parts of rings, applied to the spokes on each side, and bolted together, to repair a wheel wherein some one or more of the spokes had been split or broken near the hub; and the testimony of one witness, that his father and himself had applied to new wheels, at the hub, next to the spokes, and on each side, a ring of iron of considerable size in either direction, and bolted the one ring to the other, to bind the hub, and assist in sustaining the tenoned spokes. Without questioning the sincerity of the witnesses who testified on this subject, or doubting their intention to testify truthfully, we must say that the evidence was not very satisfactory; and the whole either failed to show much likeness to the plaintiff's device, or was otherwise of too vague and uncertain a character to warrant a conclusion that there was any actual anticipation of it. The witness last referred to no doubt testified to some approximation to the flanged collars, very rude at best, and only in a few instances used at all. But we think that the testimony fails to show satisfactorily such prior invention, knowledge, or use of the plaintiff's combination as invalidates his patent in respect to the second claim, which alone the defendants have infringed.

(8.) It is not without doubt and hesitation that we have reached the conclusion that the plaintiff is, upon the grounds above stated, entitled to a decree. There is some reason to believe that the whole invention, as regarded by himself, and set forth in the specification annexed to his original patent, was the increase of the number of spokes, by introducing wedge-shaped spokes which should not be tenoned into the hub, lest it should cut it too much away, and, at the same time, enlarging somewhat the tenons of the spokes which were tenoned, and strengthening the spokes, particularly those not tenoned by the flanged collars. Such a wheel the defendants have not constructed. But the plaintiff may have contemplated the use of flanged collars generally in combination with tenoned spokes, and the analysis of his specification and claims, which we have given, indicates, at least, that they are sufficient to include it.

The plaintiff must have a decree declaring the defendants to have infringed the second claim of the patent, and ordering an injunction. The plaintiff having, since the suit was commenced, surrendered the patent upon which his suit was founded, and his case now standing on the reissue of the patent granted September 6th, 1870, set forth in his supplemental bill, he is not entitled to an account of anything done prior to that date; and, as this suit was commenced prior to the patent law of 1870 [16 Stat. 198], he is not entitled to damages, as such, notwithstanding the fact that his supplemental bill was filed after the passage of the act.

[NOTE. In a subsequent proceeding between the same parties, an injunction was issued restraining the defendants from manufacturing the wheels, although a change had been made in the construction, which it was claimed avoided the decree in this case, and the patent itself. Case No. 12,370.]

Case No. 12,370.

SARVEN v. HALL et al.

[11 Blatchf. 295; 4 O. G. 666; 6 Fish. Pat. Cas. 495.] [1]

Circuit Court, D. Connecticut. Sept. 23, 1873.

PATENTS — CARRIAGE WHEEL — INFRINGEMENT — DEVICES.

1. The second claim of the reissued letters patent granted to James D. Sarven, September 6, 1870, for an "improvement in carriage wheels," and extended for seven years from June 9, 1871 (the original patent having been granted to him June 9, 1857) namely, "a carriage wheel constructed with a mortised wooden hub, with tenoned spokes, and with flanges which embrace the faces of the spokes in the immediate vicinity of the hub, and are connected together so as to form a metallic band through which the spokes extend into the mortices in the wooden hub, substantially as before set forth," does not require that the tenoned spokes should have shoulders bearing on the wooden hub.

2. Such claim is infringed, if, with the other features of the claim, the wheel has tenoned spokes with shoulders which sustain the spokes against endwise pressure, by bearing on the tapering sides of metallic mortices.

[This was a bill in equity by James D. Sarven against Elihu Hall & Co.]

[2] [Motion for preliminary injunction. Suit brought on letters patent No. 17,520, for "an improved carriage-wheel," granted to complainant June 9, 1857, reissued August 11, 1868, and again reissued September 6, 1870, No. 4,116, and extended for seven years from June 9, 1871. The validity of the patent was established in the case of Sarven v. Hall [Case No. 12,369]. The claims of the patent were:

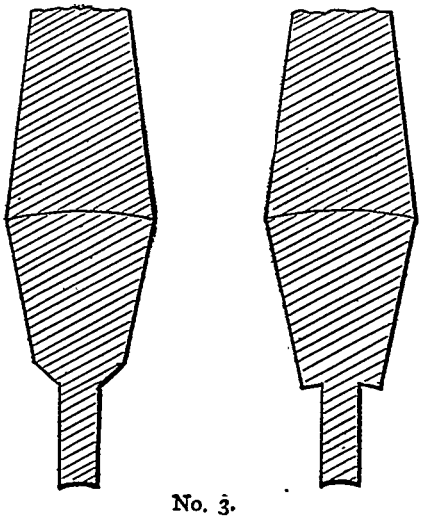
["A carriage-wheel constructed with the spokes, combined with the wooden hub, by tenons entering mortises in said hub, and with each other, in such manner that a solid belt is formed around the said hub, substantially as before set forth. Also, a carriage-wheel, constructed with a mortised wooden hub, with tenoned spokes and with flanges, which embrace the faces of the spokes in the immediate vicinity of the hub, and are connected together so as to form a metallic band, through which the spokes extend into the mortises in the wooden hub, substantially as before set forth. Also, a carriage-wheel, constructed with a mortised wooden hub, with

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 11 Blatchf. 295, and the statement is from 6 Fish. Pat. Cas. 495.]

[2] [From 6 Fish. Pat. Cas. 495.]

tenoned spokes combined with each other, so that a solid belt is formed around the hub, and with metallic flanges, which embrace the faces of the spokes in the immediate vicinity of the hub, and are connected together so as to form a metallic band, through which the spokes extend into the mortises in the wooden hub, substantially as set forth."

[The above engraving [3] shows the Sarven wheel, as described in the patent. The defendants first made the Warner wheel, patented to Almon Warner, February 5, 1867, shown in the following engraving, No. 2.[3] After the first decision, owing to the fact that complainant's counsel and experts had insisted at the hearing, as one of the reasons of infringement, that the Warner wheel had shoulders on the spokes, bearing against the wooden hub, defendant cut away the shoulders, and proceeded to manufacture wheels, in other respects, the same as before. This present suit and motion were brought to prevent the manufacture of the wheel thus changed. The engravings below show the spoke as originally used by defendants, and the spoke as changed by them, with the shoulders cut away.] [2]



No. 3.

John S. Beach, Samuel S. Fisher, and Keller & Blake, for complainant.

Chas. R. Ingersoll and Benj. F. Thurston, for defendants.

WOODRUFF, Circuit Judge. This suit is brought to restrain an alleged infringement of letters patent for an "improvement in carriage wheels," reissued to the plaintiff, September 6, 1870, and, on the 8th of June, 1871, extended for the term of seven years from the 9th of June, 1871, on which day his original patent, granted June 9, 1857, expired. In a former suit between the same parties, in this court, decided in April, 1872 [Case No. 12,369], it was held, that the plaintiff's patent was infringed by a carriage wheel which the defendant, a corporation, was then and theretofore manufacturing, and a decree was entered in favor of the complainant against the defendant, for an injunction and an account of profits, &c. A change was thereupon made in the construction of the carriage wheels manufactured by the defendant, which, on its behalf, is claimed to avoid the decree in the former case and the patent itself, and to relieve the defendant from the charge of infringement. The plaintiff, on the other hand, insists, that notwithstanding such change, the wheel which the defendant is now manufacturing infringes his patent, and, upon that ground, he has filed the present bill, and moves for an injunction to restrain the manufacture of such wheel.

In the former suit, the defendant's wheel was held to infringe the second claim in the plaintiff's reissued patent, which is in these words: "Also, a carriage wheel constructed with a mortised wooden hub, with tenoned spokes, and with flanges which embrace the faces of the spokes in the immediate vicinity of the hub, and are connected together so as to form a metallic band, through which the spokes extend into the mortices in the wooden hub, substantially as before set forth." The plaintiff was not held to have an exclusive right to the use of either of the distinct devices mentioned in this claim. Each was held, upon the evidence, to be old, that is to say, a carriage wheel with a wooden hub, a carriage wheel with a wooden hub and tenoned spokes, a carriage wheel with flanges on each side of the spokes, bolted together, to assist in resisting lateral strain, and connected together by bolts, so as to form a metallic ring, through which the spokes passed, were neither of them new. But, it was found and held, upon the evidence, that a carriage wheel combining all these was the invention of the complainant, and was embraced within the above recited second claim of his patent. In respect to this combination, the wheel of the defendant differed from the plaintiff's only in this—that, instead of flanges placed separately upon each side of the spokes, and bolted together through or between the spokes, the flanges used by the defendant were cast in one piece, the annular sides being connected by cross pieces, which passed between each two spokes, thus forming what was appropriately termed a mortised annulus, through the mortices of which the spokes were driven, and into the mortices of the hub; and it was insisted that, thus constructed, the double flange or mortised annulus, by means of the tapering sides of the mortices therein, which firmly grasped the spoke, served to bear the pressure or thrust endwise upon the spoke, relieved the shoulder bearing on, or adapted to bear on, the hub, and so constituted a distinct device from the mere flanges bolted together for resisting lateral pressure. In relation to this point, expert witnesses were examined on the behalf of the complainant, and their testi-

[3] [For drawings of these patents, see Case No. 12,369.]

[2] [From 6 Fish. Pat. Cas. 495.]

mony went very far to show, that, if the defendant's wheel had been constructed without shoulders on the spokes, bearing, or which, in use, might be brought to bear, upon the wooden hub, the wheel would not infringe the complainant's patent, as, for example, if the end of the spoke entering the hub were uniformly tapering; and, on the argument of the cause, much stress was laid, by the complainant's counsel, on the fact, that the spokes in the defendant's wheel had, like those of the plaintiff, shouldered tenons, the shoulders passing through the metallic mortices and bearing on the wooden hub. The court were of opinion, that the circumstance that the sides of the openings in the mortised annulus were tapering, so as to furnish an endwise bearing to the spokes, did not render it a distinct device, in such sense as to relieve the defendant from the charge of using the patented combination; that, in their use, and for the purpose for which the plaintiff's flanged collars are useful, the sides of the mortised annulus are identical, in the office they perform, viz., to sustain the spokes against lateral strain; that, in the mechanical construction of the parts that perform that office, they are substantially the same; that the crosswise partitions and form of tapering mortices may be improvements upon the plaintiff's flanged collars bolted together; but that the mortised collars do, nevertheless, operate, for all the purposes for which flanged collars are used, in precisely the same way. Conceding, for the purposes of the case, that the tapering sides of the mortices formed by the cross pieces enabled the mortised collar to perform a function of which the plaintiff's collars were incapable, viz., to grasp firmly the end of the spoke and sustain it against the endwise pressure, it was none the less an equivalent of the plaintiff's flanged collar, in all the functions, mode of operation, and construction of the latter, although, by an additional feature, it had, also, a further useful function, and, as an equivalent in the combination, it did not relieve the defendant from the charge of infringement. Possibly, this holding may be deemed in conflict with some observations in the opinion delivered, in the supreme court, in Rees v. Gould, 15 Wall. [82 U. S.] 187, but it is, certainly, in no conflict with the actual decision made in that case, which involved no such question; and the opinion of this court in the former suit will govern the decision of the present motion.

On such former trial, however, the claim in behalf of the defendant was urged, that the tapering sides of the mortices in the mortised collars were not merely auxiliary to the shoulders near the end of the spokes, in resisting the endwise bearing, but that, in fact, such shoulders were unnecessary, and that the mortices in the metallic ring in fact sustained all of that pressure; and examples in which some of the spokes were not driven in so far that their shoulders reached the wooden hub, were exhibited in proof thereof. This was strenuously denied by the complainant and his witnesses, who claimed and testified that shrinkage of the spoke would render the support derived from the bearing of the shoulder upon the wooden hub indispensable, and that the instances in which the shoulder did not, in the examples produced, reach so far, were exceptional and, in fact, merely occasional imperfections in the manufacture, otherwise, why did the defendant make all his spokes with shouldered tenons? It will be thus seen, that, on such former trial, the question whether the defendant's wheel had tenoned spokes, with shoulders thereon bearing upon the wooden hub, to give greater strength to the spoke, and sustain, or assist in sustaining, the endwise thrust or bearing, when in actual use, was made to assume great apparent importance; and, in view of the testimony of the complainant's experts above mentioned, and the apparent concessions of his counsel, it is not at all strange that the defendant was led to the belief, that, if it should construct spokes so that their shoulders should not bear on the wooden hub, and practically illustrate and verify, in its new manufacture, its claim that its mortised collar, by the tapering sides of the mortice, so grasped and held the spokes as in fact to sustain all of the endwise bearing or thrust, it would avoid any infringement of the complainant's patent. I cannot resist the impression, that, for this belief of the defendant the complainant and his witnesses and counsel are largely responsible. The defendant, therefore, after the decree, cut away, in part, the shoulders of the spokes thereafter used, by rounding off the corners, so that, as is now claimed, there is no shoulder, at the head of the tenon, which rests on the wooden hub. The complainant, however, still insists that what remains constitutes a shoulder, which, though it may be less effective, does, nevertheless, perform the office of a shoulder at the head of the tenon, whenever, and so soon as, by very slight shrinkage, or for any other reason, the spoke, by force, acting endwise thereon, is driven, in the slightest degree, inward toward the centre of the wheel. The defendant, on the other hand, with its witnesses, deny that the spoke can be driven in so as to produce such bearing, the tapering sides of the mortices in the metallic collar being absolutely and invariably sufficient, as its wheels are constructed, to sustain the spoke against such force or pressure.

I shall not, on this motion, attempt to settle this disputed question. I thought, when considering the former case, and I now think, that undue prominence was given to the subject of the bearing of the shoulders of the spokes on the wooden hub, as compared with their bearing, whether more or less completely, upon the tapering sides of the mortices in the metallic ring. That prominence arises chiefly out of the fact, that the patented combination, as described in the second claim of the complainant's patent, is "a mortised wooden hub, with tenoned spokes, and with flanges which embrace the faces of the spokes

* * * so as to form a metallic band through which the spokes extend into the mortices in the wooden hub, substantially as before set forth," and out of the suggestion thereupon, that there are no tenoned spokes, in any proper sense, unless there be a shoulder at the head of the tenon, bearing upon the substance or object in which the mortice is made, to receive the tenon. That this suggestion gives the ordinary meaning of the term "tenoned" is unquestionable, although the word "tenon" has not, derivatively, any such necessary inherent meaning. But, let it be assumed, that, in mechanics, the word "tenoned" imports not merely a tenon to be inserted in a mortice, but, as a correlative or adjunct, a shoulder to sustain the thing tenoned against endwise pressure, as illustrated in tenoned posts inserted in the sill of a building, tenoned braces to strengthen an angle in a frame, and the like. There is no necessary or prescribed form either to the tenon or to the shoulder. The tenon may be straight, curved or dovetailed; the shoulder may be rounded or square; it may be at a right angle with the tenon or at an acute or oblique angle. Let it, then, be further assumed, that the defendant has done that which the complainant denies, viz., so constructed the spokes in the new manufacture, that their shoulders do not now bear on the exterior surface of the wooden hub. What has the defendant done? The defendant's spokes have still both shoulders and tenons, in the literal sense of the word. The shoulders are made not at right angles to the tenon; they do not bear directly on the wooden hub, but they do bear, and do sustain the spokes against endwise pressure—the very office claimed for the shoulder of a tenon. They bear upon the superimposed metallic collar, and yet are within that collar and receive the same support against lateral strain which the flanged sides of that collar give, and are intended to give, and as the flanged collars do, in the complainant's wheel. True, the defendant, if it has, in fact, made the whole bearing shoulder of its spokes bear on the tapering sides of the metallic mortices, has created a difference between its wheel and that of the complainant, but not a difference in office or in mode of operation. It has still tenoned spokes, within the literal reading of the complainant's specification and claim, and tenoned spokes within the substance of the complainant's invention. True, they are not specifically like the spokes shown in the complainant's drawings, nor are they specifically like the tenoned spokes in an ordinary wheel. But, in considering the validity of the reissued patent, the court did not, on the former trial, deem the plaintiff, in the use of flanges in the combination in question, confined to spokes tenoned as in the ordinary wheel, as seemed, on this argument, to be assumed by the defendant's counsel. The language of the opinion may have tended to mislead, but the ordinary wheel was only mentioned for illustration. The original patent declared that the patentee claimed the use of the flanged collars, when used in connection with a wooden hub, if the spokes are arranged as therein set forth, or in any other manner—a claim, doubtless, too broad, but corrected, in that respect, in the reissue.

I cannot, therefore, resist the conclusion, that, within the substance of the plaintiff's second claim, the defendant's spokes are tenoned spokes, and, therefore, as truly within this second claim of the complainant's patent, whether the endwise pressure upon the spokes is received and borne upon the tapering sides of the metallic mortices, or on the exterior surface of the wooden hub.

There is another view of the subject, which involves the doctrine of equivalents in a combination, which tends to the same conclusion, unless the observations made in the case of Rees v. Gould, above cited, be deemed to impair its force. The complainant is entitled to the exclusive use of the combination described in his second claim. The several devices combined by him were, as heretofore held, none of them new. Among those devices are tenoned spokes. And let it be conceded that, by tenoned spokes, he must be deemed to mean spokes having a shoulder at the head of the tenon, resting on the wooden hub; and that the defendant places the shoulder of its spokes on the inclined or tapering sides of the metallic mortices—it might place the shoulder on a distinct projection within those mortices. Is it not obvious, that, having regard to the purpose of a shoulder on the spoke, the function it performs, the mode of its operation, to receive and sustain the endwise pressure, which are claimed to be the sole purpose, function and operation of the shoulder, the defendant's construction is a precise equivalent of that described and claimed in the patent? If a spoke tenoned into a wooden hub, and having a shoulder resting on the surface of the hub, were new, and were patented, it is not possible that one who should place a metallic band around a wooden hub, and make a mortice therein, and a mortice in the wooden hub beneath, and insert the tenon in the mortice, so that the shoulder should bear either squarely or obliquely on the metal, could escape the charge of infringing such patent.

On the argument of the motion, I was much impressed by still another view of the subject. Looking at the whole specification, and construing the claims of the patentee by aid thereof, it will be seen, that the invention had reference to improving the carriage wheel in two important particulars, viz., strengthening the wheel so as to resist lateral strain, and strengthening it against force or strain in the direction of its plane. The patentee did not profess to have improved its capacity to resist the bearing or thrust endwise of the spokes; this was no part or purpose of his invention. By means of the circular flanges, bolted together, the increased strength to resist lateral strains was to be

effected, and by these metallic circular bands, made fast to the hub and bolted to the spokes, and by making the spokes to form a solid or continuous belt of wood around the exterior of the wooden hub, the greater power to resist a strain in the direction of the plane of the wheel was to be secured. In reference to either result, tenons inserted in mortices in the wooden hub were of essential importance. By his arrangement, no strain, either laterally or in the direction of the plane of the wheel, could be made to act on the tenon of one spoke only, but by the joint power or efficiency of the metallic bands and tenons, several tenons acted together to resist any force, jar or shock from any direction. When, therefore, the patentee had described his invention and made his second claim, including tenoned spokes, the claim should be construed with reference to the office or function which entered into his improvement, and with reference to the service done by the tenon in its relation to the parts which constituted an improvement and enabled the wheel better to resist force applied laterally or in the direction of the plane of the wheel. This was all he professed to have improved. For that purpose, it was the tenons entering the hub, and made fast therein, that entered into his combination, as rendering service towards effecting his improvement. The endwise thrust was not in his contemplation, or the shoulders at the head of the tenon, as pertaining to any improvement made by him. True, there must be capacity to resist such end thrust. One mode of constructing a wheel, which would give it greater power in that respect, he had very prominently, and, as suggested in the former opinion, I think, chiefly in view, viz., increasing the number of spokes. But, as to the matter of tenoning the spokes, the point was to so unite the spokes as that any strain upon one, instead of acting on one alone, should, through the tenons inserted in the hub, and the circular flanges, bolted to all, be resisted by the joint power of several or all of the tenons. Hence, his improvement was applicable to any wheel having spokes tenoned into the hub, entirely irrespective of the question whether the shoulders at the head of the tenon rested on the surface of the wooden hub, or whether any other provision was made to sustain the endwise pressure. The hold of the spokes in the hub was the efficient means of making his improvement practically useful, and constituted the marked distinction between his wheel and the wheel described in the Smith and Parfrey patent, in which there were no spokes inserted in mortices in the hub. In this view of the proper meaning of "tenoned spokes," in the claim of the patentee, there remains no question that the defendant's present manufacture is an infringement. The tenons at the end of the defendant's spokes are identical in form with the tenons in the wheel of the complainant, they are secured in the mortices in the wooden hub in the same manner, and, in their action conjointly with the circular metallic band, they perform precisely the same office or function, in resisting strains either laterally or in the direction of the plane of the wheel. The particular mode in which the shoulder above is formed, or how it is sustained, is, with reference to that which constitutes the substance and gist of the complainant's invention, immaterial, so long as the rings or flanges are made to bear upon or against the body of the spoke, and bind it so as to effect the objects the patentee disclosed and secured.

These reasons all concur in the result, that the complainant's motion should be granted. The question of costs is not very important, but, in view of the manner in which I think the defendant has been misled into the situation in which I deem him now placed, which, in my judgment, falls but little short of estopping the complainant to allege that a wheel without tenons having shoulders bearing on the surface of the wooden hub infringes his patent, I cannot charge the defendant with costs.

SATTERFIELD (FINDLEY v.). See Case No. 4,792.

SATTERLEE (ROBINSON v.). See Cases Nos. 11,965–11,967.

SAUERWEIN (GALE v.). See Case No. 5,-191.

SAULE (HOWELL v.). See Case No. 6,782.

SAULSBURY, The WILLARD. See Case No. 17,681.

Case No. 12,371.

In re SAUNDERS.

[2 Lowell, 444; [1] 13 N. B. R. 164.]

District Court, D. Massachusetts. Nov., 1875.

BANKRUPTCY — ACCEPTANCE OF PREFERENCE — RIGHT TO VOTE FOR ASSIGNEE— PROOF OF DEBT.

1. A creditor who has never accepted a deed of trust made to a third person the enforcement of which would give him a preference, and who disclaims all interest in it, may prove his claim as unsecured.

2. A preferred creditor may surrender his preference at the first meeting, and vote for assignee, when the preference is of such a nature as to be effectually destroyed by such a surrender.

[Cited in The Illinois, Case No. 7,005.]

3. A mere agent to prove a note in bankruptcy, must prove it in the name and in behalf of his principal, if proof in his own name is objected to.

4. A proof of debt, in the mode required by statute, establishes a prima facie case, even under objection, and subject to counter proof, or to an order of court for further proof, without producing such evidence of handwriting, &c., as would be necessary in the trial of an action.

Proof of debt by secured creditor. W. A. Saunders, having land standing in the name

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

of his brother, and being deeply in debt, procured his brother to convey the land to A. E. Johonnot and R. E. Demmon in trust to pay certain notes mentioned in a schedule annexed to the deed. One creditor to a considerable amount held several notes not specified in the schedule. The deed was recorded, and just before the end of two months from its date, Mr. Huntington, the creditor before mentioned, and certain others, filed a petition in bankruptcy against W. A. Saunders, relying, among other things, upon this deed as an act of bankruptcy; and bankruptcy was adjudged. At the first meeting, Huntington objected to the proof of the notes secured by the trust deed; Johonnot, one of the trustees, testified that only one of the holders of the notes had been asked to assent to it, and he had peremptorily refused. The several holders gave evidence that they had never acceded to the deed in any way, and most of them had never heard of it. They all filed, as part of their affidavits of debt, a disclaimer of any interest under the deed. On the other side, three notes, held by Fairbank, Gill, and Fish, respectively, were objected to, on the ground that they were procured for the purpose of influencing the proceedings in bankruptcy. The evidence was, that Huntington, fearing that he should not be able to procure one-fourth in number and one-third in amount of creditors to join in his petition for adjudication, had applied to these three persons, to whom he owed debts, and asked each of them to receive a note of Saunders as collateral security. This they all did, and immediately, at the request of Huntington, signed the petition for adjudication. One of the notes offered for proof by a creditor was indorsed by the bankrupt, and objection was made at the hearing before the court that no evidence of its protest had been given.

G. W. Park, for Huntington.

M. Storey, for creditors under the indenture.

LOWELL, District Judge. The petitioning creditor, Mr. Huntington, was placed in a difficult position. He found on the records a deed of trust for the bankrupt's creditors, from which his notes appeared to be studiously omitted; and while he held debts sufficient in amount to enable him to make his debtor a bankrupt, and thus to avoid this preference, he could not multiply himself to make up the number now somewhat oppressively required by the statute. The case illustrates the serious obstacles which congress has lately interposed to shield a fraudulent debtor.

The courts, however, endeavoring to give the statute a reasonable construction, have held that creditors who have been preferred shall not count in estimating number or value, so that the petitioning creditor's arrangement to increase the number was perhaps unnecessary in this particular case. I have so held within a week past. In re Currier [Case No. 3,492].

When it comes to proof of debts at the first meeting, it turns out that the secured creditors all disclaim their security, and deny that they had ever accepted it. Now, although our law presumes the assent of creditors in such a case, in the absence of evidence to the contrary, yet there can be no doubt that they may dissent; and it would never do to permit a debtor to close the door of the first meeting against some of his creditors by giving them security behind their backs, and holding them to a presumed consent which they have never given. The opposing creditor suspects that these gentlemen might have taken up a different position if the two months had run out before a petition was filed. But I must decide by the sworn evidence, which gives no countenance to such a suspicion. Upon the evidence these creditors are neither secured nor preferred.

The case of Johonnot himself is different. He was at once a creditor and a trustee, and by receiving delivery of the deed as trustee without qualification, he assented to it as creditor. He swears not only that the deed was never acted on, but that it was abandoned before the petition was filed. Under these circumstances, I think he should be permitted to prove, even at the first meeting, upon making and delivering to the register for the use of the assignee, when appointed, a deed of the lands included in the conveyance.

I have before decided, for reasons satisfactory to my own mind, that security may, in many cases, be renounced and surrendered by a creditor at the first meeting. I am aware that there have been decisions to the contrary, founded upon the words of the statute, which says a surrender may be made to the assignee. But since a creditor, by proving his debt, ipso facto surrenders his security, and since a vote at the first meeting is often of much more importance than a piece of worthless security, I am not prepared to admit that a creditor who wishes to exercise this right is precluded by the permissive language of the statute, authorizing him to release to an assignee what he conclusively abandons by the mere proof of his debt. To guard against misapprehension, I have always required that a positive surrender or release, or whatever else the case might require, should be made.

The second question is, whether the three notes held by Messrs. Fairbank, Fish, and Gill, respectively, can be voted on separately in the choice of an assignee. Notwithstanding the form that was gone through of handing these notes to their present holders as collateral security, I think the fair result of all the evidence is, that they are merely agents of Mr. Huntington; and while it is true as a general proposition that one who

could sue a debt in his own name may prove it in his own name, yet I am of opinion that an agent holding negotiable paper, for the mere purpose of proof, cannot prove it, under objection, excepting in the name and for the benefit of the real owner. See, In re Lane [Case No. 8,043].

On the third point, I am of opinion that the holder of a note overdue, making due affidavit as required by the statute, makes out his prima facie case, subject to the discretion of the register and court to order further proof, and to the right of any creditor or person interested to offer counter proof. In a great many cases, perhaps in a majority, the creditor has no personal knowledge of the facts, and his affidavit would not be of the slightest value in any court of justice upon any issue involving those facts. But I never heard it suggested that a creditor is to be prepared or obliged, by the mere interposition of an objection, to produce such evidence as would be necessary at an ordinary trial of those facts. It is not too much to say that the bankrupt law would break down under the strain that such a necessity would put upon creditors. Order accordingly.

Case No. 12,372.

The SAUNDERS.

[2 Gall. 210.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1814.

NONINTERCOURSE — USING BRITISH LICENSE — VOYAGE ENDED.

1. Under the second section of the act of Aug. 2, 1813, c. 56 [12 Weightman's Laws, 225; 3 Stat. 85], prize allegation cannot be sustained for using a British license, unless the vessel be seized in delicto, during the voyage. If the voyage be entirely ended, the offence is purged.

[Cited in Rogers v. The Amado, Case No. 12,005.]

2. Quære: How it would be on an information on the first section of the same act.

This was an information in the nature of a prize allegation, founded on the second section of the act of August 2d, 1813 (chapter 56). The allegation in substance charged, that the said brigantine Saunders, was, at the port of Greenock in Scotland, employed in an illegal intercourse with the enemies of the United States, in the month of November, 1813; and in the same month, proceeded from said Greenock, with a full cargo on board, purchased and received from enemies of the United States, under the protection of a license from the government of Great Britain, to the port of Corunna in Spain, where the said cargo was sold and disposed of; and afterwards, under the protection of the same license, departed in ballast from Corunna for the United States, and arrived at New Bedford, on the 10th of March, 1814; and, on the 5th day of the ensuing April, was seized at said port by the collector of the customs.

The claim, and accompanying affidavit, which were admitted to contain all the material facts, asserted in substance, that on the 10th day of October, 1812, the brig sailed from the Capes of the Delaware with a cargo of flour owned partly by the claimants [Lewis & Co.], and partly by Spanish subjects, bound for Teneriffe, and from thence to Philadelphia, having on board, for her protection during the voyage, a British license, countersigned and vouched by Don Onis, the unaccredited minister of Spain; that on the 17th of November following, she was captured by the British letter of marque, the Monarch, and ordered for Greenock, but, during the voyage, was by stress of weather compelled to go into Madeira, where a part of the cargo was taken out, and with the residue, the captors proceeded in the brig to Greenock; that after her arrival at Greenock, the brig was libelled as prize, and pending the prize proceedings, the cargo was sold as perishable by order of the admiralty; that the brig was detained until the 6th of August, 1813, when restitution thereof, and of the cargo, were decreed on payment of the costs of the captors; that by various accidents the brig was detained at Greenock until the 25th of November following, when she sailed for Philadelphia in ballast; that in the course of the voyage, she was compelled by stress of weather to put into Corunna for repairs: and after refitting, she sailed from that port, and arrived at New Bedford on the 12th of March, 1814, without having touched at any other ports during the voyage; that at the last port the voyage was terminated, the crew were discharged, and the brig hauled up, and all her papers and documents delivered to the owners or their agents; and afterwards, and not before, the seizure was made by the collector.

Mr. Blake, Dist. Atty.

There are two grounds of forfeiture: (1) An offence committed, to which the forfeiture is annexed as a penalty. (2) The using of a British license, by which the vessel lost her American character, and became quasi enemy's property. The objection, that the vessel was not liable to seizure after the completion of her voyage, involves the absurdity, that her being forfeited or not depended upon mere chance or fortune. Upon this principle, a vessel, which would have been good prize, if taken on the high seas, will, if so successful as to run the gauntlet and get safe into port, be secure from seizure and forfeiture. Admitting even that in the hands of an innocent vendee, the vessel might be protected, yet that is not the present case; for she remained, until the time of the seizure, the property of the same persons, who owned her on the voyage. By the act of the 2d of August, 1813, c. 56, § 2 (12 Laws [Weightman's Ed.] 225 [3 Stat. 85]), all vessels using an enemy's license are made good prize of war. As it is not denied that the Saunders sailed

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

under the protection of an enemy's license, it is difficult to discover any reason for her being exempt from forfeiture; especially, when the rights of no innocent persons will be affected. The license, it is true, was not on board at the time of the seizure, but, being permanent, it must be considered as still in the use of the vessel. It was in the possession of the master or owner, and was as much a document belonging to the vessel, as her American register.[2]

W. Sullivan, for claimants.

The license is plainly limited to a single voyage, and at the time of the seizure, had lost all its effect, so that the vessel could not again have sailed under its protection. If the vessel is subject to condemnation, it must be either as enemy's property, or for having traded with the enemy. This, being a prize allegation, must be governed by the ordinary rules of prize proceedings. Now no rule is better established, than that the papers and the evidence of persons on board are to be first examined. But in this case all the papers were lodged at the custom-house, and if produced, they would prove the vessel to be American property. No papers have been offered by the libellant, and no examination of persons, except of one man, which was taken seventy-eight days after the ship's arrival. This evidence is not admissible, and there then remains no evidence, upon which the process can be maintained. There is no doubt that the vessel was American when she sailed, being documented and cleared as such. She is not then enemy's property, unless by reason of some act indentifying her with the enemy. It is not denied, that by the general law, this vessel would have been subject to capture and condemnation as prize, if found on the high seas with a license of this description. But a distinction is to be made between the moral agent, who commits the offence, and the instrument with which it is committed. The person is liable to punishment at any distance of time, but the thing must be seized flagrante delicto, in the very act of committing the offence. No instance, it is believed, can be found of a seizure as prize after the complete termination of the enterprise. The confiscations, or condemnations for intercourse with prohibited ports, &c., under the restrictive system, were by statute. It being expressly provided, that certain penalties should follow certain acts, if the acts were done, the liability was incurred, and the forfeiture might be exacted at any distance of time. But it is not so with the act, on which this process is founded. It merely declares, that under certain circumstances, a vessel shall be deemed an enemy's vessel and be treated as such. In addition to this, no authority to seize, even when all the circumstances exist, is given to the collector.

[2] [The reporter was absent during a part of Blake's argument.

STORY, Circuit Justice (after reciting the facts). Upon these facts, the question presented for the decision of the court is, whether, under the second section of the act of the 2d of August, 1813 (chapter 56), the said brig is liable to seizure and condemnation, for having had and used a British license on a voyage, which was, at the time of the seizure, completely terminated. This section provides, that any ship of the United States, sailing under, or found on the high seas using, a British license, shall be considered and held, as sailing under the flag of the government of Great Britain, and may be seized on the high seas or elsewhere, by the public or private armed ships of the United States, and upon due proof thereof be, together with her cargo, condemned to the use of the captors, and the proceeds distributed according to the rules prescribed in the cases of prizes made from the enemy. This section must now be taken to have been made merely in affirmance of the general law of prize; and, in its terms, it is confined to captures made by commissioned ships, during the existence of the illegal voyage. It is the actual use of the license, at the time of the seizure, and not the former use in a previous voyage, which authorizes the search and capture. The authority to seize, also, is given only to commissioned ships, and is not extended to the mere civil officers of the government. Upon the express provisions of this section, therefore, the case cannot be sustained. It must stand, if at all, upon the general law of prize, and the right of the United States to enforce the prerogatives of war against all, who shall offend against them, and, in a more special manner, the execution of their own laws against their own citizens. Admitting then, what indeed cannot be denied, that the sailing under a British license subjects a vessel of the United States to be deemed as sailing under the enemy's flag, it remains to be considered, whether the forfeiture continues to attach, although the hostile character so acquired be completely gone. In cases of breaches of blockades, and of contraband of war, the doctrine seems to be established, that the vessel must be captured in delicto; otherwise the offence is purged. The Imina. 3 C. Rob. Adm. 167; The Lisette, 6 C. Rob. Adm. 387. If, therefore, the port of destination have become neutral, or the blockade have been raised, before the capture, the corpus delicti is deemed to be extinguished. The same principle has been applied, where the intention was to trade with the enemy; if, at the time of carrying the design into effect, the person is no longer an enemy, or the port no longer hostile, the offence is not committed; for there must be both intention and act. The Abby, 5 C. Rob. Adm. 251.

It strikes me, that the present case must be decided upon analogous principles. No case has been adduced, in which the penalty has been inflicted for an illegal traffic with the enemy, upon the mere footing of the prize

law, unless where the vessel has been captured during her delinquency. The very silence of the books, in such a case, furnishes some argument against the existence of a rule, which should attach an indissoluble taint. The reasonable principle, to be extracted from the authorities, would seem to be, that so long as you retain the hostile character by your illegal conduct, either in contraband trade, in violation of blockade, or in hostile intercourse, you shall be subject to all the penalties of such character. But when without fraud, you have resumed your real national character, it purges away all the noxious qualities, which previously infected it. In the case before the court, it is clear, that, during the voyage, the vessel might have been seized and condemned, as an enemy's vessel, sailing under an enemy's flag. But at the time of her seizure, her American character had re-attached. She was no longer engaged in hostile traffic, or sailing under an enemy's license, or using an enemy's protection. In no respect was she, then, to be deemed an enemy's vessel. I hold, therefore, that not having been taken in delicto, the prize law would not adjudge her good and lawful prize.

I give no opinion, how the law would be in a case founded on the first section of the act of the 2d of August, 1813 (chapter 56). There may be a material distinction, founded on the language of that section. The forfeiture there imposed is absolute, without reference to the time of seizure. Nor do I give any opinion as to a case, where, by fraudulent suppression or false destination, the forfeiture could not be inflicted on the original voyage, and, under such circumstances, is sought to be enforced on a capture in a subsequent voyage. See The Christiansberg, 6 C. Rob. Adm. 376.

SAUNDERS (BANK OF ALEXANDRIA v.). See Case No. 852.

Case No. 12,373.

SAUNDERS v. BUCKUP et al.

[1 Blatchf. & H. 264.] [1]

District Court, S. D. New York. April 5, 1831.

SEAMEN—ASSAULT BY MASTER—USE OF DANGEROUS WEAPON—CONDUCT OF SEAMEN—OBSOLETE GRIEVANCES—WITNESS.

1. A master cannot justify an assault and battery on a seaman with a dangerous weapon, by showing that the weapon was casually in his hand, and was used by him in a moment of excitement, under circumstances which would have justified some punishment of the seaman.

2. The court, in estimating the amount of damages to be given for an assault and battery, will have regard as well as to the conduct of the libellant as to that of the respondent.

3. A court of admiralty discourages actions for damages on account of obsolete grievances. [Cited in Scull v. Raymond, 18 Fed. 553; Southard v. Brady, 36 Fed. 562.]

4. Where, in a libel for an assault and battery by a master, the mate, who was a witness of the transaction, but was in no way connected with it, was joined as a party to the suit with the master, the court will presume that this was done to render the mate an incompetent witness, and will consider that fact in estimating damages.

This was a libel in personam [by Thomas Saunders against Bartholomew Buckup and another] for an assault and battery committed at sea by a master upon his cook, on the 7th of February, 1827, on a voyage from New York to Vera Cruz. The master was cracking nuts upon the quarter-deck with a light hammer, when word was brought to him that the cook was scuffling with the mate. He ran forward, and discovered, according to the testimony of one of the witnesses, that the cook was overpowering the mate; whereupon he knocked him down with the hammer he had just been using, and which he had still in his hand. The libellant fell immediately, and bled freely from the head, and was, for a few moments, insensible. The wound was said to have been very slight, and he was walking about the deck the same day. The libel was filed on the 6th of October, 1830, against the master and the mate.

Washington Q. Morton and Henry M. Western, for libellant.

George W. Niven, for respondents.

BETTS, District Judge. The libel in this case is extended to great length, and is full of extravagant and declamatory assertions regarding the nature of the injury which is the subject of this suit. Upon these inflamed and exaggerated representations of the libellant, under oath, as to his great wrong and suffering, I had been induced to order the master to be arrested and held to bail in two thousand dollars. The proofs entirely fail to support the libellant's statement, further than to show that an assault and battery was committed upon him with an improper instrument. Though the hammer, which was the implement used in this case, is proved to have been light and small, it was an improper and dangerous weapon to use in such a manner, and the result showed the peril attending the act. It appears that the conduct of the master towards the libellant had been unexceptionable previously to the occurrence, and that he was kind and attentive to him as soon as the injury was inflicted. Moreover, the conduct of the libellant, on the occasion, was highly reprehensible, and deserved punishment. Whatever may have been the origin of the dispute between him and the mate, it was a breach of order and discipline, amounting to mutiny, for him to be engaged, under any circumstances not necessary for his self-defence, in a conflict

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

with an officer of the vessel. At the same time, a master will not be allowed to exercise undue violence towards his crew, or, most especially, to use improper weapons for the purpose of chastising a seaman, unless under circumstances so urgent as to call for instant and extraordinary measures for the rescue or defence of his under officers. All the testimony shows that, though this was not such a case as would justify the use of a perilous weapon, the master was actuated by no ill-will towards the libellant, and that it was entirely casual that he struck with the instrument used by him. It was not procured for the purpose. It chanced to be in his hand, and was, no doubt, used thoughtlessly, and under the excitement of the moment. There is, also, no proof that the libellant was at all disabled by the blow, beyond the stunning effects of it for the moment; and the fact that he was walking about the deck the same day, after the injury, sustains the testimony of Pell, his own witness, that the wound was otherwise very slight.

If this were all the case, the court might be disposed to inflict severe damages on the master, for example's sake, that it might be understood by men in this important and delicate trust, that they must act cautiously, under the influence of reason, and not of impulse or fear, in applying force to their crew. The master of a ship should acquaint himself accurately with the character of an offence before he proceeds to punish it, and should judge soundly of the degree of force suitable for bringing his men to subordination when they are violating their duties. He must not consider himself entitled, at his mere option, to apply the last degree of violence to a seaman. The court must see that in what he did he was governed by a rational discretion; and the court is always ready to afford him the benefit of the most liberal intendment, to uphold his authority in the varying exigencies attendant upon his duty to his ship's company, his owner, and the mariners who are subjects of his treatment.

There are, however, circumstances in this case which ought to be brought into view in determining the sum in which the master shall be amerced. Although damages are often awarded for the purpose of punishment, yet the court will notice that those damages go into the pocket of the individual who institutes the action; and, unless that consideration is allowed its proper weight, what may be designed as a punishment for the malfeasance of one party, may operate as a reward for the improper conduct of the other. The libellant was, in this case, a wrong-doer. He was amenable to punishment on the spot, and, had he been struck with a rope, or a stick of moderate size, and had the same consequences followed, the court would have held the master, if not wholly justified, yet so far excused, that but a nominal fine would have been imposed upon him. The kind of weapon used furnishes the whole foundation for the libellant's action. The court has already observed that it was improper and unjustifiable in the master to make use of that weapon; but it is also to be remarked that the preponderance of the testimony is, that the libellant attempts to inflame his damages, and to practice a gross imposition on the court, by exhibiting here an instrument as the same with which the blow was struck. He produces in court a ship-carpenter's or blacksmith's hammer, of two or three pounds weight, having a long handle, and palpably a most dangerous weapon. A brisk blow with it would inevitably beat in a man's head. There is no proof that such a hammer was ever on board the vessel; and the witnesses unite in declaring that they had not seen it, and do not believe the one which the master used was at all of that kind or magnitude. A lady witness says that her little boy, five years of age, was accustomed to crack nuts with the one the master was using. The court is compelled to receive this attempt of the libellant with the more distrust, because of his sworn representations laid before the court to obtain the exorbitant bail ordered in the case. Those sworn statements he did not attempt to support on the trial; on the contrary, his own witness disproved their verity.

Again, the libellant permitted this matter to rest for nearly four years before he brought suit. Had his action been at law, it would have required only a very short time to bar its prosecution, by the statute of limitations. No excuse is assigned for this delay. A jury will, under such circumstances, always consider the suit as raked up to extort money or gratify malicious feelings, and, though bound to give a verdict for the plaintiff, if four years have not elapsed, will rarely go beyond nominal damages. The statute of limitations does not apply to this court as an obligatory law. The Utility [Case No. 16,806]. But its provisions, as well as the peremptory exceptions of the civil law, are always regarded, in admiralty, in adjusting the equities of parties. Our state statute bars an action for assault and battery after four years. 2 Rev. St. 296. But, by the civil law, such an action was required to be brought within one year. Code, pp. 9, 35, § 5. It is a cardinal rule with this court, not to intermeddle with stale demands, much less to give countenance to actions founded on obsolete quarrels and grievances. The court will presume, that if this suit had been brought on the return of the libellant to this country—(and no reason is assigned in the proofs why he did not return in the same vessel)—it would have been put in possession of a much more accurate and satisfactory account of the whole transaction. The action was delayed for nearly four years, and was then brought against the master and mate. The effect of this mode of prosecuting it is,

to shut out the testimony of the mate, who would be the witness most competent to state the occurrence in all its circumstances. He had no connection with the master in giving the blow which is the gravamen of the suit; and, though he might be liable for an assault and battery which preceded that blow, yet the case affords no explanation of the reason for his being made a party to the action brought for the consequences which followed the blow, and the inference seems warranted, that this was done to preclude his being a witness in behalf of the master.

Under all these circumstances, though I feel constrained to award damages as a reproof to the master for the indiscreet and improper use of the instrument he employed, yet I do not consider this a case in which the libellant is entitled to more than a moderate compensation. Accordingly, I decree that the master pay $10 damages and costs. Decree accordingly.

Case No. 12,374.

SAUNDERS et al. v. The HANOVER.

[2 Quart. Law J. 1.]

District Court, E. D. Virginia. 1857.

COLLISION—BURDEN OF PROOF—STEAM AND SAIL—RIGHT TO COURSE.

1. The general rule in cases of collision is that the vessel proceeding in the cause for indemnification must, in order to obtain a decree in her favor, show, by preponderating evidence, that the other vessel was guilty of negligence or of some misconduct.

2. The onus of proof does not lie on the vessel proceeded against, except when a prima facie case of negligence is made out on the other side.

3. In the United States, it is the law that steamers meeting a sailing vessel, whether closehauled or with the wind free, the latter has the right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid her.

4. In England the rule is that if the sailing vessel has the wind free and meets a steamer, each must put the helm aport. With this exception, the rule in the United States and England is the same.

5. The rule is clear that when two vessels are nearing each other, and there will be any hazard of striking, without a change of course, and one of them is closehauled and the other has the wind fair, it is the duty of the latter to give way, or avoid or get out of the way of the former.

6. General principles in cases where, from the courses of vessels, there is danger of collision.

In admiralty.

Chandler & Sharp, for libellants.

Macfarland, Crump & Crenshaw, for respondents.

HALLYBURTON, District Judge. This action was brought by the owners of the schooner Venus to recover compensation for losses occasioned, as is alleged in the libel, by the fault of the Hanover in running down the former vessel. The collision which gave rise to this suit, and in consequence of which it is said the Venus and her cargo were totally lost, occurred off the coast of New Jersey, on the night of the 4th May, 1855, at about half-past 9 o'clock. It is admitted by all parties that the direction of the wind and the courses on which the two vessels were steering are correctly represented on the chart which was handed to the court by counsel; that is to say, the wind was from N. N. West, the Hanover was steering S. W. and S. with her starboard tacks on board, and the Venus N. E. and ½ E. on the larboard tack. The Venus was closehauled, and the Hanover had the wind fair, and under these circumstances, the general rule of navigation required that the latter vessel should give way or get out of the way of the former; but it is averred in defence of the Hanover that the night was so dark as to make it impossible to see the Venus further than about one or two ship's lengths, and that everything was done by her after the Venus was seen which was proper and could be done to prevent mischief, but that the latter vessel was so negligently or unskilfully navigated, that she was thrown across the bows of the Hanover, which vessel then went stern on into the starboard side of the Venus, and caused the damage of which complaint is now made, without any negligence or fault of the damaging vessel whatever.

Before we look into the testimony on these points, let us consider for a moment the law of evidence by which we are to be directed. The rule that in suits of this kind the vessel proceeding in the cause for indemnification must, in order to obtain a decree in her favor, show by preponderating evidence that the other vessel was guilty of negligence or of some misconduct, is very often referred to in the reported cases. In The Ligo, 2 Hazz. Adm. 357, Sir Christopher Robinson says: "This is a case of collision in which a vessel, the Express, has been lost in consequence of that accident, and the law will support a claim for indemnification on the part of the owners of that vessel, provided it can be shown that the loss was owing to the fault of the vessel charged as the wrong doer." And, again, in the same case: "The law required that there should be preponderating evidence to fix the loss on the party charged before the court can adjudge him to make compensation." And in The Bolina, 3 Notes of Cas. 208, it was said by Dr. Lushington that, "with regard to inevitable accident, the onus lies on those who bring a complaint against a vessel and who seek to be indemnified. On them is the onus of proving that blame does attach upon the vessel proceeded against; the onus of proving inevitable accident does not necessarily attach to that vessel; it is only when you show a prima facie case of negligence and want of due seamanship." All this is, no doubt, true; but in the application of the rule laid down, difficulties may arise which are not well settled by authority. It is not always easy to

say when a prima facie case is made out so as to shift the onus from one party to the other. When a vessel, for instance, as in the present case, shows that she was sailing close-hauled upon a wind, and was run down by another vessel having the wind in her favor and sailing free, does it devolve upon the latter, if she asserts that she was excusable on account of the darkness of the night, to plead and prove by testimony the fact upon which she thus relies for her exculpation? or is the other party obliged, in order to make out a prima facie case of negligence, to state in the first instance, and offer evidence to show, that there was light enough to have seen, if a good and sufficient lookout had been kept on board the damaging vessel?

There are not above three or four cases to be found, I believe, in the books of reports, in which anything is distinctly said in relation to what ought to be the rule of evidence in this respect, and those few seem not to be in harmony with each other. The court of admiralty in Ireland appears to have thought in the case of The Londonderry, to be found in the Supplement to 4 Notes of Cas. (page 31), that the party complaining in a suit for collision was in every instance bound to allege and prove, in order to make out even a prima facie case of negligence, that there was light enough for the vessel charged as the wrongdoer to have seen the injured vessel if she had kept a good lookout. The Londonderry, a large steamer, ran down in the night the Dolbaden Castle, a small schooner, which, in consequence of the state of the wind and tide, was nearly incapable of altering her position. And Doctor Starke in delivering the opinion of the court, distinctly states, and more than once, that the owners of the sailing vessel must prove by testimony, in order to establish even a prima facie case; and as a part of that case, that, although it was night, there was light enough for the steamer to have seen if she had not been negligent; and that unless proof of this fact should be offered in the first instance sufficient to satisfy the court in the absence of all proof to the contrary, the steamer would not be put upon her defence, or at least would not have to adduce any evidence. From what is said by Sir John Nicholl in the case of The Celt, 3 Hagg. Adm. 322, he appears to have been of the same opinion. His words are these: "Here is one vessel closehauled, and beating to the windward, and the other with the wind free and all sail set; and if it had been open daylight, it would have been prima facie the duty of the Celt to have kept clear of the Anthony, and of the Anthony to have kept on her course." I infer, however, from what is said by Doctor Lushington in the case of The Columbine, 2 W. Rob. Adm. 28, and of The Harriett, 1 W. Rob. Adm. 183, and from the modes of pleading adopted in the case of The Juliet Erskine, 6 Notes of Cas. 633, and in other cases, that a different view of the law was taken by that learned judge. According to the principle of these decisions, as I understand them, the party charged with being in fault, if he means to offer an excuse for not complying with the general rule, must plead such excuse and sustain his plea by testimony, whether that excuse be the violence of the wind or any other cause rendering the vessel charged unmanageable, or the intense darkness of the night, making it impossible to have seen the injured vessel; and this I take to be the true principle. The Victoria, 3 W. Rob. Adm. 50; The Batavier, 2 W. Rob. Adm. 407; and The Scioto [Case No. 12,508], seem directly in point to show that, where vessels at anchor are run down by other vessels under sail, the burthen of proof is on the latter to show that they were unable to see, or that, from the vis major or some other cause over which the mooring vessel had no control, the accident could not be prevented; and if this be so, there is no apparent reason why the principle should not be extended to vessels closehauled or in any other situations, were it the duty of the other vessels, under the general rules of navigation, to avoid them. Therefore, if the Hanover alleges in her defence that the best measures were adopted after she saw the Venus that could have been taken to avoid an accident, and that she did not take other and more effectual steps at an earlier period because the Venus was not seen, and could not have been seen, in consequence of the darkness of the night, she must prove it.

Let us now review the testimony in order to get at the facts of the case. It is not pretended that any effort was made by the Hanover to avoid coming into contact with the other vessel until they were near each other, and there was danger of collision even with prudent management on both sides; but it is alleged in defence that the night was very dark, so dark that the Venus could not have been seen by a careful and vigilant lookout until the Hanover was close upon her, or any sooner than she was, and that even then there could have been no collision if the Venus had not luffed and crossed the bows of the Hanover. It is further averred that the latter vessel had a good and sufficient lookout. It is admitted that the Venus had no light. Six witnesses were examined for the defence. Five of them express the opinion that a vessel could not, in consequence of the darkness of the night, have been seen more than her length or about that distance; and one thinks that the lost vessel could not have been seen more than 100 yards, though a taller vessel might have been seen farther off.

On the other hand, the witnesses in support of the claim for damages—four in number—all express the opinion that a vessel without a light would have been visible at the distance of a mile. Supposing, then, the witnesses to be unimpeached on both sides, and equally credible, and that each one is expressing merely his opinion, the numerical preponderance on the side of the Hanover would perhaps, in

weighing the testimony, be sufficient to turn the scale in her favor. But there are several circumstances which induce me to put more confidence in the testimony of the defence than in that in support of the libel. All men are extremely liable to be biased in their opinions by their interest and their inclinations, and perhaps there is no question in relation to which an interested or prejudiced witness would be more likely to have an opinion colored by his wishes than in a question of distance between two vessels at night, because of the difficulty of forming an accurate judgment, particularly under such circumstances of alarm and excitement as attended the accident of which we are speaking. Now, all the witnesses for the Venus, without exception, were persons belonging to that vessel. They were the master, the 1st and 2d mates, and a mariner. While among those on the other side are two who may be supposed to be more free from bias than any other witnesses,—Williams who was a passenger on board the Venus, and Hazlewood. This is a consideration which should certainly have influence, and to which much weight is usually attached by courts of admiralty. In the next place, some circumstances are stated by some of the witnesses for the Hanover which, if we suppose them to be true,—and there is nothing to render them doubtful,—would justify us in relying with much confidence on their opinions. Curtis states in his deposition that he could not see some trunks which had been thrown on the deck of that vessel, and fell over them, and that several vessels were near running into her and the Venus after the collision, when the lights of the Hanover had been broken or taken down; and Hazlewood confirms this statement so far as it relates to the danger of being run down by other vessels. If this be so, it proves beyond a doubt that, whatever may have been the distance at which vessels might have been seen, they could not have been seen far enough without a light to prevent danger of collision, unless we are to presume that all vessels approaching them so nearly were unskilfully or negligently navigated.

On the other hand, there are statements in some of the depositions for the Venus which show a carelessness or inaccuracy of memory which must very considerably detract from their weight. Winter, who was on the lookout, says that vessels might have been seen a mile without lights, and yet he states that, when he first saw the Hanover with lights, she was only about a mile off, and he could not tell whether she was coming or going. He was looking out for vessels at the time, and therefore we must suppose saw the Hanover as soon as she was visible. But what is more material is his statement that the Hanover was approaching the Venus on the lee bow. This would be a very important fact if it were established, and might show that the Hanover was to blame for not putting her helm hard up instead of hard down, and that she was attempting to cross the bows of the Venus instead of passing under her stern, which would have been the case if the Hanover had been approaching to leeward instead of to the windward of the course the Venus was steering; but it is admitted that the direction of the wind and the course of the two vessels are accurately represented on the chart which was given by counsel, and the testimony in the case proves, I think, that they are so, and thus it seems to me impossible to believe that the Hanover could have been seen at any time steering for the lee bow of the Venus. She could only have been seen on the lee bow after the collision. The deposition of the master of the Venus also states that the lookout said there was a sail on the lee bow, and he, the master, looked and saw the vessel, and then he proceeds to state what occurred with any intimation that the Hanover was not approaching in that direction,—but leaving the impression that she was so. It is observable, too, that neither the master nor mate alludes to the luffing of the Venus just a few minutes before the collision, and which it will hereafter be shown, must have taken place. Both the master and the mate say an order was given to luff, but the mate says he gave the order when the Hanover was about half a mile off, and the master says an order was given by him a few minutes before the collision, and the vessels were sailing, one at the rate of more than five miles an hour, and the other more than three miles. The order by the master must have been given when they were quite or nearly half a mile apart, and the luffing of which he speaks could not have been that which happened nearly at the moment when the vessels came into contact, and which caused the Venus to be struck on the starboard instead of the larboard side. Neither of these witnesses attempts to explain how it was that the Hanover ran stem on into the starboard side of the Venus upon the supposition that the former vessel was to the windward of the latter; but both make statements calculated to leave the impression that the former vessel came up under the lee of the latter, and therefore struck her of course upon the starboard side without any fault or mismanagement of the damaged vessel. These are grave errors and omissions, and, whether they be the result of carelessness or a defect of memory or any other cause, must very much impair the force of these depositions. It is proved by Hazlewood and other witnesses that there was on the Hanover what I regard as a good lookout, and I am therefore of opinion, from all the testimony, that there was no negligence in her not seeing the Venus in time to avoid all danger of collision, and that she did not see the latter vessel sooner because the night was very dark, and there was no light on board of her.

We have now to inquire whether or no, when danger was imminent, the Hanover took such prudent, proper, and skilful measures of precaution as to exempt her from

blame. The wind, as we have said, was about N. N. W. The Venus was heading N. E. ½ E. closehauled upon a wind, and on the larboard tack; and the Hanover was steering S. W. and by S. sailing free with her starboard tacks on board to the windward of the track of the Venus, and nearing her larboard or weather bow. Under such circumstances, what ought the master of the Hanover to have done? Those rules of navigation which are intended to prevent vessels from coming into collision with each other are the same or nearly so in this country as in England, as appears from numerous decisions in the district and circuit courts of the United States, and was settled by the supreme court of the United States in the case of St. John v. Paine, 10 How. [51 U. S.] 558. It is there laid down as a general rule in relation to steamers and sailing vessels, that, "when meeting a sailing vessel whether closehauled or with the wind free, the latter has a right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid her." In England the rule is that, if the sailing vessel has the wind free and meets a steamer, each must put the helm aport. See The Celt, 3 Hagg. Adm. 326; The City of London, 4 Notes of Cas. 40; The Rose, 2 W. Rob. Adm. 1; and The Osprey [Case No. 10,606]. With this exception, which seems to have grown originally more out of difference between the English and American courts as to the true construction of the rule as laid down in the cases of The Shannon, 2 Hagg. Adm. 173, The Perth, 3 Hagg. Adm. 414, and some other English cases, than anything else, the rules upon the subject are the same in this country, I believe, so far as they are to be found in the books of reports, as they are in England. These rules are of course intended to apply, as is said in The City of London, The Rose, and many other cases, only when there is a chance of a collision, or as it is expressed with more accuracy in the case of The Gazelle, 2 W. Rob. Adm. 518, "when vessels must necessarily pass each other so near that by continuing their respective courses there would be risk of their coming into collision." When they are so far apart, though in sight of each other, that there is no risk whatever of their coming into contact, either may lawfully and at discretion port or starboard her helm, luff up or bear away, pass to windward or leeward astern or across the bow of the other, without any penalty.

Now the rule is clear that when two vessels are clearing each other, and there will be any hazard of striking without a change of course, and one of them is closehauled, and the other has the wind fair, it is the duty of the latter to give way or avoid or get out of the way of the former. The rule of the Trinity House, as stated in the case of The Friends, 1 W. Rob. Adm. 478, is in these words: "The recognized rule for sailing vessels is that those having the wind fair should give way to those on a wind." This regulation of the Trinity House would merely, as such, have no force here, but, as is remarked by the court in the case just referred to, the rules stated in the Trinity House regulations were certain recognized rules which had long prevailed. They are not stated as having been enacted, but as established rules. The interpretation given to this rule, then, will show what the general rule of navigation was before the regulations of the Trinity House were made, and what the rule is here. What then is that interpretation? In the case of The Gazelle, 2 W. Rob. Adm. 517, it is said by the court that "the first regulation is that sailing vessels that have the wind free shall give way to those on a wind. By the term 'giving way' is meant, I apprehend, that they shall get out of the way by whatever measures are proper for the purpose either by porting or starboarding the helm as the occasion shall require." The same construction seems to be put upon the rule in the case of The Speed, 2 W. Rob. Adm. 225; The Rose, Id. 1; Handaysyde v. Wilson, 3 Car. & P. 528. And in the case of The Osprey, before cited, the court say that whenever one vessel is to keep her course, and the other is to take the whole duty of avoiding her, the latter, whether steamer or sailing vessel, is not restricted to going to the right, but may take any course and resort to any measures which are most judicious and convenient. The supreme court of the United States says in the case of St. John v. Payne [supra] that a vessel that has the wind free or sailing before or with the wind must get out of the way of the vessel which is closehauled or sailing against it, and it has never been decided, so far as I know, that a vessel sailing free is to give way or to get out of the way of another by porting her helm invariably, or always putting it to starboard, but must do that which means to be best and safest under the circumstances of the particular case. Such being the rule, my opinion is that the master of the Hanover did precisely what he ought to have done in the situation in which he was placed.

Of course, I speak with great diffidence upon a subject in reference to which I have not much information and no experience, and where I have had but little aid from any nautical witness. Such, however, is my opinion, and such I understand to be the opinion of Capt. Lowndes, the only nautical witness who has been examined in the cause. The Hanover was approaching the Venus to windward. The latter vessel was closehauled, and the master of the Hanover could not know that she might be brought any nearer to the wind. On the other hand, the Hanover was free with her starboard tacks aboard, and could easily luff or bear away. She would therefore naturally, as it seems to me, take that course which would leave the Venus

free to alter her course in the way which might be the only possible one, and certainly would be the easiest. There was another reason however, and perhaps a stronger one, for the adoption of the steps taken by the Hanover.

It seems to be regarded as extremely improper, as a general rule, for one vessel to cross the bows of another when there is danger of contact. Thus, in the case of The Rose, 2 W. Rob. Adm. 1, the Trinity masters say: "The expression 'giving way,' means, not crossing a vessel's bows, but going under her stern." And The James Watt, Id. 279, The London Packet, Id. 217, and The City of London, 4 Notes of Cas. 40, seem to the same effect. Now, if the Hanover had put her helm hard up instead of hard down, if instead of luffing she had borne away, she must have gone directly across the bows of the Venus, and thus apparently have increased the danger. It seems to me, therefore, that the Hanover pursued the best course to avoid an accident, and adopted the measures she ought to have taken even if upon her had been the whole duty of giving way, and if, notwithstanding the vessels came together, it was not her fault; and if there were no fault on the other side the injury done must be regarded as the result of inevitable accident.

We must not forget, however, that this collision was at night, when it was very dark, and under doubtful circumstances, when each vessel might reasonably be in doubt whether she was seen by the other or not, and as to the exact direction in which the other was steering; and in such a state of uncertainty it appears to have been the duty of the vessel on the larboard tack to have given away, as well as of the other vessel. This rule seems to be well established in England, as may be seen by reference to The Ann & Mary, 2 W. Rob. Adm. 189; The Traveller, Id. 198; The Ebenezer, Id. 206; The Seringapatam, Id. 507; The Commerce, 3 W. Rob. Adm. 288; The George, 5 Notes of Cas. 368, and the same case on appeal in 6 Notes of Cas. 53; and The Rose, 2 W. Rob. Adm. 1. There is the following note to the case of The Traveller, by the reporter: "Both this and other decisions which have taken place are very important with respect to vessels engaged in the occupation in which these vessels were employed, as establishing the principle that at night it is the duty of the vessel on the larboard tack to give way to a vessel on the starboard tack, even although the latter should be sailing with the wind free." If this be so as I suppose it to be, it furnishes an additional and conclusive reason why the Hanover should not have put her helm up instead of luffing, because she had then a right to expect that the Venus would port her helm and endeavor to pass her on the larboard side. But whether it was the duty of the Venus to have borne away or no, she certainly ought not to have luffed. She should either have borne away or have kept steadily on her course, as all authorities on this point demonstrate.

Now, it is proved not only by witnesses who were on board the Hanover but by Williams also, who was a passenger on board of the Venus, that the latter vessel luffed just a few moments before the collision, and was brought athwart the bows of the former by that process; and what is stronger evidence on this point perhaps than any witness in the cause is the fact that the Venus was first struck on the starboard side, which, if the diagram already referred to be accurate, as it is admitted on all sides to be, could hardly have happened by any possibility if the Venus had not luffed as it is alleged she did. It is also expressly stated by Winter, the second mate of the Venus, that he gave an order to luff which was immediately obeyed when the vessels were about a half a mile a part, and as soon as he could discover the course of the Hanover; and the master of the former vessel affirms that he himself gave an order of the same sort a few minutes before the two vessels came into contact, so that the Venus must have luffed twice at least before she was struck; and Williams and other witnesses for the defence state it as their opinion that, if she had merely held her course without any change whatever, this unfortunate accident would never have happened; and I am inclined to agree with them in opinion. When Williams saw her first, he describes her sails as shaking in the wind, though she had not then come into contact with the other vessel. Some time must have been lost in bringing her into this position; and as a few seconds might have been enough to have enabled her to have passed the point at which the collision took place, it seems highly probable that if she had not been luffed the last time, and, more so, if she had not been luffed at all, she would have gone clear without difficulty. Indeed, the master himself, according to the testimony of Hazlewood, admitted this; and such admissions and declarations of the master of a vessel seem always to have been received in cases of this kind. The Manchester, 1 W. Rob. Adm. 62; The Virgil, 2 W. Rob. Adm. 203; The Lord Seaton, Id. 391; and The Ewell Grove, 3 Hagg. Adm. 227.

I am therefore of opinion, not only that the Hanover was blameless; but that the Venus was in fault, and that her loss is imputable to the mismanagement and bad seamanship of those who had the control of her, and to their want of caution in not having a light. I do not mean to say that the Venus was bound to carry a light, or that under the circumstances she was not so bound. As a general rule, it is true that vessels under sail are not under any obligations to have a light; yet it is said in the case of The Rose, 2 W. Rob. Adm. 4, and in The Iron Duke, Id. 378, that though there is no occasion on which it is laid down that merchant vessels ought constantly to carry lights, under certain circum-

stances undoubtedly it may be right and expedient to do so. And in the case of The Londonderry the court said, according to general principles, as settled in the case of The Rose and The Iron Duke, there is no obligation in a sailing vessel to hoist lights except when she wants a pilot. It is very true that in not hoisting a light there may be shown, under circumstances of particular cases, such evidence of gross folly or wilful neglect as to disentitle a complaint to any relief; and, after stating the testimony, the judge went on to say: "I do not think, therefore, that the neglect of the Dolbaden Castle (though far from being a subject of praise and approbation) was of that kind (the general rule of navigation being with her) as to disentitle her to sue here for damages; that is to say, I do not think the circumstances can be brought forward to non-suit the promoters or put them out of court." However this may be, there can be no doubt that whether the Venus was bound or not to have a light on the night in question, if she had none, and could not have been seen by another vessel in time to have avoided her in the darkness of the night, and was consequently run down, she can claim no damages on the ground of negligence in the vessel, provided such other vessel had a good and sufficient lookout, as the Hanover appears to have had.

It is insisted, however, that the conduct of the master of the Hanover after the accident was blameable, and wanting in humanity, in not rendering proper assistance to the damaged vessel, and in his treatment of her passengers and crew, and that the owners of the latter vessel are therefore entitled to some damages, or at least their costs in this suit. No precedent nor any authority has been produced for giving damages in such a case, though, as to costs the court has a discretionary power over them, they may doubtless be given upon a proper occasion. The only cases known to me in which this subject has been considered by any court of admiralty are The Chester, 3 Hagg. Adm. 317; The Celt, Id. 322; and The Lawrence, 7 Notes of Cas. 556. The last case was decided in 1850, by Doctor Lushington; the two others in 1836, by Sir John Nicholl. In The Chester it was unnecessary to make any decision upon the question of liability for damages for subsequent misconduct, and the court therefore expressed no opinion in relation to it; but in The Celt the judge, after directing the decree to stand over that it might be ascertained whether there was any precedent respecting the effect of subsequent misconduct in such a case, and no precedent being produced, refused to give damages upon that ground, but condemned the owner of the Celt in all costs and expenses of the suit. In the case of The St. Lawrence, Dr. Lushington, after referring to the case of The Celt, said he wanted no precedents in such a case, he wanted nothing but principle to guide him; and though pronouncing in favor of the St. Lawrence so far as the claim for damages was concerned, he refused to give her costs. There can be no doubt, I think, of the correctness of the decision that the court has no right to give damages for such a cause. To hold otherwise would be to hold that an action might be brought against a vessel for not rendering a salvage service. If we once exclude all idea of blame, and hold the damaging vessel to be wholly free from any fault in occasioning the accident, she must be regarded as no more bound to render assistance in saving the property than any other vessel which might be near at the time and know of or see the occurrence. But no precedent can be shown, I apprehend, of a suit against any vessel passing by another vessel in distress, however near, without a proffer of aid; and there can be no better right to claim damages for that sort of misconduct in the present case than in that. If I were satisfied that the master of the Hanover had been guilty of any cruelty or neglect of the duties of common humanity, I should condemn him, or rather the owners of the vessel, as responsible for his conduct, in costs; but of this I am not satisfied. I am certainly a very incompetent judge of what aid ought to have been given or could be rendered to a vessel situated as the Venus was, and upon such a point would have been glad to have had the advice of nautical men. In the English courts of admiralty such matters are always referred to the Trinity masters.

It is proved that the master of the Venus showed a willingness to return to his vessel, and attempt to run her ashore if the master of the Hanover would follow him to land. This the latter would not agree to do; but gives as a reason, what the court cannot say is insufficient, that his vessel drew too much water, and he therefore could not venture.

It is also stated in the deposition of the master of the Venus that he requested the master of the Hanover to remain by the damaged vessel until daylight; but this statement is positively and distinctly denied in the deposition of the master of the Hanover, and he is, to some extent, supported by the testimony of the other witnesses. Nelson and Lend both speak of the conversation between the masters of the two vessels, in which it was proposed that the master of the Venus should return to her, and endeavor to strand her; but neither of them alludes to any request or desire expressed by any one that the Hanover would remain near her during the night.

This charge, then, is not proved; and, in the absence of any proof of such request or desire, I cannot impute blame to the master of the Hanover for not staying by the Venus, because I do not know and am entirely unable to say whether, as he could not follow or aid in bringing the Venus to land, it was at all likely that he would be able to do her any material service by keeping near her upon the sea, or what risk or inconvenience

the Hanover might have incurred by so doing. The chance of her floating with no one on board to direct her motions may have been thought too desperate to be worth the time and trouble of watching her. The master of the Venus seems to have thought she must go down, as no doubt she did; and if he did not desire or propose that the Hanover should remain near her during the night, the court cannot say it was her duty to have done so.

As to the language used, or said to have been used, by the master of the Hanover, however objectionable it may have been in some respects, it was not such as this court would deem it proper to punish by imposing costs or withholding them.

I do not regard it as indicative of any want of humanity or unwillingness to assist those in distress, but as uttered in a moment of great excitement, and as prompted by a desire to preserve the necessary order and discipline in a time of much confusion and alarm. If I could for an instant suppose that the speaker was actuated by any design to have left the passengers of the Venus without succour, I would, without hesitation, impose upon the Hanover the payment of the costs of suit, were they ten times what they are, but this I do not believe.

One of the witnesses deposes that some persons were attempting to cut the rigging of the Hanover, and that the master of that vessel threatened to shoot them if they would not desist; and there is nothing in the cause, so far as I have observed, to discredit this testimony. But, whether this be so or not, it must have been difficult to have ascertained at once the precise extent of the mischief, and what further harm might have been done to either vessel if they had not been speedily separated. The master of the Hanover may have feared that the rush of men and the disorder which prevailed around him would produce disastrous consequences unless he would restrain it, and under those impulses have spoken in a manner which, though we may disapprove it, we do not look upon as evidence of any indisposition to extend proper aid to the sufferers.

In the case of The Celt, the master of that vessel refused to try, though requested to do so, whether anything could be saved from the damaged vessel, and afterwards carried away the master and crew of the schooner, and landed them in a state of destitution on the coast of Ireland. In the case of The St. Lawrence, her master refused to turn about in order to make an effort to save the life of a man who had fallen overboard and was afterwards drowned. The conduct of the master of the Hanover was not like that. He ran along with the Venus for some time to afford her crew, as he affirms, an opportunity of returning to her if they pleased. Everything was removed from their vessel which they wished to take and conveniently could take away; and what could be done to make them comfortable, it appears, was done. I do not think, therefore, that the owners of the Hanover ought to pay the costs of this action. In the view I have taken of this case, it is, of course, unnecessary to make any estimate of the value of the Venus or her cargo, or to decide whether she might or ought not to have been preserved by proper exertion on the part of her master and crew. I must say, however, as was said in the case of The Mellona, 3 W. Rob. Adm. 7, that in all cases of this kind, and under similar circumstances, the prima facie presumption of law is that the vessel was lost in consequence of the collision. They who maintain the contrary must prove it. The decree to be entered is that the libel be dismissed, and that the owners of the Venus pay the costs of this action.

Case No. 12,375.

SAUNDERS et al. v. HOWARD.[1]

Circuit Court, D. Connecticut. April Term, 1864.

INTERNAL REVENUE—MANUFACTURER—MERCHANT TAILOR.

[A merchant tailor, who makes clothes, exceeding $1,000 per annum in value, to order, for individual customers, although for the use of such customers, and not for resale, is a manufacturer, within the meaning of Act July 1, 1862, § 75 (12 Stat. 462), imposing an internal revenue tax of 3 per cent. on manufactures of wool, and under section 64, par. 29, providing that "any person who shall manufacture by hand or machinery and offer for sale any goods, wares and merchandise, exceeding annually the sum of $1,000, shall be regarded as a manufacturer under this act."]

[At law. Action by T. P. & H. B. Saunders against Mark Howard, as collector of internal revenue, to recover internal revenue taxes paid.]

SHIPMAN, District Judge. This suit is brought to recover back certain moneys alleged to have been illegally exacted of the plaintiffs by the defendant, as collector of internal revenue for the First district of Connecticut. No questions arise as to the amount collected, or the manner in which it was done. The whole controversy turns on the construction to be given to the act of congress approved July 1, 1862, imposing the tax. If that act embraced the business of the plaintiffs, and subjected them to the operation of the clauses relied on by the officers of the government, then no recovery can be had. If, on the other hand, the exaction was made under a mistaken view of the law, and the plaintiffs were not legally bound to pay the amount taken, then they are entitled to recover. The liability of the defendant is merely nominal, as the commissioner of internal revenue is authorized, subject to the regulations of the secretary of the treasury, to refund the amount, if erroneously assessed or collected,

[1] [Not previously reported.]

if the same was paid under protest. For the purpose of facilitating the disposition of the case, the facts, about which there was no dispute, have been agreed on, as follows: That the defendant was collector for the district named, and that the money was paid to him as such collector. That it was paid under protest,—not voluntarily, but under legal coercion. That the plaintiffs were merchant tailors doing business within this collection district, and that they manufactured or made the articles upon which the duty was assessed, and on account of which it was paid, to order, for individual customers, for the use of such customers, and not for resale. That the value of the articles so manufactured or made by the plaintiffs, and upon which the duty was assessed, exceeded the sum of $1,000 per annum. That, if the plaintiffs are entitled to recover at all, judgment is to be entered in their favor for the sum of $526.55.

The seventy-fifth section of the act in question lays a duty or tax of 3 per cent. on manufactures of wool, and provides that, where the articles are manufactured out of fabrics which have paid a prior tax or duty, upon the manufacture of these fabrics into specific articles the 3 per cent. shall be levied only on the increased value thereof. No question arises in this case, under this distinction, as to the basis of assessment. The only point to be determined is whether or not the plaintiffs are to be deemed manufacturers, within the meaning of the act. It has been argued with great force by the plaintiffs' counsel, supported by sound authority (Atwood v. De Forest, 19 Conn. 513), that there is a plain and well known distinction between the terms "manufacturer" and "mechanic," and that the language of trade and commerce classes under the former those who manufacture goods for sale in the market generally, and, under the latter, those who merely make specific articles for customers upon the order of the latter. This doctrine cannot be successfully controverted; and were the question involved in this suit to rest upon the just distinction between these two classes of fabricators, as simply designated by these respective terms, independent of any other consideration, the plaintiffs would be entitled to judgment. But the act in question goes beyond the mere terms "manufacturer" and "mechanic," and defines what shall be understood by the former term, at least. The twenty-ninth paragraph (section 64) of the act declares that "any person who shall manufacture by hand or machinery, and offer for sale any goods, wares and merchandise, exceeding annually the sum of one thousand dollars, shall be regarded as a manufacturer under this act." Now, it will not be denied that there is a sense in which every fabricator of articles manufactures them; and he does this as well when he sells them upon, and after, a special order, as when he fabricates them first, and then sells them to whomsoever may chance to buy. Indeed, he may be said to manufacture an article or articles, in a still more restricted sense, when he makes them without ever intending to sell them, and solely for his own use. But the act in question does not use the term manufacture in this restricted sense, for it couples with the word "manufacture" the words "and offer for sale"; and the question arises whether these words mean, in this act, manufacture and sale generally, or whether they include manufactures and sales, to particular individuals, of articles upon special order, known as "custom work." No importance can be attached to the fact that the word "manufacture" precedes the words "and offer for sale"; for it is well known that a large share of goods manufactured by heavy establishments, are first ordered by customers, and subsequently made and delivered. They are often, too, ordered to be made of particular measures or dimensions. It is difficult to see any practical or legal distinction between the manufacture and sale of a suit of clothes to order, and a set of jewelry, or an equipment of farming tools, upon a like order. Still, if the act stopped here, it might be doubtful what interpretation should be given to these words. But it goes further, and fixes $1,000 as the amount of goods necessary to be produced, in a given case, before the producer becomes a manufacturer. It ignores or restricts the ordinary meaning of the term "manufacturer" by adopting an arbitrary standard for the purposes of the statute. All fabricators who make and offer for sale goods, but not of an aggregate value exceeding $1,000, are not deemed by this act manufacturers, although they may be, in point of fact, in all senses in which the term is used in business, or by the world at large. But even this would not be conclusive in favor of the claim set up by the government without a reference to the general design and object of the statute. For it does not follow, by any logical process, that, because all who manufacture, but do so to an amount less than $1,000, are not manufacturers, therefore all who fabricate more than that amount are manufacturers. The line drawn by the sum fixed is purely arbitrary. It could not, alone, establish a new definition of the terms in question, unless such an intention was clearly expressed in the act itself. It is clearly expressed that all who manufacture and offer for sale goods, but to an amount not exceeding $1,000 annually, are not manufacturers, within the meaning of the act. The definition of the term is thus far changed or narrowed by an arbitrary rule. But it is not clearly expressed that all who fabricate and offer for sale goods to customers, known as "custom work," to the amount of more than $1,000 annually, are manufacturers, even in the sense of this act.

Left at this point, the question would remain doubtful. We must therefore resort to the object which congress had in view in the enactment of the law, and determine, if we can, by the exercise of "reason and good dis-

cretion," how the statute is to be understood. This is a well-settled rule of interpretation of statutes. "When words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the objects and remedy in view; and the intention is to be taken or presumed according to what is consonant to reason and sound discretion." 1 Kent, Comm. (9th Ed.) p. 518, and a case there cited. The object this statute had in view was to raise revenue under an inexorable and pressing exigency. As one mode of accomplishing this object, congress laid a tax or duty on business of nearly all kinds, whenever the magnitude of the business carried on by an individual was such as to warrant the inference of some considerable income from the same. To protect ordinary mechanics and small fabricators, the statute laid no tax upon those whose operations fell short of $1,000 per annum. Those of larger business were taxed. Now, it is an elementary principle of legislation touching the raising of revenue by taxation, resting upon the solid foundations of justice, that the burden shall be as uniformly distributed as possible; that those of like means and in like pecuniary condition shall pay like sums to the state for the common good. The claim of these plaintiffs, if sustained, would make the rule grossly unequal. It would leave them to pay no tax upon a large and remunerative business, while others, engaged in much less extensive operations, though of the same general character,—that is, supplying the community with necessary articles,—would be heavily taxed. It is true that courts cannot remedy the defects or supply the omissions of the legislature by making uniform that which the legislature has made unequal; but, in searching after the true interpretation of a statute on a point where the words leave the matter in doubt, they will give weight to considerations of justice and of public policy, where they harmonize with the known and obvious intention of the law, and are consonant with the fundamental rules of right and reason. There is not only no reason founded in good sense or justice why a person who makes articles to the value of more than $1,000 annually, for special customers, should be wholly exempt from taxation, while the person who makes the same articles, to the same amount, for general customers, is heavily taxed. The court cannot conclude that such was the intention of congress, when not only the words of the act do not plainly reveal such an intention, but where to attribute such an intention to that body would tend to defeat the objects and contravene the obvious policy of the law as a means of raising a uniform revenue. The conclusion, therefore, is that the plaintiffs were within the class upon which the seventy-fifth section of the act imposed a duty of 3 per cent. In coming to this conclusion, the court has not failed to consider the effect of the amendment of the twenty-ninth paragraph (section 64) of the act of July, 1, 1862, by the act of March 3, 1863 [12 Stat. 714]. As already stated the twenty-ninth paragraph (section 64) of the act of July 1, 1862, provides that any person who shall manufacture and offer for sale any goods, wares, and merchandise, exceeding annually the sum of $1,000, shall be deemed a manufacturer. By the act of March 3, 1863, this twenty-ninth paragraph was amended by inserting, after the words "merchandise," "or who shall manufacture by hand or machinery for any other person, or persons any goods, wares, or merchandise." It is suggested that these words supply an omission in the first act, by including mechanics who manufacture for individual customers to an amount exceeding $1,000 per annum, and that, therefore, it is to be assumed that they were not included in the first act. But I do not think it is clear that the omission supplied was of the precise character claimed. By coupling the words "offer for sale" with "manufacture," in the twenty-ninth paragraph (section 64) of the act of 1862, those who manufactured for others, but never sold or offered for sale, were omitted from the class of manufacturers. This was clearly an oversight, and the omission was clearly supplied by the act of March 3, 1863 (12 Stat. 714). But if the object was to include in the amendment those who manufactured and sold, not generally, but to particular customers, as these plaintiffs do, why was not plain language used? Not, I think, from oversight, for on the 717th page the same amendatory act is precise in dealing with persons of the class of the plaintiffs, for it says, "Tailors," etc., "making clothes," etc., "to order as custom work and not for sale generally, shall, to the amount of one thousand dollars be exempt from duty, and for any excess beyond the amount of one thousand dollars shall pay a duty of one per cent. ad valorem." As this very precise language was used when speaking of the class of fabricators to which these plaintiffs belong, in this part of the amendatory act, I conclude it was not used with reference to the amendment of the paragraph (section 64) of the act of July 1, 1862, but with reference to the twenty-ninth paragraph itself, in connection with the seventy-fifth section of that act. It was to exempt custom tailors, to the extent of $1,000, and reduce their duty on all amounts exceeding that sum; to exempt them, not from the operation of any part of the amendatory act of 1863, but from the effect of the twenty-ninth paragraph of the sixty-fourth section, and from the seventy-fifth section of the original act of July 1, 1862.

It follows from these views that judgment must be entered for the defendant. Let judgment be entered accordingly.

Case No. 12,376.

SAUNDERS v. MASON.

[5 Cranch, C. C. 470.] [1]

Circuit Court, D. Virginia. Oct. Term, 1838.

MORTGAGES—DEED OF TRUST—PAYMENT—NO ONE COMPETENT TO RECEIVE—RECONVEYANCE.

If there is no person in existence competent to receive payment of the debt, to secure which property has been conveyed in trust, the court will, after a lapse of sixteen years, decree a conveyance by the trustee to the heirs of the debtor.

Bill in equity by the heirs of Peter Saunders, stating that their ancestor conveyed a real estate to the defendant, Thomson F. Mason, in trust to secure a debt due by him to the Franklin Bank, whose charter expired sixteen years ago, and there has not since been any person competent to receive payment of the debt; and praying that the property may be conveyed to plaintiffs.

The facts were admitted by the defendant, the trustee.

Mr. Semmes, for plaintiffs, cited Cruise, tit. 12, Trust, c. 1.

THE COURT (MORSELL, Circuit Judge, absent,) decreed a conveyance, according to the prayer of the bill.

SAUNDERS (ORNER v.). See Case No. 10,584.

Case No. 12,377.

SAUNDERS et al. v. The VICTORIA.

[11 Leg. Int. 70.] [2]

District Court, E. D. Pennsylvania. May 2, 1854.

ADMIRALTY—JURISDICTION—FOREIGN VESSEL AND LIBELLANT—CONSUL'S PROTEST.

[A libel by a British seaman for wages against a British vessel will be dismissed, upon protest of the British consul, where it appears that the parties are about to pass within British jurisdiction, and therefore can have recourse to the tribunals of their own country within a reasonable time, and without loss of proofs.]

In admiralty.

Present, C. M. Neal, Esq., for libellants. Benjamin Rush, Esq., solicitor for the British consulate, for respondent, also G. B. Mathew, Esq., British consul.

Libel for wages, on the ground of an alleged deviation in the voyage.

Before proceeding to the merits of the case, respondent's proctor entered a plea to the jurisdiction, the controversy being between British subjects, belonging to a British vessel, arising out of a contract entered into in a British port, to be terminated in a British port, and in point of fact not yet terminated. Plea overruled.

Respondent's proctor then cited Lynch v. Crowder [Case No. 8,637], before Judge Betts, October, 1849, and Patch v. Marshall [Id. 10,793], before Judge Curtis, October, 1853, and asked leave on behalf of the British consul to enter the written dissent of the latter to the proceeding, observing that while the consul entertained the highest respect for this tribunal of the United States, he was nevertheless responsible to his sovereign and her government, for a proper attention to any matter occurring between British subjects, in regard to which his official duty required him to intervene. He would feel therefore that he was derelict to his duty, not to state the reasons which governed his conduct in this instance.

THE COURT, having granted leave, Mr. Rush then read the following paper, signed by Mr. Mathew:—"To the Honorable John K. Kane, Judge of the District Court of the United States, in and for the Eastern District of Pennsylvania. Saunders et al. vs. The British Brig 'Victoria'—In Admiralty. In the above suit, instituted in this honorable court, by three of the crew of a British vessel, against said vessel and her master, on a claim for wages, the undersigned, her Britannic majesty's consul for Pennsylvania, residing at Philadelphia, begs leave respectfully, to enter this his dissent to the crew being permitted to sue in a court of the United States. First. Because the brig Victoria, on board of which the libellants and respondent sailed, is a British vessel, and the respondent, her commander, a British subject. Second. Because an investigation of the cause of suit, would call in question official acts and conduct of a British functionary in regard to British subjects, which the undersigned has already disposed of to the best of his judgment; respecting which he is responsible only to his own government; and with regard to men, master and sailors, all residents at Nassau, where there is, as in all British colonies, an adequate court of appeal. (Signed) George B. Mathew, Consul." Whereupon, THE COURT referred the counsel to the cases of Weiberg v. The St. Oloff [Case No. 17,357], and The Golubchick, in 1 W. Rob. Adm. 143, as illustrating the law of the admiralty jurisdiction in cases of foreign vessels; but upon a view of the admissions contained in the libel, that the contract of shipment, if violated at all by the respondent, had been so violated at a time when recourse might have been had before a British tribunal, and that the parties are about to pass within a British jurisdiction again, and might therefore have recourse to the tribunals of their own country within a reasonable time, and without loss of proofs, concurred with her Britannic majesty's consul in the views expressed by him; and thereupon, made the following order:—

And now, 2d May, 1854, it appearing to THE COURT, that the vessel is a British vessel, and the seamen British subjects, and that she is now about to sail to a British port, where redress may be had by the libellants, if en-

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

[2] [Reprinted by permission.]

titled thereto; it is upon the dissent of the British consul to further proceedings being had in this court, said dissent being now filed, ordered that this libel be dismissed. Libel dismissed.

Case No. 12,378.

Ex parte SAUNDERSON.

[1 Cranch, C. C. 219.] [1]

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

ALIENS—NATURALIZATION—RESIDENCE.

To entitle an alien to be naturalized, his residence in the United States for five years must be a continued residence.

Application to be naturalized. Affidavit of William Hodgson, that James Saunderson came to this country in October, 1797, and continued to reside here until 1800, when he went to England, and returned in April, 1801. In the fall of 1801, he went to England again, and returned in 1802; that he had since continued to reside in Alexandria.

THE COURT refused to admit him, because he had not continued to reside, according to the act of 1804 (2 Stat. 192), and had not made a previous declaration of his intent according to the act of 1802 (2 Stat. 153).

SAUTBRINK v. The PLYMOUTH ROCK. See Cases Nos. 11,235–11,237.

Case No. 12,379.

In re SAUTHOFF et al.

[7 Biss. 167; 14 N. B. R. 364; 5 Am. Law Rec. 173; 8 Chi. Leg. News, 370; 3 Cent. Law J. 544; 3 N. Y. Wkly. Dig. 96.] [2]

District Court, W. D. Wisconsin. Aug. 4, 1876.

BANKRUPTCY — MARSHALING ASSETS — MORTGAGE LOANED TO BANKRUPT—POLICY PAYABLE TO WIFE—HOMESTEAD.

1. A creditor who held several judgment notes against a person afterwards declared bankrupt, and also mortgages and two insurance policies as collateral security, a few days before the filing of the petition in bankruptcy, caused judgment to be entered upon the notes, and executions to be issued thereon. *Held*, that the court had power to so marshal the assets as to require such creditor to foreclose a mortgage before resorting to the general fund.

2. This rule would not extend to a mortgage loaned by a third party to the bankrupt, to be used as a security for the payment of the judgment notes. The rights of the assignor of such a mortgage would be superior to those of the assignee in bankruptcy.

3. The same principle applies to the case of a policy payable to the wife. She is to be regarded as a security to that extent, and entitled to protection in preference to the assignee. But the mortgage of the bankrupt and wife, to the petitioner, and the policy of insurance payable to the bankrupt in this case, fall within the general doctrine of marshalling securities, and the petition to that extent is to be regarded as doubly secured, and should be required to first exhaust his remedy on them, and be allowed the balance out of the general fund in court.

4. The fact that a part of the property is a homestead does not change the rule requiring a party having security on two funds, to first exhaust his remedy upon the fund he alone was secured upon, where there is another party having security on the other alone.

In bankruptcy. Application by John J. Suhr for an order directing payment of three judgments in his favor against the bankrupts [Sauthoff and Olson], entered on the 3d day of April, 1876, upon their promissory notes, by virtue of separate warrants of attorney attached to each. The judgments in the aggregate amount to about $3,000. No question is raised as to the validity of the judgments, the facts as admitted being that the notes were discounted in the usual course of business by petitioner, who is a banker, and that the warrants to confess judgment were attached to and accompanied by the notes, and were given more than two months before the petition against the bankrupts was filed. There is no charge that the bankrupts in any way procured the entry of judgments except by giving the warrants of attorney to confess. On the day the judgments were entered, executions were issued on each, and a sufficient portion of the bankrupts' stock in trade was seized to satisfy them. The other creditors instituted proceedings in bankruptcy, on the 6th of April, and, after an assignee was appointed, the parties agreed that the goods might be sold by the assignee and the proceeds be kept separate and deposited in the registry of this court, and that the lien of executions should be transferred to the fund in court with the same force as it existed on the goods by virtue of the levy. The petition further shows that, as collateral security to the debt of the petitioner, the bankrupt, Sauthoff, assigned to him a policy of insurance upon the life of his wife, payable to him, and that he and his wife assigned another policy upon his life, payable to his wife, and that the bankrupt procured his brother, Wm. Sauthoff, to assign as further collateral security, a note and mortgage, belonging to him, upon the homestead of the bankrupt, upon which there was due one thousand dollars, and that the bankrupt and his wife gave as further collateral security another mortgage upon the homestead of $1,000, all which were duly transferred to and held by the petitioner as collateral security for his debt against the bankrupts.

Sloan, Stevens & Morris, for John J. Suhr.
H. M. Lewis, for assignee.

HOPKINS, District Judge. By means of these securities and of the judgments which he took, the petitioner had ample security, and will get his pay in full, while the other creditors will not get to exceed one-half of theirs. The assignee has sold the property for

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

[2] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 3 N. Y. Wkly. Dig. 96, contains only a partial report.]

enough to pay all of the judgments out of which petitioner makes this application for payment.

The assignee opposes the application, and insists that the petitioner should be required, first, to exhaust the other security that he has, and only receive out of the fund in court the amount that may remain after applying the avails of the other securities. He insists upon the application of what he claims to be the rule in equity, that as the petitioner has security upon two funds for his debt, while the general creditors, represented by the assignee, have security on but one, he should be required to resort first to his security upon which the other creditors have no lien.

The general rule in equity is, that where there are several creditors having a common debtor, who has several funds, all of which can be reached by one creditor, and only a part by the others, the former shall take pay out of the fund to which he can resort exclusively, so that all may be paid. This principle enforces the right of the creditor having a lien upon all the funds to be paid in full, but it requires him to obtain it out of such portions of the funds as will cause the least inconvenience and injury to the creditors whose liens are confined to one fund. In this way no wrong is done to the one who has all the funds within his reach. His lien is not impaired as to either fund. The authority of the courts over him only extends to directing him which he shall first appropriate to his claim, restraining him, during such reasonable time as may be necessary to successfully make such application, from proceeding to appropriate the other; keeping the other sacred, however, in the mean time, to make up any deficiency. The common debtor can not complain of this rule, for he is benefited by having a larger portion of his debts paid by pursuing this course than if all the funds were needlessly exhausted by a single creditor.

But it is uniformly held that courts should not exercise this power to the material injury or prejudice of the creditor holding both funds. But this restriction does not extend so far, as was contended by petitioner's counsel, as to deprive the court of the exercise of the power in all cases where the creditor may be somewhat delayed in his remedies, or where the time of obtaining payment may be somewhat postponed. If it did, it would defeat the operation of the rule in most cases, for in almost every conceivable case, some time would be necessarily required in converting a security of any kind into money, and a delay of some extent is therefore inevitable in the practical application of the doctrine of marshalling securities. But a mere delay or postponing of payment is not regarded in such cases as a material injury, for the interest on the claim is deemed an adequate compensation to the party for such delay. Interest is deemed a sufficient compensation for the delay of payment, which is incident to all judicial proceedings.

The remedy to render available the security should also be certain and direct, before a party should be required to adopt it, and defer other remedies that he is entitled to, in order to obtain satisfaction of his debt.

In this case the remedy of the petitioner is quite simple. An action to foreclose a mortgage and sell the property is not a difficult or uncertain remedy, and a party could hardly maintain the position that a security so easily converted into money as a mortgage, and by so expeditious a method as exists in this state, was a doubtful remedy, or would unreasonably delay him or materially injure or prejudice his rights. Courts of equity exercise this power in such cases—not as an independent equity that exists against the creditor; for, as the writers on this subject say, no equity can be created against the creditor holding the double fund security by a party who has an imperfect security. But they say it is an equity against the debtor, for to allow the doubly secured creditor to take the doubly charged estate, would enable the debtor to get back the singly secured estate discharged of both debts.

This would be literally true in this case, for when the special sureties are released from the petitioner's claim, they will all go back to the debtor, and they cannot be reached by the assignee in his hands. So that the right sought to be enforced is rather an incident to the equity against the common debtor, and is free, if judicially applied, from all objection or charge of injustice. Adams, Eq. 272; Will. Eq. Jur. 337, Story, Eq. Jur. § 634 et seq. This doctrine is analogous to that which gives a surety the right to compel the creditor to exhaust this remedy against the principal's property before resorting to him. Now what application is to be made of this doctrine in this case?

First: Is the mortgage assigned by William Sauthoff to the petitioner such a security that the assignee can require the petitioner to apply it upon his debts before using the general fund? I think not. That transaction was, in effect, but a loan of this mortgage to the bankrupt for that purpose, and that William occupies the position of a surety to that extent, and as such his rights are equal, if not superior, to the rights of the assignee, and if his rights are equal, the claim of the assignee is defeated. But I think they are paramount, and that he has a right to require that the petitioner first exhaust all property of the bankrupts upon which he has a claim to secure the same debts, and the rights of the assignee, as to this mortgage, are subordinate to his.

The same principle applies in the case of the policy payable to the wife. She is to be regarded as a security to that extent, and entitled to protection in preference to the assignee as the representative of the general creditors. But the mortgage of the bankrupt Sauthoff and wife to the petitioner, and the policy of insurance payable to the bankrupt,

fall within the general doctrine above stated on the subject of marshalling securities, and the petitioner to that extent is to be regarded as doubly secured, and should be required to first exhaust his remedy on them, and be allowed out of the general fund in court, the balance remaining after applying the proceeds of those securities upon his debts.

The petitioner's counsel contended for the right to take the whole pay out of the general fund, and to leave the assignee to his rights of subrogation. But I do not deem that just in this case. The estate should not be burdened with litigation which would involve new and intricate questions, that would not arise in suits prosecuted by the petitioner. I can see no hardship in requiring him to collect those claims himself.

The petitioner's counsel also claims that as this mortgage was on the bankrupt's homestead, which was not liable for his debts in this state, and could only be incumbered or conveyed by the wife's joining her husband in a conveyance of it, that it should be considered in the nature of a security furnished by the parties, the wife particularly, that was equally entitled to protection as the securities I have before referred to. He cited and relied principally upon the case of Dickson v. Chorn, 6 Iowa, 19, as sustaining his position. In regard to that case, it is only necessary to remark that it was decided mainly upon the statute of that state, and therefore can not be regarded as an authority where the statute does not exist. In that case the creditor had a mortgage on the insolvent's homestead, which he cancelled voluntarily and sought full payment of the debt originally secured by the mortgage out of the general assets. The court ruled that as the statute required a creditor secured by a mortgage on a homestead to exhaust his remedy against the other property of the mortgagor before selling the homestead, the creditor had a right and it was his duty to collect his pay out of the general assets, if he could, before he could resort to his mortgage. This case, therefore, when properly understood, does not contravene the general equity doctrine hereinbefore laid down.

The supreme court of this state has, in two cases, considered the question substantially involved here,—First, in Jones v. Dow, 18 Wis. 241; and again in White v. Polleys, 20 Wis. 503; and they do not recognize any such right in a mortgagor of a homestead in this state, as is contended for in this matter by petitioner's counsel. In the case of Jones v. Dow, supra, the mortgage covered the homestead and a business block, and the mortgagor insisted that the business block should be sold first. But the court, it appearing that there were judgment creditors who had a lien upon the block and not upon the homestead, denied his claim, and the chief justice in delivering the opinion of the court, says: "Until the legislature shall declare the obligation to preserve the homestead superior to that of paying one's honest debts, we must hold the equity of the creditor at least equal to that of the debtor in cases like this." And, in the other case, the question arose between a mortgagor, whose mortgage covered his homestead and other property, and a judgment creditor having a lien upon the other property only, and the court there held that the debtor had no right to have the property not included in homestead first exhausted, in order to preserve to him the homestead; that a part of the property being a homestead did not change the equity rule that required a party having security on two funds to first exhaust his remedy upon the fund he was alone secured upon, where there was another party having security on the other. I fully concur in these views, and shall follow the doctrine of those cases in my disposition of this question.

The legislature has, since that decision, in suits to foreclose mortgages covering the mortgagor's homestead and other property, required the sale of the property not included in homestead first. But this is not such a suit, and the statute in terms, does not include a proceeding of this nature, or suits in equity for the marshalling of assets, and as it is in derogation of a long established principle of equity jurisprudence, I do not feel at liberty to extend its operation by construction beyond its plain reading.

I shall, therefore, order petitioner to collect and to exhaust his remedy upon the mortgage of F. Sauthoff and wife, and the policy of insurance payable to the bankrupt, and to apply the avails upon his claim, and that he be paid from the general fund only what shall remain after such application. But as it is apparent that enough will not be realized therefrom to pay it in full, I shall order that he be paid now $2,000 to apply thereon, retaining enough to meet any balance, if there should be any. Perhaps the assignee and petitioner may be able to agree upon a valuation of these securities and upon a sum at which the petitioner will be willing to take them, in which case, if approved by the court, the matter may be at once closed.

The clerk will enter an order in accordance with the terms of this opinion.

[For subsequent proceedings in this litigation, see Case No. 12,380.]

Case No. 12,380.

In re SAUTHOFF et al.

[8 Biss. 35; [1] 16 N. B. R. 181; 5 Cent. Law J. 364.]

District Court, W. D. Wisconsin. Aug., 1877.

BANKRUPTCY—PARTNERSHIP—DISSOLUTION—FIRM DEBTS—FIRM ASSETS CONVERTED INTO HOMESTEAD—ESTOPPEL.

1. A partner withdrawing firm assets, upon dissolution, as his interest in the partnership, takes them subject to the rights of the firm creditors, if the fund remaining is insufficient for the

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

payment of their debts. This is true even though no fraud is intended, and the partners believed the remaining assets to be ample.

[Cited in Brecher v. Fox, 1 Fed. 274.]

2. If the retiring partner invest the assets thus withdrawn by him, in a homestead, a court of equity will compel its surrender for the benefit of the creditors.

[Cited in Re Corbett, Case No. 3,220.]

3. Subsequent dealings of the creditors, with the remaining partner, and sales and credits by them do not estop them from enforcing their claim against the assets withdrawn.

In bankruptcy. The facts in this case were as follows: Sauthoff and Olson were copartners, doing business at Madison, Wisconsin, as dealers in clothing. The copartnership was formed in 1865, and the parties continued in business until January 27, 1876, when Sauthoff purchased from Olson his interest in the business, and the firm was dissolved. From the testimony it appeared that there was about the same quantity of goods in the store at the time of the dissolution as at the time of bankruptcy. The outstanding accounts due the firm at the time of dissolution, on their face, amounted to about ten thousand dollars. Their liabilities then due, and to become due, were a little over nine thousand dollars, of which amount about six thousand dollars remained unpaid when the petition in bankruptcy was filed. By the terms of dissolution, Sauthoff was to pay Olson for his interest in the property and business six thousand five hundred dollars, and the transaction was consummated by the payment to Olson in cash of one thousand dollars, the execution by Sauthoff to Olson of two notes, one for one thousand dollars, and the other for one thousand eight hundred and fifty dollars, and by the further delivery to Olson of a portion of the book accounts of the firm, such portion so delivered amounting to two thousand six hundred and fifty dollars on their face. Sauthoff assumed the firm debts and continued the business, making some additional purchases of goods, and incurring new liabilities therefor. In April, 1876, but little more than two months subsequent to the dissolution, Sauthoff was unable to meet his liabilities, which included such as remained unpaid of the late firm, and sought a compromise with his creditors, offering them thirty cents on the dollar. Subsequently, and within a short time, bankruptcy proceedings were commenced against Sauthoff & Olson. Previously, and in March, 1876, Olson had purchased a homestead. He had also collected about one thousand four hundred dollars in money from the outstanding accounts turned out to him by Sauthoff at the time of the dissolution of the firm. A portion of this money, together with the one thousand dollars which Sauthoff had paid him in cash, was used by him in partial payment of the purchase price of the homestead. The remainder of the accounts in his hands, uncollected, and amounting to about one thousand two hundred and fifty dollars, he, subsequent to the bankruptcy, on demand, delivered to the assignee. The stock in trade in the hands of Sauthoff, at the time of the bankruptcy, was subsequently sold by the assignee for about eight thousand two hundred dollars. From the accounts and demands which came to the assignee he collected about one thousand four hundred dollars. The assignee, in behalf of creditors, by the present proceeding seeks to reach the one thousand dollars paid in cash at the time of the dissolution by Sauthoff to Olson, and also the sum of one thousand four hundred dollars collected by Olson upon the book accounts, which he took on the transfer of his interest to Sauthoff, and to charge the homestead property of Olson, acquired as before stated, with the payment of so much of these amounts as were expended in the purchase of that property, it being claimed on the part of the assignee that the dissolution of the copartnership and the payment by Sauthoff to Olson of the one thousand dollars, and the delivery to the latter of a portion of the book accounts of the firm, operated as a fraud upon creditors, and that Olson should restore to them what he thus received. No payment had been made to Olson by Sauthoff upon the notes for two thousand eight hundred and fifty dollars, given upon the termination of the copartnership.

[For prior proceedings in this litigation, see Case No. 12,379.]

H. M. & H. A. Lewis, for assignee.

Vilas & Bryant, for bankrupt Olson.

DYER, District Judge. In a case where a copartnership which is indebted has been dissolved, the retiring partner withdrawing, on transfer of his interests, a portion of the assets or capital, and the transaction being followed at a not remote period by the insolvency of the member assuming the debts and continuing the business, it is the duty of the court, when called to consider the rights and liabilities of the parties, to look cautiously into the facts, with a view to the discovery of any possible fraud, and the correction of any wrong that may have resulted to creditors.

The principle is elementary that in equity, partnership creditors have an absolute priority of claim upon the partnership property for the payment of their demands, and that the interest of each individual partner is his share of the surplus after payment of the partnership debts. To such an extent has this rule been carried, that it has been held that where a partner sells his interest to a stranger, or it is sold upon execution against him, his right to have the partnership debts paid, and his liability therefor discharged out of the property, are not divested by the sale, and that such a sale gives to the purchaser only such an interest in the assets as may remain after the payment of partnership debts. Menagh v. Whitewell, 52 N. Y. 146; Osborn v. McBride [Case No. 10,593]. The sale of partnership property by one of a firm of

commercial partners on the eve of his insolvency will be set aside. Saloy v. Albrecht, 17 La. Ann. 75.

The appropriation by an insolvent firm of partnership property to the payment of the individual debts of one partner is not simply void, but is fraudulent, and avoids the deed of assignment. Wilson v. Robertson, 21 N. Y. 587.

Admitting the full force of these principles, it is also true that they are not so enforced as to operate against or affect a dissolution of copartnership made in good faith, and which is unaccompanied by any improper withdrawal of assets beyond the reach of creditors.

"The right of copartners upon dissolution to transfer the joint property to one of the firm is clear and unquestionable. The effect of such a transfer as between the partners, is to vest the legal title to the property in the individual partner, with a right to use and dispose of it as his separate estate. * * * If in such transfer there is no fraud and collusion between the copartners, for the purpose of defeating the rights of the joint creditors, and the transaction is made in good faith upon dissolution, and for the purpose of closing the affairs of the partnership, the joint property thereby becomes separate estate, with all the rights and incidents, both in law and equity, which properly attach thereto." Howe v. Lawrence, 9 Cush. 555.

These are principles applicable to a case where one partner retires and the other takes the entire property and assets; and they are substantially reiterated in Sage v. Chollar, 21 Barb. 596, and in Waterman v. Hunt, 2 R. I. 298. See, also, Dimon v. Hazard, 32 N. Y. 65. Where, however, the circumstances of the case show that the dissolution of the partnership is a fraud, as if it be an incident to a scheme for giving one creditor a preference, or for enabling a member of the firm wrongfully to appropriate assets which should be applied in payment of partnership debts, or where the conversion of joint into separate assets is a result contemplated, and is the motive, or one of the motives of the act of dissolving the firm, the act may be avoided by the joint creditors. In re Waite [Case No. 17,044].

The correctness of the ruling in In re Boothroyd [Id. 1,652], cannot be questioned, namely: "That the purchase by an insolvent trader of a homestead upon the eve of bankruptcy with knowledge of his insolvent condition and for the purpose of placing the property beyond the reach of process, is a legal fraud, which no court should hesitate to hold void as to creditors." Advancing a step further, where a copartnership is insolvent, or is possessed of assets not more than adequate for the payment of debts, one member of the firm cannot, upon retiring, rightfully withdraw beyond the reach of creditors and to their injury a portion of the assets or property, and make a personal appropriation of those assets by putting them in the shape of a homestead.

Under such circumstances, though it takes the form of a homestead, the property is as much within the reach of a court of equity as before; and no such change in its form or character can give it new sacredness or endow its possessor with new privileges in its ownership or use.

Keeping in view the principles thus stated, the question now is, whether upon the facts, the transaction between Sauthoff & Olson is one which must be condemned as a fraud in fact or law upon their creditors.

Without referring in detail to the circumstances bearing upon the point, it may be first stated, that the evidence does not show that there was any actual intended fraud in the act of dissolution. Although the interest of the retiring partner, based upon the estimated value of their assets, was greatly exaggerated, I think the intent of the parties in dissolving their business relations, as disclosed by the testimony, was honest, and that positive bad faith is not to be imputed.

Admitting this to be true, the question still remains, whether their actual pecuniary condition was such as to justify the withdrawal by Olson of the assets which were taken by him when the partnership was dissolved. The amount so withdrawn was two thousand four hundred dollars. He took two thousand six hundred and fifty dollars in book accounts. Of these he collected one thousand four hundred dollars, and returned the balance to the assignee. It is true that the one thousand dollars paid him in cash by Sauthoff was then raised by loan or pledge, as collateral security, of a mortgage on Sauthoff's homestead, held by his brother. But, subsequently, the holder of that mortgage as such security, having obtained judgment against Sauthoff for the one thousand dollars, it was held by this court that Sauthoff's brother, as the assignor of the mortgage, stood in the position of a surety, and was entitled as such to protection; and there having been an execution levy under the judgment upon Sauthoff's stock, it was ordered that the one thousand dollars be paid in full from the general fund; so that ultimately it came from the assets of the concern and to that extent in fact diminished them. Now, the question is, keeping in view the rights of creditors, was the actual pecuniary condition of this firm such as to entitle the retiring partner to appropriate the amount of their assets which he in fact received, and to place them in the form of exempt property?

In settling this question, the principle we must apply is, that if a retiring partner takes out a portion of the assets of the firm for his individual use, he must do so without impairing the fund to which the creditors have the right in equity to look for payment; and it must be made clearly to appear that such remaining fund is ample. If such partner receives more than his interest in the surplus

after payment of the firm indebtedness, equity must treat it as a wrong to creditors, and this equity cannot be avoided by the fact that the partners believed that enough remained to pay the partnership debts, if, in fact, after making such appropriation in favor of one or both partners, the remaining assets prove insufficient.

The results to be reached one way or the other in this case, depend, of course, upon what shall be the determination as to the sufficiency of the assets of the firm left by Olson for the payment of the partnership debts. On their face, the book accounts of the firm amounted to between nine thousand and ten thousand dollars, and this was the value placed upon them by the parties. But that they erred greatly in judgment is demonstrated by the fact that only about two thousand eight hundred dollars of the accounts have thus far proved of any value, and of this amount the assignee has received about one thousand four hundred dollars, the bankrupt Olson retaining the balance. What further moneys may be derived from such of the accounts as are uncollected is not now known.

Concerning the value of the stock of goods of which the parties were possessed at the time of the dissolution, it is quite impossible upon the present testimony to arrive at a satisfactory conclusion. Complications in this connection arise, because of the fact that no distinction has been preserved in the bankruptcy proceedings between the debts of the firm and those incurred by Sauthoff subsequently to the dissolution. Goods purchased by Sauthoff on his individual credit were mingled with the original stock, debts were paid by him from the common fund, without regard to those contracted by the firm and those contracted by himself; the sale made by the assignee included goods on hand at the dissolution and those purchased subsequently, and, so far as distribution has been made, no distinction has been observed between the firm creditors and the subsequent individual creditors of Sauthoff.

Of course, no part of the moneys which it may be determined Olson should restore can rightfully be used in the payment of individual liabilities incurred by Sauthoff subsequently to the dissolution. And in view of the necessity of ascertaining with accurracy the value of the assets of Sauthoff and Olson at the time the copartnership was dissolved, I shall direct a further reference to take testimony upon that question. Having settled the principles upon which the rights of the parties are to be determined, upon the coming in of that testimony it can be ascertained what amount, if any, should be restored to the fund by Olson for application upon the partnership indebtedness.

It has been urged by counsel for respondent, that, by their course of dealing with Sauthoff, selling him goods, giving him fresh credit and permitting such goods to be mingled with the old stock, the creditors must he held to have ratified the transaction between Sauthoff and Olson, and are now estopped from asserting a claim upon the property withdrawn by the latter from the assets of the firm. But it cannot be claimed that the action of the creditors operated to release Olson from liability for the firm indebtedness, and I fail to see how their subsequent dealing with Sauthoff so far sanctioned the appropriation by Olson of the moneys he took out of the firm as now to deprive them, if it shall be found that the remaining assets were insufficient to pay their debts in full, of the right to follow those moneys.

The present order will be, that the case be referred to the register to take testimony and ascertain what was the fair actual value of the assets of the firm of Sauthoff & Olson at the time of the dissolution of that firm, the value of the stock in trade, fixtures and accounts to be separately stated; also, to ascertain what proportion of the stock of goods sold by the assignee was held by the firm at the time of dissolution, and what was the amount and value of the goods purchased by Sauthoff on his individual account subsequent to the dissolution.

Case No. 12,381.

In re SAVAGE et al.

[16 N. B. R. 368.] [1]

District Court, N. D. New York. 1878.

BANKRUPTCY—PROVABLE DEBTS—PARTNERSHIP—JOINT AND SEPARATE ESTATE.

1. Where all the members of one firm are partners in another firm, they cannot prove its debt against the latter.

2. Where a bank has discounted drafts drawn by the former firm upon one who is a partner with the members of such firm in the latter firm, it cannot prove its claim thereon against the joint estate, but must look to the separate estate of the drawee.

In bankruptcy.

WALLACE, District Judge. Jesse Peckham, Isaac M. Hoag, Stephen T. Peckham and Edwin Stocking were partners in trade, composing the firm of Peckham & Hoag, dealers in lumber, at Toronto, Canada. And it appears from the stipulation of the parties that all these persons (except Stocking, who has died), together with one Richard Savage, are the surviving members of the firm of Richard Savage & Co. The latter firm carried on the lumber business at Syracuse, in this state. The proofs show that the firm of Peckham & Hoag shipped lumber at Toronto to the firm of Richard Savage & Co. at Syracuse, and drew their drafts upon Richard Savage individually, on account of the lumber thus shipped. These drafts were discounted by the Canadian Bank of Commerce at Toronto, and the proceeds placed to the credit of Peckham & Hoag. The bank now seeks to prove these drafts

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or their consideration as money lent and advanced against the joint estate of Richard Savage & Co. The bank is also the assignee of Peckham & Hoag for all demands existing in favor of that firm against the firm of Richard Savage & Co.

The bank cannot recover upon the drafts, because it is well settled that an action upon negotiable paper will only lie against those who are parties to it upon the face of the paper; and the proof does not show that Richard Savage was the firm name of those who composed the firm of R. Savage & Co. It is true that it was agreed between the members of Richard Savage & Co. that these drafts should be drawn on Savage individually, it being understood between them that the bank would probably prefer to have the drafts thus drawn as a matter of form. But the firm were not in form the drawees, and the express object was to obviate such a result, and the case therefore is not one where all the partners become obligated by the use of a firm name which is intended to represent the obligation of all. As between themselves all intended to be bound for the debt, but they did not intend to be bound upon the contract with the bank evidenced by the draft.

The case is similar to that where an agent signed a note made for his principal, not in the name of the principal, but in his own name. If one who discounts the note knows that it is in fact made for the benefit of the principal, he cannot recover of the principal, but must look to the agent. If the moneys advanced upon the discount of the drafts had been loaned to the firm of Richard Savage & Co., then the bank could recover upon the original consideration, unless the circumstances show that the bank intended to rely on the individual credit of Richard Savage. There is a conflict in the testimony as to whether or not the bank did intend to rely on Savage individually, and on the whole I incline to the conclusion that the officers of the bank supposed that the firm of Peckham & Hoag, the drawers, and Richard Savage, the drawee, constituted together the firm of Richard Savage & Co., and that the officers of the bank preferred to have the name of Savage individually as the drawee. The bank must be held to have elected to look to Savage individually, and is therefore precluded from recovering against the firm of Richard Savage & Co. upon the consideration of the drafts as well as upon the paper. The claim of the bank, if it can be proved at all, must rest on the right of the firm of Peckham & Hoag to prove the claim against the larger firm which has been assigned to the bank. The difficulty in the way of this proof arises from the fact that the members of Peckham & Hoag were also members of Richard Savage & Co. An action at law cannot be maintained in such a case, and I have been unable to find any decision sustaining such an action in equity.

When the same person is a partner in two different firms composed of different individuals, one of which firms, being indebted to the other, becomes insolvent, I do not doubt the latter may prove its debt and receive its dividend from the insolvent firm, because in such case an action in equity would be sustained. But when as here all the members of one firm are partners in another firm, quite a different case is presented. The rule has been long settled in bankruptcy that one partner cannot prove his claim against the firm of which he is a member in competition with creditors of the firm, the reason being that as the creditors of the firm are his creditors he would be taking from his own creditors what ought first to be applied in payment of their debts. But the English cases do not apply this rule where the partner carries on a distinct trade and the claim is one for articles furnished and not for money or advances. The rule has only been modified for the purpose of the distribution of the assets of the bankrupts as between the creditors of the partner or partners individually and the joint creditors, so that where all the members of a firm are in bankruptcy, and several or all of them have been partners in two distinct firms engaged in a distinct business, the one firm from the other, the two firms are treated as distinct concerns for the purpose of the distribution of their assets among their respective creditors. If the firm of Peckham & Hoag and the firm of Richard Savage & Co. were both in bankruptcy, so that this court could deal with both estates, there would be no difficulty in the way of distributing the estate conformably to the practice thus established. But the firm of Peckham & Hoag is not here. Certain individual partners in that firm are here as partners of Richard Savage & Co. The assets of Peckham & Hoag are not within the control or jurisdiction of this court. If it should be permitted to those bankrupts who were members of Peckham & Hoag to prove a claim jointly against the estate of Richard Savage & Co., this court would be powerless to control the distribution of the proceeds, and it would be unable to ascertain or recover such sum, if any, as might be due from one member of Peckham & Hoag to the other, and consequently could not apply it to payment of joint debts after payment of the individual debts of the partners.

I am unable to see why, in a case like the present, proof should be permitted except to the extent of the interest which the members of Peckham & Hoag have in the assets of Richard Savage & Co. There is an interest only in the joint assets after the payment of the joint debts. As there cannot possibly be any surplus in view of the amount of the joint debts, it is useless to attempt to work out the rights of the parties. The claimant must rely on the separate es-

tate of Savage, the drawee of the drafts and the joint estate of Peckham & Hoag, its assignors and the drawers of the drafts.

An order is directed expunging the proof of debt and disallowing the claim.

Case No. 12,382.

SAVAGE v. The BUFFALO.

[Cited in Serg. Const. Law, 202, note. Nowhere reported; opinion not now accessible.]

Case No. 12,383.

SAVAGE v. D'WOLF.

[1 Blatchf. 343.] [1]

Circuit Court, S. D. New York. Oct., 1848.

EVIDENCE—SECONDARY—SUBSCRIBING WITNESS—UNSEALED INSTRUMENTS—PRESUMPTION WHEN EXECUTED ABROAD—NEW TRIAL.

1. Proof of the admission by a party of the execution of negotiable paper, or proof of his hand-writing, without producing or accounting for the subscribing witness, has, in New-York, been held sufficient.

[Cited in brief in Barry v. Ryan, 4 Gray, 524.]

2. But whether this rule extends to all unsealed instruments, quere.

3. If the instrument was executed abroad, as in Cuba, the presumption of law is that the subscribing witness is beyond the jurisdiction of the court here.

4. Where a written instrument was admitted in evidence as an original paper, on the assumption and belief, without question, that it was such, and it appeared by the evidence that that conclusion was not warranted: *Held*, that a new trial should be granted.

This was an action [by William Savage against Julia L. D'Wolf, executrix, etc., of James D'Wolf] upon three promissory notes made by the defendant's testator to the plaintiff, and amounting, with interest, to $34,554-17, tried before Mr. Justice NELSON, at New-York, in November, 1847. The notes were given at Havana, in the island of Cuba, in consideration of an agreement on the part of the plaintiff to discharge three mortgages upon certain coffee and sugar estates in that island, amounting nominally to a sum exceeding $80,000. It was a part of the agreement that the notes should remain in the hands of a third person in escrow, until the several mortgages should be discharged of record. On the trial, the court having decided that the possession of the notes by the plaintiff was prima facie evidence that the condition upon which he was to receive them had been complied with, the defendant undertook to rebut this presumption by proof that the mortgages had not been discharged, and that the notes had therefore been wrongfully delivered up to the plaintiff. For this purpose she offered in evidence the contract under which the notes in question were given, which was in writing, but not under seal, and purported to have been executed in Havana by the defendant's testator in person, and by the plaintiff through his agent, at even date with the notes. There were subscribing witnesses to the execution of the contract. The hand-writing of the parties was proved, but the testimony of neither of the subscribing witnesses was produced, nor was their absence accounted for or the hand-writing of either of them proved. There was also evidence of the admission of the plaintiff that the instrument was executed by his agent. The court admitted the contract in evidence under the plaintiff's objection. Another instrument was offered in evidence by the defendant, for the purpose of showing that the condition upon which the notes were given had not been complied with. This was a release or discharge of the three mortgages, executed by the plaintiff a short time before the suit was brought, which the defendant's testator refused to accept, as not being a sufficient compliance with the terms of the agreement. It was claimed by the defendant that this fact raised an implication that no satisfaction or discharge of the mortgages had been before made, and that, as the one so offered was insufficient and unsatisfactory, the condition had not been complied with, and the notes were improperly in the hands of the plaintiff. The defendant's counsel at first produced a copy of the release which had been tendered, and undertook to account for the non-production of the original. But, before the evidence on this point was through, the adverse counsel produced a paper which was supposed and believed at the time to be the original itself, and to be identified by an original entry of the tender on the back of it, made by the witness to the tender, and was, on that ground, admitted in evidence. The jury found for the defendant, and the plaintiff now moved for a new trial, on a case.

Hiram Ketchum, for plaintiff.
Francis B. Cutting, for defendant.

NELSON, Circuit Justice. There is some difference of opinion between the judges, upon the question whether the agreement under which the notes were given was properly admitted in evidence, on proof of the hand-writing of the parties and of the admission made by the plaintiff, without further accounting for the subscribing witnesses. The paper having been executed abroad, the presumption of law was, undoubtedly, that the witnesses were beyond the jurisdiction of the court. But their hand-writing was not proved, nor was the omission to do so properly accounted for. Proof of the admission by a party of the execution of negotiable paper, or proof of his hand-writing, without producing or accounting for the subscribing witness, has, in New-York, been held sufficient. Hall v. Phelps, 2 Johns. 451; Fox v. Reil, 3 Johns. 477; Shaver v. Ehle, 16 Johns. 201; Henry v. Bishop, 2 Wend. 575. But, whether this

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

rule extends to all unsealed instruments, may admit of some doubt.

Upon another ground, however, the verdict should be set aside, and a new trial granted. There is some obscurity in the case in respect to the facts connected with the admission in evidence of what was claimed to be the release or discharge tendered to the defendant's testator. But, it is at least questionable, whether the instrument produced and identified at the trial was the original, or only a copy with the endorsement of the fact of the tender. It may be, and probably is, the fact, as stated by the plaintiff's counsel, that the witness made the endorsement upon a copy as well as upon the original paper tendered, and that it was the copy that was produced and admitted in evidence. The belief that the paper produced was the original seems to have been rather an inference of the court from there being on it the endorsement in the hand-writing of the witness to the tender, than the result of any direct proof of the fact. The conclusion, however, seems hardly to have been warranted.

It is quite apparent that both parties entered upon the trial without proper preparation. All the material facts were capable of the most satisfactory proof. The execution of a commission to take testimony in Cuba, where the contract was made and the witnesses resided, and where, if at all, the condition was complied with before the delivery of the notes to the plaintiff, would have removed every embarrassment. This course should be taken before the cause is again presented to the court.

New trial granted.

SAVAGE (HALL v.). See Case No. 5,944.

SAVAGE (UNITED STATES v.). See Case No. 16,225.

SAVAGE (WILDES v.). See Case No. 17,653.

SAVAGE MIN. CO. (THORNBURGH v.). See Case No. 13,986.

SAVALOFF (UNITED STATES v.). See Case No. 16,226.

Case No. 12,384.

The SAVANNAH.

District Court, E. D. Pennsylvania. June, 1868.

SHIPPING—LIABILITY OF VESSEL FOR TORT—INJURY TO BRIDGE ACROSS NAVIGABLE RIVER.

An action in rem will not lie, by the owners of a bridge against a vessel, for damages sustained in a collision.

[Cited in City of Milwaukee v. The Curtis, 37 Fed. 706.]

Decided by CADWALADER, District Judge. Nowhere reported; opinion not now accessible. The statement of the point decided was taken from 1 Pars. Shipp. & Adm. 53.

Case No. 12,385.

SAVANNAH v. ATLANTIC & G. R. CO.

[3 Woods, 432.] [1]

Circuit Court, S. D. Georgia. April, 1879.

RAILROAD COMPANIES—TAXATION—BY MUNICIPAL BODIES—GEORGIA CONSTITUTIONAL PROVISION.

1. The act of the general assembly of Georgia of February 28, 1874 (Laws 1874, p. 107), which requires railroad companies to return the value of their property to the comptroller-general, to be taxed as the property of other citizens, gives no authority to local or municipal bodies to tax the property of such companies.

2. The constitution of Georgia of 1877, which abolishes all laws exempting property from taxation, does not thereby impose any tax. Until the legislature authorizes a tax, none can be collected, and then only the particular tax authorized.

Heard on the petition of the mayor and common council of the city of Savannah, for allowance of taxes for the years 1877 and 1878, in property of the Atlantic & Gulf Railroad Company in the city.

W. D. Harden, for petitioners.

W. S. Chisholm, for complainants.

Robt. Falligant, for railroad company.

H. R. Jackson, A. R. Lawton, and W. S. Basinger, for receivers.

BRADLEY, Circuit Justice. The claim in this case is based on two grounds: (1) That the act of 1874, subjecting the company to taxation as other citizens, has abolished the exemption granted by the company's charter, and has made its property taxable in all places. (2) That the constitution of 1877 has abolished all laws exempting property from taxation, except certain enumerated classes of property held for benevolent and public purposes, and, therefore, the property of the company is, at all events liable to be taxed since 1877.

The first ground is clearly untenable. The act of 1874 did nothing more than declare that all railroad companies should annually return the value of their property to the comptroller-general to be taxed as other property of the people of the state, and that they should pay him the taxes assessed upon such property. This law clearly gives no authority to local and municipal bodies to tax the companies also. It might as well be said that because I authorize one man to pick cherries off my trees, therefore everybody has a right to do it. Taxation can only be imposed by law, and when the law prescribes how it is to be imposed, no one else has a right to exact it differently.

The second ground is no more tenable than the first. The constitution of 1877, it is true, says that "all laws exempting from taxation other than the property herein enumerated, shall be void." If this clause relates to past as well as future laws, still its only effect is to abolish exemption and to leave the legis-

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

lature free to tax all kinds of property. But until the legislature imposes a tax, no tax can be collected, and when it imposes only a particular tax, that alone can be collected.

Now, as we have seen, the legislature has imposed a particular tax, and none other, on railroad companies, and has made that tax payable to the comptroller, and not to the county or municipal authorities. The result is, that these authorities have acquired no right to tax the property of the companies. This seems to us very obvious, and requires no further discussion.

The application is denied.

SAVANNAH, The (UNITED STATES v.). See Case No. 16,226a.

Case No. 12,386.

The SAVANNAH PRIVATEERS.

[See Case No. 14,501.]

SAVANNAH STEAMSHIP CO. (NICHOLL v.). See Case No. 10,225.

Case No. 12,387.

SAVARY v. GERMANIA BANK.

[7 Reporter, 615;[1] 19 Alb. Law J. 521.]

Circuit Court, S. D. New York. March 15, 1879.

TROVER AND CONVERSION — PROMISSORY NOTE—UNAUTHORIZED TRANSFER—INTENT.

The unauthorized transfer of plaintiff's property by defendant, though without wrongful intent and before demand, is still a conversion.

Motion for new trial.

WALLACE, District Judge. The motion for a new trial must be granted for the reason that under the count in the declaration for a conversion of the notes there was a question of fact for the jury. Upon the trial the plaintiff's rights were mainly discussed on other grounds; the evidence, however, was sufficient to authorize the jury to find that the defendant acquired the notes payable to the order of the plaintiff through a forged indorsement of his name without the consent of the plaintiff to the maker. Upon this theory of the facts the plaintiff was entitled to recover. The defendant is not absolved from liability because it acted in good faith. No person except the payee can assert any title to a bill or note payable to his order without his indorsement. While the unauthorized delivery of a bill or note payable to bearer vests a good title in a bona fide purchaser, an unauthorized indorsement of the payee's name, when the note or bill is payable to order, conveys no right of action. Byles, Bills, 24. When the defendant delivered over the plaintiff's notes to a person not entitled to them, assuming the right to deal with the notes in disregard of plaintiff's title, it was a conversion, although the defendant supposed the notes belonged to the maker as a voucher, and although it was acting merely as the agent of the maker in what it did. A wrongful intent is not an essential element of a conversion; it suffices that the rightful owner has been deprived of his property by some unauthorized act of another who assumed dominion or control over it; and the latter is not excused because he was acting as agent for one whom he supposed to be the true owner and derived no benefit himself from the transaction, and parted with the property before any demand for its restitution. Wright v. Hawley, affirming Dudley v. Hawley, 40 Barb. 397, 39 N. Y. 441. Motion granted.

[1] [Reprinted from 7 Reporter, 615, by permission.]

Case No. 12,388.

SAVARY v. GOE.

[3 Wash. C. C. 140.][1]

Circuit Court, D. Pennsylvania. April Term, 1812.

DEBT—ACTION ON BOND—SPECIAL PLEA—CONDITION—TENDER—PRESENT OBLIGATION.

1. Debt on bond, conditioned to deliver to the plaintiff or his agent, in B., a quantity of whiskey, in all the month of May, 1809. Plea, that in all the month of May, 1809, the defendant was ready and willing to deliver to the plaintiff or to his agent, at the place of embarkation in B., the whiskey, according to the condition of the bond; but the plaintiff, or his agent, was not then and there ready to accept the same. The rule of law is, that if the condition of the bond is not parcel of the obligation, as if the latter be a money penalty, and the former be to do some act, as to deliver goods, &c., it is not necessary for the defendant to plead uncore prest.

2. If money is to be paid, or any other act to be done, on a certain day, and at a certain place, the legal time of performance is, the last convenient hour of the day for transacting business. But if the parties meet at any part of the day, a tender and refusal at the time of the meeting are sufficient.

[Cited in Fredenburg v. Turner, 37 Mich. 403; Smith v. Boston & M. R. R. (6 Allen) 269.]

3. The rules of pleading require, that the plea should be direct in stating with sufficient precision the matter of defence, and not leave it to be found out by inference, however strong.

4. The plea, in this case, is bad, as it does not state that the defendant was at the place of embarkation, in person or by an agent, ready and prepared to deliver the whiskey.

This was an action of debt on a bond, in the penalty of 1920 dollars, with condition, that the defendant should deliver to the plaintiff, or his agent or assigns, at the place of embarkation in Brownsville, the quantity of 1920 gallons of good merchantable proof whiskey, in good and tight barrels, in all the month of May, 1809. Upon oyer of the obli-

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

gation and condition, the defendant pleads in bar, that in all the month of May, 1809, he was ready, and prepared, and willing, to deliver to the plaintiff, or to his agent or assigns, at the place of embarkation at Brownsville, the quantity of 1920 gallons of good merchantable proof whiskey, in good and tight barrels, according to the tenor and effect of the said condition; but the plaintiff was not then and there ready to accept the same, nor was any agent or assignee of the plaintiff then and there ready to accept the same. There are four other pleas to the declaration; but as they, as well as the one just stated, are all demurred to specially, and the objections made to the first are also directed to the others, they need not be specially set forth.

WASHINGTON, Circuit Justice. It is objected to this, and the other pleas—1. That it does not state that the defendant is still ready to deliver the whiskey in the condition mentioned. 2. That it does not allege the readiness and preparation of the defendant, at the last convenient hour of the 31st of May. 3. It does not state that the defendant was at the place of embarkation, in person or by an agent, ready and prepared to deliver.

The first objection was pressed, not so much upon the authority of adjudged cases, as upon the unreasonableness of the doctrine to which it is made, which renders a tender and refusal, or a readiness to perform, and the want of it in the other party, tantamount to performance, so as for ever to discharge the obligation. The rule of law was, indeed, admitted to be, and so it undoubtedly is, that if the condition of the bond be not parcel of the obligation, as if it be to deliver certain goods, the obligation being for money, it is not necessary for the defendant to plead uncore prest; and if the legal consequence of tender and refusal, in such a case, be a discharge from the obligation, it belongs not to this tribunal, on that account, to depart from the established doctrines of law. This objection, therefore, has no validity.

The doctrine laid down by the plaintiff's counsel, upon which his second objection is founded, can by no means be questioned. It is clear, that if money is to be paid, or any other act to be performed, on a certain day and at a certain place, the legal time of performance is the last convenient hour of the day for transacting the business. This rule is established for the convenience of both parties, that neither may be compelled, unnecessarily, to attend during the whole of the day. But, if the parties meet at the agreed place during any part of the day, a tender and refusal, though not at the last convenient hour, is sufficient; for, in this case, neither party is put to inconvenience. So, if the place be fixed, and the party is to do the act on or before a certain day, or has the whole month to do it in, as in the present case; yet he cannot plead a readiness to perform, and the absence or want of readiness of the other party, at any time prior to the last convenient hour of the last day; and this, for the reason before assigned. Whether, in this latter case, the party bound to perform, may appoint an earlier day than the last for doing the act, and in such case, may compel the other party, after reasonable notice thereof, to accept, or to submit to the consequence of his absence or refusal, on the appointed day, need not be decided in this case, as the court will not find it necessary to give an opinion on the second plea, which presents this question. The cases are certainly not clear on this point, and are somewhat at variance with each other. But there is no question, as to the doctrine above stated, that the tender or readiness to perform, must be stated to be on the last convenient hour of the last day, if an earlier period be not appointed.

In answer to this objection, it is insisted, by the defendant's counsel, that this plea does, in effect, allege a readiness and preparation at the last convenient hour of the 31st of May; because, if, in the words of the plea, the defendant was ready in all the month of May to deliver, he must have been ready on the last hour of the 31st of May, because that was part of the month, during the whole of which it is alleged he was ready. This argument carries with it such strong marks of good sense, and is so entirely logical, that one hardly knows how to raise a sound objection to it; and yet a plea like the present, is believed to be without a precedent. It is no vindication, however, of its correctness, that the court arrive at the matter and real point of it by argument and logical deduction. The rules of law seem to require, that a plea should be direct in stating with sufficient precision the matter of defence, and should not leave it to be found out by inference, however strong and conclusive. It is said, that the defendant has assumed upon himself, the necessity of proving more even than his contract and the law imposed upon him, to which the plaintiff ought not to object. That he undertakes to prove his own readiness, and the want of it in the plaintiff, not only on the last convenient hour of the 31st of May, but during each and every hour of the whole month of May. To this, it may be observed, that this circumstance constitutes one of the demerits of the plea; because, if the plaintiff had taken issue on the whole plea, it would have been immaterial, since the defendant might have lost the cause, in consequence of not being able to prove a readiness during the whole month; and yet it was not material whether he was so or not, provided he was ready at the last convenient hour of the last day of the month. It is true, the plaintiff might have selected out of the plea, which runs over the whole month, the last convenient hour of the 31st, and taken issue on the readiness of the defendant, and his own absence or readiness at that time of the day, passing over the rest of

the plea, with a protestation against its truth. But if, instead of doing this, he chooses to demur, he is certainly at liberty to do so.

In the case of Lancashire v. Killingworth [Case No. 8,037], it is laid down in the clearest terms, that if the plaintiff or defendant, as the case may be, plead a tender, or a readiness to perform, and that the other party was not at the place ready to accept, he must state at what time of the day he was there, and how long he continued, that it may appear that he staid to the last convenient hour of the day. It is true, that in that case, the declaration stated that the plaintiff was at the place on such a day, which he might well have been, and yet not be there at the last convenient hour of the day. But yet, the court not only condemned the plea on that account, but proceeded to state the proper form of pleading in such a case. This decision, as to the form of pleading, has never, to the recollection of the court, been overruled or relaxed by any subsequent case; and such undoubtedly has been the usual form of pleading a tender or readiness to perform, in the absence of the other party. In the case of Halsey v. Carpenter, Cro. Jac. 359, which was debt on a bond, to pay £304 to three persons tam cito, as they shall come of age, a plea of payment in the words of the bond, was considered bad on a special demurrer, because it did not state the time, place, and manner of performance; and yet that plea, unquestionably, covered every hour of the time, after the obligees came of age.

The third objection to the plea, stands upon still stronger ground than the one just mentioned; for, it is not only uncertain and argumentative, but the conclusion from the premises stated, is by no means so inevitable. Because the defendant was, in all the month of May, ready, prepared, and willing, to deliver the whiskey to the plaintiff or his agent, at the place of embarkation; the plea argues that the defendant must have been personally, or by his agent, at the place of embarkation, ready to deliver. But the conclusion does not necessarily follow, even if it were proper to get at it in this way. A man may truly say, that he is ready and prepared to pay money, or deliver an article at a particular place, for instance, at a spot near to, and within sight of his own house, and would have done so if the other party had come to receive it; and yet he may not have gone to the spot, in consequence of the non-appearance of the other party. To say the least of such a plea, it is uncertain and ambiguous; whereas, if the party would excuse himself for the want of a strict performance of his contract, he should show, by clear and direct allegations, that he did all on his part that was in his power, in order to perform.

In some of the cases, it is said, that though the other party be absent, still, the plea must state an offer to perform, which would seem to be rather an idle form. Still, this shows that the party must state himself to be present in person, or by an agent, since, if absent, he could not offer, although he might be ready to do so. Indeed, the want of the words "obtulit solvere," was deemed fatal on demurrer, in the case of Cole v. Walton [unreported], notwithstanding the plea stated in express terms, that the defendant was at the place, and remained till sunset, ready to pay, but that the plaintiff was not there ready to receive. It is unnecessary to decide, whether, in such a case, an offer need be made or not; but this, and other similar cases, are strong to show, that the presence of the party bound to perform, ought to be distinctly stated, and such appears to be the uniform mode of pleading. Judgment for plaintiff, and writ of inquiry to be executed before the marshal.

Case No. 12,389.

SAVARY et al. v. LAUTH.

[1 MacA. Pat. Cas. 691.]

Circuit Court, District of Columbia. Aug., 1859.

PATENTS — INTERFERING APPLICATIONS — LACHES AND ABANDONMENT.

[A delay of over four years after perfecting an invention before filing an application, during which time another has invented the same thing, promptly applied for a patent, and manufactured and placed on sale large quantities of the new article, in the region of the first inventor's residence, is sufficient to bar the first inventor's right to a patent.]

[This was an appeal by Richard and Dennis Savary from a decision of the commissioner of patents, in interference, awarding a patent to Bernard Lauth, and refusing the application of appellants.]

Munn & Co., for appellants.

R. W. Fenwick, for appellee.

MORSELL, Circuit Judge. The application and specification of Lauth is dated the 8th of March, 1858, and filed the 12th of March, 1858; that of the Savarys, dated the 31st of July, 1858, filed the 6th of August, 1858. The appellants claim their invention to have been discovered by them in the spring 1854. January, 1858, appears to have been the earliest period of Lauth's discovery. The inventions, I think, are identical, judging from the specifications stating and describing the claims of each of the parties. The commissioner refused to grant a patent to the appellants, and awarded priority of invention to the appellee, upon the ground of insufficiency of the testimony on the part of the appellants to sustain their claim; to which a number of reasons of appeal were filed. These and all the papers and evidence in the cause have been laid before me, and due notice of the time and place given to the parties, who accordingly appeared by their respective advocates, and filed their arguments in writing, and submitted the case. The appellee has raised an issue on a collateral point, in which it is contended that if the appellants had a

right, as contended for by them, they have forfeited it by their negligence. The language is, "Does not the appellants' conduct create an equitable estoppel against them as regards Lauth? They were undoubtedly aware of his application, and also of the fact of his continued, extensive, and expensive experiments; that he was engaged in a bitter and prolonged contest with Cuddy for this invention, involving loss of time and the expenditure of large sums of money, and yet they interposed no claim, nor gave Lauth warning that they intended to apply for a patent. These considerations, together with the selfish conduct of the appellants towards the public, should postpone their claims." A decision by me in the case of Ellithorp v. Robertson [Case No. 4,409], is cited as authority. The appellants' counsel in reply says: "It is difficult to perceive why Lauth's counsel should have referred to Mr. Curtis, who does not give the slightest countenance to the pretensions which they set up in behalf of their client, which is also true of the other authorities to which they refer, upon any other hypothesis than that they have fallen into the common error, as it is apparent they have, of applying to the case of two interfering applicants for a patent [neither of whom has a patent] the principles which are applicable to the case of a prior inventor who is asking to invalidate a patent already granted, and the patentee of which is prima facie the prior inventor in virtue of the grant itself. Here neither party has a patent, and there is no presumption of law either in favor of or against either party. It is a simple question of fact as to who was the prior inventor of the invention claimed in the two applications." In another part of the case it is denied that there is any evidence of the knowledge by the appellants of the facts as above alleged. It is also stated by the appellants, and not denied, that Lauth promptly applied for the protection of his invention, and as promptly, and with considerable expense to himself, introduced it into general and extensive sale. If the solution of the question raised by this defense depended on the right acquired by the appellee, or whether the evidence proves an abandonment in the general ordinary sense of the term, in which intention forms an essential feature, I should feel no difficulty in overruling the objection; but there is another party—the public—whose interests may be affected, on behalf of whom the various statutes have prescribed certain previous conditions and prerequisites which must be strictly fulfilled before the inventor can be placed in a condition to claim the right to a patent, and this irrespective of intention, which may be termed a statutory bar. The counsel for the appellants contends that the appellants cannot be accused of laches in making their application so long as they have made it before the grant of a patent to any one else. This principle cannot be conceded. The consideration given for the monopoly is that the public shall have the full and free benefit and knowledge of the invention at the expiration of fourteen years from the date of the invention. The design of the law is that the earliest knowledge and use of the invention by the public, consistent with the just and reasonable rights of the inventor, should be obtained, and protection will not be given from dangers happening from unnecessary delays on the part of the inventor after he has perfected his invention and before his application for a patent; as, (among many others,) if in such interval a subsequent discoverer of the same invention should put the public in possession of the knowledge and use thereof, how could such inventor, lying by for years, and suffering such use in public by another, be in a condition to offer a quid pro quo to the public—how could he say it was not known to others? And further, the spirit of the objection being that the invention is known by others and in public use, how can it be material whether the person so making it known and putting it into public use be a patentee or not? The material question in these kinds of cases is not so much whether the appellee was entitled as whether the party appellant is so. He must make out a perfect claim to recover.

The positions which have been thus stated, I think, will be fully sustained by the statutes on the subject and the constructions given to them to be found in the decisions of the supreme court; in each of them it is made a condition precedent to the obtention of a patent by the applicant that the said invention was "not known or used by others in public," or, in other words, in public use. The language of the statute of 1836 is, "not known or used by others before his or their discovery or invention thereof, and not at the time of his application for a patent in public use or on sale with his consent or allowance as the inventor or discoverer." The fifteenth section declares that if the thing patented "had been in public use or on sale with the consent and allowance of the patentee before his application for a patent," judgment shall be rendered for the defendant with costs. That at the time of the application for a patent in this case by the appellants the invention was not new as to public use and exercise, is clear. Was it then known or exercised by others before, with their consent or allowance? There is no express or direct proof of this fact; but how are the circumstances? The appellee in the interval between the time when the appellants say their invention was perfected in the year 1854 and the time of filing their application for a patent, and without any notice of the claim of the appellants, discovered in substance the same invention, and immediately filed his application for a patent, and a similar application was made by one Cuddy, and an interference declared, and testimony directed to be taken. Many of the witnesses resided in Pittsburgh, where for some length

of time the examinations by the parties were carried on. This proceeding, from its nature, must have been public and notorious—the places of the residence of the appellants were, one at Wheeling, the other at Steubenville, but a short distance from Pittsburgh—after which the trial took place before the commissioner upon the evidence so taken in the usual public way, and resulted in favor of the appellee, and the commissioner awarded to him priority of invention and a patent for his invention. A specification was filed stating his invention, a resort to all which might have been had, it is presumed; and before and at the time of this proceeding a great quantity of this new manufacture was publicly made at appellee's mill in Pittsburgh, and sent to near and distant market-places for sale. These are strong circumstances to raise the presumption that appellants knew or might have known of appellee's use and sale in public of the invention; yet they failed to give public notice or file their application for a patent until September, 1858, thus suffering the public use and sale aforesaid. The appellants kept their invention a secret for years, until an independent inventor, having fortunately discovered substantially the same invention, had used it in public and sold the new manufacture, without any other apparent reason than the determination to keep their invention a secret, thereby forfeiting that protection which by due diligence they might have had. If such is the result of the facts, then the principles laid down by the supreme court in the case of Shaw v. Cooper, 7 Pet. [32 U. S.] 292, although a decision before the act of 1836 [5 Stat. 117], and under a statute somewhat different in its provisions, are applicable, on which I shall content myself to rely for authority. At page 318 in the opinion there is this passage: "The true construction of the patent law is—the court say in Pennock v. Dialogue, 2 Pet. [27 U. S.] 19—'that the first inventor cannot acquire a good title to a patent if he suffers the thing invented to go into public use or to be publicly sold for use before he makes application for a patent.'" At page 319, speaking of the policy of the government, the court say: "Vigilance is necessary to entitle an individual to the privileges secured under the patent law. It is not enough that he should show his right by invention, but he must secure it in the mode required by law. * * * And if the invention, through fraudulent means, shall be made known to the public, he should assert his right immediately, and take the necessary steps to legalize it." Again: "No matter by what means an invention may be communicated to the public before a patent is obtained, any acquiescence in the public use by the inventor will be an abandonment of his right." Page 321: "The acquiescence of an inventor in the public use of his invention can in no case be presumed where he has no knowledge of such use; but this knowledge may be presumed from the circumstances of the case; and if the inventor does not immediately after this notice assert his right, it is such evidence of acquiescence in the public use as forever afterwards to prevent him from asserting it." Again, same page: "If his invention has been carried into public use by fraud, but for a series of months or years he has taken no steps to assert his right, would not this afford such evidence of acquiescence as to defeat his application as effectually as if he failed to state that he was the original inventor?" Again: "A strict construction of the act as it regards the public use of an invention before it is presented is not only required by its letter and spirit, but also by sound policy. A term of fourteen years was deemed sufficient for the enjoyment of an exclusive right of an invention; but if he may delay an application for his patent at pleasure, although his invention be carried into public use, he may extend the period beyond what the law intended to give him. A pretense of fraud would afford no adequate security to the public in this respect, as artifice might be used to cover the transaction. The doctrine of presumed acquiescence, where the public use is known or might have been known to the inventor, is the only safe rule which can be adopted on this subject." The last paragraph is as to the intention, in which the court say: "Whatever may be the intention of the inventor, if he suffers his invention to go into public use through any means whatsoever, without an immediate assertion of right, he is not entitled to a patent. Nor will a patent obtained under such circumstances protect his right." This view of the subject, it is considered, is a full bar to the claim of the appellants, and makes it unnecessary to consider what the case would have been upon the merits. The decision of the commissioner must be affirmed.

[Patent No. 25,235 was granted to B. Lauth, August 23, 1859, and has not, so far as ascertained, been involved in any other cases reported prior to 1880.]

Case No. 12,390.

SAVIN v. The JUNO.

[1 Woods, 300.] [1]

Circuit Court, D. Louisiana. Nov., 1873.

SEAMEN — WAGES — RECEIPT UPON PAYMENT OF LESS THAN AMOUNT DUE—NUDUM PACTUM.

A mariner having repeatedly asked for his wages without receiving them, and being in a strange land and in great need of money, agreed to take one-third the amount due him in full payment, and release the ship and owners, and on payment of one-third the amount due signed

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

a receipt in full; *held*, that the agreement to take less than the whole amount due was nudum pactum and the receipt no bar to a recovery for the balance due.

[Cited in The City of New Orleans, 33 Fed. 684.]

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

In admiralty.

E. N. Whittemore, for libellant.

Jos. P. Horner, for claimant.

WOODS, Circuit Judge. This is a case in admiralty, appealed from the district court. The libellant claims the sum of eighty-eight dollars and twenty-five cents, as the balance due him on his wages as cook and steward of the ship Juno, for services rendered as such from the first of August, 1872, until the 14th of January, 1873. The defence which is set up by way of peremptory exception is, that on the 24th of January, 1873, the libellant in consideration of the sum of $55, released the Juno, her captain and owners from the claim set forth in the libel.

The facts as shown by the proof are, that the ship was indebted to the libellant in the sum of one hundred and thirteen dollars and sixty-eight cents. Instead of paying him the amount, the captain paid him one-third of the amount and took his receipt in full for the $113.68. The libellant understood the purport of the receipt when he signed it, and agreed to take one-third the amount due him in full payment, but he had repeatedly tried to get his pay from the captain without success, and was in a strange place and at the time he signed the receipt, in great need of money.

The question is, does the receipt bar him from the recovery of the money which it is admitted was due him and has not been paid? I am clearly of the opinion that it does not. By the common law an agreement not under seal to take a sum less than was due in satisfaction, was nudum pactum, and could not be enforced. In the admiralty an acquittance and release, under seal even, executed by a seaman on the payment of his wages, does not operate as an estoppel, but is treated as a common receipt. It is prima facie but not conclusive proof of payment. The David Pratt [Case No. 3,597]; Harden v. Gordon [Id. 6,047]; Thomas v. Lane [Id. 13,902].

The question is, what is due the libellant? Only one-third of his wages has been paid him. His agreement to take less is nudum pactum. The taking of a receipt in full from him does not pay the other two-thirds, nor does the receipt constitute a contract binding upon him not to demand the balance due him, and is no bar to a recovery.

Let there be a decree for the libellant for $79.12, the residue of his wages which it is conceded was not paid, with interest from January 24, 1873, the day when it was due, and costs, in the district and circuit courts.

Case No. 12,391.

SAWIN et al. v. GUILD.

[1 Gall. 485;[1] 1 Robb, Pat. Cas. 47.]

Circuit Court, D. Massachusetts. Oct., 1813.

PATENTS — INFRINGEMENT — SALE BY SHERIFF UNDER EXECUTION.

The sale of the materials of a patented machine, by a sheriff, on an execution against the owner, is not such a sale as subjects the sheriff to an action for an infringement of the patent-right, under the patent act of the 17th of April, 1800, c. 25 [2 Stat. 37].

[Cited in Byam v. Bullard, Case No. 2,262; Woodworth v. Curtis, Id. 18,013. Cited in brief in Morse v. Davis, Id. 9,855. Cited in Wortendyke v. White, Id. 18,050; Wilder v. Kent, 15 Fed. 218; Steam Stone-Cutter Co. v. Sheldons, 21 Fed. 876.]

[Cited in Rodgers v. Torrant, 43 Mich. 114, 4 N. W. 508.]

[This was an action by John P. Sawin and another against John Guild.]

Mr. Fairbanks, for plaintiffs.

W. D. Sohier and D. Davis, for defendant.

STORY, Circuit Justice. This is an action on the case for the infringement of a patent-right of the plaintiffs, obtained in February, 1811, for a machine for cutting brad nails. From the statement of facts agreed by the parties, it appears that the defendant is a deputy sheriff of the county of Norfolk, and having an execution in his hands against the plaintiffs for the sum of $567.27 debt and costs, by virtue of his office, seized and sold on said execution, the materials of three of said patented machines, which were at the time complete and fit for operation, and belonged to the plaintiffs. The purchaser, at the sheriff's sale, has not, at any time since, put either of the said machines in operation; and the whole infringement of the patent consists in the seizure and sale by the defendant as aforesaid. The question submitted to the court is, whether the complete materials, of which a patented machine is composed, can, while such machine is in operation by the legal owner, be seized and sold on an execution against him.

The plaintiffs contend, that it cannot be so seized and sold, and they rely on the language of the third section of the act of the 17th of April, 1800, c. 25, which declares that if "any person, without the consent of the patentee, his or her executors, &c., first obtained in writing, shall make, devise, use, or sell the thing, whereof the exclusive right is secured to the said patentee, such person, so offending, shall forfeit," &c.

It is a sound rule of law, that every statute is to have a reasonable construction; and its language is not to be interpreted so as to introduce public mischiefs, or manifest incongruities, unless the conclusion be unavoidable. If the plaintiffs are right in their construction of the section above stated, it is

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

practicable for a party to lock up his whole property, however great, from the grasp of his creditors, by investing it in profitable patented machines. This would undoubtedly be a great public mischief, and against the whole policy of the law, as to the levy of personal property in execution. And upon the same construction, this consequence would follow, that every part of the materials of the machine might, when separated, be seized in execution, and yet the whole could not be, when united; for the exemption from seizure is claimed, only when the whole is combined and in actual operation under the patent.

We should not incline to adopt such a construction, unless we could give no other reasonable meaning to the statute. By the laws of Massachusetts, property like this is not exempted from seizure in execution; and an officer who neglected to seize, would expose himself to an action for damages, unless some statute of the United States should contain a clear exception. No such express exception can be found; and it is inferred to exist only by supposing, that the officer would, by the sale, make himself a wrong-doer, within the clause of the statute above recited. But within the very words of that clause, it would be no offence to seize the machine in execution. Hesse v. Stevenson, 3 Bos. & P. 565 (s. p.) The whole offence must consist in a sale. It would therefore follow, that the officer might lawfully seize; and if so, it would be somewhat strange, if he could not proceed to do those acts, which alone by law could make his seizure effectual.

This court has already had occasion to consider the clause in question, and upon mature deliberation, it has held that the making of a patented machine to be an offence within the purview of it, must be the making with an intent to use for profit, and not for the mere purpose of philosophical experiment, or to ascertain the verity and exactness of the specification. Whittemore v. Cutter [Case No. 17,600]. In other words, that the making must be with an intent to infringe the patent-right, and deprive the owner of the lawful rewards of his discovery.

In the present case, we think that a sale of a patented machine, within the prohibitions of the same clause, must be a sale not of the materials of a machine, either separate or combined, but of a complete machine, with the right, express or implied, of using the same in the manner secured by the patent. It must be a tortious sale, not for the purpose merely of depriving the owner of the materials, but of the use and benefit of his patent. There is no pretence, in the case before us, that the officer had either sold or guaranteed a right to use the machine in the manner pointed out in the patent-right. He sold the materials as such, to be applied by the purchaser as he should by law have a right to apply them. The purchaser must therefore act on his own peril, but in no respect can the officer be responsible for his conduct.

Conformably to the agreement of the parties, a nonsuit must be entered.

Case No. 12,392.

SAWTELLE v. RAILWAY PASS. ASSUR. CO.

[15 Blatchf. 216.] [1]

Circuit Court, N. D. New York. Sept. 9, 1878.

INSURANCE—ACCIDENT—NEGLIGENCE OF ASSURED—DIRECTION BY COURT.

A contract of insurance against death or injury, issued by a railway passenger assurance company, provided that the company should not be liable for an injury incurred in consequence of the negligence of the assured. In a suit on such contract, it appeared that the assured died by falling from the platform of a railroad car, between 11 and 12 o'clock at night, when the train was in full motion, and he was either riding on the platform of the car or was passing from one car to another. No other circumstances being shown: *Held*, that the assured was guilty of negligence and met his death from exposure to unnecessary hazard, and that it was proper to direct a verdict for the defendant.

[Distinguished in Burkhard v. Travelers' Ins. Co., 102 Pa. St. 268.]

[This was an action by Eleanor Sawtelle, administratrix of Henry H. Sawtelle, against the Railway Passenger Assurance Company of Hartford, for the alleged nonperformance of an insurance contract. Heard on motion for a new trial.]

H. L. Comstock and W. S. Cameron, for plaintiff.

Grover Cleveland, for defendant.

WALLACE, District Judge. Upon the evidence it is clear that the assured met his death by falling from the platform of one of the cars of the Erie Railway Company, between eleven and twelve o'clock at night, when the train was in full motion, either while riding upon the platform of the car or while passing from one car to another. The contract of insurance provides, that "no claim for insurance shall be made when death or injury may have happened in consequence of exposure to unnecessary danger, hazard or perilous adventure," and that "standing, riding or being upon the platform of moving railway coaches, or entering or attempting to enter, leaving or attempting to leave, any public conveyance using steam as a motive power, while the same is in motion, are hazards not contemplated by the contract." If the assured met his death while riding upon the platform of the car, concededly, the plaintiff cannot recover. If he met his death while passing from car to car, the defence, probably, could not rest on the clause which excludes from the risk injuries received while "standing, riding or being upon the

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

platform of moving railway coaches," because, these words do not fairly refer to a transitory occupation of the platform. Neither is it clear that the defence could rest on the other clause, which excludes from the risk injuries received "while entering or attempting to enter, leaving or attempting to leave, a public conveyance using steam as a motive power, while the same is in motion," there being fair room for argument that these words refer to the act of getting on or getting off the train, or attempting to do so, and not to that of passing from one part of the conveyance to another. Conceding, however, for the purposes of the case, that the instruction to the jury to find for the defendant could not be justified by either of the clauses of the contract last considered, it was, nevertheless, properly given, because the contract excludes indemnity to the assured for an injury incurred in consequence of his own negligence.

Negligence and "exposure to unnecessary danger" are equivalent terms; and, if the jury had found that the deceased did not lose his life "in consequence of exposure to unnecessary hazard," the verdict could not have been sustained, upon the settled rules of the law of negligence. There were no disputed facts, and no disputable inferences of fact, which presented a question for the jury. The naked question, therefore, is one of law, whether or not the act of passing from car to car while the train is at full speed, and in the night time, is negligence; and this question must be resolved in the affirmative. Doubtless, circumstances of such peril might exist as would justify a passenger in attempting to escape from the car in which he might be located; but no such circumstances were shown here. If the deceased had fallen from the platform and been injured by the breaking of the coupling between the cars, the railroad company could have successfully defended an action to recover damages, upon the ground of his concurring negligence, although it might have been shown that the coupling gave way because of defects in its fastening or material. Negligence is the absence of that care which a reasonable and prudent man would exercise under the circumstances of the case; and, can it be doubted that a prudent man would understand that he was acting at his peril if he attempted, in the night time, and while the train was under full headway, to pass from one car to another? Such are the undulations of a railway car, when the train is in rapid motion, that locomotion within the car is a task of some difficulty. The passenger moves with uncertain step, and seeks assistance by grasping the seats, as the car sways to and fro. But, the passage from car to car is attended with greater difficulty. The din and clamor of the train, the rushing of the wind and dust and smoke, the consciousness that a misstep or miscalculation of distances may be fatal, tend to confuse or excite the faculties and disturb the judgment; and, although it is a common practice thus to pass from car to car, it is rarely accomplished without experiencing a sense of relief when it has been safely done. When darkness adds another condition of uncertainty to the attempt, there can be no justification of the act, in the mind of any prudent man.

In this case, the defendant met his death while exposing himself to the danger of passing from car to car. Nothing is shown to raise the inference that any unwonted circumstance occurred to produce the fatal conclusion of his attempt. It is reasonable to infer, that, like many who have met a similar fate, he lost his balance or made a misstep.

It has been repeatedly held concurring negligence sufficient to defeat a plaintiff, that his injury occurred while attempting to get on or get off a car while in motion; and this irrespective of the fact whether the motion was rapid or slow. The reasons for this rule apply with equal force to an attempt to pass from car to car; and, when, as here, the attempt is made in darkness, and while the train is at full speed, it must be justified by some necessity, or it cannot escape the imputation of negligence.

The direction for a verdict for the defendant was right, upon the ground that the assured was guilty of negligence and met his death in consequence of exposure to unnecessary hazard.

The motion for a new trial is denied.

Case No. 12,393.

In re SAWYER et al.

[2 Hask. 153.] [1]

District Court, D. Maine. June, 1877.

BANKRUPTCY—EXEMPTION—MAIN STATUTE—LIFE INSURANCE POLICY.

1. A policy of life insurance, subject to annual premiums is exempted to the bankrupt under Rev. St. U. S. § 5045, as properly exempt from execution in Rev. St. Me. 1871, c. 49, § 65, subject to the assignee's lien for so much of two year's premiums as exceeds $150 per year, even though the assured borrowed the money to pay these premiums by pledging the policy therefor.

2. The assignment of a policy of life insurance to secure a bona fide loan thereon is valid.

3. The lapsing of a policy for nonpayment of premiums due after the commencement of bankrupt proceedings does not defeat the title of the assignee to the policy.

4. A paid-up policy of life insurance is not exempt to the assured, a bankrupt, under Rev. St. U. S. § 5045, and Rev. St. Me. 1871, c. 49, § 65, but goes to his assignee in bankruptcy.

[In the matter of F. O. Sawyer and John E. Sawyer, bankrupts.] Certificate of facts from Mr. Register Fessenden, touching the re-

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

fusal of an assignee to set apart to the bankrupts policies of life insurance upon their lives.

Thomas H. Haskell, for bankrupts.
Henry W. Swasey, for assignee.

FOX, District Judge. Each of the bankrupts at the date of commencement of proceedings in bankruptcy, February 10, 1877, held policies of insurance on their lives, which they claim to be exempted as assets under the provisions of the bankrupt law and the statutes of Maine. The assignee, not assenting to these views, and having declined to set apart the policies as thus exempt, a hearing was had before a register, who has certified the facts before me for my decision thereon.

The policy on the life of F. O. Sawyer was issued April 5, 1872, by the Etna Life Insurance Company for the sum of $3,600, payable at the expiration of ten years, or at the death of the party, if earlier. The annual premium called for by the terms of the policy was $377.65 to be paid on or before April 6th, in each year.

The premium due April 5, 1877, was not paid, and it is claimed that thereby the policy lapsed; but in that case, the insured is entitled from the cash accumulations and paid-up insurance to a paid-up policy of about $1,800, upon surrender of the other policy within twelve months from April 5th.

The premium for 1875 was $341.81; for 1876, $333.17, which was paid by a loan made by the agent of the company, Dewey, to Sawyer, he assigning the policy as collateral security. The policy lapsed April 5, 1876, but was renewed June 5th of that year.

By Rev. St. § 5045, it is provided that "there shall be exempted to the bankrupt such property as is exempted from levy and sale on execution or other process or order of any court by the laws of the state in which the bankrupt had his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the laws and constitution of each state as existing in the year 1871; * * and in no case shall the property hereby excepted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this title, and the determination of the assignee shall, on exception taken, be subject to the final decision of the said court."

By Rev. St. Me. c. 49, § 65, it was enacted that all life policies and money due thereon are exempt from attachment and all claims of creditors during the life of the insured, when the annual cash premium paid does not exceed $150; but when it exceeds that sum and the premium was paid by the debtor, his creditors have a lien on the policies for such sum, over $150 per year, as the debtor has paid for ten years, subject to any pledge or assignment thereof made in good faith.

The rights of the assignee are subject to the claims of Dewey, as there is nothing to impeach the fairness of that assignment.

The fact, that the premium has not been paid since the commencement of bankruptcy proceedings, can not affect the rights of the assignee, as his rights are dependent on the condition of things February 10th, the date of filing the petition in bankruptcy. Whether he can, by reason of the non-payment of the premium which fell due April 5th, be deprived of all benefit under the policy is not made the subject matter of decision, but it is what were the rights of the bankrupt and assignee on the tenth day of February last.

This policy, as it appears to the court, is within the operation of the act, and was to all intents a life policy, with the burden of annual premiums then attached to it. The fact, that, if the party should continue to live the ten years and pay up all his premiums, he would then be entitled to the amount insured, is not sufficient to change the nature of the instrument so as to withdraw it from the exemption. If he died before the ten years, the amount was thereby payable, thus depending on the life of the party so long as the premiums were to be paid, whether the amount should become payable before the expiration of the ten years or not. For the ten years at least, it was a life policy, the time of payment being wholly contingent on the death of the insured.

The premiums for two years in excess of $150, therefore, belong to the estate, and the bankrupt is entitled to have a release from the assignee of all interest in the policy on payment of this sum. It is claimed that the premium for 1876 was paid by Dewey and not by the bankrupt; but certainly the legal result of that proceeding was merely a loan of the requisite amount to meet the premium, made to the bankrupt by Dewey, and the policy pledged in payment. As between the bankrupt and the company the premiums are paid by the bankrupt, and it is of no consequence from what source he obtained the means of payment, whether from money he had held a long time, or by him then borrowed for that purpose. It was his funds, and the payment was made by him, and the liabilities of his estate are thereby increased to that extent to share any dividend which may be declared.

It is further claimed that the premiums paid within two years are alone exempt. No such restriction is found in the Maine statutes. It is "such sum over $150 as the debtor has paid for two years," not within two years. The court can only construe this as subjecting to the claims of the creditors two years' premiums less $150 per year.

FOX, District Judge. The claim of John E. Sawyer is somewhat different. The policy he held was a paid up policy of $3,170, payable in five years from May 17, 1875, the consideration for it being the surrender of a policy of $5,000. No annual cash premiums were pay-

able on this policy, and as it seems to the court, this policy therefore was not within the language or intent of the statute. Only one class of policies are thus exempted, viz., those which call for a premium annually, whereby the estate of the insured is diminished to the extent of the premium only; and the statute was designed to, and by its language certainly does not exempt a policy which has been procured by a single payment of a large amount, thereby making great inroads upon the estate of the insured. The statute does not reach such a case as the present, of a paid up policy which has never been burdened with annual premiums. The action of the assignee in relation to the policy of John E. Sawyer, in declining to exempt the same, is therefore approved and affirmed.

Case No. 12,394.

In re SAWYER.

[2 Hask. 337.] [1]

District Court, D. Maine. April, 1879.

BANKRUPTCY—TRADER—FAILURE TO KEEP BOOKS—ASSENT OF CREDITOR.

1. The failure to keep a cash account by a bankrupt trader with the assent of his partner, who is the objecting creditor, will not prevent the bankrupt's discharge at the objection of such partner.

2. Such failure to keep a cash account after the dissolution of the copartnership will prevent the bankrupt's discharge at the objection of his creditor, though his former partner.

3. A bankrupt is a tradesman, who, as ancillary to his business as a tinsmith, kept a small stock consisting of small articles of hardware, locks, pins, needles, thread and the like, for sale in his shop and to furnish to peddlers with his tinware, and which he sometimes peddled himself.

In bankruptcy. Petition of [John H. Sawyer] a bankrupt, for discharge, objected to by a creditor for his not having kept proper books of account.

FOX, District Judge. On the return day of the petition for discharge, Denis S. Perkins, a creditor of the bankrupt, having proved his claim, appeared and objected to his discharge for the reason, that since March 2, 1867, the bankrupt had not kept proper books of account, and especially a cash book.

It appears that the bankrupt and objecting creditor were, for the year previous to February, 1875, in partnership in the stove, tin and hardware business at Mechanic Falls in this district, the business being mostly under the control and management of the bankrupt, who kept the books; that Perkins was about the store, at times, selling the merchandise as called for, and was well aware of Sawyer's method of doing business, and that a cash book was never kept by him, and that this was done, without any dispute or objection by this creditor. Under these circumstances, Perkins must be understood as having assented to this omission of duty by his copartner, and it is not for him now to insist on this objection, to deprive him of his discharge. The law is as well settled in bankruptcy as in equity, that one who has become a party to, or assented to an act, cannot afterwards for his own advantage denounce this act as illegal. In re Williams [Case No. 17,706]; In re Brick Co. [Id. 9,259]; In re Schuyler [Id. 12,494]; In re Currier [Id. 3,492].

The firm was dissolved in February, 1875; the bankrupt purchased the interest of Perkins and assumed the partnership liabilities, which he afterwards paid; the stock, amounting to about $2,000, remained in the store, Sawyer disposing of it as best he could, not making any additions thereto. The balance remaining was in April removed by him to Webb's Mills, where he hired a shop of his father-in-law, placing his goods in the front part, and using the rear as a workshop for the manufacture by him of tinware, which was the bankrupt's trade; this stock, at retail prices, was worth about one thousand dollars, and consisted of stoves, tin and ironware, horseshoes, shovels, paints, hoes, cutlery, &c. Sawyer's old sign was over the door; a portion of the time he employed himself in the manufacture of tinware, supplying tin peddlers and also a peddle cart of his own, which he sometimes drove about the country peddling tinware and such other articles as usually form a portion of a peddler's stock in trade; a portion of the time, Sawyer was employed in farming, and when absent his shop was locked up; but for a part of the time, his wife had a key to the shop and waited on customers who desired to purchase. After his removal to Webb's Mills, Sawyer from time to time purchased stoves, castings, sheet-iron, tin and such other goods as were needed in his business; he so conducted up to March, 1878, when his stock being attached, he filed his petition in bankruptcy. During all the time he was at Webb's Mills, he never kept any cash account, nor did his books show his purchases and sales during that period.

It is claimed that, while at Webb's Mills, the bankrupt was not a tradesman within the meaning of the bankrupt act, but only a mechanic, a tinsmith; but in fact, during all this time, he was engaged in both capacities, carrying on his business of a tradesman in stoves, hardware, &c., equally as well as that of a tinman. He, by his sign, held out to the public that he was in trade; he is found all this time with a stock small in value, but probably as large as his business warranted; and this he would replenish as was requisite to meet the demands of the locality. Besides driving a peddle cart himself at times, he supplied two other peddlers, not only with the tinware they required, but with all the other articles, needles, pins, thread, tacks, locks, hardware, and such other articles as these parties carry about for sale, all being

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

taken from his stock in trade. In so small a place, the demand would not be great for any one article, but the variety required would be extensive; and an examination of the schedule of the goods attached on the writ discloses almost every article which would ordinarily be expected to be found in such an establishment. This party, therefore, is found for these three years in possession of a stock for sale in his store, buying and selling as occasion demanded; he thus held himself out to the public as in trade and that this was one branch of his business; it is not requisite that this should have been his sole business, although the principal part of his capital was thus invested. He did not restrict himself to disposing of his stock brought from Mechanic Falls, but, as his stock was reduced, new goods were procured by him, and the court, therefore, though with regret, is compelled to pronounce that he is brought within the act as being a tradesman, and, not having complied with its provisions, must be denied its relief.

Discharge denied.

Case No. 12,395.

In re SAWYER.

[2 Lowell, 475; 14 N. B. R. 241; 3 N. Y. Wkly. Dig. 143.] [1]

District Court, D. Massachusetts. May 11, 1876.

BANKRUPTCY—COMPOSITION—PAYMENT TO OPPOSING CREDITOR—ADVANTAGE HELD OUT.

1. Where a creditor was paid to give up his threatened opposition to a composition,—*Held*, the resolution was void, though a sufficient number of creditors had accepted it, and there was no evidence that their action was influenced by his, nor that the debtor himself procured the payment to be made.

[Cited in Re Bennett, Case No. 1,312; Fairbanks v. Amoskeag Nat. Bank, 38 Fed. 634.]

[Cited in Farwell v. Raddin, 129 Mass. 8.]

2. So, where one who held the bankrupt's note was induced to sign the resolution by an expectation of advantage held out by the indorser, though what precise advantage was to be given did not appear, nor that the bankrupt had any thing to do with it.

A composition offered in this case appeared to be duly accepted, and was recorded; and a few days afterwards a creditor petitioned to have the order for recording vacated, on the ground of fraud newly discovered by him. It appeared that one C. C. Farwell, who signed the confirmation, was asked to sign by an indorser of his note, who was active in procuring signatures, and that Farwell expected to obtain some advantage from this indorser if he should consent to sign, though he could not say what, nor why he expected it. There was no promise, and nothing was proved to be known by the bankrupt [James M. Sawyer] about it. Another creditor, who did not sign the composition, had expressed his intention to oppose it, and was paid something not to oppose; but there was no evidence that the bankrupt knew any thing of this payment, or that the money came or was to come from him.

B. E. Perry, S. W. Creech, Jr., and Mr. Towle, for objecting creditor.

Mr. Boardman and C. Blodgett, for bankrupt.

LOWELL, District Judge. I have expressed my opinion upon the general subject of a secret advantage to one creditor, to induce him to assent to a discharge of a bankrupt, and as to the debtor's knowledge, &c., in the late Case of Whitney [Case No. 17,580], which, I think, has been printed. It is vain to expect that privity in such a fraud shall be usually brought home to the debtor by direct evidence, and it must be, as it always has been, the rule, that he who has the advantage may be presumed to have had a part in obtaining it until the contrary is proved. The statute distinctly avoids a discharge obtained by means of a pecuniary consideration, given to a creditor with the debtor's privity; but the composition law is silent on this point, leaving us to general rules and principles; and it is a well-recognized rule of all courts that any compact between creditors compounding with a debtor is vitiated by any advantage given to one of them. There is no rule more universally acknowledged, and the statute rather limits than enlarges the scope of this doctrine, when it speaks of the debtor's privity.

Under the composition clauses my opinion is, that if a creditor is induced to vote or sign, by any means different from or beyond the composition, whether known to the debtor or not, his vote, so influenced, operates as a fraud on the other creditors, and makes the composition voidable by any of them, from the nature of the case. In England, from whose law we borrowed this particular feature of ours, it has several times been held that if the vote is influenced by good feeling merely, and a desire to benefit the debtor, it will not stand against an objection; and a saying of the learned chief judge in bankruptcy has received the approbation of several courts. "Benevolence, generosity, forbearance, may be well exercised, with this restriction, however, that the practice of these moral virtues is not to be made at the expense of other people." Ex parte Williams, L. R. 10 Eq. 57. See Ex parte Cowen, 2 Ch. App. 563; Hart v. Smith, L. R. 4 Q. B. 61; Ex parte Russell, 10 Ch. App. 255; Ex parte Greaves, 5 Ch. App. 326; Ex parte Deacon, 4 Ch. App. 87. Whether our courts would go so far, I do not undertake to say; but it is clear that a majority arrived at by bribery, though the bankrupt be

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission. 3 N. Y. Wkly. Dig. 143, contains only a partial report.]

no party to it, is no fair majority; and it seems to follow that if a vote is influenced by the expectation of advantage, though without any positive promise, it cannot be considered an honest and unbiased vote.

The man who was undoubtedly bought did not vote or sign any paper, but simply withdrew an intended opposition. In the case of assent to or dissent from a bankrupt's discharge, it has been said by several eminent judges that a creditor has no moral right to oppose, unless for good cause; and so, if the opposition of a creditor is bought off, it must be presumed that there was good ground for opposition. Browne v. Carr, 7 Bing. 516; Hall v. Dyson, 17 Q. B. 785; Dexter v. Snow, 12 Cush. 595. It is not proved that the bankrupt took part in this fraud, and it does not stand on the footing of any other creditor being actually misled, because this creditor signed nothing. Still, as I have said, knowledge must be imputed to the bankrupt in most cases, unless there is clear and undoubted evidence against it.

Order to record composition set aside.

Case No. 12,396.

In re SAWYER.

[2 Lowell, 551;[1] 16 N. B. R. 460; 15 Alb. Law J. 280.]

District Court, D. Massachusetts. March 20, 1877.

BANKRUPTCY—COUNSEL FEES—ASSIGNEE'S FEES.

1. It is the duty of the registers to examine and regulate the charges and expenses of assignees and counsel, whether any creditor objects to the account or not.

2. Assignees have no moral right to spend money, which is not more than sufficient for the privileged creditors, in litigation for the benefit of the general creditors. They are bound to pay the privileged debts as soon as money can be realized for the purpose.

3. The charges of the assignees for counsel fees, and for their own services in this case, considered, and much reduced.

In bankruptcy.

LOWELL, District Judge. The account rendered in this case brings to view one of the weak points of this, as of all other bankrupt laws,—the temptation which assignees are under to exhaust the assets in unwarrantable charges. I wish it to be distinctly understood that it is the duty of the registers to examine and regulate the charges, whether any creditor takes the trouble to object to the account or not; and to see that, when the account is correct, a dividend is paid. I had supposed this was well known, but this account seems to have lain in the register's office for some months without action.

The assignees in this case have received about $6,000, and the charges for legal services are about $2,000, and for the assignees themselves $1,200. These are all disallowed. For their services the assignees may have the commissions established by the rule of the supreme court, and no assignees are ever to have more, without my order, as I have already decided. For counsel fees I allow the sum of $200. I disallow the item of $100 paid to the register's clerk.

The bill will be reformed by the clerk on this basis, and a dividend will be paid forthwith to the privileged creditors of the amount in the hands of the assignees, as found upon a proper accounting.

In this case, the debts, not exceeding $50 each due the workmen, are more than enough to absorb the fund, and I wish to repeat what I said at the hearing, that, where there are debts due workmen which are privileged, the assignee has no moral right to waste their money in litigation for the supposed benefit of the general creditors. If the latter want litigation, they must pay for it. In future I shall allow no counsel fees in such a case until the privileged debts are paid in full.

I do not think it necessary, in most cases, that the workmen should be put to the expense of proving their debts, and the estate, to the very considerable cost of paying their dividends in due and regular form. If the general creditors agree, the assignee may pay them, out of hand, as soon as he receives enough money for that purpose, or may pay a part equally among them. The assignee, no doubt, is entitled to the protection of a proof, if he requires it; but he will not often find it essential to his safety. Account to be reformed.

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

Case No. 12,397.

SAWYER v. AULTMAN & T. MANUF'G CO.

[5 Biss. 165.][1]

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

WITNESS FEES—WHEN TAXABLE—NOT SUBPŒNAED.

1. Witness fees cannot be taxed in the federal courts unless the witness has been regularly subpœnaed.

[Cited in U. S. v. Sanborn, 28 Fed. 303; Burrow v. Kansas City, Ft. S. & M. R. Co., 54 Fed. 282.]

2. It is not sufficient that they attended at the request of the party. The act of congress evidently contemplated some process of the court.

This case was tried by a jury at the May term of the court, and plaintiff came in with an affidavit and asked to have the costs of his witnesses taxed, although his witnesses were not subpœnaed.

BLODGETT, District Judge. There has been a rule in existence in this court since some time about 1842, prohibiting the clerk from taxing the costs of any witnesses except

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

such as were regularly subpœnaed. The witnesses in this case were not subpœnaed, but attended and testified at the request of the plaintiff; and counsel of plaintiff, I presume, acting as is the practice in the state courts, now claim to have their costs taxed as witness fees. On consultation with Judge Drummond, we are not disposed to change the rule which has been standing so long in this court, and so long acquiesced in that counsel should by this time understand it. We are satisfied that more mischief would result from a change of the rule than by strictly adhering to it; and, more than all that, I am somewhat in doubt whether the court has any right to tax costs for witnesses not regularly subpœnaed. By act of congress, provision for compensation for witnesses reads, "for each day's attendance in court, or before any officer pursuant to law, each witness shall," etc. 10 Stat. 167. Now no person can be said to be in attendance before the court pursuant to law unless duly subpœnaed.

Then, again, another paragraph in the same act commences: "When a witness is subpœnaed in more than one cause," etc.; thereby clearly conveying the idea that the only case in which witnesses can draw their compensation is when they are acting in pursuance of a subpœna. This being the act of congress, and the rule being in consonance with the act of congress, we are disposed to adhere strictly to it.

Motion overruled.

SAWYER (BAILEY v.). See Case No. 744.

SAWYER (BARTHOLOMEW v.). See Case No. 1,070.

Case No. 12,398.

SAWYER v. BIXBY et al.

[9 Blatchf. 361; 5 Fish. Pat. Cas. 283; 1 O. G. 165; Merw. Pat. Inv. 326.] [1]

Circuit Court, S. D. New York. Jan. 27, 1872.

PATENTS — PATENTABLE INVENTION — METHOD OF PUTTING UP POWDERS.

1. The reissued letters patent granted to Henry Sawyer, October 1st, 1867, for an "improvement in putting up powders, &c.," which claim, as a new article of manufacture, "a package or case, which, when made with distributing holes, and filled, is cemented by the wax or wafer, as set forth," do not claim any patentable invention.

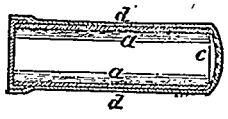
[Cited in Reckendorfer v. Faber, Case No. 11,625.]

2. The invention claimed is a small cylindrical box, perforated at the end with holes, and having the perforations closed by wax, or wafer, or paper pasted on, to retain the contents, while the box is being transported, the wax or wafer being removed, or the paper punctured, when it is desired to permit the contents to pass through the holes. Everything in such invention, both in means and in result, was old.

[Cited in Milligan & Higgins Glue Co. v. Upton, Case No. 9,607; Reckendorfer v. Faber, Id. 11,625.]

[This was a bill in equity by Henry Sawyer against Samuel M. Bixby and Clarence Tucker.]

[Final hearing on pleadings and proofs. Suit brought upon reissued letters patent No. 2,769 for an "improvement in putting up powders, etc.," granted to complainant October 1, 1867. [The original letters patent were granted January 5, 1864 (No. 41,097).] The nature of the invention is sufficiently set forth in the opinion. In the accompanying engraving, a is the box; c, the perforated top; and d, the exterior covering of paper.] [2]



Andrew J. Todd, for plaintiff.

Charles A. Durgin, for defendants.

WOODRUFF, Circuit Judge. The complainant alleges that the defendants have infringed re-issued letters patent granted to him October 1st, 1867, for an "improvement in putting up powders, &c." The claim contained in the specification annexed is in these words: "What I claim as a new article of manufacture is, a package or case, which, when made with distributing holes and filled, is cemented by the wax or wafer, as set forth."

The specification and the specimens of the manufacture produced show, that what the plaintiff claims as an invention, is a small cylindrical box, perforated at the end after the manner of a pepper or sand box, for the purpose of conveniently and evenly distributing the powder contained within it, when put to use, and the closing of these perforations by wax, or wafer, or paper, pasted, or made to adhere by mucilage, or some glutinous substance, for retaining the powder when sold and transported by the manufacturer, dealer or customer, the wax or wafer being removed, or the paper punctured, when it is desired to use the powder. I am decidedly of opinion, that, in this device, there is no patentable invention. Pepper boxes, sand boxes, dredge boxes, and spice boxes, either of which is exactly adapted to the distribution of powder of any kind, are not new and are not claimed to be new. In construction and effect, they are substantially like, and, in mechanical structure, identical with, the plaintiff's cylindrical box, perforated at one end for the distribution of the powder. In respect of distribution, the plaintiff employs no new means and produces no new result. The closing of packages of various forms, and of bottles, by wax, or wafer, or the pasting of paper, made to

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 9 Blatchf. 361, and the statement is from 5 Fish. Pat. Cas. 283. Merw. Pat. Inv. 326, contains only a partial report.]

[2] [From 5 Fish. Pat. Cas. 283.]

attach itself by the use of gum, or other adhesive material, is no more new than the other; and, when those or either of them are applied to the openings in the plaintiff's boxes, they produce no new result. They close the openings, and that is all. They are old means, and they produce their old and obvious, well-known result. In combination, there is no other effect. Each performs the same office, in the same manner, as it does when employed for any other purpose, and precisely as it must, whatever be the form of the package, or the particular use to which the package is applied. The employment of these instrumentalities, in putting up packages for transportation, is, therefore, the exercise of judgment in selecting, not of invention in devising or combining. At most, it consists in applying old devices to a new use, which, when it involves no new means and produces no new effect, is not patentable, notwithstanding it may be useful to combine the two results, by uniting the two instrumentalities.

But this is not all. The proof shows, that, long before the plaintiff's supposed invention, paper boxes and sand boxes, with a perforated end, were not only used for the convenient distribution of their contents, but were put up for transportation and sale, with the perforations covered by thin paper pasted thereon, to be removed or punctured when actually used.

I find no ground upon which to sustain the claim of the plaintiff to any decree herein. The bill of complaint must be dismissed, with costs.

SAWYER (CORNIER v.). See Case No. 3,245.

SAWYER (EARLE v.). See Case No. 4,247.

Case No. 12,399.

SAWYER v. GILL.

[3 Woodb. & M. 97.] [1]

Circuit Court, D. Maine. May Term, 1847.

INJUNCTION—TO STAY EXECUTION AT LAW—WHEN PROPER—SERVICE—UPON ATTORNEY IN ACTION AT LAW.

1. Where a bill in chancery prays an injunction against former proceedings, at law, which have gone to judgment and not execution, a case may be made out to justify a stay of execution. Fraud in getting jurisdiction in this court over the original action, would be such a case.

2. The injunction might be proper, also, against levying the execution on articles improperly attached, when not good against the execution itself.

3. A service of the bill of injunction in such a case, may be good as a substituted service, if made on the attorney of the plaintiff in the action at law.

[Cited in Cortes Co. v. Thannhauser, 9 Fed. 228.]

4. He will be allowed time to communicate with his client. But such a service is not now good in a cross action; though if made, the first action will be continued till the defendant in the cross action voluntarily appears, or authorizes an appearance for him.

This was a bill in equity [by Frederic W. Sawyer against Charles T. Gill], filed November 18th, 1846, with a view to enjoin the defendant against proceeding in another suit to obtain judgment and enforce his attachment of certain goods, seized on mesne process in that action against the firm of Saxton & Huntington. The present plaintiff was assignee of that firm, and in behalf of the creditors, generally, contended that the proceedings in Gill's action were not bona fide, but collusive, in order to retain said goods from being applied under the insolvent system, for the benefit, pro rata, of all the creditors of the firm. Accordingly, he filed this bill, in which it is alleged that the note, on which that suit was brought, was made to run to Saxton & Huntington themselves, or order, and endorsed by them, and prosecuted by the plaintiff, a citizen of New Hampshire, in order to attach those goods and avoid the distribution of them, equally, under the laws of Massachusetts; and that the interest in that note did not belong, honestly, to Gill. The bill asked, also, that the goods might be discharged from the attachment, as well as the injunction issue virtually, against any execution being levied on them; and it desired any other relief proper in the premises. The subpœna, which issued on the bill, was returned non est inventus, and a notice was then served on H. H. Fuller, the counsel for Gill in the action at law, as Gill resided out of the state and had not been found within it. Mr. Fuller appeared in court and filed a written statement, objecting to the validity of the service on him in this case, on the ground, that, though he was counsel in the other suit, neither the same subject matter nor parties existed in the two; nor was he instructed in respect to this case, or bound to take upon himself its defence.

R. F. Fuller and H. H. Fuller, for himself.
F. W. Sawyer, as complainant, for himself.

WOODBURY, Circuit Justice. There is no doubt that the practice in modern times is more extensive than formerly, to make services on attornies of parties in suits, rather than on parties themselves. This is more especially the case in respect to orders and notices. This is convenient to all concerned, because, in conducting the suit, both parties act through their attornies; and after their names are on record, and well known, it is less expensive to transact the business of the suit with them, and saves trouble to the parties, who, if notified in person, would be obliged afterwards to travel and consult with their attornies.

But the principle or hypothesis on which this practice rests, would confine it substantially to the suit where the attorney has appeared, and is presumed to be instructed.

[1] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

Hence, in that suit, notices to produce papers, take depositions, file pleas, proceed to trial, &c., &c., can, as a general rule, be properly and effectively served on the attorney of record of either party. 1 Tidd, Prac. 443. See our 4th rule in chancery; 1 Browne, 15. So, a rule to show cause may be served on an attorney. Hutcheson v. Johnson, 1 Binn. 59; Wardell v. Eden, 2 Johns. Cas. 121; 4 Johns. Cas. 62; Colem. Cas. 137. So, a rule to enforce the payment of costs. 1 Smith, Ch. Prac. 456; 6 Lewis, 429. The length of time given him to consult with his client, if living out of the state, or when the subject of the notice required a personal resort to him, is matter of sound discretion, and will be modified so as to prevent any evil in any instance, or any surprise from this mode of service. But when courts have gone thus far, on the principles before explained, they can proceed no further in respect to other distinct actions, however guarded as to time given to communicate with one's client. As to those actions, he may not be his attorney, or substitute.

If the service relates to a new and independent action, therefore, in which he has not been especially retained, and is not the attorney on record, it becomes a question of power and authority, and not of convenience, how notice to appear and defend in it shall be given; and a court, no more than an individual, possesses a right to treat him as the attorney, in another disconnected suit. He is not the agent of the party in that separate suit—quoad hoc. Hind, Ch. 91; 1 Smith, Ch. Prac. 111; Hoff. Ch. Prac. 110; 5 Sim. 502. And how can the court make a person the agent of another for a matter which the principal has never confided to that person? 2 Cox, 389; 3 Brown Ch. 386; 1 Schoales & L. 238; 2 Mer. 458.

In Louisiana, a curator is often appointed for absentees, by the court, and he is served. See Civil Code of Law.

By the statutes of many states, where the respondent in an action has his residence out of the state, as here, and property is attached, notice is ordered in the public papers; and if not made in any way personally, the cause, after a certain number of continuances, is allowed to be defaulted, and judgment taken open to review, or new trial, for a certain length of time; and such judgments, without actual notice, usually bind only the property attached. See Sumner v. Marcy [Case No. 13,609]. But I am not aware of any service being declared good by any statutes, if made on another person, merely because the latter had been a special attorney for the party in some other cause.

Proceedings might be continued in chancery, where not provided for by statute, and a personal service ordered by actual notice on the respondent. After that, judgment pro confesso could be rendered if not conflicting with any act of congress, and if no actual appearance is made, somewhat in analogy to the provisions in the statutes as to legal proceedings connected with foreigners, or absentees. But is it necessary to be attempted in that way here? Is this bill a distinct, independent proceeding from the action at law, so that the counsel there ought not to defend here, on a substituted service being made on him? After full inquiry, I think it is not independent. It is true, that, nominally, both the parties are not the same; nor is all the subject matter the same. But, in reality, the parties are in interest identical, and the point now in controversy was involved in the action at law.

The whole of this bill is to elicit matter bearing on the satisfaction of the judgment in the other action, and connected with the attachment in it, as well as the execution of the judgment. Courts, and especially those sitting in equity, must look through forms to the substance, or the heart of transactions. There, Gill was the plaintiff, who is the defendant here; and there, Saxton & Huntington were the defendants, whose assignee, Sawyer, their privy in law and interest, is the plaintiff here. For many purposes, the assignee stands in the shoes of the debtor, as fully as an administrator does of one deceased. He does so, as to all rights of property, and can even go further, when necessary, to protect the other creditors against frauds and other illegal preferences of particular favorite creditors. See cases in Leland v. The Medora [Case No. 8,237]; Osborne v. Moss, 7 Johns. 161; 10 Paige, 218; 4 Johns. Ch. 450. How is it, also, as to the subject matter in controversy? There, it was not merely a note of hand and its recovery; but it was to sustain a suit on it in the circuit court of the United States, by a bona fide owner of it being out of the state so as to be able to attach property on the writ, and hold it and satisfy the judgment on it; when one not so living or so owning it could not thus attach and satisfy his judgment, provided the debtor before such satisfaction became insolvent and his property was transferred to an assignee.

It is impossible to shut out of sight that this mode of securing and satisfying the note, and not the mere indebtedness on it, was the real matter in contest. When Gill became insolvent, as was anticipated, his other creditors and his assignee were interested to defeat this object, and to have the goods discharged, as required by the Massachusetts insolvent system, and administered on equally, under her insolvent laws, for the benefit of all. This bill was, therefore, instituted, and judgment and execution in that suit delayed, in order to test this very point—a point vital to the limited jurisdiction of this court—a point indissolubly interwoven in those proceedings as well as these, and the only one really to be contested, either there or here. Merely changing the mode of trying it from some appropriate motion there, to a bill here; and staying the judgment and execution there, till this bill is acted on, cannot

alter the essence—one and indivisible—of the controversy. This bill is in the nature of a prohibition to those proceedings. The counsel there, too, was probably instructed in all which he will need consultation on here. This proceeding, as a mere incident to the other, he would naturally conduct as well as the other, as well as he would conduct a motion connected with the other, on a proceeding for contempt in the other, or a subsequent writ of error issuing on the other. They are connected parts of one whole.

It is in this view, that in a suit as to land, —if in the meantime an injunction is brought to stay waste on that land,—Justice Washington thought the service might properly be on the attorney on record. Conk. Prac. 90; Hitner v. Suckley [Case No. 6,543]. See, also, Anon., 1 P. Wms. 523. But the injunction must relate to the suit, or the subject matter of it, and not to a distinct question. If they are not connected parts of one whole, but are, virtually, cross suits between parties in relation to a controversy between the same parties, one of them, by quitting the country, or residing abroad, is not allowed to evade responsibility. Conk. Prac. 90. But the proper mode of service in such case has been controverted. The writ might be well served on his attorney, in the first action, according to early decisions. Mason v. Gardiner, 4 Brown, Ch. 478. The authority of that case, however, is doubted in Waterton v. Croft, 5 Sim. 507, though the practice was in that form and deemed good till 1775. 5 Sim. 505. So in Bond v. Duke of Newcastle, 3 Brown, Ch. 386, and Anderson v. Lewis, Id. 429, and 1 Schoales & L. 238, and Read v. Consequa [Case No. 11,606]; Sims v. Lyle [Id. 12,892]; Ward v. Seabry [Id. 17,161]. So Eden, Inj. 53.

It seems that since 1755, instead of a substituted service on the attorney in case of a cross cause, it is thought better that the proceedings in the first suit should be stayed till the party residing abroad appears and defends the second action. This reaches the same result in a different way; as in the other form the attorney would not be required to proceed, or the respondent would not be in contempt till the attorney enjoyed a reasonable time to communicate with his client. That could be done here, two or three times a day—at Nashua, the first town in New Hampshire—where Gill resides. So a reasonable time to decide whether to defend the bill or not, would be given, and after appearing —should he do so—time to file answers to the interrogatories and charges made in the bill. But a service of a bill for an injunction on the attorney of a party in the suit at law, is still held to be good; it being not so much a cross suit, as an appurtenant or proceeding connected with the suit. 2 Madd. Ch. Prac. 198; Eden, Inj. 53; [Dunn v. Clarke] 8 Pet. [33 U. S.] 1; Delancy v. Wallis, 3 Brown, Ch. 12; and Anderson v. Lewis, Id. 429, and note 2; French v. Roe, 13 Ves. 593; and Kenworthy v. Accunor, 3 Madd. 550. But there must be, if required, an affidavit of the truth of the equity claimed in the bill. Brown, Ch. 12, 24, and note. This is to prevent bills for mere delay. Eden, Inj. 53. In bills for injunctions it seems well settled to be the duty of the attorney of the plaintiff on the record in the suit at law, to inform him of this notice, and if, after such notice, he does not answer in due time, I see no reason why judgment pro confesso should not be entered against him on the bill. [Dunn v. Clarke] 8 Pet. [33 U. S.] 1.

One argument against considering the contest here the same in substance as in the action at law, deserves a moment's attention. It is that the decree here would not be, in such a case, to suspend or prevent the judgment there forever. That it might not be so is true. But the judgment there was not the sole controverted point. It was rather the true interest in the note, whether being in Gill or not, and whether the right in him to sue in this court and attach goods and hold them so as to be levied on by an execution on that judgment, existed or not. Now the decree here, if against Gill, in the end would probably be to restrain him, not from an execution, but from levying the execution on those particular goods, on the ground that he has been guilty of fraud and has no bona fide right to sue and attach here to the injury of other creditors in Massachusetts. In this last view the question relates more to jurisdiction than the amount of the debt. Whether the whole judgment ought not also to be enjoined against, as obtained here, where rightfully no jurisdiction existed, there having been only a fraudulent assignment or sale to a citizen of another state, is a question open to be settled, when reached, and on which the disclosure in answer to this bill, will, when made, probably fling some light. Though the debt, secured by the note, may be owing and may properly be proved against the insolvent's estate, yet it by no means follows that a judgment on it in this court should be rendered, where its jurisdiction over the note is limited, and it has by fraud, or for sinister purposes, been sued in this court, where the party on the truth of the case had no legal right to sue. An injunction may issue to stay an execution no less than a trial or judgment. 3 Brown, Ch. 24. Fraud is one ground for an injunction to stay proceedings at law (Eden, Inj. 19); and fraud is here alleged, and the injunction, when proper, may go to a part or all of the proceedings, as may be found necessary to defeat the fraud; or it may go only against a levy of the execution on the particular goods improperly attached. The service on the attorney in this case, is, therefore, under the circumstances, considered sufficient.

Case No. 12,400.

SAWYER v. HOAG.

[3 Biss. 293].[1]

Circuit Court, N. D. Illinois. June, 1872.[2]

BANKRUPT INSURANCE COMPANY — RIGHT OF SET-OFF—ASSIGNED CLAIMS.

[One indebted to a bankrupt insurance company, by reason of his subscription to its capital stock, is not entitled to set off against his indebtedness an adjusted liability arising under one of its policies, which claim he purchased from the assured for one-third of its face value, with full knowledge of the company's insolvency, but before the institution of bankruptcy proceedings. Hitchcock v. Rollo, Case No. 6,535, and Drake v. Rollo, Id. 4,066, followed.]

On the first of April, 1865, the complainant, Charles B. Sawyer, subscribed for fifty shares of stock of the Lumbermen's Insurance Company of Chicago. At the time of his subscription he was informed by the directors that he must pay or give his check for the full par value of his stock, and that the company would loan to him eighty-five per cent. of such par value on his note for five years at seven per cent. interest, secured to the satisfaction of the directors by good collateral securities. He thereupon gave to said company his check for $5,000, the full amount of the par value of said stock, and received from the company a check for $4,250, and gave to the company his note for the amount of said check, payable in five years, with interest at seven per cent. per annum, and secured the same by assignment of fifty shares of stock of the Fifth National Bank of Chicago, $100 each, which securities were then, and continued to be, ample security for the payment of said note and interest. On the first day of March, 1870, Sawyer took up said note and gave in substitution thereof his note for $4,250, payable on demand, with interest at ten per cent. per annum, depositing the same security. On the third day of December, 1867, said company issued to Justin Hayes a policy of insurance against loss by fire to the amount of $5,000. The property mentioned in said policy was destroyed in the October fire, 1871, and on the 25th of January, 1872, said loss was adjusted by the company at $5,000, and a certificate of such adjustment, and the amount due and payable thereunder, was executed and delivered by the company to Hayes. On the same day, Hayes sold and assigned said certificate to the complainant for 33 per cent. of its par value. After the October fire, in 1871, and at the time complainant purchased said certificate of Hayes, it was a notorious fact, and well understood by the public and complainant, that said company was hopelessly insolvent. On the 20th of June, 1872, a petition in bankruptcy was duly filed against said company, which, on the 13th of September, 1872, was adjudicated a bankrupt, and the defendant, Hoag, afterwards elected assignee. Thereupon the complainant offered to set off his claim under said certificate against his indebtedness upon his note to the company. The assignee refused to allow it, and was at the time of filing of the bill, proceeding to collect said note, and to realize upon said securities without deduction of the claim of the complainant. The original transaction was regarded and treated by the company and complainant as a loan by the former to the latter, and his stock was at all times treated and regarded as fully paid. Both transactions were entered upon the books of the company as cash transactions. At various times after the giving of the original note, the company reported to the authorities of Illinois, and other states, that its capital stock had been fully paid in. The complainant, in his bill, prayed to have his claim under the certificate of loss set off against his note held by the assignee, and to have the collateral securities in the hands of the assignee returned to him.

Daniel L. Shorey, for complainant.

It is the right of a debtor of an insolvent insurance company to purchase adjusted and negotiable claims at a discount and set them off against his indebtedness, notwithstanding the purchaser knew the company was insolvent at the time he purchased them. Under the 20th section of the bankrupt act of 1867 [14 Stat. 526], in cases of mutual debts or credits between the parties, an account is to be stated, and the balance is to be allowed or paid. Two conditions only are required by the statute: 1st. That the claim to be set off shall be in its nature provable against the estate. 2d. That such claim shall have been purchased by or transferred to the debtor before the filing of the petition. The complainant is within both conditions. The claim is a provable claim, and it was purchased and transferred to the debtor nearly five months before the filing of the petition in bankruptcy. A certificate of loss is assignable under the statute of Illinois. Gross' St. p. 461. The assignee may bring an action in his own name on such an instrument. Stewart v. Smith, 28 Ill. 397.

The assignee, if sued by the person or company issuing such certificate, would have the right to set-off the same in such suit. Gross' St. p. 512. Under the bankrupt act his right of set-off is at least as well defined. He holds a claim, independent of the right of set-off, that is, in its nature, provable against the estate. Under that act, a claim to be set-off may be either a debt or a credit. "A debt which may be proved before the commissioners and to the owner of which a dividend must be paid, is a debt in the sense of the term as used in the statute." Tucker

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

[2] [Affirmed in 17 Wall. (84 U. S.) 610.]

v. Oxley, 5 Cranch [9 U. S.] 34. "A credit is such as in its nature must terminate in a debt." Rose v. Hart, 8 Taunt. 499.

It will not be disputed that on the purchase of the certificate the complainant had a right of action against the company thereon. If the company had sued the complainant on his promissory note, he could have pleaded his claim under such certificate as a defense in set-off. If the complainant had sued the company on his certificate, it could have maintained no other defense than a set-off under the note against him. If each party had recovered a judgment against the other on their respective claims, either would have the right upon a summary application to the court rendering such judgments, to have the one set-off against the other. Barber v. Spencer, 11 Paige, 518.

The relative rights of the parties are in no wise changed by the bankruptcy proceedings, and the assignee in bankruptcy has no greater or other right than the bankrupt would have had if there had been no such proceedings. Mitford v. Mitford, 9 Ves. 100; 2 Smith, Lead. Cas. 370. Under section 14 of the bankrupt act, rights of action of the bankrupt vest in the assignee, who may prosecute the same in the same manner, and with like effect as they might have been prosecuted by the bankrupt. The Massachusetts insolvent law of 1838 contained a similar provision, which is construed in Bemis v. Smith, 10 Metc. [Mass.] 194. If it is claimed that the assignee of the bankrupt has some other and higher right than the bankrupt would have, it is incumbent on those who make the claim to show upon what statute, upon what authority, or upon what legal principle the distinction in favor of the assignee is supported. The earlier bankrupt acts in England contained no provision in relation to set-off. This was regarded as a defect, and it was to remedy this inconvenience that the act of 5 Geo. II. was passed. Ex parte Prescot, 1 Atk. 230.

The several bankrupt acts in England and the United States from the time of Geo. II have fixed a time prior to which any claims acquired by the debtor to the bankrupt might be set-off. In all the English bankruptcy acts there is an element of uncertainty. In the earlier, the right of set-off could not be acquired after notice of an act of bankruptcy, insolvency, or stopping payment. In the latter acts, notice of insolvency and of stopping payment was omitted. In the act of 1867 the limit is fixed at the filing of the petition. The English authorities, from the time of Geo. II to the present, do not contain a single case where a provable claim has been disallowed in set-off if it had been purchased prior to the time fixed by the bankruptcy act in force for acquiring such claims.

For cases where set-off has been allowed, see Dickson v. Evans, 6 Term R. 57; Ogden v. Cowley, 2 Johns. 273; Hankey v. Smith, 3 Term R. 507; 2 Smith, Lead. Cas. 316. In Hawkins v. Whitten, 10 Barn. & C. 217, a case under the act of 6 Geo. IV, c. 16, § 50, which gives the right of set-off in all cases where it existed before any act of bankruptcy had been committed, or where there was no notice of such act, the defendants, two days after they had knowledge that the bankrupts had stopped payment and shut up their banking house, industriously procured notes of the bankrupts for the purpose of set-off. The court held that notice of insolvency, or notice of stoppage of payment, is no longer an ingredient upon the point of set-off. Notice of an act of bankruptcy is alone the criterion or dividing point, and although these notes were purchased for the very purpose of making them the subject of a set-off, still this has not been prohibited, and cannot be said to be illegal. The English authorities reaching back under the several bankruptcy acts nearly one hundred and fifty years, probably do not contain one case in conflict with the decision in the case last cited. The latest cases in the high court of chancery maintain this doctrine to its fullest extent. In re Universal Banking Corp. (Ex parte Strang) 5 Ch. App. 492. See, also, In re City Bank of Savings [Case No. 2,742], Dist. Ct. Cal. There is nothing in the act of 1867 narrowing the right of set-off as it previously existed. It has fixed the limit of time for purchasing claims in set-off at the filing of the petition in bankruptcy, and thus avoided the uncertainty of the English statutes upon which this act was modeled.

In New York the rule is well settled that claims may be purchased by a debtor to the bankrupt for the purpose of set-off, at any time prior to notice of proceedings in bankruptcy. Ogden v. Cowley, 2 Johns. 274; Smith v. Brinkerhoff, 6 N. Y. 305. There are a few cases holding that under the banking law a set-off cannot be procured after the bank has stopped payment. Diven v. Phelps, 34 Barb. 224. Also cases holding that members of insolvent mutual insurance companies cannot set-off losses due to them against claims of the company, on the ground that such members hold the double relation of debtor and creditor, and have voluntarily entered into engagements that modify the general rule of set-off. It is not worth while to consider whether these cases are well decided, for they expressly limit the effect of the decision to cases of mutual companies, and at the same time incidentally affirm the general rule relied on in this argument. Lawrence v. Nelson, 21 N. Y. 158.

Under the insolvency law of Massachusetts of 1838 [Laws 1838, p. 452], the right of set-off accrues at the time of the first publication. Demmon v. Boylston Bank, 5 Cush. 194; Aldrich v. Campbell, 4 Gray, 284. The ruling in this last case was not modified by the case of Smith v. Hill, 8 Gray, 572, as contended by counsel for defendant. On the contrary, the court decided the case in Smith v. Hill wholly upon the facts peculiar to the

latter case, and the decision left the case of Aldrich v. Campbell undisturbed. There is no possible parallel between the facts in Smith v. Hill and the facts of the case now before this court. There is nothing to distinguish this case from the cases of Aldrich v. Campbell and Hawkins v. Whitten, before cited. In all three of the cases alike, the claim was purchased against a party in failing circumstances, for a good but less than a full consideration, for the purpose of a set-off. In Smith v. Hill, on the part of the debtor, there were promises not fulfilled, there was a trust sought to be violated, and acts designed to mislead. In this case there is not an intimation that any of such facts exist.

The fact that the complainant, at the time of the purchase of his claim in set-off, was a stockholder of the company, imposes upon him no peculiar disability in relation to the purchase of such claims. The relative rights of the company and of himself are the same as the rights between the company and a stranger. The corporation is a legal entity, having a separate existence as a person distinct in law from all its members. It is so created for the express purpose of having a distinct and independent existence and capacity in legal contemplation, so that it may contract or be contracted with, sue or be sued by any of its members. Massachusetts Iron Co. v. Hooper, 7 Cush. 187; Smith v. Hurd, 12 Metc. [Mass.] 384; Hill v. Manchester & S. Waterworks Co., 5 Barn. & Adol. 875; Ang. & A. Corp. 413; Pondville Co. v. Clark, 25 Conn. 97.

The conceded facts show that the original transaction was regarded and treated by the company and the complainant as a loan from the company to him, and his stock was at all times treated and regarded as fully paid. It was not permissible for the company to treat this transaction otherwise than as a loan. The complainant could not treat it otherwise. The assignee cannot now treat it otherwise, for he has no greater rights as against the complainant than the company had. But admitting, for the purposes of the argument, that complainant's indebtedness is for his original stock, there is nothing in principle to distinguish such indebtedness from any other, and it does not follow as a conclusion of law that he could not offset it by the claim in controversy. The rule of set-off, as established in the bankrupt act, makes no distinction as to the nature of the debts against which a set-off may be allowed.

This precise question has been fully considered by the English high court in chancery in Re Universal Banking Corp. (Ex parte Strang) 5 Ch. App. 492; in Re Duckworth, 2 Ch. App. 578. See, also, Pondville Co. v. Clark, 25 Conn. 97.

[NOTE. This case was heard and taken under advisement at the same time with Hitchcock v. Rollo, Case No. 6,535, and Drake v. Rollo, Id. 4,066, and the bill was dismissed on the grounds stated in the opinions in those cases.

[On appeal to the supreme court, the decree of this court was affirmed. 17 Wall. (84 U. S.) 610.]

SAWYER (JORDAN v.). See Case No. 7,521.

Case No. 12,401.

SAWYER v. MORTE et al.

[3 Cranch, C. C. 331.] [1]

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

EXECUTION—LANDS—EQUITABLE INTEREST.

1. A mere equitable interest in lands is not liable to attachment and condemnation, by way of execution, under the Maryland law of 1715, c. 40.

2. Under the statute of 5 Geo. II. respecting lands in the plantations, the legal estate only was liable to execution at law.

3. The cases of Campbell v. Morris, 3 Har. & McH. 535, Pratt v. Law, 9 Cranch [13 U. S.] 456, and Ford v. Philpot, 5 Har. & J. 316, considered.

At law.

This case was submitted by Mr. Morfit, the plaintiff's counsel.

CRANCH, Chief Judge, delivered the opinion of the court (THRUSTON, Circuit Judge, doubting).

This is an attachment, by way of execution, under the statute of Maryland, 1715 (chapter 40), upon a judgment obtained by the plaintiff against Mortè, and was laid upon real estate, the legal title to which is in the garnishee, W. Brent, and never was in Mortè. The garnishee answers to interrogatories, that he holds the land to indemnify himself against certain responsibilities which he had assumed for Mortè, and that the value of the property is probably more than sufficient for his indemnification. The motion now is for judgment of condemnation.

In support of this motion, Mr. Morfit, for the plaintiff, has cited the cases of Campbell v. Morris, 3 Har. & McH. 535; Ford v. Philpot, 5 Har. & J. 316; and Pratt v. Law, 9 Cranch [13 U. S.] 496.

In the case of Campbell v. Morris, 3 Har. & McH. 535, the opinion of the general court of Maryland was, decidedly, that an equity of redemption was not liable to this process of attachment. That case was reversed by the court of appeals; but as that court did not give the reasons of their opinion, and as it was strongly argued by the appellant's counsel that Mr. Morris had a legal estate, because it was covenanted in the mortgage that Mr. Morris should retain the possession and enjoy the profits until forfeiture of the mortgage, it may reasonably be presumed that the court of appeals decided the cause upon that ground, and not upon the doctrine that a mere equity was liable to attachment.

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

This presumption was corroborated by the facts stated by Mr. P. B. Key, in arguing the case of Pratt v. Law, 9 Cranch [13 U. S.] 479, 486; and the letter of the chief judge of the court of appeals, explaining the grounds of that judgment, in which it appears that it was the legal, not the equitable estate, which they considered liable to condemnation, and in which he says:—"But upon this," (meaning the question whether an attachment would lie for the mortgagor's interest,) "the judges gave no opinion." By the construction which the courts of Maryland had uniformly given to the British statute of 5 Geo. II. c. 7, making lands in the plantations and colonies liable for debts, nothing but the legal estate is liable to execution at law. The rule is the same in England. Plunket v. Penson, 2 Atk. 292; Shirley v. Watts, 3 Atk. 200; Burden v. Kennedy, 3 Atk. 739. And the act of assembly of Maryland, 1794 (chapter 60, § 10), is founded upon that known and acknowledged rule of law. That statute recites, that "Whereas it often occurs that persons against whom judgments or decrees are obtained hold or possess, or claim lands, tenements, and hereditaments, by equitable title only, and the creditor or creditors of such persons are often without remedy, either at law or in equity," and then proceeds to give the chancellor power to decree the sale of the equitable title, and to give the purchaser all the remedies which the person had whose equitable title is thus sold. That this rule of law was well established is manifested by the statute of Maryland, 1810, c. 60, (passed since the separation of this district from that state, and consequently never in force here,) which, for the first time, subjected equitable estates to legal process.

In the case of Ford v. Philpot, 5 Har. & J. 316, the court of appeals, in the year 1821, decided that the equity of redemption of a mortgagor was liable to attachment and condemnation, and passed by a sale under the fieri facias, in the year 1789. The court, in giving its opinion, leaned upon the cases of Campbell v. Morris, and Pratt v. Law [supra], neither of which cases seems to us to support the decision.

We have already seen that, in the former of those cases, the court went upon the assumption that Mr. Morris had an estate at law; and, in the latter case, the supreme court of the United States say: "We are not now at liberty to enter into the consideration of that question." It is evident that they considered the court of appeals in Maryland as having conclusively settled the question, so far as it affected that case, although it may not have settled it as to other cases. They considered the Maryland court as having decided that Mr. Morris had such an interest as was liable to attachment; and that, although that court might have erred as to the nature of the estate which Mr. Morris held, yet, as the judgment of that court remained in full force, and could not be reversed, it was conclusive in that cause. The supreme court of the United States did not undertake to decide whether the court of appeals erred as to the nature of the interest of Mr. Morris, or in the principle of law which that court thought applicable to the case. But the case of Ford v. Philpot [supra] was a case of mortgage, in which, for all purposes, except as security for the debt to the mortgagee, and subject to that incumbrance, the mortgagor is in law considered as the owner of the property; and if the mortgage-money be paid, the estate becomes again absolute and perfect in the mortgagor, without any reconveyance from the mortgagee.

The equity of redemption is so far considered a legal estate as to be, in a manner, bound by a judgment against the mortgagor, so that a judgment creditor is entitled to redeem. But, in the present case, Mr. Mortè, the debtor, never had the legal estate; and this difference was thought, by this court, at this term, in the case of Law v. Law [Case No. 8,128] sufficient to authorize the court to decide that the proceeds of the sales of an equitable interest of a vendee were equitable, and not legal assets, and were not bound by a judgment against the vendee. Whatever, therefore, might be the weight which this court might allow to the authority of the case of Ford v. Philpot [supra], decided since the separation of this district from the state of Maryland, we do not think it decisive of the present.

There is another objection to condemnation in this case. The responsibilities of Mr. Brent, the garnishee, are not so definite that we can exactly know what they are; nor does it appear certainly whether he is not still liable for Mr. Mortè upon the government contract; and we have, perhaps, no jurisdiction to ascertain the fact. The plaintiff's remedy being, therefore, to say the least, doubtful at law, and very clear in equity, where all persons interested may be made parties, and where the rights of all may be protected and enforced, we think it safest to follow what we consider as the old rule of law in Maryland, that a mere equitable interest in lands is not liable to attachment and condemnation, under the attachment laws of that state, as they existed when they were adopted as the laws of this part of the district. The motion for condemnation, therefore, is overruled, and the attachment quashed.

Case No. 12,402.

SAWYER et al. v. OAKMAN et al.

[7 Blatchf. 290; 5 Am. Law Rev. 381.] [1]

Circuit Court, S. D. New York. June 11, 1870.[2]

WHARVES—INEQUALITIES IN BOTTOM — INJURY TO VESSEL—SUNDAY WORK—FEES PAID FOR SURVEY—DEPRECIATION IN VALUE.

1. Circumstances stated under which the owner of a wharf is bound to notify the master of a vessel which is about to haul in to such wharf, as to the condition of the bottom alongside of the wharf, where the vessel, when hauled in, will touch the bottom by the fall of the tide.

[Cited in Nelson v. Phoenix Chemical Works, Case No. 10,113; The Niantic, 6 Fed. 635; Pennsylvania R. Co. v. Atha, 22 Fed. 924.]

2. The owner of a wharf, making use of it for gain, in the course of his business, is liable for the damages caused by inequalities in the bottom alongside of the wharf, to a vessel lawfully using the berth in the course of business and exercising due care.

[Cited in Pennsylvania R. Co. v. Atha, 22 Fed. 924.]

3. Although the act of hauling a vessel into a berth at a wharf on Sunday is an illegal act under a state statute, yet if damage be suffered by the vessel on that day, at such berth, through the wrongful act or omission of another, the owner of the vessel may recover against him for such damage, in admiralty, in a court of the United States.

[Cited in Ball v. Trenholm, 45 Fed. 588.]

4. Cases stated in which fees paid for surveys of injured vessels are allowed as part of a recovery.

[Cited in New Haven Steam-Boat Co. v. Mayor, etc., 36 Fed. 716; The Alaska, 44 Fed. 500.]

5. The rule stated, in respect to allowing a libellant for depreciation in the value of a vessel injured and repaired.

6. The expense of a protest disallowed, in this case.

[This was an appeal by Samuel Oakman and others from a decree of the district court for the district of Massachusetts (Case No. 12,404), in a libel by Charles Sawyer and others against Samuel Oakman and others, to recover damages sustained by libellants' boat. The cause was removed into this court from the circuit court for the district aforesaid, pursuant to Act Feb. 28, 1839, § 8 (5 Stat. 322).]

John Lathrop, for libellants.

H. D. Hadlock, for respondents.

WOODRUFF, Circuit Judge. A decree in favor of the libellants having been made in the district court of the United States for the district of Massachusetts, the respondents appealed to the circuit court, claiming that, upon the whole case, they are not liable for the damages awarded to the libellants, and that, if liable at all, the commissioner by whom the amount of such damage was ascertained and reported, erred in allowing certain items which he included therein. The libellants, having, in the district court, taken certain exceptions to the report of the commissioner, by reason of the disallowance of certain items claimed as damages, which exceptions were overruled in the district court, also appealed to the circuit court. It appearing that the Honorable Nathan Clifford, the associate justice of the supreme court of the United States assigned to the first circuit, is so related to one of the parties as to render it, in his opinion, improper for him to sit on the trial of the case on appeal, it was in May, 1868, ordered, that this fact be entered of record, and that a copy of such order, with the proceedings in the said suit, be certified to this court, at a term thereof therein mentioned, to be held at the city of New York, and the same were so certified in pursuance of the act of congress in that behalf. Act Feb. 28, 1839, § 8 (5 Stat. 322). The suit was accordingly brought to trial in this court.

The schooner Bowdoin, of Portland, in the state of Maine, whereof the libellants are owners, on a voyage from Philadelphia to Boston, and having on board a cargo of coal consigned to Messrs. Crane & Fassett, but deliverable at the wharf of the respondents, arrived on or about Monday, the 22d of October, 1866. On reporting her arrival, her master was required by the respondents to await the discharge of two other vessels, and she was accordingly laid at the outer end of the wharf, and there remained until Saturday, the 27th. The dock was of such depth of water that vessels could enter only at high tide; and when, on the afternoon of Saturday, the second of the two vessels thus preferred was hauled out, the Bowdoin made an effort to enter, but, the tide having begun to ebb, the current was such that she did not succeed, and she was requested by the foreman of the wharf, or person superintending the discharge of vessels, to be in the berth thus vacated in such season that the discharge might be commenced early on Monday morning. Shortly before high water in the afternoon of Sunday, she was hauled into the dock by her master and crew.

The wharf of the respondents was about three hundred feet in length, and was wider at the head, or next the shore, than at the outer end. The change in the width on the easterly side thereof was at a distance of one hundred and twenty-five feet from the head, and, at that point, the falling off in width was by a rectangular "jog" about five feet in depth, to which jog the wharf was built of stone, and thence outward it was extended, of the narrower width, by and upon piles. At the head of the dock, and for a considerable distance outward, the bottom was bare at low water, so that vessels lying at or near the inner portion of the wharf took ground as the water receded. At the outer portion of the dock, the water was of sufficient depth to float vessels alongside of the wharf, even at

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 5 Am. Law Rep. 381, contains only a partial report.]

[2] [Affirming Case No. 12,404. Decree of circuit court affirmed by supreme court; unreported.]

low water. The Bowdoin was directed to take the inner berth, and did so; but it is claimed by the respondents that she was not hauled in so near to the head of the dock as, under the directions given, she ought to have been. Of course, at low water she grounded and, after she took ground on Sunday night her master retired to his berth, from which he was called on Monday morning with notice that his vessel was in danger. It then appeared, that, through some cause, the vessel had, in the night, become badly strained, that her timbers were broken at or near the main hatch, forward of the mainmast, and at the foot of the mainmast itself, that the floor and ceiling of the cabin were rounded up, that the deck was drawn away from the main hatch, that there were other injuries showing strain and breakage at about that point, and that the stern of the vessel was off and settled, so that, in the language of the witnesses, she was "hogged" and also twisted, so that her masts were not in range. For this injury to the vessel the present suit was brought against the owners of the wharf, who, it appears, are also owners of the wharf upon the other side of the dock.

The libellants aver and claim that the injury was caused by the presence of a considerable body of coal which had fallen into the dock from the wharf at a point directly opposite the place of the principal injury to the vessel, forming an elevation upon which, at that point, the vessel rested when the water receded; that, as she was not supported aft that place, the weight of her cargo caused her to strain and settle away; and that the pile of coal being highest on the side nearest the wharf, she was thrown partially over, especially towards her stern, and twisted.

On the part of the respondents it is alleged and claimed, in their answer, that the dock is constructed with a view to the two berths, so that the upper one is upon a shelf extending from the head of the dock to the jog in the wharf, upon which vessels there discharging will lie safely aground; that, from the jog outward, there is an abrupt descent or slope of the bottom to the deep water of the lower berth, wherein vessels are intended to float at all times; and that the cause of injury was the neglect of those in charge of the Bowdoin to haul her to the place where they were directed to place her, so that, instead thereof, they left her partly in one berth and partly in the other. They have given proof showing that, when hauled in on Sunday, her stern extended outwardly about twenty feet beyond the jog in the wharf.

On the trial, the respondents attempted to show, and, on the argument, their counsel insisted, departing somewhat from the specific statement of the cause of injury set up in the answer, and apparently for the purpose of explaining why the immediate place of the strain, injury and bulging upward was so far forward, that the hogging of the vessel was caused by the manner in which she was laid alongside of the wharf, namely, that she was not laid parallel with the wharf, so as to bring her keel over the keel track, but that her stern was at such distance from the wharf that her keel lay obliquely across the keel track, and so, when she settled, rested on the bank on its easterly side, (formed by the frequent pressure of vessels into the mud, by which pressure a keel track or bed for vessels was formed,) and that this was the elevation near the centre of the vessel which prevented her from settling evenly to and into the bottom of the dock. They deny that the coal in the dock was of such quantity, or in such place, as could have caused the injury. They also insist, that if the Bowdoin had been hauled in and laid parallel with the wharf and farther inward, so that her bow would have been near the head of the dock, no injury would have been sustained. They further insist, in their answer, and on the trial, that the hauling in of the Bowdoin was a violation of the statute law of Massachusetts, providing, that "whoever keeps open his shop, warehouse, or workhouse, or does any manner of labor, business or work (except works of necessity or charity) on the Lord's day, shall be punished by a fine not exceeding ten dollars for every offence;" and that, for this reason, the libellants are not entitled to a decree.

The testimony on both sides is very voluminous and greatly conflicting. I cannot, within any reasonable time, or within any proper limits to an opinion, discuss the details of the evidence, or review the various arguments of the counsel by whom the case was discussed with great ability and minuteness. I have not attempted, in the statement above given, to notice many of the details of claim and defence, but only to state enough to make my conclusions intelligible.

Whether the bottom of the dock is in fact so graded that there was any such abrupt descent of the bottom, at the jog in the wharf, or for a distance below, as made it in any degree unsafe to lay the vessel where she was placed on Sunday—whether it is proper to so grade the bottom of a dock as to form such shelf or terrace—whether, if that be the form of the bottom, it is not the duty of the wharf-owner to inform the master of a vessel coming from a port in another state, of that fact, that he may act with knowledge thereof in placing his vessel—whether the master or mate, in this case, received directions which apprised him that he ought to bring his vessel nearer the head of the dock—whether the position of the vessel in that respect was the real cause of the injury, or, whether, on the other hand, it was caused by the presence of the pile of coal alleged by the libellants to have sustained the vessel at the point of injury—whether she was laid parallel with the dock when brought in, or, on the other hand, was swung off at her stern by reason of the form of the bottom, made uneven by the presence of a sloping pile of coal—whether, when

she was hauled in, proper fenders were used to throw her off from the wharf, and bring her keel over the keel bed—upon these and other questions of fact and of law, and upon the credibility of witnesses, the claims of the parties and the testimony are in irreconcilable conflict.

It appears, by the testimony taken in the court below, that, upon the taking thereof, very numerous objections were made by the parties respectively to the competency of witnesses, to the form of interrogatories, and to the admissibility of testimony. On the trial and argument, however, these objections were not renewed on behalf of the respondents, nor was my attention called thereto. I must, therefore, regard them as waived.

My conclusions, after a careful and laborious, but, I trust, thorough and patient examination of all the testimony, and a comparison thereof in all its parts, are in substantial accordance with those stated in the opinion of Judge Lowell, of the district court, before whom the case was first tried; and I do not find in the testimony of the witnesses who were for the first time examined in this court, any sufficient reason for rejecting the conclusions reached by that court, while, on the other hand, the testimony given on this trial by some of the witnesses examined below for the respondents, is weakened by the evidence of discrepancy between their testimony in that court and this. Nevertheless, it is not upon such discrepancy, that, in any considerable degree, my conclusions of fact are founded.

(1.) In the first place, the proof shows to my satisfaction, and I accordingly find, that the Bowdoin was hauled into the dock, and laid alongside of the wharf, with all due and proper care and in a proper manner, parallel therewith, when taken in on Sunday, and that the swinging off of her stern to the position in which she was found on Monday morning was due to the cause which produced her injury. The testimony of those who took her in is unqualified and mainly uncontradicted on this point. The testimony on behalf of the respondents, as to her situation on Monday morning, is greatly conflicting, and, conceding that her stern was then as far from the dock as may reasonably be inferred from such testimony, that fact is entirely consistent with the testimony on behalf of the libellants, that it was caused by the same circumstances which brought the strain upon the vessel and caused her to lean over towards her side and from the wharf.

(2.) This conclusion is inconsistent with the theory of the respondents, that the injury was caused by the placing of the vessel obliquely over the bank outside of the bed in which she ought to have lain in her berth. And, in my judgment, that theory cannot be sustained for another reason. On Monday morning, the bow of the vessel was very near or against the wharf; and the bank outside of the keel track and bed for vessels was at such distance from the wharf that, to have placed her obliquely over that bank, so that the bank would have been beneath the place where her bottom was lifted, would have thrown her stern nearly thirty-five feet from the wharf—a condition of the vessel not only wholly inconsistent with the testimony of those who hauled her in, but grossly incredible in itself, and in fact not claimed by the respondents on the argument. To the suggestion, that the elevation producing the strain was not necessarily immediately under the place of fracture, it may be answered, that, if the suggestion be conceded, still, to have placed the keel of the vessel upon the bank even at the stern would have placed the stern more than one-half of the vessel's width from the wharf; and, again, if the keel rested on the bank near the stern of the vessel, which it must have done if at all, the tendency would have been not to "hog" the vessel, but to produce a curve in the opposite direction, the centre of the vessel settling instead of rising. Without placing great stress upon these geometrical estimates, I add, that they, in connection with the proofs already referred to, suggest very forcibly to my mind, that this theory of the injury, by resting the vessel obliquely on the bank, is an after-thought, in some degree, at least, originating in the difficulty of accounting for the injury at the place of the strain and fracture, except on the theory of the libellants. No such explanation of the cause of the injury is intimated in the respondents' answer. In the answer, the respondents have distinctly specified the negligence of the vessel upon which they rely, and which, as they aver, caused the misfortune. I am constrained by these considerations to conclude that, on this point, the defence wholly fails.

(3.) Whether the injury was caused by the elevation in the bed of the vessel by the presence of a quantity of coal, greater or less; or, whether it was caused by the position of the vessel, her stern overhanging a shelf in the bed of the dock some twenty or twenty-five feet—is, unquestionably, left in much doubt by the conflict of testimony. It is, however, a noticeable fact, that even the respondents' witnesses are some of them driven to reject the last-named explanation, and resort to the oblique position of the vessel on the bank for a satisfactory explanation.

If I deemed it essential to a correct decision of the case, to state a conclusion upon this point, I should say, that, after a close scrutiny of the evidence, I deem the allegation of the libellants in this respect best sustained. The deliberate judgment of the witnesses called there on Monday for the special purpose of examination into the cause of the accident, and their repeated subsequent examinations, are entitled to great weight. At that time, the respondents, manifestly resting on their theory of the effect of overhanging the shelf, appear to have taken no interest in the examination. The influx of a body of coal into the dock at

the point in question was a circumstance which called for some diligence on their part, either to remove it, or, by thorough examination, see that it could not produce injury. The character of the injury and the place in the vessel where the rounding up and the breaking and crushing of timbers and planks took place, strongly indicate the presence of some elevation in the bed of the vessel at or very near that point. It is not necessary to assume that such elevation was in the very keel track. On the contrary, it is conceded that the vessel, in her proper place, would lie very near the wharf. The coal at the side of the wharf furnished a standing place some two feet out of the water when witnesses were there after the removal of the vessel; and the effect of resting the inner side of the vessel thereon would be to raise it, even though no great quantity of coal was in the keel-track itself, anl also have the effect of throwing the vessel over and away from the wharf.

In reaching such a conclusion, I could not, I am aware, succeed in harmonizing the testimony, or refuse the concession that there is very much testimony on behalf of the respondents in hostility thereto, and, probably, none so influential as the fact, that the other vessel, the Daybreak, had just before discharged in that berth in safety, and the testimony that, although the coal has not been removed, other vessels have lain in the same berth and without being injured. Whether that is because they were shorter in length, or because they were hauled nearer to the head of the dock, or whether the often-repeated pressure upon the coal has reduced the elevation, is not very clear; but, that the Bowdoin, in the position in which she actually lay, was injured thereby, seems to me to be the best explanation of the accident.

But, without resting upon that conclusion, I concur with the court below, that the respondents are not exonerated even by the theory that the injury resulted from the circumstance that the stern of the vessel overhung the shelf at the bottom of the dock. If it be deemed established that there was a more rapid descent of the bottom at or near the jog in the wharf, neither the jog nor any information given the master or the mate apprised them of the fact. There is some reason to doubt whether such a mode of grading the bottom of a dock in which vessels are to take ground, is proper; but, if it be justified, there is no doubt that it is the duty of the wharf-owners to give proper notice to vessels coming there from other ports. The advice or the direction given to the master of the Bowdoin was not such as either to inform him of the condition of the bottom, or to suggest to any one who was ignorant thereof, that a difference of a few feet in the location of his vessel was of the slightest moment. The direction given to him, in regard to placing his vessel, had obvious reference to the convenience of the respondents in discharging the coal. It would suggest nothing else. It was given in connection with the movable stage used in discharging; and, having the matter of discharging the coal in his mind, what he did was in substantial compliance with the direction. His vessel was one hundred and fifty feet in length, from the taffrail to the end of her jib-boom; and he hauled in until the end of the jib-boom reached the head of the dock. True, the elevation of the jib-boom was such that it would lie over the wall of the dock when the vessel rested on the bottom; but, having reached a point at which his main hatch was opposite the lower end of the movable stage and at which discharging was convenient, it was not due to any information he had received, that he should haul in farther, projecting his jib-boom over the bulkhead. Still less was it his duty to take up his martingale. He was only bound to ordinary care; and it is abundantly proved, that laying a vessel along a wharf having a similar jog, is neither unusual nor suggestive of carelessness in the master.

I agree fully with the opinion below, that, whether the injury to the vessel was caused by the pressure of the pile of coal or to the shelf in the grading of the dock, it was not the fault of the master. He was using the dock lawfully, in the due course of business; and the respondents, when they directed him to haul in, should have at least taken care that he was informed of these inequalities in the surface of the bottom, if that was material to his safety.

That the respondents are liable for defects in the condition of their dock is not questioned. The cases cited in the opinion below are conclusive on the subject. Philadelphia, W. & B. R. Co. v. Philadelphia, etc., Steamboat Co., 23 How. [64 U. S.] 209; Parnaby v. Lancaster Canal Co., 11 Adol. & E. 223. The opinion of Mr. Justice Gray, in Carleton v. Franconia Iron & Steel Co., 99 Mass. 216, is a very full and conclusive opinion establishing the doctrine, and sustained by most abundant authorities.

(4.) I deem it unnecessary to enlarge upon the question, whether the supposed violation of the laws of Massachusetts, in hauling into the dock on Sunday, is a bar to a recovery for the injury sustained afterwards, when the vessel had grounded. The view taken by Judge Lowell of the decision in 23 How. [64 U. S.], above referred to, is entirely satisfactory to my mind. See, also, the opinion of Judge Shipman, in the case of The Metropolis [Case No. 9,501], in this district; 1 Pars. Shipp. 597, note; and Powhatan Steamboat Co. v. Appomattox R. Co., 24 How. [65 U. S.] 247. In the last case it was held, that placing goods in a warehouse on Sunday did not bar an action to recover therefor, although destroyed by fire on that same day.

(5.) As to the damages allowed to the libellants. The only items excepted to, not disallowed by the court below, are the fees of several skilful and competent men for making surveys of the schooner, who examined her condition from time to time, and made their

reports, stating the condition of the vessel, and what in their judgment was necessary and proper to be done to her, and her condition after the repairs were completed. Such surveys are customary, often quite necessary as a safe guide to the conduct of owners, and often quite important in reference to the relations of owners to insurers, and to regulate the conduct of the master or owner in respect to any attempt to repair, where it is apprehended the cost of repairs will exceed the value of the vessel when repaired, and when the question of abandonment is presented to the owners. Such expenses are constantly allowed as against insurers, and surely a tort-feasor stands in no more favorable position. In a just sense, they are the consequence of the injury to the vessel. I entertain great doubt, however, whether, where it appears that the only object of an examination is to procure evidence of the cause of the injury, to be used against the respondents, the expense can be deemed a proper charge. But the evidence taken by the commissioner is not before me, nor are the facts upon which he found the fees allowable. I cannot say that they were in this case improper.

(6.) As to the libellants' appeal. The sum claimed by the libellants for estimated depreciation I must disallow. It is, as stated in the commissioner's report, "to a very great extent, a matter of conjecture." On very clear proof of actual depreciation and of the extent thereof, where it was shown that, from the peculiar nature of the injury, it was impossible to make the vessel as good as she was before her injury, I have, in one case of collision, made an allowance for depreciation over and above the loss of the use of the vessel and the necessary expenses of repairing, &c. But such allowance should only be made upon proof that is clear, and that furnishes a safe guide in determining the amount. From the nature of the subject, the opinions of witnesses, resting largely on grounds that have no relation to the actual value and condition of the vessel when completely repaired, are wholly unsafe, and can be tested by no appreciable rule of estimate. To act upon them is to expose respondents to great danger of injustice, when substantial justice to the libellants does not require it.

The commissioner reports that the schooner, by the repairs put upon her, was restored so as to be as strong as she was before the accident, and that she was thereby rendered as valuable to her owners for their own use and employment as she was before. If that be so, then she was as valuable to any other persons for their use and employment. But he is of opinion that she would not sell for so much as she would have sold for if the disaster had not occurred. I think it quite probable that market price is, in such a matter, so sensitive, that it might be difficult to satisfy a proposed purchaser that the vessel was as valuable as before, or difficult to satisfy him that he would in future, should he desire to sell, be able to produce that conviction in the mind of a purchaser from himself. But, the fact being true, that the vessel is just as good as before the accident, the respondents having, by the sum otherwise awarded as damages, made her so, every attempt to estimate the influence of a purchaser's timidity or incredulity on her market value, must be of the most uncertain and vague conjecture, not resting upon any sound reason. It is quite too loose to be the foundation of a charge against the respondents.

As to the item of $15 claimed for expenses of protest, which the commissioner disallowed. No reason for such a protest, in order to charge the respondents, is suggested. No proofs made before the commissioner, showing its necessity or usefulness, are reported to the court. I see no reason for disapproving his report in that respect.

The decree below must be affirmed, and the libellants have judgment for the amount, with interest and costs of the respondents' appeal.

[NOTE. The original respondents appealed to the supreme court, where the decree of this court was affirmed (unreported). On the presentation of the mandate of the supreme court, final judgment and award of execution were entered in the circuit court, ex parte, against the original respondents, and a summary judgment against Lee and Davis, as sureties on the appeal to the circuit court. Under this execution, the body of Lee was taken. Lee thereupon moved to set aside the execution. Upon a hearing in the circuit court, the execution was set aside. Case No. 12,403.]

Case No. 12,403.

SAWYER et al. v. OAKMAN et al.

[11 Blatchf. 65.] [1]

Circuit Court, S. D. New York. April 2, 1873.

ADMIRALTY — APPEAL — STIPULATION — SUMMARY JUDGMENT—CERTIFICATE OF COMMISSIONER.

1. A suit in admiralty, in personam, appealed to the circuit court for the district of Massachusetts, from the district court for that district, was transferred to this court, under the 8th section of the act of February 28, 1839 (5 Stat. 322). This court ordered that the decree of the district court, which was for the libellant, should be carried into effect, unless the respondent should give a stipulation, with two sureties, to pay the damages and costs. Thereupon, a paper was filed in this court, signed by a United States commissioner for the district of Massachusetts, certifying that the respondent, and L. and D., as sureties, appeared before him, and bound themselves that the respondent should pay the damages and costs, or that execution should issue against them. The paper was signed by no one but the commissioner, and bore date prior to May 8, 1872, when rule 5, in admiralty, of the supreme court, was amended. This court affirmed the decree below, and its decree was, on appeal, affirmed by the su-

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preme court. On the mandate of the latter court, this court entered a summary judgment, ex parte, against L. and D., under which the body of L. was taken in execution. L. then moved this court to set aside the judgment and execution: *Held*, that the commissioner in Massachusetts was not authorized to authenticate the stipulation by such a certificate, and, therefore, that this court had no evidence that L. entered into the stipulation.

2. L. was no party to the appeal to the supreme court.

3. He was entitled to apply, by motion, for relief.

4. The summary judgment, and the execution, against L., must be set aside, as unwarranted.

[Cited in The Sydney, 47 Fed. 262.]

[This was a libel by Charles Sawyer and others against Samuel Oakman and others to recover damages for injury to plaintiff's boat. From a decree in the district court for libelants (Case No. 12,404), respondent appealed to the circuit court, where the decree of the district court was affirmed (Id. 12,402). An appeal was then taken to the supreme court, where the decree of the circuit court was affirmed (unreported). The cause is now heard on a motion to set aside a judgment and execution against one of the stipulators.]

Edward F. Hodges, for the motion.

John Lathrop and Charles F. Blake, opposed.

WOODRUFF, Circuit Judge. A motion has been made herein, on the petition of James Lee, Junior, an alleged stipulator, on the appeal from the district court for the district of Massachusetts to the circuit court, which was transferred to this court under and by virtue of section 8 of the act of congress of February 28th, 1839 (5 Stat. 322). After the transfer of the cause to this court, and on the 16th of February, 1870, an order was made, (under and in conformity with the 133d rule of this court,) that the decree of the district court be carried into effect, unless the appellant should give security, by the stipulation of himself and of two competent sureties, for the payment of all damages and costs on the appeal, in this court, and in the supreme court of the United States, in the full and just sum of ten thousand dollars. Thereafter, on the 5th of March, 1870, a paper was placed on the files of this court, purporting to be signed by Charles Demond, as "Commissioner of the U. S. Court for the District of Massachusetts," reciting the proceedings in the cause and the order of this court, above mentioned, and certifying that Oakman, on behalf of himself and of the interests represented by Eldridge, appeared and produced, for sureties, James Lee, Jr., and J. Wade Davis, and that the persons so appearing, submitting themselves to the jurisdiction of the court, bound themselves, their heirs, &c., in the sum of ten thousand dollars, unto Charles Sawyer and others, (the libellants,) "that the said Samuel Oakman shall pay all damages, costs and expenses which shall be awarded against him in this suit, * * * and, unless he shall do so, they do hereby consent that execution shall issue forth against them, their * * * goods and chattels, * * * to the value of the sum above mentioned," and further certifying that the commissioner is satisfied that Lee and Davis are each worth more than ten thousand dollars. This paper was not signed by the petitioner, or by either of the persons named in it, and is not authenticated, save by the commissioner's signature. A decree was had by the libellants on the appeal, and, in affirmance of the district court, the libellants were awarded their damages and costs,—Sawyer v. Oakman [Case No. 12,402],—with the usual supplemental clause, that, "unless an appeal be taken from this decree within the time prescribed by law, a summary judgment therefor be entered in favor of the said libellants, appellees, and against James Lee, Jr., and J. Wade Davis (sureties on said appeal, in the sum of ten thousand dollars, the amount of their stipulations, by them given on said appeal,) and that said appellees have execution therefor, to satisfy this decree." But, the original respondents, Oakman and others, did appeal to the supreme court of the United States, and so the condition upon which, under such decree, such summary judgment was to be entered, failed. The supreme court affirmed the decree of this court, and, on the presentation of the remittitur or mandate of that court, final judgment and award of execution was entered in this court, ex parte, against the original respondents, and summary judgment was also awarded against the petitioner, Lee, and J. Wade Davis, as sureties on the appeal to this court, and execution was ordered, (pursuant to the act under which the cause was removed,) to issue into the Southern district of New York and, also, into the district of Massachusetts. The execution, as addressed to the marshal of the latter district, directed him, for want of goods, chattels, &c., to take the body, &c. Upon that execution, James Lee, Jr., was taken, and thereupon he presented this petition and moves to set aside the execution, and such summary judgment, against him, on various grounds, one of which alone it will be necessary to consider.

I find no statute of the United States which can be construed to authorize a commissioner appointed by the circuit court of another circuit, to authenticate a stipulation in admiralty by his mere certificate that the proposed stipulators appeared before him and acknowledged themselves bound, &c. No such statute was cited by the counsel, or insisted upon on the argument upon this petition. If no such authority exists, then this court had no evidence before it, on the record

or otherwise, that the petitioner, James Lee, Jr., ever stipulated, or became, in any manner, bound, for the damages and costs in this cause, and there was no legal warrant for the decree which, on the presentation of the mandate of the supreme court, was entered against the said petitioner; and, if no legal stipulation had, in fact, ever been made by him, then he was not a party to any proceedings in this court or in the supreme court. The mandate of the supreme court did not, per se, require this court to enter such a judgment against the petitioner. The decretal order made in this court prior to the appeal to the supreme court was provisional and not final. It directed, that, if an appeal was not taken from the decree within the time prescribed by law, a summary judgment should be entered in favor of the libellants, against the sureties, for the amount of their stipulation. Such appeal was taken, and it, therefore, became necessary to apply to this court, after the decision of the supreme court, for a final decree against the original respondents and their sureties, and an award of execution. The sureties had not appealed to the supreme court. If the petitioner had not, in fact, legally stipulated, he was, in no wise, directly, or by implication, a party to the appeal. The supreme court made no decision touching the liability of the petitioner. They affirmed the decree as to the appellants, leaving the rights and obligations of all others as if no appeal had been taken. The mandate of the supreme court neither directed this court to enter a final decree against the stipulators, nor to award execution against them, but only commanded "that such execution and proceedings be had in said cause, as, according to right and justice, and the laws of the United States, ought to be had," &c. As to the appellants, and their obligations under the decretal order appealed from, the mandate was conclusive, but, as to alleged stipulators, it could have no operation, if, in truth, they had not, in some legal manner, become identified with the cause, so as to be bound by the decree against them. It was, therefore, not too late for the petitioner to apply to this court, so soon as he had information of the decree made here against him, on the presentation of the mandate, and show that he was not legally held as stipulator, and, therefore, that this court had no jurisdiction to enter a summary judgment against him; and I perceive no reason why, after the issuing of execution on such decree, made without notice to him, he should not be heard, on motion.

If, then, no statute authorized a commissioner in Massachusetts to certify to this court the petitioner's appearance and acknowledgment of being bound, &c., to the libellants, the writing not being signed by him or sustained by proof, in any form, that he ever consented to enter into such obligation, save such certificate, this court had nothing before it legally warranting a summary judgment against the petitioner, unless there is some established practice, recognized by the court, or some rule, which makes a paper or writing so certified by a commissioner valid as a stipulation in admiralty, and a sufficient ground for such summary judgment; and it is proper to add, that, where there is a valid and authentic stipulation, it is not questioned that a summary decree against the stipulators is regular and proper.

Rule 5 of the rules in admiralty, prescribed by the supreme court of the United States, in force at the time the instrument in question was placed on the files of this court, provided, that "bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits or bail and depositions in cases pending before the court." This rule of the supreme court imports their opinion that there was no prior general authority, under any statute, under which any United States circuit court commissioner could take such stipulations, and that, under the power given to the supreme court to regulate the practice, that court could confer the authority; and the terms of the rule limit the authority to commissioners of the court in which the cause is pending. That the rule was thus limited is indicated not merely by its terms, but by the fact, that, by a rule adopted at the December term, 1871, and promulgated May 8, 1872 (Webb v. Sharp, 13 Wall. [80 U. S.] 14), the supreme court amended this 5th rule, by extending the authority to take stipulations to "any commissioner of the United States authorized by law to take bail and affidavits in civil cases." Thus, that court have clearly indicated, that, without such amendment, no commissioner could take a stipulation except commissioners of the court in which the cause is pending.

Unless the instrument which was filed in this court has some legal sanction, as in the nature of a recognizance taken before some officer authorized to take it in the course of legal proceedings in this court, it not only does not warrant a summary judgment, but is liable to the further suggestion, that, not being signed by the petitioner, and it not appearing, by any evidence which the court can judicially recognize as authentic, that the petitioner himself acted upon it or took thereby any advantage, it may be liable to the objection, that, as a voluntary acknowledgment of obligation, it has no validity under the statute of frauds.

To the suggestion, that, as the cause was originally pending in the district of Massachusetts, and was transferred to this court for hearing and determination, by reason of the disqualification of the judge of the First circuit, this court should be regarded as acting in the place of the circuit court for the First circuit, and bound to recognize the act of a commissioner of that court, it is sufficient to

say, that, by the statute, the cause is itself transferred, with all its record and proceedings, into this court, to proceed here, and judgment to be pronounced here, as if the cause had been commenced here. Whatever, therefore, is done here must be so done that it would be valid in a suit commenced here. Whatever was done before the removal has all the force it would have if the cause had not been removed. What is afterwards done must be valid in this court, or it is not valid at all. This court is not, pro hac vice, removed to the district of Massachusetts, but the cause itself is removed to this circuit and district. Had congress seen fit to direct, in case of such disqualification, that the circuit judge of this circuit should hold the circuit court for the district of Massachusetts, and hear and determine the cause, the suggestion would be pertinent.

Once more. By rule 136 of the circuit court for the Southern district of New York, in all civil causes of admiralty and maritime jurisdiction, not expressly provided for by specific rules of that court, the rules of the district court for the Southern district of New York are adopted, and are to be received as rules of practice in the circuit court; and, by rule 59 of the district court, "all stipulations in causes civil and maritime shall be executed by the principal party, (if within the district,) and at least one surety, resident therein," &c. Without inquiring whether this term "executed" can be construed to mean any thing short of a signing of the stipulation itself by the persons to be bound thereby, it is quite plain, that the paper relied upon by the libellants, as against the petitioner here, finds no support in these rules.

If I had a right to consider this subject extra-judicially, I might think that the petitioner did, in fact, appear before the commissioner in Massachusetts, with intent to become bound to these libellants, and did consent to be bound, and that judgment might be summarily entered against him, and execution be issued; that the libellants acted, or forebore to enforce the decree of the district court, in reliance upon such appearance and acknowledgment; and that, by this motion, the petitioner is seeking to evade the responsibility which he intended to assume, and upon which he knew the libellants would rely. But, I cannot, judicially, upon the face of the instrument in question, say that he did, in fact, incur any such responsibility. The libellants were at full liberty to disregard it, as not conforming to the order, made by this court, for the giving of security to stay the execution of the original decree, and as not authorized by the rules of the supreme court or of this court.

I am constrained to the conclusion, that the entry of the summary judgment against the petitioner, on the return to this court of the mandate of the supreme court, was improvident and unwarranted, and that the execution against the petitioner should be set aside.

Case No. 12,404.

SAWYER et al. v. OAKMAN et al.

[1 Lowell, 134.] [1]

District Court, D. Massachusetts. March, 1867.[2]

WHARVES—INEQUALITIES IN BOTTOM—INJURY TO VESSEL—WORK ON SUNDAY—MASSACHUSETTS STATUTE.

1. The owners of a dock are responsible for damage suffered by a vessel lawfully using the dock, and caused by a defect in the bottom, known to the owners of the dock and not known to the master of the vessel.

[Cited in Union Ice Co. v. Crowell, 5 C. C. A. 49, 55 Fed. 88.]

2. Where a vessel hauled into a dock in the harbor of Charlestown on a Sunday, against the law of the state, which prohibits work on that day, under a penalty, her owners are entitled to recover damages caused by a defect of the dock, whether they were suffered on the Sunday or on the next Monday.

3. The effect which the statute of Massachusetts, prohibiting work on the Lord's day under a penalty, shall have on the rights of the parties to a collision cause, pending in the district court, one of whom has violated the act in moving his vessel on that day, is not a question of the construction of the statute, but of the application of general rules of law to the case of a person who has violated such a statute, and the district court must follow the decisions of the supreme court of the United States, and not those of the state tribunals.

4. The case of Philadelphia R. Co. v. Philadelphia Steamboat Co., 23 How. [64 U. S.] 209, decides that such a violation of a Sunday law is no bar to a proceeding for damages by collision.

[This was a libel by Charles Sawyer and others against Samuel Oakman and others to recover damages for injury sustained by libellants' boat.]

F. C. Loring and John Lathrop, for libellants.

J. C. Dodge, for respondents.

LOWELL, District Judge. The libellants are the owners of the schooner Bowdoin, and the respondents own a wharf and dock at Charlestown. In October last, the schooner, loaded with a full cargo of coal, arrived in port consigned to the respondents, and at the request of the latter, made fast at one of the piers of the wharf, and awaited for some days the discharge of two other vessels which had an earlier right to the berth. On Saturday, the master attempted to haul into the dock, which was then clear, but failed, and did haul in, at high tide, in the afternoon of Sunday. On Monday morning it was discovered that the vessel was badly hogged and strained, causing a damage estimated, in the libel, at ten thousand dollars, for which the owners are now proceeding. The libellants attribute the damage to the bad state of the dock, which, they say,

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

[2] [Affirmed in Case No. 12,402. Decree of circuit court affirmed by supreme court; unreported.]

had a large pile of coal in it and was otherwise dangerous. The respondents aver, that the injury resulted from the negligence of the master in not hauling to the place pointed out to him for that purpose, and in not putting in suitable fenders. It seems that the dock has two berths, of which the upper or inner berth is much shallower than the other, and is intended for vessels that take the ground at low tide; and the theory of the defence is, that the vessel lay partly in one and partly in the other, and so did not rest wholly upon the ground at low tide; and she had a considerable list outwards, or to port, which is alleged to have been caused by the master's negligence; and the damage is attributed, by them, to one or both of these causes. They further set up, as a matter of law, that the master, in removing his vessel on Sunday, was acting illegally under the statutes of Massachusetts, and cannot recover for any injuries received by or in consequence of doing such an act.

Much evidence has been given, on both sides, concerning the size of the pile of coal which had slid into the dock some days before. The witnesses for the libellants estimate it at twenty tons, and say it reached into the keel bed; while on the other side it is reduced to a very much smaller size, and said to have ended short of the place where vessels ordinarily lie. There has also been much controversy upon the question whether the master should have hauled farther ahead. It seems that he and the mate were told that they were to take the berth which the vessel just discharged, called the Daybreak, had occupied; and that a landing stage was pointed out to one or both of them as the point to which they were to bring the main-hatch of their schooner. This landing stage was movable, and after the Daybreak was discharged it was hauled inward from the edge of the wharf to allow her to pass out, and was twisted round so that its lower end was some feet farther down the dock than it had been when the Daybreak was discharging. To this end of the stage, as thus situated, the master hauled the upper corner or line of his main-hatch, which he says is a substantial compliance with the directions given him. Finally, it is said on the one side, that the listing of the vessel shows that the master had not put in suitable fenders, and that this may be one chief or even the sole cause of the strain to his vessel. On the other it is declared, that he put in the usual fenders, and that if larger fenders were required the wharfinger should have notified him.

Upon these much-contested points I am of opinion, upon the preponderance of the evidence, that the damage was probably caused by the vessel's resting on the pile of coal, though this point is by no means clear. But if not, yet that the master complied substantially with the directions of the wharfinger in placing his vessel as he did, and that he put in the usual fenders. He was not warned of any danger, nor that there was any reason for his hauling to any particular spot, except the convenience of discharging his vessel at that berth, which was the real and only object of the notice, nor of the necessity for larger fenders, and in hauling, as he did, to a place within reach of the landing stage and suitable for discharging, and in fending in the usual way, he exercised due care and skill; for I agree, that without special notice he would not be bound to more than usual care either in placing his schooner or in making fast.

It is clear, that if the vessel was properly navigated and made fast, the injury must have resulted from some defect in the respondents' dock, and this is hardly denied. Now, whether the defect was of the kind supposed by the one side or by the other, appears to me immaterial, because in either case the respondents must be presumed to have known of it, since the pile of coal had been there for some days, and the inequalities in the bottom of the dock for some years. And upon principles recognized alike at common law and in the admiralty, the owners of the dock and wharf making use of it for gain in the course of their business, would be liable for the damages arising from such defects to a person lawfully using the dock in the course of business and in the exercise of due care. Philadelphia R. Co. v. Philadelphia Steamboat Co., 23 How. [64 U. S.] 209; Parnaby v. Lancaster Canal Co., 11 Adol. & E. 223; Mersey Docks & Harbour Board Trustees v. Gibbs, L. R. 1 H. L. 93. It remains to inquire whether the libellants are in a condition to recover this damage. They hauled in on a Sunday, not at the end of a voyage, but in order to be in a position to save a tide on Monday. It is alleged in the libel that the position of the schooner was somewhat dangerous where she lay on Saturday, from which it might be inferred to be a work of necessity to move her. But the evidence does not bear out this allegation, and it was abandoned at the argument. Another objection taken is that the damage was not done on Sunday. It seems that the injury was not apparent to the master at ten o'clock at night, which was after low water; the vessel, from the depth of her draft would be aground not only at low water, but during a great part of the rising and falling of the tide, so that she was in a position to suffer damage during several hours of Monday (which begins at midnight), as well as during a part of Sunday, and it is argued that I ought not to infer, in the absence of evidence, that the injury was, in fact, done on Sunday. I am much inclined to this opinion. But it may be doubted whether the burden of proof would not be on the libellants to show that they were lawfully using the dock when the damage was sustained; and, if so, the mere absence of inference either way might not be enough

for them, if the original act of hauling in on Sunday puts them in the wrong. It may be said that, as there was no appearance of strain or injury when the captain went to bed on Sunday night, and none such was discovered until six or seven o'clock in the morning, the inference may fairly be drawn that it occurred after midnight.

And this again may be so; but as the question is one of fact, and in which there is great liability to mistake, I have thought it my duty to look at the point of law on the supposition, for the purposes of this opinion, that the damage was done on Sunday. It can hardly be denied that the act of hauling in on the Lord's day was an illegal act under the statute of Massachusetts, cited at the bar, which prohibits the performance of work and labor on that day, excepting in case of necessity; and cases were cited from the Massachusetts reports more or less analogous to this, and especially the important and leading case of Gregg v. Wyman, 4 Cush. 322, which tend to show that a plaintiff who is obliged, as part of his case, to found himself upon such an act, cannot recover damages of a defendant who is likewise in the wrong. But without examining the authorities, or the reasons on which they rest, with critical attention, and assuming that no action analogous to this could be maintained in the courts of Massachusetts, I yet feel constrained, whatever my judgment might be upon the question, if new, to follow the decision in 23 How. [64 U. S.] 209, above cited. That was a case very similar in its circumstances to this, and a statute of Maryland almost identical with ours was relied on, but the supreme court sustained the action. It is true that a doubt is expressed by the court, whether the act of beginning a voyage on Sunday was intended to be prohibited by the statute; but it is equally true that they express a very decided opinion, that, if it were, yet the action for damages against a wrong-doer would not be barred thereby.

And I do not feel at liberty to overlook one point of their opinion more than the other. Indeed, of the two, the latter doctrine appears to be the more relied on in the judgment. This is not one of those local questions in which the admiralty courts are bound to follow the state decisions. In the first place, the thirty-fourth section of the judiciary act of 1789 [1 Stat. 73], which provides that the laws of the several states shall be regarded as rules of decision in the courts of the United States, in trials at common law, does not in terms apply to trials in the admiralty; and on this ground Judge Story intimated an opinion that statutes of limitation would not bar actions in such courts, and this has remained the established doctrine, as appears, among other things, by the fact that state rules of evidence have never governed in the admiralty until the passage of a recent act of congress. So that the question which rule I am bound to follow, depends on whether this is a case which by general principles is governed by the local law. Now to the extent of holding that work done in contravention of the statute is illegal, it may be that the local law should govern, but the statute itself is silent concerning the legal consequences of doing such an act excepting to the extent of the penalty directly imposed. The effect which it may have on the wrong-doer's standing as regards third persons is no part of the construction of the statute, but the application of a general principle of law. Thus in Gregg v. Wyman [supra], it was decided upon general principles, as derived in a great measure from English cases, that a wrong-doer could have no right of action when he was obliged to claim through his wrongful act. The fact that the act was prohibited by a state statute, had nothing to do with that part of the case; it might as well for all the purposes of the decision have been one which was illegal at common law or by a statute of the United States. This libel is for a marine tort, committed within the ebb and flow of the tide, and although within the body of a county, yet the rights of the parties depend upon the law as administered in the admiralty. To take a very common example, let us suppose that instead of an illegal act, contributory negligence of the master were shown, it is clear that the damages would be divided in this court, although by the law as administered in the state courts, the plaintiff could not recover any damages. For these reasons, it appears to me to be my duty, without discussing the main point upon principle, to follow the decision, or very strongly expressed opinion of the supreme court, and to pronounce for the damage. Decree for the libellants.

[NOTE. This case was taken to the circuit court by appeal, and, Mr. Justice Clifford being related to one of the parties, the case was removed to the Second circuit, where the decree of this court was affirmed. Case No. 11,402. The original respondents appealed to the supreme court, where the decree of the circuit court was affirmed (unreported). On the presentation of the mandate of the supreme court, final judgment and award of execution was entered in the circuit court, ex parte, against the orignal respondents, and a summary judgment against Lee and Davis, as sureties on the appeal to the circuit court. Under this execution, the body of Lee was taken. Lee thereupon moved to set aside the execution. Upon a hearing in the circuit court the execution was set aside. Id. 12,403.]

SAWYER (SCHEDDA v.). See Case No. 12,443.

Case No. 12,405.

SAWYER v. SHANNON et al.

[Brunner, Col. Cas. 111; [1] 1 Overt. 465.]

Circuit Court, D. Tennessee. 1809.

REAL PROPERTY — TITLE BY PRESCRIPTION — EJECTMENT.

In an action of ejectment defendant is not required to show a connected chain of conveyances from a grant to entitle him to the protection of the statute of limitations; if he has possession and holds under a conveyance, though defective, it is sufficient.

Ejectment; not guilty and issue. The defendants [Shannon and Boling] claimed under the oldest grant, and relied on the statute of limitations. It was proved on the part of the defendants that Thomas Molloy purchased at sheriff's sale, and took a sheriff's deed; he sold to Shannon, and gave his bond to convey. Shannon took possession early in the spring of 1800, and made a lettuce and cabbage patch about twenty poles within the tract of the plaintiff; cleared a small quantity adjoining, perhaps a quarter of an acre, which in the following fall he added to, and continued to add to the clearing. On the 22d of August, 1800, Molloy conveyed to Shannon, and on the 15th of August, 1807. The declaration in ejectment is indorsed as having issued, and came to the hands of the marshal, on the 26th of August, 1807. The defendants showed a copy of a grant to John Eaton; a judgment on a scire facias against the heirs of Pinkham Eaton, naming four persons, among whom was John Eaton. The land was sold, and a sheriff's deed made to Molloy as above.

For the plaintiff [Sawyer's lessee] the following grounds were taken: First, The defendant must show a regular and connected chain of legal title from the grantee; otherwise the statute cannot apply. Second. A connected title has not been shown. The judgment is against four of the Eatons, stating them heirs of Pinkham Eaton, deceased; the grant, part of which was sold by the sheriff, is to John Eaton, administrator of Pinkham Eaton, deceased. The judgment was obtained upon two nihils, which is not legal in a case where heirs are to be affected. There should have been a scire feci returned. The judgment is invalid; but if good, the sheriff had no right to sell the land of John Eaton, for the grant does not state that John Eaton took as heir, and we cannot presume it; the sheriff had no more right to sell the land of John Eaton under this judgment than of any individual in society; the sale was therefore void, and no right vested under it in Molloy; he therefore had not any to convey to Shannon. The statute was intended to protect possessors, under a regular chain of legal title, against an older irregular title. It could not give a title, unless there was one before, and where there is a defective title, it is as none.

PER CURIAM (charging jury). We are inclined to think the statute applies; some doubt, however, exists on two grounds—whether it be necessary for the defendant to show a good legal title by valid conveyances from the grant. The point, however, upon which we doubt at present is, that the sheriff in his return on the execution does not state the particular tract out of which he sold; but at present the jury may consider the statute of limitations as applying to the case, as it is believed the plaintiff was not competent to make objections, on account of errors in the judgment.

The jury after some time found a verdict for the plaintiff, and upon a rule for a new trial it was argued by Overton and Haywood for the defendants upon the following grounds: First. The grant to John Eaton is good, and passes the estate to him, as heir of Pinkham Eaton, deceased. Second. If the judgment against Eaton's heirs is erroneous, the plaintiff being a stranger, not party nor privy in blood nor estate, cannot take advantage of it. Third. If the judgment is erroneous, the sale is good. Fourth. But it is not even erroneous. Fifth. The statute of limitations protects irregular conveyances, and even where there is no regular chain of conveyances, provided the possessor claims under a deed bona fide.

As to the first point, it was said that mistakes in grants could not destroy their validity. See 2 Bay, 539; 2 Bin. 109; 3 Call, 242. The intention of the party granting must be collected as in construing other instruments. The grant recites the number of the warrant and entry, both of which are in the name of Pinkham Eaton, and the grant, though it states John Eaton administrator, manifestly designed that he should take as heir; in fact, he was obliged to take in that capacity, as the law would not allow of his taking in any other. Bac. Abr. (Ed. 1807) tit. "Grant," 1, 393; Id. 392, H 3; Id. 391, H 2; Id. 399, n. 378, 384; Id. 388, H 1; 1 Hayw. [N. C.] 238, 239, 254, 377, 496; 2 Hayw. [N. C.] 139, 148, 160, 179, 183, 354, 384, 301, 347, 348, 350; Acts Tenn. 1796, c. 20.

On the second ground, the judgment having been rendered by a court of competent jurisdiction, must stand until reversed by parties or privies. 5 Com. Dig. tit. "Pleader," 3 B 7; 3 B 9. See, also, 4 Mass. 612; Hardin, 291; 2 Caines, Cas. 255, 259; and Swift's L. E.

As to the third point, we lay it down as certain that this land having been granted in right of representation of the deceased, was liable to sale for his debts. The twenty-third section of the court law (1794, c. 1) rendered lands, tenements and hereditaments liable to execution. Upon a similar clause in Ird. Rev. Nov., 1777, c. 2, it was determined by M'Nairy, J., previous to the act of 1793 (chapter 5, § 7), that an entry could be sold under execution. Frazier v. Haw [1 Overt. 465] at Nashville, in the state district court. The act

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

giving bounty lands to the officers and soldiers, in case of the death of the officer or soldier, gives it expressly to the heirs. Acts 1782, c. 3, § 6. It is said Pinkham Eaton died in the year 1781, and that this land vests in the heir by purchase, and is not liable to the debts of the deceased. This we by no means admit; but supposing it did, if the heir or heirs were satisfied that it should be liable, it does not lie in the mouth of the plaintiff, who is a stranger, to say that it shall not. The sale is good, though the judgment may be erroneous or irregular. 2 Tidd, Prac. 936; Com. Dig. tit. "Execution," C 6; 2 Hayw. [N. C.] 79, 80; 1 Hayw. [N. C.] 62, 63, 65, 66, 71, 95. See 2 Bin. 223; 1 Bin. 40; 2 Bay, 329; [Weitzell v. Fry] 4 Dall. [4 U. S.] 220; Hylton v. Brown [Case No. 6,981]. But it were not even necessary to name the persons who are heirs. 2 Salk. 600; 1 Ld. Raym. 669. They might have been named as heirs generally. A scire facias is not subject to the same strictness as an original suit. Latch, 112.

Fourth. But this judgment is not erroneous. John Eaton, to whom the grant issued, is one of the persons named as heirs, and though others might have been joined, who had no interest in the land, the judgment is good against John Eaton. He could only take advantage of more persons being joined than ought to have been, by plea in abatement. 1 Com. Dig. tit. "Abatement," F. 12, 13, 14, 15. Neither of the other defendants can reverse the judgment as to this land for two reasons: Want of interest (2 Bac. Abr. tit. "Error," B; Id. tit. "Execution," P.); and having had a day in court. Anciently irregularities in executions were classed under the title "Error" (5 Com. Dig. tit. "Pleader," 3 B 1); but of late years such errors are rectified on motion (2 Tidd, Prac. 935). But in no case where a judgment shall have been reversed shall the party be restored to property sold on a fieri facias, which will be perceived by recurrence to the authorities last mentioned, and the cases referred to in Haywood's Reports, in the third division of this argument, except indeed it be in a case where the party obtaining the judgment purchases under the execution. Lands are sold here by fieri facias, and the same principles are attributable to proceedings under it respecting land that would be respecting personal property. See Hylton v. Brown [supra]. An objection has been taken to the return of the sheriff in not describing the land sold; to this it is answered that the sale would have been good, if the execution had never been returned. A fortiori where the return is merely informal, and can do no injury. 6 Com. Dig. tit. "Return," F 1; 4 Com. Dig. tit. "Execution," C 7. See [M'Dill v. M'Dill] 1 Dall. [1 U. S.] 63; [Hamilton v. Galloway] Id. 93.

Though we have been thus minute in removing objections to supposed errors in obtaining the judgment and issuing the grant, it was not thought absolutely necessary. One plain and decisive answer to the plaintiff is at hand for all these objections. You are a stranger to them, and as you cannot be injured by these transactions of others, res inter alios acta non nocet, so you shall not derive any benefit from them agreeably to a maxim of the civil law, "Alii per alium non acquiritur exceptio." A judgment of a competent tribunal, and all the proceedings under it, stand good, and must be taken as true, until reversed. Whether John Eaton be heir or not, is immaterial with you; the title would be in some person with whom you would have to contend. The state has said in the grant that he takes as heir, and as such the judgment is against him, and this must be taken as true whenever it comes collaterally before the court. Amb. 761. Eaton makes no complaint that these lands have been sold for his brother's debts; the plaintiff has no right to complain.

Fifth. Whether the judgment or conveyances be regular or not, the statute of limitations covers the defendants' case. The act of 1715 confirms claims under executors, administrators, heirs, and wives. Now it is clear that these persons had no more right to sell lands than one person would have to sell the land of another; yet validity is expressly given to them by the act, when attended by the seven years' possession. For many years in North Carolina the bench and bar were divided in their construction of the act of limitations. Some thought (and a very respectable portion of the bench and bar were of that opinion) that possession alone for seven years, without any title, or color of title, would give a right, and bar others (1 Hayw. [N. C.] 11; 2 Hayw. [N. C.] 88, 223); the question was at length settled by the court of conference, that there should be a color of title to enable a person to hold by seven years' possession. Id. 336. But no person ever supposed or contended that a perfect legality of connected title was required. Id. 59; Napier's Lessee v. Simpson, Robertson, June, 1809 [1 Overt. 448]. The subject respecting seven years' possession was contested here in the same manner it was in North Carolina, and the difference of opinion was the reason of the passage of the act of 1797, c. 43, § 4. It was the only design of the act to make color of title necessary. The section transposed into plain language will read thus: "Where any person shall have had possession of land for seven years, such possession being in consequence of a grant, or deed founded on a grant, without claim by suit in law, that then all persons shall be barred." This act is professedly an explanation of the act of 1715; its object was not to introduce any new provision, it was only to remove a doubt, whether a naked possession for seven years would give a right or not; to carry the act any further would be going beyond its express words, which was to remove the doubt then existing. Before the passage of the act of 1797, no person ever doubted that possession would require anything more than a color of title, bona fide;

as a deed from some person honestly made, the land having been granted by the state.

The expression in the act of 1797 which has created the doubt is "founded on a grant," from which it is implied, according to the argument on the other side, that there must be a regular connection with the grant; if one link is broken, it cannot be said to be "founded on a grant." The act of 1715 speaks of titles derived under sales from executors, etc. In this case we know there is not any regular, legal chain of title, and it surely was not the intention of the act of 1797 to repeal the act of 1715, as to irregular and imperfect conveyances by executors and others. The principles contended for on the other side would repeal the most beneficial part of the act of 1715, instead of explaining it, as the legislature profess to do. The expressions seem to be of the same import as those in the act of 1797; we ought not therefore to extend their meaning beyond the object the legislature had in view. The intention of the legislature manifestly was, that no seven years' possession should be available unless the possessor had a deed, and that the land so possessed should be granted; or in other words, that the possession should have its foundation or derivation in a grant from the state. The possession by deed must be bottomed or founded on a grant to make it available. Giving the act of 1797 this construction, which it will bear, avoids the absurdity of enacting a new law, which the legislature, from their own unequivocal language, never designed. To give it any other construction would nearly annihilate the highly beneficial provisions of the statute, which was to cure defects in titles, by protecting after a certain lapse of time the honest improver and cultivator of the earth. Cowp. 217; 1 Burrows, 119; 1 Hayw. [N. C.] 319; 2 Hayw. [N. C.] 11, 59, 69, 114, 345. See 4 Mass. 188; 2 Bay, 160; 1 Bin. 212.

There is no doubt but that the defendant Shannon, and Molloy, under whom he claims, had been in possession upwards of seven years. From April, 1800, until the 22d of August following, when Shannon got his deed, it was the possession of Molloy, Shannon having been placed on the land by him. 2 Bac. Abr. 423, tit. "Ejectment," D 3; 6 Com. Dig. tit. "Trespass," B 12; 2 Strange, 1128; 2 Hayw. [N. C.] 11, 345; 2 Caines, Cas. 301; 4 Johns. 230. The suing out of the declaration in this case ought to be considered on the 26th of August, 1807, when it came to the hands of the marshal; and this would be steering clear of the objection that Shannon had no deed to cover his seven years' possession. Computing from this day he had a deed the whole time, and four days to spare. There is no telling that this declaration issued at the time it is marked on the back; the attorney might have ante-dated to prevent the running of the statute; and if he had written it he might not have given it to the marshal. It was the same thing as if it had not been written at all. Unless then, it could be proved that it had been issued before, we must take the time of its coming to the hands of the marshal as the true time. 2 Burrows, 958. It is not, however, wished to be understood that we have no other defense than the statute of limitations. We have an older entry than their grant, which according to the practice of the state we could rely on. The entry was read and compared with the plat. Our entry has been surveyed agreeably to its call. Acts Nov. 1777, c. 1, §§ 5, 10; 1779, c. 6, § 6; 1783, c. 2, § 12; 1786, c. 20, § 1.

The beginning of the entry is special, and in running down towards Harpeth the surveyor was obliged to stop at Moore's tract, which was an older one. The land being taken upon the west, the surveyor could run it no other way than he did. A surveyor in surveying acts independent of the claimant, and if he did not construe the entry in the equitable manner now contended for, is that to operate to the injury of Eaton, or those claiming under him? Much was said in the case of Polk's Lessee v. Robertson [2 Tenn. 456, 457], and many cases cited from Haywood's Reports, to show that the mistake of a surveyor shall not prejudice a grantee. [Bell v. Levers] 4 Dall. [4 U. S.] 210; [Hepburn v. Levy] Id. 218; 3 Bin. 30, 32. Why should the surveyor's mistaken construction of an entry prejudice the enterer or claimant? It would be highly unjust that the act of the surveyor should operate to the prejudice of the enterer, unless in cases where he surveyed contrary to the plain words of an entry. Not a meaning by what is called an equitable construction; as where the inclusion of a particular object is called for, that you must put it in the center, or where an entry calls to lie on a water course, it must be on both sides, or equally on both sides. In the first case, as common men and surveyors have and will always understand such entries, there would be a compliance with it, if the object should be included in any part of the survey; and in the second, if the land surveyed should lie on the creek, though on one side, and bounded by it. Hoggat v. M'Crory [1 Tenn. 8–12]: Kerr's Lessee v. Porter [1 Tenn. 353–361]; and Kendrick v. Dallum [2 Overt. 212]. As the oldest entry was to be first surveyed, having by all our acts a preference in being surveyed and granted, precise certainty was not necessary in an entry, and none of the statutes require it. Agreeably to our law and its practice, an entry may be more or less certain. We have understood it to be the design of the first to confine the surveyor in making the survey to precise limits, the enterer choosing a particular spot, as calling for course and distance. In the other the surveyor surveys as he thinks proper, according to the plain calls of the entry; and if he conforms to the calls according to common understanding, being the oldest entry, and having the preference in survey and grant, by law it must hold. But where certain courses and distances are called for in

an entry, if different courses or distances are taken by the surveyor, this is what we call surveying contrary to an entry, and a subsequent claimant, without notice, upon the principles of equity, is not to be affected. We have conformed to these principles, and therefore without the aid of the statute of limitations we have the right to hold.

Dickenson & Campbell, in conclusion, said they did not mean to contest the regularity of the judgment. It was the act of 1797 that must be relied upon. The legislature were competent to make what alterations in the act of 1715 they thought proper. Their meaning in the act of 1797 is very plain; when they require a deed of conveyance founded on a grant, it must necessarily be connected with it by regular conveyances; if it is not it cannot be founded on a grant.

TODD, Circuit Justice. It is not intended at this time to give any decided opinion; I will therefore suggest an idea which may be attended to on both sides. Is it not a rule in construing explanatory statutes to confine the construction strictly to the letter? Otherwise there should be an explanation upon an explanation. See Bac. Abr. (Wils. Ed.) 388, and notes.

Counsel for the Plaintiff. There can be no doubt that the rule is as stated; the meaning of the words "founded on a grant," here, plainly import a connection of title; and irregular or void titles are the same as none. It is clear that when John Eaton took a grant from the state he took the land as trustee for the heirs of Pinkham Eaton, and it was decided in the case of Williams v. M'Ferson that an equitable right, as a bond, etc., was not subject to execution. The defendants have not produced any proof who were the heirs of Pinkham Eaton, which they ought to have done. But if they had it would not have been sufficient, for this land was not subject to the debts of the deceased; the law allowing bounty lands did not pass until after the death of Eaton. Though it says the heirs of the deceased shall receive a grant, the right must vest in them as purchasers, and not as heirs, and consequently the debts of the deceased cannot fall on it. The sheriff having no right to sell this land, no right of course was conveyed; the act of 1797 makes it necessary for the court to decide the legality of the proceedings at law, as well as the conveyance. If either are essentially defective there cannot be a regular chain of title. Eaton's entry was a mere nullity, as it was made in the name of Pinkham Eaton, when he was dead. In the argument of the plaintiff's counsel every position taken by the defendants was contested at length.

Among others it was urged that the statute of limitations was not to be favored, and if doubtful ought to be construed in favor of the plaintiff, so as to save his right. Mr. Campbell towards his conclusion observed that John Eaton did not take the land as heir, and if he did as one of the heirs, he held it as trustee, and nothing but a bill in equity could render it liable to execution.

TODD, Circuit Justice. There is one point in this case that I wish the plaintiff's counsel to attend to particularly, which is this: If Pinkham Eaton's heirs are satisfied as to the proceedings in obtaining the judgment at law, and selling the land, can strangers take advantage of any errors in those proceedings, or complain of them in a collateral way?

Mr. Campbell concluded by observing that they had the oldest grant, which gave them a clear legal right, and to take away that the court should see that there was a regular chain of title.

Mr. Overton, for defendants, observed that as the court would have the matter under consideration, he wished leave to state as to the construction of statutes that the difference between an explanatory statute, alluded to by one of the court, seemed to consist in this: An explanatory statute should never be extended nor narrowed by an equitable construction, where the words were plain, because this would be an explanation upon an explanation; but if doubtful, as was manifestly the case in the act of 1797, the same rule must be applied as in other cases, to find out the intention of the legislature. What did the legislature mean to do in passing the fourth section of the act of 1797? The answer is in the preamble, to remove doubt as to the act of 1715. What was that doubt? We all know it was whether a naked possession, without deed, of ungranted land, would produce a bar or not. To carry the act any further new principles will be introduced, and as to the intention of the legislature in introducing them, whether any, and to what extent, must be ascertained by the principles of sound construction, in the same manner as in any other case, there may be different rules in construing the same statute; as where its provisions are penal and also remedial (2 W. Bl. 1226); so here if it be doubtful whether the enacting words go further than a preamble which is to explain, if the act be considered as explanatory, it must receive such a construction as will confine it strictly to the removal of doubts; if attempted to be explained any further it will be subject to such rules as will enable judges to ascertain whether the legislature designed to introduce a new law, instead of explaining an old one; and he took it to be a clear principle that the court would not construe such an act, as introductive of a new law, unless the words used by the legislature could not admit of any other construction. 11 Mod. 150; 6 Bac. Abr. (Wils. Ed.) 384. All the rules respecting the construction of statutes amount to nothing when the intention of the legislature is plainly expressed; they vanish; they are never thought of. In doubtful cases the intention is what is sought after, and the rules of construction, which are nothing but the dictates of common sense, apply in one case as well as in another, according to the subject-matter.

TODD, Circuit Justice. Let a new trial be granted in order to avoid delay. There are several points which may be considered open to further discussion upon the trial if the parties choose.

M'NAIRY, District Judge. It was clear to him from the wording of the Act of 1715 that irregular and defective conveyances were sufficient, with seven years' possession, which existed in this case, and he felt well satisfied that the statute applied. The construction of the act of 1715 by the defendants' counsel he believed to be correct.

TODD, Circuit Justice. As to the construction of the act of 1797 he had great doubts at first, which were not entirely removed. The opinion of those who knew the cause of making the statute, and the doubts intended to be removed, certainly deserve consideration in doubtful cases. The case, however, will stand open for a new trial.

At a subsequent term there was a verdict for the defendants.

Case No. 12,406.

SAWYER et al. v. STEELE.

[3 Wash. C. C. 464.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1819.

NON-INTERCOURSE—DISTRIBUTION OF PROCEEDS OF FORFEITURE—CLAIM—NOTICE.

1. Action of indebitatus assumpsit, by the officers of the revenue cutter, of the district of Delaware, for one half of the forfeiture incurred. for a violation of the non-intercourse law, by a vessel seized by the collector of Delaware, on the information of the plaintiffs, and by him sent to this district for trial; where she was condemned, and the amount of the forfeiture was received by the defendant, the collector of the port of Philadelphia. The rules prescribed by the laws of the United States. for the distribution of the proceeds of the forfeiture.

[Cited in Fifty Thousand Cigars, Case No. 4,782; The City of Mexico, 32 Fed. 109.]

[Cited in brief in Barry v. Goodrich, 98 Mass. 337; Rice v. Thayer, 105 Mass. 261.]

2. The commissions of the plaintiffs are not required to be given in evidence. It is sufficient for them to prove, that they acted on board as officers.

[Cited in Com. v. Kane, 108 Mass. 425; Com. v. Tobin, Id. 426.]

3. The information to induce a seizure need not be as full as the evidence in the case would authorize. It is sufficient if it induced the prosecution.

[Cited in U. S. v. One Hundred Barrels of Distilled Spirits, Case No. 15,946; U. S. v. George, Id. 15,198; Re Webster, Id. 17,332; The City of Mexico, 32 Fed. 106; U. S. v. Simons, 7 Fed. 712.]

4. It is not necessary that the officers of the revenue cutter should, when they give the information, make a claim for a part of the forfeiture; or that they should take any part in the prosecution of the case, to entitle them to a portion of the proceeds.

5. The consent of the plaintiffs, that the vessel should be sent from the district of Delaware to the district of Pennsylvania; or a disavowal, by them, of having instituted this suit, does not constitute a waiver of their right to their share of the forfeiture.

6. The defendant is not liable to the plaintiffs, for such part of the proceeds of the forfeiture as he had paid over to other officers of the custom-house, for their shares, before notice of the claims of the plaintiffs.

[Cited in Boston & M. R. R. v. Portland, S. & P. R. R., 119 Mass. 500.]

This was an action of indebitatus assumpsit, for money had and received by the defendant, to the use of the plaintiffs. The case, with the material parts of the evidence, are stated in the charge.

Joseph R. Ingersoll, for plaintiffs.

Charles J. Ingersoll, for defendant.

WASHINGTON, Circuit Justice (charging jury). This is an action of indebitatus assumpsit, for money had and received, brought by the officers of the revenue cutter General Green, belonging to the Delaware district, against the collector of this district, to recover their proportion of the forfeiture incurred by the Perseverance, for a breach of the non-intercourse law, in 1812. The information against this vessel and her cargo, was filed in the district court of Pennsylvania, and a condemnation was decreed, which was affirmed in this court; and the proceeds having been paid over to the defendant by the marshal, the plaintiffs claim one half of the amount, alleging, that the forfeiture incurred was recovered, in consequence of information given by them, as officers of the above-mentioned revenue cutter. The question is, are the plaintiffs entitled to recover any thing? and if any thing, how much?

The 18th section of the act of congress, of the 1st March 1809 [2 Stat. 528], c. 91, entitled "An act to interdict the commercial intercourse between the United States and Great Britain and France, and their dependencies, and for other purposes" (volume 4, p. 217), declares "that all penalties and forfeitures, arising under or incurred, by virtue of this act, may be sued for, prosecuted, and recovered, with costs of suit, by action of debt in the name of the United States of America, or by indictment or information in any court having competent jurisdiction to try the same; and shall be distributed, and accounted for, in the manner prescribed by the act entitled, 'An act to regulate the collection of duties on imports and tonnage,' passed the second day of March, one thousand seven hundred and ninety-nine; and such penalties and forfeitures may be examined, mitigated, or remitted, in like manner, and under the like conditions, regulations, and restrictions, as are prescribed, authorized, and directed, by an act entitled 'An act to provide for mitigating or remitting the forfeitures, penalties, and disabilities, accruing in certain cases therein mentioned,' passed the third day of

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

March, one thousand seven hundred and ninety-seven, and made perpetual by an act passed the eleventh day of February one thousand eight hundred."

The 91st section of the duty law, above referred to, entitled "An act to regulate the collection of duties on imports and tonnage," (volume 3, p. 223, c. 128), enacts "that all fines, penalties, and forfeitures, recovered by virtue of this act, (and not otherwise appropriated,) shall, after deducting all proper costs and charges, be disposed of as follows: —one moiety shall be for the use of the United States, and be paid into the treasury thereof, by the collector receiving the same; the other moiety shall be divided between, and paid in equal proportions to the collector, and naval officer of the district, and surveyor of the port, wherein the same shall have been incurred, or to such of the said officers as there may be in the said district; and in districts where only one of the aforesaid officers shall have been established, the said moiety shall be given to such officer. Provided, nevertheless, that in all cases where such penalties, fines, and forfeitures, shall be recovered in pursuance of information given to such collector, by any person other than the naval officer or surveyor of the district, the one half of such moiety shall be given to such informer, and the remainder thereof shall be disposed of between the collector, naval officer, and surveyor, or surveyors, in manner aforesaid. Provided, also, that where any fines, forfeitures, and penalties, incurred by virtue of this act, are recovered in consequence of any information given by any officer of a revenue cutter, they shall, after deducting all proper costs and charges, be disposed of as follows:—one fourth part shall be for the use of the United States, and paid into the treasury thereof, in manner as before directed; one fourth part for the officers of the customs, to be distributed as hereinbefore set forth; and the remainder thereof to the officers of such cutter, to be divided agreeably to their pay."

Before examining this case upon its merits, it may be proper to dispose of some preliminary objections, not only to the right, but to the quantum claimed by the plaintiffs.

1. It is insisted, that the plaintiffs are not entitled to any share of the forfeitures incurred, under the non-intercourse law, because the act of the 6th May, 1796 [1 Stat. 459], c. 22, making further provision relative to the revenue cutters, is confined to forfeitures incurred under the impost laws, and recovered, in consequence of information given by the officers of these cutters. It is true, that that law is so confined; but the answer to the objection is, that the present action is not founded on the act of May, 1796, but on the 18th section of the act of March 1, 1809 [2 Stat. 528], before referred to, which allows to these officers a certain proportion of the forfeitures incurred for a breach of the non-intercourse law, where they are the informers.

2. That if the plaintiffs are entitled to any thing, it can only be to one-fourth of the forfeitures, the United States being, at all events, entitled to one-half. This is not, in the opinion of the court, the true construction of the 91st section, of the duty law, which prescribes the manner in which forfeitures for breaches of the non-intercourse law are to be distributed. If there be no informer, the United States are entitled to one-half, and the custom-house officers to the other. If there be an informer, then, instead of the half, which, in the former case, was given to the custom-house officers, one-fourth is allowed to them, and the other fourth to the informer. But if the informer should happen to be an officer of a revenue cutter, then only one-fourth is reserved to the United States; the same proportion is allowed to the custom-house officers; and the remainder, which is one-half of the whole, is given to the officers of the cutter. It is no argument, to say that this is an unreasonable allowance. The legislature has thought proper to make it, and our duty is to execute its will.

3. The plaintiffs, claiming as officers of a revenue cutter, it is contended, that they cannot recover, without having given their commissions in evidence. There is nothing in this objection, as it was fully proved by the collector of the port of Wilmington, and denied by no witness, that Sawyer was the commander of this revenue cutter, which was under the control of that collector; and that the other plaintiffs were mates on board of her, and that they acted as such officers. The commissions of these officers, being always the same in form, no question has been made, or can occur, as to the construction of theirs; and it is quite sufficient, in this action, that they acted in the capacities mentioned by the collector.

4. The last objection is, that these plaintiffs cannot join in this action; but should have sued separately. This is a question of a good deal of difficulty; and will require more consideration, than it is in the power of the court now to bestow upon it. If the jury, therefore, should find for the plaintiffs, we shall request them to reserve this point.

We come now to the questions which arise upon the merits of the cause. The first is, whether the forfeiture incurred by the Perseverance, was recovered, in consequence of any information given by the plaintiffs, or either of them? The law does not require that the information shall be as full as the evidence which may ultimately be given at the trial, or which may be necessary to establish the forfeiture. It is sufficient, if it be acted upon, induces the prosecution, and contributes eventually to the recovery. Any information, is the expression used in the law; and if, therefore, it should furnish the ground of inquiry, prosecution, and recovery, the in-

formant is entitled to the reward; although he was unable to assert positively, that the offence had been committed. It is not necessary, that the informant should accompany the communication which he makes, by an assertion of his claim to a share of the forfeiture; or, that he should make the seizure, or concern himself with the prosecution, by causing its institution, or providing testimony to support it. With all these things, he has nothing to do. He may even be ignorant, at the time he gives the information, that he has any claim to assert. It is sufficient for him to show, that the information which he gave, caused the prosecution and recovery.

But it has been contended, that, where the information comes from an officer, whose duty it is to furnish it, as in the case of an officer of a revenue cutter, it will be considered as given in the ordinary discharge of his duty; and so not entitling him to the reward, unless he asserts his claim. If there were any thing in this argument, the law would have no operation in favour of those officers, who, the law always presumes, will perform their duty; and yet offers them sometimes an extraordinary reward for doing it. The policy of the legislature, in this case, is obvious, —it was to excite the vigilance of the officers of the revenue cutters, to detect, and to bring to light, violations of the revenue and non-intercourse laws; and to secure their integrity, by such a reward, as would place them above any temptations, which the offenders could offer them.

Having thus given what appears to the court to be the true construction of the law, it only remains to recapitulate the material parts of the testimony. The collector of the district of Delaware has testified, that the first information which he received, respecting the cargo of the Perseverance, was from Sawyer, the commanding officer of the revenue cutter; and he is confident, that he never heard any thing in relation to the rum on board, prior to the information received from him. In confirmation of this fact, and to show the precise nature of the information thus communicated, a letter from Sawyer to the collector, bearing date the 6th of February, 1812, which the witness stated was received the same day, was produced, in which the writer states, that there are strong grounds of suspicion against the Perseverance, to detain her; and amongst others, he mentions that "she has on board 97 hogsheads of rum, which the mate calls aqua ardenti; but which I take to be Jamaica, and that of good quality." On the 13th of the same month, another letter was written by Sawyer, to the collector, repeating the same information, and recommending the appointment of a particular person to taste the rum; and, on the 16th, he again wrote, and informed the collector that the district attorney was of opinion, that the vessel and cargo were liable to forfeiture, and ought to be seized and libelled. The witness further stated, that, in consequence of the first information received from Sawyer, he directed the vessel to be detained; and that one of the officers of the cutter, was put on board of her, for that purpose. That being satisfied the rum was Jamaica, he consulted with the district attorney, as to the course to be pursued, who advised a seizure of the vessel; which would have been done, had he not been induced by the persuasions of the owner, to send her to this district, for trial, under the command of Sawyer, who delivered her to the custom-house officer of this port. In this evidence, we trace the active agency of the commander of the cutter, from the time when he first gave the information respecting the suspected cargo of this vessel, to that when she was delivered into the hands of the defendant, to be proceeded against; and the question for you to decide is, whether the recovery of the forfeiture, which was ultimately obtained, was in consequence of information received from any officer of the revenue cutter. If it was, then,

2d. Was any thing done by the plaintiffs, which amounted to a waiver of their right to a share of the sum recovered? The affirmative is contended for by the defendant, upon two grounds:

(1) Because the plaintiffs consented to the removal of the vessel and cargo, from the Delaware to the Pennsylvania district, which, as it operated to an abandonment of the claim of the collector of that district to a share of the forfeiture, produced the same effect in relation to the claim of the plaintiffs. The answer to this is, that it is made the duty of the collector, where he has probable ground to suspect a violation of the non-intercourse law, to make the seizure, and to proceed regularly against the offending article, in order to obtain its condemnation. If, instead of doing this, the collector, who receives the information, and may legally proceed to enforce the forfeiture, chooses to turn over the business to the collector of another district, and thus to abandon the claim which he might have asserted to a part of the sum to be recovered, the claim of the informant cannot be affected by the transaction, although he should have assented to it; because he has nothing to do with the seizure, or other proceedings. To him it is immaterial where the trial takes place;—his right to a share of the forfeiture, though inchoate, arises from the information, and is consummated by the recovery. His consent to the removal of the property, then, whilst it amounts to the assertion of an interest in the forfeiture, should it be decreed, (for otherwise his consent was not worth asking,) cannot in any manner affect that interest. In short, this is not a case, where a jury would be justified in presuming a waiver. It is much more likely, that the plaintiffs were ignorant of their rights, than that, knowing them, they would voluntarily relinquish the chance of obtaining so considerable a sum of money.

(2) The letter from Sawyer to the defendant, written after the institution of this suit, is supposed to amount to a waiver, at least of his claim to any part of the recovery. Whatever other answer might be made to this objection, this is sufficient, that the letter cannot be construed to apply to the claim, but merely to the suit, the institution of which, in his name, he disavows; and it is a fact, that, notwithstanding that letter, he has persevered in the suit to the present moment.

If the plaintiffs are entitled, under the law, to a share of the forfeiture of this vessel and cargo, and have not waived their claim to it, the only remaining question is—3. Are they entitled to recover any thing; and if any thing, how much, from the defendant? No evidence was given, nor is it even pretended, that any notice of this claim was given to the defendant, by the plaintiffs, or by any other person, until the institution of this suit, in November, 1817; before which time, 4,955 dollars, the supposed share of the custom-house officers, had been paid; the other moiety was not paid into the treasury of the United States, before the year 1818.

If the defendant had paid over the whole of the sum recovered to the United States, and the custom-house officers, before he received notice of the claim of the plaintiffs, he would not have been liable in this action for any part of the sum which he had so parted with; because, being appointed by law an agent to receive, and to distribute the money, (where there is no informer,) between the United States and the custom-house officers, he was strictly in the performance of his duty in so distributing it, unless he had notice that there was an informer, and that an officer of the revenue cutter was that informer. The law could never be so unreasonable, as to punish a public officer for doing what itself had enjoined, unless a certain circumstance existed, of which he had not notice. It is to be remarked, that the distribution of forfeitures, is to be in moieties between the United States and the custom-house officers; and that a different distribution is not to be made, unless there be an informer. Surely, then, if there be an informer, the collector ought to be apprized, before he makes the distribution, who he is. If, for want of such notice, the informer has lost his recourse against the collector, it is attributable to his own neglect; the consequence of which, it would be most unjust to permit him to shift from his own shoulders to those of the defendant. It is obvious, that the difficulty in this case arises from the uncommon circumstance, that the information was given to the collector of a district, within which it was expected the seizure would be made, and where the suit for the forfeiture might have been prosecuted; instead of which, the vessel, with her cargo, was sent by that collector, to the collector of another district, where the suit was instituted and the recovery obtained. In ordinary cases, the collector can never be ignorant on whose information he acts, where there is an informer. The court is therefore of opinion, that the defendant is not liable to the plaintiffs, for any part of the money paid by him to the other officers of the custom-house, or of the share to which the United States are legally entitled.

If the jury should be of opinion, that the plaintiffs were, in point of fact, informers within the meaning of the act of congress as before explained, and that the defendant had not notice of the plaintiffs' claim, as informers, before the 4,955 dollars were disposed of; then, in estimating the damages to which the plaintiffs are entitled, they ought to deduct the sums actually paid to the naval officer and surveyor, the proportion to which he himself was legally entitled, (for the balance is still in his hands,) and the proportion to which the United States were legally entitled, from the net sum received by him, and your verdict ought to be for the residue. Thus—

Amount of recovery, after costs and charges deducted		$9,911 00
Paid the naval officer and surveyor	$3,310 00	
Share of the United States	2,477 87½	
Share of the collector....	827 50	
		6,615 37½
		$3,295 62½

As to interest, which is claimed from the time this suit was instituted, the court leave that question to the jury.

The jury found for the plaintiffs $3,295.62½ if the court should be of opinion, &c. &c.

Case No. 12,407.

SAWYER et al. v. STEELE.

[4 Wash. C. C. 227.] [1]

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

NON-INTERCOURSE — FORFEITURE — DISTRIBUTION OF SHARE—OFFICERS OF REVENUE CUTTER —ASSUMPSIT—JOINDER.

1. The officers of a revenue cutter may join in an action of assumpsit against the collector, for their proportion of a forfeiture, under the laws of the United States.

[Cited in Boston & M. R. R. v. Portland, S. & P. R. R., 119 Mass. 500.]

2. The general doctrine of the law as to joinder in actions.

This was an action of indebitatus assumpsit brought by the plaintiffs, the officers of a revenue cutter, against the defendant, the collector at Philadelphia, for money had and received to their use, to recover their proportion of the forfeiture incurred by the Perseverance, for a breach of the non-intercourse law. The jury found a verdict for the plain-

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

tiffs, subject to the opinion of the court, upon the question, whether the plaintiffs can join in the action.

WASHINGTON, Circuit Justice. The rule of law applicable to this subject, is laid down in Slingsby's Case, 5 Coke, 19, which has never been departed from, to my knowledge. It is, that where the grantees are to take a joint interest in the thing granted, they must join in the action, although the covenant is made with them severally; and the reason assigned is, that a man cannot, by his covenant, unless in respect of several interests, make it first joint and, then several; but if the interests are severed, then the covenant in respect thereof may be several. 1 East, 500. This rule is universal in its application to actions in form, ex contractu. But in cases of tort, or which sound in damages, two or more may join, though their interests be several, if the damages sustained are joint. Coryton v. Lithebye, 2 Saund. 115; Weller v. Baker, 2 Wils. 423; Winterstoke Hundred's Case, Dyer, 370; Vaux v. Stewart, Rolle, Abr. 31; Brooke, Abr. "Joinder in Action," 103. The reason why, in these and similar cases, the parties must join, although their interests are several, is, that the damages cannot be apportioned between the parties, and as neither can sue for the whole, or for a part, they must join from necessity. But I take the rule itself to be universal, that where the legal interest is joint, the parties cannot sever in their action, unless the interest is first severed; because if they might do so, the court could not know for which plaintiff to give judgment. Where the reason ceases, the observance of the rule is dispensed with; and therefore, if one of two persons, having a joint interest, receives his proportion, this amounts to a severance, and the other may sue alone for his share. 1 Esp. N. P. 117.

Keeping this rule in view, the court will proceed to the more particular examination of this case; and the only question will be, whether the grant of the proportion of the forfeiture for which this action was brought, is to be construed several or not. The eighteenth section of the act of March, 1809 [2 Stat. 528], refers to the ninety-first section of the duty law [1 Stat. 697], for the manner in which the penalties and forfeitures incurred under that act are to be distributed. The section so referred to declares, that all fines, penalties, and forfeitures, recovered by virtue of that law (and not otherwise appropriated) shall, after deducting all proper costs and charges, be disposed of as follows; one moiety shall be for the use of the United States, and be paid into the treasury by the collector receiving the same: the other moiety shall be divided between, and paid, in equal proportions, to the collector and naval officer, and surveyor of the port, where the same shall have been incurred: provided, nevertheless, that in all cases where the said penalties, &c. shall be recovered, in pursuance of information given to such collector by any person other than the naval officer or surveyor, the one half of such moiety shall be given to such informer, and the remainder thereof shall be disposed of between the collector and the other officers. It is also provided, that "where the said penalties, &c. shall be recovered in consequence of any information given by any officer of a revenue cutter, they shall, after deducting all proper costs and charges, be disposed of as follows: viz. one fourth part shall be for the use of the United States, and paid into the treasury thereof, in manner as before directed; one fourth part for the officers of the customs, to be distributed as hereinbefore set forth; and the remainder to the officers of such cutter, to be divided among them agreeably to their pay." It is not to be controverted, that this would have been a grant of a joint interest to the officers of the cutter, if the words "to be divided among them agreeably to their pay," had been omitted; and then the inquiry is, how far those words operate to sever the grant to those persons? What is the legal operation of these words?

The plaintiff's counsel have contended, that the officers of the revenue cutter took a joint interest in the proportion of the forfeiture to which they are entitled; and in support of their argument, they have relied principally upon the case of Ward v. Everard, 1 Salk. 390, 1 Ld. Raym. 422, and other books where the same case is reported. I agree that the words "equally to be divided," had they been used in the law under consideration, would not have severed their interests, and this opinion is founded upon a full examination of all the cases. Fisher v. Wigg, 1 Ld. Raym. 622; Stringer v. Phillips, 1 Eq. Cas. Abr. 291; Hood v. Stokes, 1 Wils. 341; Rigden v. Vallier, 2 Ves. Sr. 256; 2 Vent. 365; Ward v. Everard, Carth. 340; 12 Mod. 227; 3 Bac. Abr. 195; 5 Mod. 26; 2 Bl. Comm. 193; Den v. Gaskin, Cowp. 657. But it is to be observed, that all the cases which were cited at the bar upon this branch of the subject turned upon the effect of the words "equally to be divided," or others of like import. I have met with none in which the distribution was unequal, as it is in this case; and I am strongly inclined to think, that, upon Lord Holt's own reasoning in Ward v. Everard, such a distribution would have been considered by him as a severance of the interest granted. In short, I can discover in a grant of unequal interests to two or more persons, nothing of that unity of interest, which is one of the characteristics of a joint tenancy. For, although there may be a joint tenancy, notwithstanding there should be an inequality of interest between the parties in the estate granted; as for example, A and B may be joint tenants for life, and yet the fee be limited to one of them; or there may be an inequality in the chance of survivorship, as where A and B are joint tenants for the life of one of them; yet this estate cannot be created where there is not a unity, or equality in the thing held in

joint tenancy; for if it were otherwise, the jus accrescendi would be most unjust. This inequality, it is true, may take place amongst partners by the law merchant; but there, there is no survivorship.

But without pursuing this inquiry further, I feel no difficulty in deciding, that, if the joint interest was severed, so that the plaintiffs took as tenants in common, they might nevertheless join in this action. It has been before stated, that joint tenants must, in all cases, join in actions ex contractu, and so must tenants in common, in actions for torts, where the wrong complained of is an entire joint damage. But although they must sever in an avowry for rent, yet it is unquestionable law that, in debt, or covenant, for rent, or upon any other contract relating to their interest, they may join, or sever, at their election. Martin v. Crompe, 1 Ld. Raym. 341; Lit. S. 316; Carth. 289; 3 Wils. 118; 2 W. Bl. 1077; Harrison v. Barnby, 5 Term R. 249; Kitchin v. Buckley, T. Raym. 80; 1 Leon. 109; Kirkham v. Newsted, 1 Esp. N. P. 117. I do not recollect, indeed, that this doctrine was controverted by the defendant's counsel, because the ground upon which he mainly relied was, that the grant to the officers of the revenue cutter was, in its nature, several, as much so, as if a certain sum had been granted to each of the officers respectively. My opinion is different. I do not think that such an inference is warranted, either by the intention of the law apparent upon the face of it, or by a necessary construction of its language.

As to the first,—the phraseology of the ninety-first section of the duty act is peculiar. The moiety intended for the use of the United States, where there is no informer, is to be paid into the treasury by the collector, and the other moiety is to be divided between and paid in equal proportions to the custom house officers. If there be an informer, other than an officer of the revenue cutter, then the half of the moiety before given to the custom house officers, is given to such informer. Now it seems most obvious, that in all these cases, the collector is to make the distribution, and the interest of each person is clearly separated. But if the information be given by an officer of a revenue cutter, one fourth of the forfeiture is declared to be for the use of the United States, and paid into the treasury in manner before directed; one fourth for the officers of the customs, to be distributed as before set forth; and the remainder to the officers of the revenue cutter, to be divided among them agreeably to their pay. It is not to be paid to them, nor to be divided between and paid to them in equal proportions, as provided in the other cases; but it is given at once to the officers to be divided between them; so that the collector has nothing to do with the distribution, but may pay it to them, or to either of them, and leave them to divide it in the proportions marked out in the law. It would seem to be unreasonable that the legislature should have imposed upon the collector the trouble of making a distribution among persons with whom he had no privity or connexion; and the risk to which he might have been exposed by making an erroneous distribution. The same reason does not apply to the payment of a definite sum into the treasury of the United States, or to an informer, and the distribution of equal proportions amongst himself and the other officers of his establishment.

As to the second,—the grant is to the officers of the revenue cutter, to be divided between them. Here then is the unity of possession which constitutes a tenancy in common. They hold in common until the division is made; and it is no argument to say that the parties knew their own in severalty, since by a plain calculation, it might at once be known to what sum each officer was entitled; for the possession of the money was still of the whole, until the division should be made. In the case of Ward v. Everard, it was much more distinctly known to what sum each was entitled, and yet the grantees were decided to be joint tenants, the limitation of £20 a-piece being considered as merely pointing out the mode of distribution, without severing the grant. So in Knight's Case, and the case put in Co. Litt. 169b, of a grant of one co-parcener of a rent of £20 for equality of partition to the other two, viz. £10 to each, the separate right of each is distinctly marked, and yet in both, the grantees took as joint tenants. These cases then are abundantly strong, to prove at least that the plaintiffs did not take severally.

The case of part owners of a vessel is not inapplicable to the present subject. It is laid down in Abb. Shipp. 66, that they make but one owner; and in case of injury done to the ship by the wrong or negligence of a stranger, they ought regularly to join in one action, at law, for the recovery of damages, which are afterwards to be divided amongst them, according to their respective interests; although, if they sue severally, the defendant must take advantage of it by a plea in abatement, the rule being provided for his benefit, that he may not be harassed with the expense of several suits. Now it is most apparent, that, although for the reason assigned they should all join in the action, yet, in point of interest, they are nothing more than tenants in common. If it be said that by permitting the plaintiffs in this case to unite their interests by bringing one action, survivorship might take place in case of the death of one or more of them, I would answer: (1) That this objection should have had its weight with the plaintiffs, who have voluntarily united; but that it comes with a bad grace, to say the least of it, from the defendant; and (2) that it was in the power of the plaintiffs, by an agreement amongst themselves, to guard against such a consequence.

Upon the whole, we are of opinion, that

this action was properly brought by all the officers, and that judgment should be given in their favour.

Case No. 12,408.

SAWYER et al. v. SWITZERLAND MAR. INS. CO.

[14 Blatchf. 451.] [1]

Circuit Court, S. D. New York. May 18, 1878.

REMOVAL OF CAUSES—JURISDICTIONAL CITIZENSHIP.

Where the defendant removed a suit into this court, under section 2 of the act of March 3, 1875 (18 Stat. 470), on the ground that the defendant was a Swiss corporation, and that the plaintiffs, three in number, were citizens of the state of New York, and it appeared that two of the plaintiffs were, when the suit was commenced, aliens and British subjects, and the third was a citizen of New York, the cause was, on the applications of the plaintiffs, remanded to the state court, on the ground that the requisite jurisdictional citizenship must exist as to each individual plaintiff.

[Cited in Mackaye v. Mallory, 6 Fed. 751; Boyd v. Gill, 19 Fed. 147.]

[This was an action by Samuel A. Sawyer, David L. Wallace, and Thomas Miller against the Switzerland Marine Insurance Company on a policy of insurance. Heard on motion to remand.]

Clarence A. Seward, for the motion.

Simon Sterne, opposed.

BLATCHFORD, Circuit Judge. The plaintiffs, as copartners, brought this suit against the defendants, a corporation created by the republic of Switzerland, in the supreme court of New York, on a policy of insurance issued to the plaintiffs as copartners, by their copartnership name. The defendants instituted proceedings, under the second section of the act of March 3, 1875 (18 Stat. 470), to remove the suit into this court, on a petition alleging that; when the suit was brought, the plaintiffs were citizens of the state of New York. An order of removal was made by the state court, and, a copy of the record having been entered in this court, the plaintiffs now move to remand the suit to the state court, on the ground that, when the suit was commenced, Wallace and Miller were aliens, and subjects of Great Britain, while Sawyer was a citizen of the state of New York. The statute provides, that, when the suit is a suit in which there is "a controversy between citizens of a state and foreign states, citizens or subjects," either party may remove the suit into the proper circuit court. I think that the views laid down in the various decisions of the supreme court, from Strawbridge v. Curtiss, 3 Cranch [7 U. S.] 267, to the Case of Sewing-Mach. Cos., 18 Wall. [85 U. S.] 553, and which views were applied by this court in Petterson v. Chapman [Case No. 11,042], to the case of a removal under the clause of the same second section which provides for the removal of a suit in which there is "a controversy between citizens of different states," require that this application should be granted. The plaintiffs must all of them be citizens of a state, and the defendants must all of them be foreign citizens or subjects. The plaintiffs are not all of them citizens of a state. Two of the plaintiffs are aliens. The requisite jurisdictional citizenship must exist as to each individual plaintiff. The party on each side, though consisting of several individuals, is, for the purpose of removal, to be considered as one individual. It is the "party" who alone can remove the suit. This case stands in no different position from that which it would occupy if Sawyer had not been a member of the copartnership, in which case, the suit being one between foreign citizens on the one side, and foreign subjects on the other, the case would not be removable under the section in question. The rule is especially applicable to a case like this, where the alien members of the copartnership are necessary parties to the suit.

An order must be entered remanding the case to the state court.

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

Case No. 12,409.

SAWYER et al. v. TURPIN et al.

[1 Holmes, 226.] [1]

Circuit Court, D. Massachusetts. March, 1873.[2]

BANKRUPTCY—ILLEGAL PREFERENCE—MORTGAGE IN EXCHANGE FOR DEED—FOUR MONTHS' LIMIT.

1. A mortgage given by a debtor to his creditor within four months before the debtor's petition in bankruptcy, in exchange for a deed of the same property given to the creditor more than four months before the petition, is valid against the debtor's assignees in bankruptcy, although the deed has not been recorded, and no possession under it been taken, before the exchange.

2. A mortgage held void as against the assignees in bankruptcy of the mortgagor; it having been given within four months before his petition in bankruptcy, he being then insolvent, to a creditor who had reasonable cause to believe him to be insolvent.

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

[This was an action by Jabez A. Sawyer and others against Edward Turpin and others. From a decree in the district court for defendants (Case No. 12,410), plaintiffs appeal.]

J. G. Abbott and Benjamin Dean, for appellants.

Joshua D. Ball, for appellees.

SHEPLEY, Circuit Judge. This is an appeal from so much of the decree of the district judge as directed the complainants to pay over to the respondents, Novelli & Co.,

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

[2] [Affirming Case No. 12,410. Decree of circuit court affirmed by supreme court in 91 U. S. 114.]

the proceeds of the sale under order of court, of a certain building described in the bill of complaint as situated on the northerly side of Atlantic street in Lynn.

Certain real estate had been mortgaged by Jeremiah C. Bacheller, a bankrupt, whose assignees are the complainants, on the twenty-seventh day of July, and the personal property, being the building above described, on the thirty-first day of July, to the defendant Turpin, for and in behalf of the other defendants, Novelli & Co. These mortgages were given as collateral security for a debt due Novelli & Co. from the bankrupt. They were given within four months of the filing of the petition on the 22d of October, on which Bacheller was declared bankrupt. The district court [Case No. 12,410] found upon the evidence, that, at the date of these conveyances, Bacheller was insolvent, and that the defendants had reasonable ground to believe him to be so. On this ground, the court decided that the conveyance of the real estate mortgaged on the 27th of July was void, and ordered the proceeds of the sale of that property to be paid to the assignees. Upon examination of the evidence, we see no reason to doubt the correctness of this portion of the decree, or the accuracy of the conclusions upon which it is based.

If the chattel mortgage had been given under like circumstances and upon similar considerations, the same consequences would have followed. The chattel mortgage differs from the mortgage of the real estate, in the fact that it was given in substitution for a deed of the same property which had been received prior to June 9, and more than four months before the filing of the petition in bankruptcy. It is well settled, that an exchange of security, even after the debtor is known to be insolvent, is perfectly valid, if the creditor, by the exchange, receives no more in value than he gives up. Stevens v. Blanchard, 3 Cush. 169. It is argued, that, as the deed surrendered in exchange for the mortgage of the same property had not been recorded, and no possession had been taken under it before the exchange of securities, the rights of the creditor must be determined upon the state of facts as they existed when he took the mortgage of July 31, and not at the date of the absolute deed of May 15, which he surrendered.

The deed was valid as between the parties, without possession or record. Gen. St. Mass. c. 151, § 1. He might have taken possession any moment, or have recorded it at any time before the exchange of securities. The deed he surrendered before record was as good as the mortgage he received before that was recorded. He obtained no other or greater security than he gave up. He could have recorded either of them, and have perfected his rights as against creditors before any rights of creditors had intervened; and no rights of creditors had intervened when the exchange was made. The grantee does not appear to have been benefited in a pecuniary way, or the general creditors injured, by the exchange, and there was consequently no unlawful preference.

Decree of district court affirmed.

[On appeal to the supreme court, the above decree was affirmed. 91 U. S. 114.]

Case No. 12,410.

SAWYER et al. v. TURPIN et al.

[2 Lowell, 29;[1] 5 N. B. R. 339.]

District Court, D. Massachusetts. Aug. 18, 1871.[2]

BANKRUPTCY—TRADER—INSOLVENCY—CONDITIONAL DELIVERY—FOUR MONTHS' LIMIT.

1. A trader is insolvent within the meaning of the thirty-fifth section of the present bankrupt act [of 1867 (14 Stat. 517)] when he is unable to pay his debts as they mature in the ordinary course of his business, and not merely when his liabilities exceed his assets.

[Cited in Strain v. Gourdin, Case No. 13,521.]

2. A contract for the conditional delivery of goods to a debtor gives his creditors no title to them until the account for the same is paid.

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

3. Where a security by way of mortgage is given more than four months before bankruptcy, a change in the former substance of the deeds made within four months of the bankruptcy, will be protected if no greater value were put into the creditor's hands at that time than he had before.

4. A mortgage given when a debtor was insolvent and when his creditor had reasonable cause to believe him to be so, is void if made within four months of the filing of a petition in bankruptcy, hence money received from the sale of the mortgaged premises must be accounted for to the assignee.

[Cited in Avery v. Hackley, 20 Wall. (87 U. S.) 407.]

[5. Cited in National Security Bank v. Price, 22 Fed. 699, to the point that a person is presumed to intend the necessary consequences of his own acts, and any act whereby he gives his creditor a preference must be presumed to have been made with an intent to prefer.]

Two bills in equity by the assignee in bankruptcy of J. C. Bacheller, of Lynn, against Novelli & Co., of Manchester, England, and their agent in this country, E. Turpin, alleging that at certain times mentioned, and all within four months before the bankruptcy, Bacheller, being insolvent, made two mortgages of certain lands in Lynn, and a third mortgage of a house standing on leasehold land, and certain transfers of goods of the alleged value of twenty thousand dollars in gold, then in the bonded warehouses of the United States of Boston, to said Turpin as agent for Novelli & Co., with intent to prefer said last named defendants, they and their agent believing and

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

[2] [Affirmed in Case No. 12,409. Decree of circuit court affirmed by supreme court in 91 U. S. 114.]

having reasonable cause to believe that Bacheller was insolvent and intended a fraud on the act. The answers admitted that the mortgages were made as security for a large balance of account for goods sold, but denied all belief and reason to believe the insolvency of Bacheller, and averred that two of the mortgages were given instead of two earlier conveyances of the same property which had been made more than four months before the bankruptcy, and which were cancelled when these now in controversy were given. As to the goods, the answers admitted that transfers were made by Bacheller to Turpin as agent of his principals on the books of the custom house, and set out the several dates thereof, and averred that the goods were on their way from Novelli & Co. to Bacheller when the sales were lawfully rescinded before the property had ever vested in Bacheller, and if the re-transfers were not valid, there was a right to stop the same goods in transitu, and that said goods had not been delivered to Bacheller at the time of his stopping payment. The evidence tended to show that Novelli & Co. had for some years before July, eighteen hundred and sixty-eight, dealt largely with a firm of which Bacheller was a member, and when he began business by himself in eighteen hundred and sixty-eight he continued to send them large orders for goods such as he had always dealt in. The terms appear to have been that each invoice was to be remitted for within sixty days from its date. Early in eighteen hundred and sixty-nine Bacheller was largely in arrears to Novelli & Co., and continued to be so until his failure. He stopped payment in September and filed his petition on the twenty-second of October, eighteen hundred and sixty-nine, the defendants appearing by his schedule to be creditors to the amount of about forty-one thousand dollars, and held the securities mentioned in the bills. All his other debts were about six thousand dollars.

It appeared that in April, eighteen hundred and sixty-nine, Novelli & Co. wrote to Turpin expressing their dissatisfaction with the state of Bacheller's account, and directing him on receipt of the letter to proceed at once to Boston and if there was still an overdue balance, "to induce, request or insist that he hands over to you as collateral security the notes and such other documents of value you can by any means obtain, to be held by you in safe keeping until such time as he can cover our overdue balance by remittance." They afterwards in the same letter say that they consider "the position of J. C. B.'s affairs are not, in a commercial point of view, satisfactory," and state their reasons. On receipt of this letter Turpin went to Lynn and saw Bacheller, and obtained from him conveyances of the land on Bacheller street and of the shop on Exchange street, and a transfer of certain goods in the custom house as collateral security. And at the same interview it was agreed that all goods that should arrive thereafter should be warehoused in Turpin's name until they were sold by Bacheller, when Turpin should send withdrawal orders and Bacheller should sell the goods and remit the proceeds. This course of business was followed from that time, excepting that the remittances were made on account without special reference to any particular sales. Goods were so transferred to Turpin in May, June, August and September as they arrived, and were re-transferred by him as they were sold. When Bacheller stopped payment in September there were —— cases thus stored in Turpin's name, for a part of which he had sent on withdrawal orders which, on the failure, were sent back to him, and on the fourteenth of October he took the goods out of bond, paying the duties and charges, and caused them to be sold. At the time of his failure the bankrupt's debt to Novelli & Co. was as large as it was in May. On the twenty-seventh of July Bacheller handed to Turpin the mortgage of the house on Atlantic street as additional security. On the 31st of July Turpin brought the deeds which he had received in May to Mr. Bacheller's clerk, who was to have them recorded, and the clerk said that it would be better to make some change in their form and accordingly made out the mortgages which bear date thirty-first of July and were recorded in September. The delay for a month or more in recording the deeds was an oversight on the part of the clerk. The title to the Bacheller street property proved to be defective and the defendants realized nothing from that mortgage, so that the discussion was eventually confined to one mortgage of lands and one of personal property.

J. G. Abbott and B. Dean, for plaintiffs.

1. Bacheller was insolvent in May and ever after according to the accepted definition; for he could not pay his debts as they matured. Thompson v. Thompson, 4 Cush. 127; Lee v. Kilburn, 3 Gray, 594, and cases cited.

2. The defendants had notice of the insolvency, because their own debt was overdue, and they were unable to obtain payment. All the correspondence shows this to be so, and besides, they were obliged to take security on real estate for a balance which should have been liquidated as fast as it accrued.

3. The defence that the new mortgages were given in exchange for the old fails, because one was given for the first time July twenty-seven; another was for a bill of sale which was void, never having been recorded and no possession taken under it, and none of them were ever acted on.

4. All transfers of merchandise made within four months of October twenty-second are void, because they were given to secure an antecedent debt, when the debtor was insolvent and known to be so. The arrange-

ment cannot be dated back to May, because a mere executory contract for security does not suffice. This has been repeatedly decided by the supreme court of Massachusetts. Forbes v. Howe, 102 Mass. 427; Blodgett v. Hildreth, 11 Cush. 311; Paine v. Waite, 11 Gray, 190; Simpson v. Carleton, 1 Allen, 109; Denny v. Dana, 2 Cush. 160.

5. The right of stoppage cannot be set up, because the defendants asserted a wholly different and inconsistent title, under a new arrangement, by which the goods were to be held as security generally.

J. D. Ball, for defendants.

1. The weight of the evidence is that the defendants had no reasonable cause to believe the debtor to be insolvent until he actually stopped payment in September.

2. All but one of the mortgages was a mere change of security, which is valid. Stevens v. Blanchard, 3 Cush. 169.

3. All the goods now in controversy, excepting one case, were transferred on their arrival simultaneously with the receipt by Bacheller of the bills of lading and invoices from Turpin, and therefore they were conveyances of property which, but for this arrangement, the defendants would have withheld. It is like the instantaneous seizure which takes place when one mortgages back land to secure the payment of the purchase money, which, if done as part of the same transaction, gives the wife of the vendee no right of dower. At all events we had a right to stop the goods in the bonded warehouses in September, for the transit was not ended. Northey v. Field, 2 Esp. 613; Burnham v. Winsor [Case No. 2,180]; Donath v. Broomhead, 7 Barr. [Pa. St.] 301; Mottram v. Heyer, 5 Denio, 629; Harris v. Pratt, 17 N. Y. 249; Winks v. Hassall, 9 Barn. & C. 372; Kent, Comm. 547. The fact that Bacheller had transferred the goods to Turpin did not affect the right of stoppage in transitu as an independent right. Naylor v. Dennie, 8 Pick. 198; Scholfield v. Bell, 14 Mass. 40; Grout v. Hill, 4 Gray, 367; Feise v. Wray, 3 East, 94.

LOWELL, District Judge. The thirty-fifth section of the bankrupt act [of 1867 (14 Stat. 517)], so far as it relates to preferences, has not, as yet, been construed by the supreme court of the United States, but its meaning is as well established as it can be until it has passed that final ordeal, because the lower courts have been remarkably harmonious in their decisions upon it. A trader is insolvent within the meaning of that section when he is unable to pay his debts as they mature in the ordinary course of his business and not merely when his liabilities exceed his assets. The Massachusetts decisions under the law of that state have approved themselves to the judgment of the courts that have had occasion to pass upon this part of the United States statute, which is borrowed from that of Massachusetts, and is presumed to have been enacted with a full knowledge of its accepted judicial interpretation. It is equally well settled that when a trader is insolvent and knows it and expects or fears that he may at some future time be obliged to stop payment, and at such a time gives security to one creditor, he must be presumed to intend to prefer that creditor, because this is the necessary result of his conduct, if what he expects or fears may happen to come to pass. And it does not relieve the act of this intent to prove that other motives may have co-operated to induce the act such as the pressure of importunity or threats, or proceedings at law on behalf of the creditor so benefited. And if the creditor believed, or had reason to believe, in the insolvency of the debtor and that the security would be likely to make a preference, the case is complete, if bankruptcy in fact occurs within four months. This state of law was assumed in the argument on both sides in this case, and the facts were discussed in view of it. Upon careful consideration I find it impossible to doubt that Bacheller was insolvent in the technical sense on the sixth of May. The correspondence and other evidence which the defendants have furnished with the utmost frankness show that they had reason to doubt his ability to pay with punctuality, and that they did doubt it, though they may have had full hopes of ultimate payment. They were aware that he was constantly in arrears to them and that his excuses were unsatisfactory, and they feared he was over-trading, and speculating, which the event shows was probably true. Under these circumstances security is taken at the risk that bankruptcy may intervene within four months.

As Bacheller did not petition until the twenty-second of October, it is plain that the assignment of May sixth cannot be impeached. And the defendants insist that all the transfers of goods in bond and all but one of the mortgages were made in pursuance of that arrangement and date from that time. The plaintiffs contend on the other hand that a mere executory contract to give security is of no avail unless the transaction is completed more than four months before the bankruptcy, and that each deed or assignment dates from the time it was made and not from the time it was agreed to be made. To the cases cited for this doctrine may be added Arnold v. Maynard [Case No. 561], and Bank of Leavenworth v. Hunt [11 Wall. (78 U. S.) 391]. Whatever may be the proper limitations of this rule under the bankrupt act, the rule itself does not apply to the several assignments of goods in bond, because the agreement of May sixth was not so much an undertaking to give security upon property to be thereafter acquired, but as a new contract, by which the deliveries of goods by seller to purchaser were to be conditional, so that Bacheller never acquired the title to these lastings excepting under the terms of the new arrangement, and his creditors had

no interest in them unless there should be a surplus after paying the balance due the defendants. If this is the fair construction of that agreement, it can only be impeached by evidence that the goods were already so far vested in Bacheller that there was no consideration for the promise excepting the old debt, and such I understand to be the agreement for the plaintiffs. But the proofs are that the course of dealing even before May sixth, was to send the invoices and bills of lading to Mr. Turpin, and I see no reason to doubt that if this new arrangement had not been made he would have had the right to withhold the lastings not yet delivered, until his account should be paid. It follows that a contract for their conditional delivery gives no just cause of complaint to Bacheller's creditors.

So if security by way of mortgage was given in May, a change in the form or even in the substance of the deeds made within four months of the bankruptcy would be protected, if no greater value were put into the creditor's hands at that time than he had before. This is admitted; but it is urged that the bill of sale of the house given in May was void and could not form a legal equivalent for the mortgage of July. The facts on this part of the case are not entirely clear, because the original bill of sale cannot now be found. It appears to have been drawn up by the bankrupt's clerk, and his impression, as well as Mr. Turpin's, is that it was not in form a mortgage. Still, it was given and received as a valid security between the parties, and I am not prepared to say that it is shown to be void. The change of securities was considered to be a mere change of immaterial matters of form, without the least intent to vary the rights of the parties or of creditors, and I am of opinion that I cannot, in the present state of the evidence, undertake to say that the surrender of the bill of sale was not a sufficient consideration even as against creditors for the mortgage on the same property. Since the decision in Bank of Leavenworth v. Hunt, above cited, I cannot but feel some doubt whether the supreme court would recognize the validity of an unrecorded mortgage of chattels; but my own opinion has been recorded in its favor and that case does not necessarily overrule it. But the mortgage of the house and land on Atlantic street stands differently. It was given for the first time July twenty-seventh, and was not in exchange for anything, and the debtor was then embarrassed and was known by the defendants to be so. I do not recapitulate the evidence. It would seem that Bacheller must have had debts besides those contracted in his regular business, and it may be that the payment of some of those debts is still more objectionable in the view of the bankrupt law than any dealings with Novelli & Co. But with this I have no concern at present. That he was insolvent in the technical sense in July, and that the defendants had reason to believe him so I am constrained to hold upon the evidence exhibited in the records. The result is that the money realized from the mortgage of the land on Atlantic street must be accounted for to the assignees. The proceeds of sales of the goods and of the shop belong to the defendants. Let decrees be entered accordingly.

[NOTE. Complainants appealed to the circuit court, where the above decree was affirmed. Case No. 12,409. They then appealed to the supreme court, which affirmed the decree of the circuit court. 91 U. S. 114.]

SAWYER (UNITED STATES v.). See Case No. 16,227.

Case No. 12,411.

SAXE et al. v. HAMMOND et al.

[Holmes, 456;[1] 1 Ban. & A. 629; 7 O. G. 781.]

Circuit Court, D. Massachusetts. Jan., 1875.

PATENTS—INFRINGEMENT—COMBINATION—MANUFACTURE OF ONE ELEMENT—FOR WHAT USE INTENDED—PRACTICE.

1. The manufacture of one of the elements of a patented combination, not proved to be made for use in connection with the other elements, is not an infringement of the patent for the combination.

[Cited in American Cotton-Tie Co. v. Simmons, 106 U. S. 95, 1 Sup. Ct. 57; Schneider v. Pountney, 21 Fed. 403; Snyder v. Bunnell, 29 Fed. 48; Syracuse Chilled Plow Co. v. Robinson, 35 Fed. 503; Hobbie v. Jennison, 40 Fed. 890. Approved in Robbins v. Columbus Watch Co., 50 Fed. 555. Cited in Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U. S. 433, 14 Sup. Ct. 630.]

2. A patent for the application to organs, &c., of any means of agitating the air "by agency external to the wind-chest, which shall not prevent the flow of the air past the reeds," so as to produce a continuous tremulous note, instead of a succession of notes, is not infringed by the manufacture of a wooden fan capable of being so applied, unless the manufacture is proved to be for the purpose of such application.

3. Where, in a suit in equity on a patent, no infringement is found, the court will not pass upon the question of the novelty of the patented invention.

[This was a bill in equity by George G. Saxe and others against A. H. Hammond and others for the infringement of a patent.]

Whitney & Betts, for complainants.

Causten Browne, B. E. Valentine, and W. W. Blackmar, for defendants.

SHEPLEY, Circuit Judge. This bill in equity alleges that the defendants infringe certain letters patent, reissued to the complainants, as assignees of R. W. Carpenter, on the 5th of October, 1869, No. 3,665, for a "tremolo" attachment to musical instruments. The defendants deny infringement, and allege prior knowledge and use of the patented in-

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

vention by La Fayette Louis and others, more than two years before the date of the application of R. W. Carpenter; and also, that the same invention and discovery, and the same devices described in said patent, and substantial and material parts thereof, were patented on the eighteenth day of November, 1856, to La Fayette Louis.

If the defendants could be held as infringers of the Carpenter patent—if it be a valid patent, and not anticipated by the devices which were made and used by La Fayette Louis at Chicago and other places—it would be necessary, carefully, to consider and decide upon the probative force and effect of the testimony in relation to those devices of Louis, which, if the testimony of the witnesses in relation to them is to be received with full credit, acted substantially as agitators to, or reflectors of, the waves or currents of air passing through the reeds in the musical instrument, and not as valves to interrupt the continuity of the musical notes. If they operated in the way first described, they would seem to have operated in the same manner, and with the like result, as Carpenter's fan-tremolo, although Louis appears to have been ignorant of the philosophy of the operation—a want of knowledge which is imputable as well to Carpenter, and even to those who have the benefit of the theories (which are only claimed to be theories, of the most learned scientists who have testified as experts on this subject). If, however, the evidence in this record is not sufficient to charge the defendants as infringers of the complainants' patent, it is not necessary to decide that question in this case.

The defendants are manufacturers of supplies of materials which are elemental parts of organs and other musical instruments. They sell to the organ manufacturers. It is not claimed, that they have made any musical instruments, or sold any, in which the tremolo attachments of any kind are arranged, or to which they are applied in any manner. The complainants allege, that they (the complainants) have licensed large numbers of manufacturers to put these fans in their organs, and prove that they agreed to license every reputable manufacturer who should apply. There is no evidence, in this record, of a sale to an unlicensed manufacturer of organs. The thing made by the defendants is shown by the exhibit produced in the case; a wooden structure of the simplest kind, which is, in itself, no infringement, and which, in order to constitute an infringement of the complainants' patent, must be placed by an unlicensed manufacturer in a musical instrument, and placed in a certain position in that instrument, external to the wind-chest. A revolving fan is not new. All the defendants make, is a fan capable of being made to revolve. The complainants claim, as their invention, the application of any means to the musical instrument whereby the air may be agitated to produce a tremulous note "by agency external to the wind-chest, which shall not check the flow of the air past the reeds," so as to give a continuous tremulous note, but not cut off the sound, and make a succession of notes, instead of a continuation of one note. Whether the fan made by the defendants, would infringe this claim, when placed in the instrument, depends upon the position and arrangement of it in the organ, whether or not it be placed external to the wind-chest; whether it be placed so as to cut off the sound and produce a succession of notes, or merely to agitate the air and vary the musical notes, without interrupting their continuity. Even if all these alternative conditions were on the side of infringement, there must be the additional element of a sale, for use, by an unlicensed manufacturer, which is not proved in this case.

The complainants rely upon the case of Wallace v. Holmes [Case No. 17,100]. There can be no doubt as to the soundness of the conclusions of the court in that case, or the cogency of the reasons given by the learned judge (Woodruff), in his opinion. But without rehearsing the facts in that case, it is sufficient to say, that they were very different from the case now before the court. The gist of the decision in that case was, that the actual concert of the makers of the different elements in the combination, was a certain inference from the facts in that case, and the distinct efforts of the defendants, to bring into use those elements of the combination which comprised the whole invention, although they could not be used without adding one other element, were found to be proved. No such state of facts is proved in this case, as has already been shown.

I must, therefore, repeat what I stated, to counsel, at the argument of the cause. As defendants only make one element of the patented invention, in order to hold them guilty, I must find proof connecting them with the infringement. Different parties may all infringe, by respectively making or selling, each of them, one of the elements of a patented combination, provided those separate elements are made for the purpose, and with the intent, of their being combined by a party having no right to combine them. But the mere manufacture of a separate element of a patented combination, unless such manufacture be proved to have been conducted for the purpose, and with the intent of aiding infringement, is not, in and of itself, infringement. A patent is valid for a new combination of old elements. A person who uses one or more of the old elements is not an infringer, unless he uses the new combination. Prouty v. Ruggles, 16 Pet. [41 U. S.] 336, 341; Byam v. Farr [Case No. 2,264]; Foster v. Moore [Id. 4,978]; Eames v. Godfrey, 1 Wall. [68 U. S.] 80. The use of a part, less than the whole, is no infringement.

I infer, from the remarks of counsel at the argument, that, although defendants deny infringement, and do not waive this defence, it is desired that the court should pass upon the question of the validity of the interfering pat-

ents for the respective inventions of Louis and Carpenter. If the court should find the complainants' patent to be valid, no decree could be made in their favor, as defendants do not infringe. To find the complainants' patent invalid, in a case in which the defendants do not infringe, would partake too much of the nature of a moot case.

Bill dismissed.

[For other cases involving this patent, see note to Hitchcock v. Tremaine, Case No. 6,538.]

Case No. 12,412.

The SAXON.

[4 Ben. 18.] [1]

District Court, E. D. New York. Feb., 1870.

SALVAGE—DERELICT—COMPENSATION.

1. Fourteen men, the crew of a pilot boat, having heard that a schooner had been injured in a collision at sea, set out in search of her, and after cruising some days found her derelict, and succeeded after three days in towing her into New York, expending about $160 in the service. The schooner and her cargo were worth $4,000.

2. The court awarded one-half as salvage, and added to it $100 and costs, on account of the libellants having set out to search for and find the wreck.

In admiralty.

BENEDICT, District Judge. This is an action instituted by the owners and crew of the pilot boat Henry E. Fish, to recover salvage for bringing in the schooner Saxon and her cargo, found derelict at sea. The owners of the schooner and of her cargo have been represented in court upon the return of the process, and made oral claim to the property seized. No answer has been filed in behalf of the claimant of the vessel, and the case has, by consent, been submitted for the adjudication of the court upon the libel and answer of the claimants of the cargo and the deposition of the owners of the Saxon and of one of the salvors. From the evidence, it appears that the schooner, laden with lumber, was, on the 30th of December last, found by the pilot boat some seventy miles south of Sandy Hook, and twenty-five miles from land, then wholly derelict, and the sea breaking over her heavily. After some difficulty, a hawser was made fast to the wreck, but the weather was too rough to permit towing until the next day, when the pilot boat started to tow to New York. After considerable difficulty, she brought the wreck inside the Hook, on Sunday, January 2d, and then, by employing a tug, safely moored it alongside a pier in New York harbor.

The pilot boat, as it appears, started out in search of this wreck, having heard that a schooner had been injured in a collision, and cruised for some days in search of her.

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

It also appears that two other boats and a brig had attempted to tow the wreck in, but had been compelled to abandon it. The crew of the pilot boat numbered fourteen, all told. The value of the schooner, as she lies, is considered by her owners to be about $1,000, and the value of the cargo about $3,000. The pilots have expended in the service, and in taking care of the wreck, the sum of $160.

Upon these facts, I shall award to the salvors fifty per cent. of the value of the property saved, to which I add $100 and the costs, because of the circumstance that the salvors started out in search of the wreck, and continued the search until it was found.

Case No. 12,413.

SAXONVILLE MILLS v. RUSSELL.

[1 Lowell, 450; 11 Int. Rev. Rec. 207.] [1]

Circuit Court, D. Massachusetts. May, 1870.

CUSTOMS DUTIES — WOOL ENCLOSED IN HIDES — METHOD OF COMPUTING COST.

By the act of March 2, 1867 [14 Stat. 471], certain foreign wools were, upon their importation, to pay a duty of three cents per pound if their value were twelve cents or less at the last port "whence exported to the United States, excluding charges at such port." Wool of this class cost less than twelve cents per pound in Buenos Ayres, whence it was imported, and was packed in hides which were of precisely the same value as the wool; and the bales were paid for in Buenos Ayres at their gross weight, including the hides, which were an article of value in the market here; *held*, the appraisers ought not to include the hides in their gross estimate of cost, and then to exclude their weight in ascertaining the cost of the wool per pound.

Assumpsit [by the Saxonville Mills against Thomas Russell, collector] to recover back duties paid under protest. The case was heard on an agreed statement of facts as follows:—

The plaintiff company in this case, in April and June, 1868, imported into the port of Boston, from Buenos Ayres, two hundred and sixty-three packages of Cordova wool. This wool was entered at the Boston custom-house during the months of April, May, and June, 1868, and all of these entries for the purposes of this case, may be treated as one and the same entry. A copy of one of the invoices is hereto annexed, all of them being substantially the same. This wool was in bales, formed of green hides. It was bought in the market of Buenos Ayres in the same condition as when entered here. The wool and hides were weighed together, and the plaintiff paid less than twelve cents per pound for the gross weight, and it was so stated in the invoice. Under the tariff law in force at the date of these importations, wool of this class, if of the value of twelve cents or less per pound, was liable to a duty

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission. 11 Int. Rev. Rec. 207, contains only a partial report.]

of three cents per pound. If of the value of more than twelve cents per pound, it was liable to a duty of six cents per pound. This wool was sent to the appraiser's office for appraisement. Previous to this, under date of April 9, 1868, the secretary of the treasury had issued a letter of instructions in regard to the appraisement of Cordova wool, of which the following is a copy: "The packing or baling Cordova wool in hide covers is not to be excluded in ascertaining the dutiable value under act of congress of March 2, 1867. On arriving into the United States, the usual allowance is made for tare, and the specific duty is assessed upon the net weight of the wool. The act of March 2, 1867 [14 Stat. 471], directs that the value of wools, for the purpose of determining the rate of duty to be found 'at the last port or place whence exported to the United States, excluding charges in such port.' It is therefore clear that the packing or baling in hide covers as above stated not having been done in such port, is not to be excluded in ascertaining the dutiable value. The net pounds of wool, divided into the aggregate cost or value thereof, including the baling prior to the receipt at the last port of exportation, will give the number of cents per pound, by which the rate of duty should be determined."

The appraiser at Boston, acting under this instruction, after examining the wool according to law, took the gross weight in the invoice and deducted from it the estimated weight of the hides that formed the bales, and divided the amount thus found into the gross cost stated in the invoice, which gave more than twelve cents per pound, and he thereupon reported to the collector that the wool was liable to a duty of six cents per pound. The defendant thereupon assessed upon this wool a duty of six cents per pound. amounting to ten thousand six hundred and forty-four dollars and thirty cents ($10,644.30), which the plaintiff paid under protest, a copy of which is hereto annexed. Plaintiff appealed to the secretary of the treasury in due time, who sustained the defendant, and in due time the plaintiff brought this suit to recover the excess of duty paid, amounting to five thousand three hundred and twenty-two dollars and fifteen cents ($5,322.15), being the difference between three and six cents per pound upon the quantity of wool in question. Previous to the letter of the secretary quoted, wool of this class and value had paid a duty of three cents per pound at this port. By the custom of trade, Cordova wool in Buenos Ayres can be, and is, bought in bulk, or in bales, as the purchaser prefers. The price per pound of the wool is the same whether bought in bulk or in bales; the hides being generally of the same value as the wool, the seller, when the wool is sold in the bales, receiving the same price per pound for his hides as for his wool; and after this wool is received here and unpacked, the hides are sold in the market to dealers. The wool in question did not of itself, without the hides, cost in Buenos Ayres the gross amount stated in invoice, and when the packings, i. e., the hides forming the bales, were removed, was not of said value. If the court, upon the facts, shall hold that the wool was subject to a duty of three cents per pound, then judgment shall be entered for plaintiff for five thousand three hundred and twenty-two dollars and fifteen cents ($5,322.15) in gold, with interest and costs; otherwise, judgment for defendant for costs.

M. E. Ingalls, for plaintiffs.

This wool is dutiable by the act of March 2, 1867 (14 Stat. 559), of which the part important in this case is, "Upon wools of the third class, the value whereof at the last port or place whence exported to the United States, excluding charges in such port, shall be twelve cents or less per pound, the duty shall be three cents per pound. Upon wools of the same class, the value whereof at the last port or place, &c., shall exceed twelve cents per pound, the duty shall be six cents per pound." The last port was Buenos Ayres, and the case finds that the wool was worth less than twelve cents at that port. We can recover: (1) Because the cost of baling is one of the charges at Buenos Ayres. (2) Because in ascertaining dutiable value, if the cost of the packages is to be included, its weight must likewise be included in dividing the weight by the price to arrive at the cost per pound. See Harding v. Whitney [Case No. 6,052] per Clifford, J., where the packing is included when it works against the importer; and we are entitled to the same rule when it works in our favor.

J. C. Ropes, Asst. Dist. Atty., for defendant.

1. The cost of the hides was properly included in estimating the cost of the wool, Act July 28, 1866, § 9 (14 Stat. 330), unless they are part of the charges in Buenos Ayres. The charges include only those expenses which are incurred after the purchase of the goods, and before and including the shipment. Grinnell v. Lawrence [Id. 5,831]; Barnard v. Morton [Id. 1,005]; Warren v. Peaslee [Id. 17,198]; Gant v. Peaslee [Id. 5,212]. The baling, in this case, was done before the purchase, and perhaps before the wool arrived at Buenos Ayres.

2. In ascertaining value the defendant simply made the usual allowance for tare, as directed by Act July 14, 1862 (12 Stat. 558).

LOWELL, District Judge. The general rule, as established by the statutes for finding dutiable value, is to take the value in the principal markets of the country of exportation, and to add the charges incurred to get the goods on board ship. The cost of packing is sometimes one of these charges, as in Barnard v. Morton [Case No. 1,005]. In other instances it forms a part of the price of the article, being itself of no value, as in Harding v. Whitney [Case No. 6,052]. Either way it

is commonly a part of the dutiable value of the goods. This statute, however, excludes the charges at the last port, and I am much inclined to think that it is to be fairly inferred from the agreed facts that the baling is one of those charges. This point is not perfectly clear upon the evidence, and I therefore pass to the next.

Assuming that the cost of the article as bought included the cost of the hides, I am of opinion that the weight of the hides ought not to be rejected in ascertaining what the wool cost per pound. The allowance for tare in assessing specific duties, is made for the very purpose of avoiding the injustice of requiring taxes to be paid on what is of no value, and stands on the same reason as the like allowance between buyer and seller. Here there was no such allowance between the parties, because the covering was of equal value with its contents. If the weight of the covering is rejected as tare, the government loses the duty on an article of value. It is true that in this particular instance the government would gain more than it would lose; but the rule must be uniform, and I apprehend that a shrewd importer might easily work such a rule to the great injury of the revenue. There is no question here of fraud, or of putting a fictitious value on the coverings in order to lessen the nominal value of the wool. The case finds that the wool whether baled or unbaled was worth less than twelve cents a pound, and that the additional cost of the wool when baled was due to the intrinsic value of the hides, and not to the expense of putting them on.

Under these circumstances the collector ought to assess the hides for their appropriate duty as articles of merchandise, but not, at the same time, to reject them as tare. Or if the importers do not object, it is easier and of some advantage to the revenue, to follow the former practice of assessing the whole as wool. Judgment for the plaintiffs.

Case No. 12,414.

SAYLES v. CHICAGO & N. W. R. CO.

[1 Biss. 468;[1] 2 Fish. Pat. Cas. 523.]

Circuit Court, N. D. Illinois. Feb., 1865.

PATENTS — ABANDONMENT — DELAYS IN PATENT OFFICE—EQUIVALENTS—NOVELTY.

1. A patentee can not be held accountable for the delays in the patent office, and the law, by its terms, provides for the perfection of imperfect and insufficient specifications, even after the patent issues.

2. The law looks with indulgence upon the delays which arise from the circumstances of parties who may make an invention, and it is only when the invention is intentionally abandoned or neglected, or the parties show, by their acts, that they have not done all that they can do, that the law declares that they shall not be protected.

[Cited in Blandy v. Griffith, Case No. 1,529; Consolidated Fruit-Jar Co. v. Wright, Id. 3,135; Goodyear Dental Vulcanite Co. v. Willis, Id. 5,603.]

[See American Hide & Leather Splitting & Dressing Mach. Co. v. American Tool & Mach. Co., Case No. 302.]

3. The doctrine of equivalents should be critically scanned where there may be a difference in relation to two machines, which, in some respects, operate by equivalent devices, and in other respects do not, to ascertain whether one has become a practical machine while the other is not.

4. When an improvement or a machine has been once made and used, it is not necessary that it should be used up to the time that another person may make a similar improvement. If it has been once used, and is a practical improvement or machine, no one else can claim to be the inventor.

This was a bill in equity, filed to restrain the defendant from infringing letters patent [No. 9,109], for "improvement in railroad car brakes," granted to Henry Tanner, assignee of Lafayette F. Thompson and Asahel G. Bachelder, July 6, 1852. The invention consisted in the employment of a lever pivoted in the center under the middle of a car body, the outer ends of which were connected by rods to windlasses at each end of the car, while the brakes were attached on opposite sides by rods to points in the same lever, intermediate between the ends and the pivot. In this way, by operating the windlass at either end, the brakes of both trucks were simultaneously applied. The claim is quoted in full in the opinion of the court. The brake used by the defendant was the one known as the Stevens Patent Brake.

S. A. Goodwin and C. M. Keller, for complainant.

Blodgett & Winston and Grant Goodrich, for defendant.

DRUMMOND, District Judge. The letters patent in this case were granted to Henry Tanner on the 6th day of July, 1852, covering what is called the "double acting car brake." It is well known that cars were originally run with four wheels, a single car brake being usually applied to them to retard or arrest the progress of the train. It became very important, when the railroad companies began to run cars with eight wheels, to have the brakes applied in such a way as to save the employment of numerous brakemen, and operate simultaneously upon all the wheels of the car, and that this should be done by an application of force at either end of the car, so that one man could act as brakeman upon two cars, instead of having three or more. It is this object which, it is alleged, was accomplished in this instance by pressing the brakes on all the eight wheels of the car simultaneously by the application of a force at either end, by means of a windlass there placed.

Although the patent was issued to Tanner, he was not himself the inventor, but this claim was set up by Bachelder & Thompson, Tanner being merely their assignee. The claim, as set forth in the specification, is this:

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

"What is claimed by us is to so combine the brakes of the two trucks with the operative windlass or their equivalents, at both ends of the cars by means of the vibrating lever A, or its equivalent or mechanism essentially, as specified, as to enable the brakeman, by operating either of the windlasses, to simultaneously apply the brakes of both trucks, or bring or force them against their respective wheels, and whether he be at the forward or rear end of the car."

The case has been argued on the part of the defendant chiefly, I may say solely, on the ground that these parties, Bachelder & Thompson, were not the original inventors of this improvement upon car brakes. It is also said that if the invention was ever made by them it was abandoned; that it was not prosecuted with that diligence which the patent laws required. For the purpose of showing want of novelty on the part of Bachelder & Thompson, the defendant relies mainly on two, or, I may say, on one improvement in car brakes called Millholland's improvement, which was, it is conceded, prior in point of time to that of Bachelder & Thompson. Some stress is also laid upon an improvement Mr. Nichols adopted in Connecticut, which, it is alleged, contained in several particulars the same principle as that of Bachelder & Thompson, and was used prior to the invention made by them. It becomes necessary therefore to ascertain when this improvement was first made by Bachelder & Thompson, and whether or not they abandoned it. The evidence in the case shows this to be the state of facts in relation to that matter: that Bachelder & Thompson, in the fall of 1846, substantially invented this method of applying the force to the car brakes, and that in June, 1847, they filed their application, with their model, and what purported to be specifications, in the patent office. They were not at all familiar with the method of obtaining a patent or with the law upon the subject, and they applied to a third party to assist them. The specifications which were filed, or what purported to be such, in the office were drawn up in a loose and very imperfect manner. The office itself was then overwhelmed with business, and applications were not taken up until long after they were filed. They, from time to time, called upon the gentleman whom they had requested to assist them, and letters were written to the patent office upon the subject, and in 1851, the application being still pending, in reply to some letters that were written, the agent of Bachelder & Thompson was told that the drawings and specifications as set forth were insufficient, and the further prosecution of an application for a patent in the case discouraged. However, upon a renewed effort on the part of Bachelder & Thompson, the officers in the patent office re-considered the subject, the specifications were rendered sufficient as was supposed, and a patent was finally issued. It thus appears that for several years, from 1847 to 1852, this matter was thus suspended in the patent office. The first question that occurs is, whether these parties had neglected or abandoned their improvement in such a way as to make it public property,—and I think they had not. The whole testimony shows that they had not abandoned what they considered to be an improvement to which they had a right under the law. Certainly they cannot be held accountable for the delays in the patent office, and the law by its terms provides for the perfection of imperfect and insufficient specifications even after the patent issues. A question connected with this, is whether, when the application was made in June, 1847, there was substantially the improvement, the right to which was sought to be given to them by the letters patent in 1852;—and I think there was. It is true there was a change in the specifications as perfected and as originally filed, more having been claimed in the original specifications. Still, I think it is clear that they claimed in their original specifications substantially the method of combining the brake in the manner in which they set the claim forth in the last specifications upon which the patent issued. Besides, the patent law looks with indulgence upon the delays which arise from the circumstances of parties who may make an invention, and it is only when the invention is intentionally abandoned or neglected, or the parties show by their acts that they have not done all they can do, that the law declares that they shall not be protected in their invention. Therefore I find that this invention was made in the fall of 1846, claimed by application in the patent office in June, 1847, and protected in law by the issuing of letters patent in 1852. Then, were they the first inventors of this improvement in car brakes? I leave out of view all that is said in the testimony of what is called the Springfield brake. No particular stress is laid upon it in the argument of the defendant. It is not claimed or set up, I believe, in the answer.

The first question is in relation to what is termed the "Nichols brake." I do not propose to dwell at any great length upon the testimony as to the time when this brake was used. Mrs. Nichols, the wife of Mr. Nichols, (Mr. N. having died in 1850,) states in her deposition that her husband made a drawing of it in the spring of 1846. If so, of course the invention would be prior to that of Bachelder & Thompson, theirs not having been made until the fall of that year. But I think that the weight of the evidence is that the Nichols brake, was not invented until the spring of 1847, and was not applied until 1848. We have constantly to bear in mind in weighing the testimony of witnesses who speak of circumstances occurring many years ago, the liability to mistake the particular year unless they have some evidence of a documentary character or otherwise, or

some leading fact, as to which there can be no error, upon which they may rely to show the particular time.

This brake was applied upon what is termed a long baggage car. The witnesses Stockbridge and Fields state that this car was not finished until the spring of 1848. Various other witnesses differ as to the time, from Mrs. Nichols, and she differs now herself in giving her deposition from what she stated when she gave her testimony in the railroad case, tried in New York, some years ago. Besides she took an account book to Fields and inquired of him as to the time her husband put on the brake, which shows that she really had no memory as to the time. Taking all the testimony together in relation to this Nichols brake, it is clear, the weight of it is, that this invention was not made by him prior to that of Bachelder & Thompson, even conceding that the two brakes are identical, as to which I give no opinion.

The principal difficulty I have had in the case is in relation to the Millholland brake. One of the defendant's counsel has presented an argument in which he insists with much force and plausibility, that the Millholland brake contains substantially the same principle as the Bachelder & Thompson brake, and that it was carried into practical effect by its use upon the cars.

We have, if I might be permitted to go out of the proofs in this case, a striking illustration of the uncertainty of human memory as to the time when this Millholland brake was first applied. When this brake first came before the court it was insisted, and apparently proved, I believe, that the Millholland brake was invented and used in 1842. Mr. Millholland says now in his deposition that he made and used it in 1843. But when we come to apply documentary evidence to the facts which are before us, I think it appears satisfactory that the Millholland brake was not used until 1845. But still if it were then used, and if it was a practical improvement, and similar in principle to that of Bachelder & Thompson, of course it prevents the patent of Tanner from operating. There is no doubt of this, that Millholland did invent a brake which operated in certain circumstances upon the two trucks by means of what is called a drum under the car, so that by the application of force at either end of the car, the wheels—all the eight wheels—were retarded. The main questions are, whether it was a practical and successful improvement, and whether it was abandoned as a mere experiment. There never was any patent applied for or issued. It is conceded and the proof clearly shows that it was never actually applied in any instance except upon one car, and I think it is clear that it was thrown aside and abandoned by Millholland himself in 1845. And if it was not introduced until 1845, then instead of being used for eighteen months it was only used for a few months. The car upon which it was applied was used very seldom. It is also certain it did not operate satisfactorily, and the brakemen complained that when used on the car, the windlass chains would break, or the car was liable to be thrown off. The Millholland brake was, in some respects, different from the Tanner brake. In the first place it operated by means of a drum upon which turned the chains to which the levers upon the brakes were attached. The brake of Bachelder & Thompson operated by means of a horizontal vibrating lever. The brake levers are also differently arranged. In the case of Millholland's brake the drum was rigid, the brake levers being pivoted in such a way that they did not operate with any degree of elasticity or self adjustability. In this respect it would seem as though the two brakes were different, but perhaps the "horizontal lever" of Bachelder & Thompson's brake may be said to be equivalent to the drum of Millholland's brake. But I think the doctrine of equivalents should be critically scanned where there may be a difference in relation to two machines which in some respects operate by equivalent devices, and in other respects do not, to ascertain whether the one has become a practical machine and the other not. For instance, in relation to the drum, the result shows that there were defects in the Millholland brake which prevented it from becoming a practical, useful brake. It was used and abandoned. The reason for that is given by a witness who says that it was in consequence of the rigidity of these various levers, or what might be called levers; that if there was any defect in the shoes in any way, so that on applying force to the windlass at either end, the power would be applied to but one of the shoes, the strain would tend to break the windlass chains, before there was sufficient pressure of the shoes upon the wheels. One of the great objects sought by Bachelder & Thompson in their improvement, was this: whether the wheels were running upon straight or curved lines, the shoes would all press simultaneously upon the wheels whenever force was applied, and by the elasticity of these various levers a defect in one of the shoes, would not prevent the contact of the others. Now I think these circumstances have great weight when we come to determine the question whether there was here an actual practical improvement in the car brake which would prevent any one else from adopting a principle that might be in that brake, and thereby perfecting the device.

I have come to the conclusion that there was not in this Millholland brake that kind of practical operating brake which would prevent any one else from obtaining a patent for a brake which would accomplish the object, which, it is clear, Millholland had in his mind, but does not seem to have carried out into practical operation by the brake which he made and applied in 1845.

I admit fully the law, as contended for by the counsel for the defendant, that when an

improvement or a machine has been once made and used, it is not necessary that it should be used up to the time that another person may make a similar improvement. If it has been once used, and is a practical improvement or machine, no one else can claim to be the inventor. But in this case I think there was not that practical improvement of the brake discovered and used by Millholland which would prevent these parties from obtaining a patent for a brake such as that which was finally set forth in their specifications. I would refer particularly to the testimony of the only expert introduced. It seems to me that he is a very clear-headed man, and his testimony sets forth with great distinctness the difference between the Millholland and Springfield brakes, and the brake of Tanner. And this difference which he refers to ought to have great weight when we come to consider whether, in point of fact, such a brake as Millholland used did really prevent any other person from obtaining a patent for a double acting brake similar, in some respects, but which would successfully arrest the progress of railroad trains. The conclusion to which I have come is that Bachelder & Thompson were the inventors of this improvement, for which letters patent were issued to Tanner; that they never abandoned it from its discovery in the fall of 1846, and that there has been nothing shown in the evidence, which, fairly considered, would deprive them or their assignee of the right to it.

No question has been made in relation to the infringement. It is denied in the answer, but it is not insisted on or pressed in the argument. Of course in deciding this case I do not in any respect change the views which I announced on a former occasion, as to the distinction between the Stevens and the Tanner brake. The only claim which the plaintiff would have in this case would be for any damage which he may have sustained in consequence of defendant having used the invention of Bachelder & Thompson. But if the brake of Stevens, or of any other person, shall include the invention of Bachelder & Thompson as a part of his brake, the plaintiff will not be prevented from claiming damages for the use of that part.

An interlocutory decree will be entered referring the case to a master, &c.

[The above decree was reopened, and defendant allowed to introduce new evidence. A decree was again rendered for complainant July, 1871, and a reference again ordered. Case No. 12,415. After the report of the master, a decree for the whole amount was ordered in December, 1873 (case unreported). On further rehearing, in September, 1875, the decree was reduced from $63,638.40 to $47,725 (case unreported). From that decree an appeal was taken to the supreme court, where the decree of the circuit court was reversed, and the cause remanded, with directions to enter a decree dismissing the bill of complaint. 97 U. S. 554.

[NOTE. For other cases involving this patent see Mowry v. Graud St. & N. R. Co., Case No. 9,893; Sayles v. Louisville City R. Co., 9 Fed. 512; Sayles v. Oregon Central Ry Co., Case No. 12,423; Sayles v. Richmond, F. & P. R. Co., Id. 12,424; Sayles v. Dubuque & S. C. R. Co., Id. 12,417; Emigh v. Chicago, B. & Q. R. Co., Id. 4,448; Root v. Lake Shore & M. S. R. Co., 105 U. S. 189; Hendrie v. Sayles, 98 U. S. 546.]

Case No. 12,415.

SAYLES v. CHICAGO & N. W. R. CO.

[3 Biss. 52; 4 Fish. Pat. Cas. 584; 3 Chi. Leg. News, 329.] [1]

Circuit Court, N. D. Illinois. June, 1871.

PATENTS — NONUSER — EQUIVALENTS — COLORABLE ALTERATION—NEGATIVE PROOF.

1. As a general rule the positive testimony of witnesses as to the existence of prior mechanism must outweigh merely negative proof.

[Cited in Hawes v. Antisdel, Case No. 6,234.]

2. The great utility of an invention being conceded, the fact that if used at all it was on a single car for some years, seems, unexplained, conclusive evidence against its existence.

3. A man should not be deprived of the results of a successful effort merely because some one else has come near it.

4. If it be asked how often a mechanism shall be used to antedate a patented invention, the answer is, until that which is claimed as new in the patent is complete, although the thing may have been imperfect as an instrument or a machine.

5. If it were manifest that the thing claimed in the patent were accomplished, one prior use would be sufficient to defeat the patent.

[Cited in Allis v. Buckstaff, 13 Fed. 891.]

6. If the construction of the thing itself demonstrates that it was within the principle of the patented invention, then, perhaps, no use of a prior device would be sufficient to destroy the novelty of that which was patented. It might then be said to prove itself.

[Cited in Stitt v. Eastern R. Co., 22 Fed. 651.]

7. In most cases, sufficient prior use must be shown to prove that the mechanism will accomplish what is claimed, and while this is true of a patented device, it is equally true of that by which a patent is sought to be defeated.

8. Inventors of a combination are as much entitled to suppress every other combination of the same ingredients to produce the same results, not substantially different from what they have invented and caused to be patented, as any other class of inventors; and they have a right to invoke the doctrine of equivalents to that extent to sustain their invention.

9. It must always be very much a matter of judgment to the eye, in the examination of two machines, and in observing their mode of operation, whether the one, in the whole, or any of its parts, is a mere colorable or formal alteration of the other.

10. If a patentee has invented a combination of two or more old things so as to produce a new and useful result, then he has the right to treat as infringers all who have used his invention in order to accomplish something more or better, when, without the aid of such invention, it could not be effected.

11. The principle of the Tanner brake, as invented by Bachelder & Thompson, and as patented, is the combination of the two series of brakes, (counting the brakes at each end of

[1] [Reported by Josiah H. Bissell, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission.]

the car as a series,) with each other and with the windlass at each end, so that all the brakes can be applied at once at either end, by the brakeman.

12. Bachelder & Thompson were the first to successfully make this combination.

In equity.

This was a rehearing of the case of Sayles v. Chicago & N. W. R. Co. [Case No. 12,414].

West & Bond and S. D. Cozzens, for complainants.

H. W. Blodgett and B. R. Curtis, for defendants.

DRUMMOND, Circuit Judge. This case was before the court some years since, and an opinion given upon the points then submitted and argued.

The court then decided that Bachelder & Thompson were the inventors, in 1846, of the combination described in their specifications of the brakes of the two trucks with the operative windlasses by the means designated, so that the brakeman, by operating either windlass at the end of a railroad car, could apply the brakes of both trucks simultaneously to the wheels to which the brakes were respectively attached; and that the patent which was issued to Henry Tanner, the assignee of Bachelder & Thompson, in 1852, was valid.

This decision was of course made on the case as then presented, and on the proofs then before the court. The question of infringement was not at that time seriously controverted, and an interlocutory order was made, referring the case to a master. Afterwards an application was made to open this decree because of new evidence discovered affecting the question of novelty of the claim of Bachelder & Thompson, and the court permitted additional proofs to be taken.

The case has been again argued upon the new evidence, and upon the last argument it has been insisted that the defendant does not infringe the Tanner patent, even if valid.

The new evidence relates mainly to two brakes, which, it is alleged, anticipated the discovery of Bachelder & Thompson. 1st. The brake upon the car John Tyler used on the Camden & Amboy Railroad. 2d. The Stanley-Talson brake used on the same road.

In 1843, Mr. Tyler, then president of the United States, made a visit to the Eastern states, and a car was fitted up with unusual effort and expense to carry the president over the Camden & Amboy Railroad, on his way east.

This car was so unique among the cars of the time that it thenceforth bore the name of the president. As a part of its appointments the defense claims that it had a double brake, combining the two trucks, and operating in the same way and producing the same effect as the Tanner brake. If that were so, then undoubtedly it anticipated the invention of Bachelder & Thompson, because it is certain that this special car was constructed, and conveyed the president over the Camden & Amboy Railroad, in 1843. The serious question, therefore, on this part of the case is, when was the double brake put on the John Tyler car?

The evidence is curious on this point. Several witnesses, many of them undoubtedly with full conviction, declare that the car had the double brake on when it started out in 1843, and when the president rode on it. Many others declare that the double brake was not put on the car till 1851, and that it was the Hodge brake, an invention subsequent in time to that of Bachelder & Thompson, now covered by the Tanner patent, and hence generally called the Tanner brake.

It is necessary to determine in the midst of this great conflict of evidence, where the truth is, in the judgment of the court; and looking at all the facts bearing on the point, I think that the witnesses who state that the double brake, combining the two trucks in the manner of the Tanner patent, was on the John Tyler car in 1843, are mistaken, or testify untruly.

It is said that the evidence for the defense in this particular is positive, and on the other side negative; that is so, and if it depended upon that circumstance alone, then it might be the positive testimony would outweigh the negative. But there are various well established facts inconsistent with this positive evidence. It is clear in the examinations which were made among the employés of the Camden & Amboy Railroad, growing out of the suits at Albany, brought by Mr. Tanner against the New York & Erie Railroad Company, and the Hudson River Railroad Company, which were numerous and thorough, that the double brake on the John Tyler car did not assume a tangible shape then, though application was made to some of the witnesses who now assert its existence in 1843. These examinations were made in 1853 and 1854, and seem to have been conducted in entire good faith to ascertain facts to enable the railroads to defend against the Tanner patent. The defense was unsuccessful.

The testimony tending to establish the attachment of a double brake to the John Tyler car in 1851, is of itself in the nature of positive evidence, and therefore is entitled in effect to the consideration of that kind of evidence.

There is one fact established which, unexplained, seems to be conclusive upon this part of the case. The counsel for the defense do not controvert the value or the utility of the Tanner brake. Now, if there was such a brake in substance or effect on the car referred to, then it was not attached to the other cars of the Camden & Amboy Railroad, because the proof appears ample that some years after 1843 the cars of the railroad company were run generally with the single brake alone; and if it were true that a double acting brake of the kind included

in the model of the John Tyler car produced at the hearing, existed in 1843, it is scarcely possible to doubt that it would have gone into general use at once on the road.

In addition to this, many of the witnesses for the defense, who originally spoke with as much confidence as any others, afterwards retracted, and admitted that they were in error when they asserted the double acting brake was on the Camden & Amboy Railroad in 1843.

The testimony shows that in 1842, a man by the name of Stanley made and applied a brake in some respects, at least, similar to that of the Tanner brake.

The materials of which it was composed were too slight, and it proved a failure. Afterwards one Talson strengthened them, and perhaps made some slight changes, and the brake was used on several occasions. It seems afterwards to have been thrown aside. For this different reasons have been given. The position taken that the John Tyler car brake, as claimed, and the Stanley-Talson brake, also as claimed, were continued in use for several years after 1842 and 1843, I consider not sustained by the evidence. There was no successful practical double brake on the Camden & Amboy Railroad in operation prior to the invention of Bachelder & Thompson.

It is the history of inventions that when different persons are exploring or experimenting in the same field, many efforts which ultimately turn out to be failures often come very near success; and when other efforts have proved successful, these last should not be deprived of the results of success simply because others have come near to them. The fact that the Camden & Amboy Railroad was without a successful double acting brake till the Hodge brake was introduced, is strong evidence against the claim set up now both for the brake of the John Tyler car and that of Stanley & Talson. It is asked how often shall a brake be used to antedate the invention of Bachelder & Thompson? The answer is, until that which is claimed as new in the patent is complete, although the thing may have been imperfect as an instrument or a machine. If it were manifest that the thing claimed in the patent was accomplished, one use would be sufficient. If the construction of the thing of itself demonstrated that it was within the principle here stated, then perhaps no use need be established. It might then be said to prove itself. But in most cases sufficient use must be shown to prove it will accomplish what is claimed; and while this is generally true of a patent, it is equally true of that by which a patent is sought to be defeated; otherwise it rests in the region of mere experiment.

The argument that there has been no infringement is this: Brakes had been applied to the trucks of railroad cars; they had been connected together, therefore Bachelder & Thompson could only claim some peculiar method of making the connection. All other methods were left open, and if the connection of the brakes was in a different way from that of Bachelder & Thompson, then there could be no infringement. The defendant's brake—that of Stevens—has a different mode of connecting the two systems of brakes, consequently there is no infringement.

We must bear in mind that the principle of the Tanner brake is the combination of the two series of brakes, counting the brakes at each end of the cars as a series, with each other and with the windlass at each end, so that all the brakes can be applied at once at either end by the brakeman. This combination is produced by means of what is termed a vibrating lever, essentially as specified, and the question is, whether the Stevens brake, that being used by the defendants, accomplishes the same result by analogous means or equivalent combinations within the terms prescribed by the supreme court in the case of McCormick v. Talcott, 20 How. [61 U. S.] 402. The view the court took of the Stevens brake on a former occasion was that it was distinct from the Tanner brake in this: That by some new and original devices Stevens obtained an equality of force upon the brakes, thus retarding the wheels uniformly, Emigh v. Chicago, B. & Q. R. Co. [Case No. 4,448]; and therefore the Stevens patent was sustained. That case went to the supreme court of the United States. There was a difference of opinion in the court on some of the points decided in this court, and the case was never reported, the decree being affirmed by a divided court; but it is understood that the court was unanimous in sustaining the validity of the Stevens patent. The only question, therefore, is whether the Stevens brake, as constructed and operated, embodies, in effect, the invention of Bachelder & Thompson by combining the brake series of the different trucks with the windlasses, so that they can be operated at once from either end of the car. The rule laid down upon the subject of infringement by the supreme court of the United States in the case of Seymour v. Osborne, 11 Wall. [78 U. S.] 516, is that inventors of a combination are as much entitled to suppress every other combination of the same ingredients to produce the same result not substantially different from what they have invented and caused to be patented, as any other class of inventors, and they have a right to invoke the doctrine of equivalents to that extent to sustain their invention.

It must always be very much a matter of judgment to the eye in the examination of two machines and in observing their mode of operation, whether the one, in the whole or any of its parts, is a mere colorable or formal alteration of the other. If a patentee has invented a combination of two or more old things so as to produce a new and useful result, then he has a right to treat as infringers all who have used his invention in order to accomplish something more or better,

when without the aid of such invention it could not be effected.

According to the view which the court takes of the evidence, Bachelder & Thompson first successfully combined the two systems of brakes with each other and with the windlasses, so that all the brakes could be applied at either end of the car. This was their invention, secured by letters patent to Tanner. No one else had the right to take what may be termed the inventive principle of this combination, use it and evolve something different and better by additional devices for which last a patent could be sustained. This we think Stevens did. What he invented he has a right to retain under his patent, but he cannot use the invention of Bachelder & Thompson without the consent of the patentee or his assignee.

The court took this view of the case before, though the question of infringement was not specially pressed on the former argument, and the court, though it may be admitted it is a point of some nicety, has seen no reason to change its opinion.

It may be that the invention of Bachelder & Thompson, without the improvement of Stevens superadded, may not be of very great value, but that question is not now before us for decision. That will be considered when the proofs upon that point are taken and reported to the court.

Decree accordingly and reference to a master.

At the coming in of the master's report, July 31, 1873, assessing the damages as against the Chicago and Northwestern R. R. Co., at $63,638.40, the defendant filed 13 exceptions, which are now (November, 1873,) on hearing before Judge Drummond. This case is a test case, nearly all the railroads in the country being directly or indirectly interested in it.

[A decree for the whole amount was rendered in that case (unreported). On further rehearing, in September, 1875, the decree was reduced from $63,638.40 to $47,725 (case unreported.) From that decree an appeal was taken to the supreme court, where the decree of the circuit court was reversed, and the cause remanded, with directions to enter a decree dismissing the bill of complaint. 97 U. S. 554.]

Case No. 12,416.

SAYLES v. CHICAGO, B. & Q. R. CO.

[Cited in Sayles v. Richmond, F. & P. R. Co., Case No. 12,424. Nowhere reported; opinion not now accessible.]

Case No. 12,417.

SAYLES v. DUBUQUE & S. C. R. CO.

[5 Dill. 561; 3 Ban. & A. 219.] [1]

Circuit Court, D. Iowa. Feb., 1878.

PATENTS—JURISDICTION IN EQUITY—ASSIGNMENT—EXTENSION OF PATENT—STATUTES OF LIMITATION.

1. Equity has jurisdiction of a bill by a patentee against an infringer which seeks a discovery and account of profits. See Stevens v. Kansas Pac. Ry. Co. [Case No. 13,401].

2. The assignment by the patentee to the plaintiff, set out in the bill, *held* to give the latter the whole benefit of the invention, including any extended term.

3. The patent in question *held*, on demurrer, to have been extended at the instance and for the benefit of the inventors.

4. The act of congress of 1870, § 55 [16 Stat. 206], as to limitation of actions for infringements of patents, construed, and *held* to bar any claim in respect of the original patent.

5. Whether state statutes of limitation apply to suits for infringement of letters-patent, quære?

[See Anthony v. Carroll, Case No. 487.]

[Cited in May v. Buchanan Co., 29 Fed. 472.]

6. The defendant company is not liable for the profits made by a predecessor company.

Letters-patent [No. 9,109] were issued July 6th, 1852, extended July 5th, 1866, to Henry Tanner, for an improvement in railroad car brakes. The extended term expired July 6th, 1873. The plaintiff [Thomas Sayles] is Tanner's assignee. On February 5th, 1877, he filed his bill in equity, stating that the defendant has used the invention and derived large profits therefrom, and praying a discovery thereof and an account, etc. The defendant filed a general and special demurrer to the bill.

A. H. Walker, for plaintiff.

George Payson, for defendant.

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

PER CURIAM. We have considered the points made in argument upon the demurrer to the bill. We have no time to elaborate our views. It must suffice to state our conclusions. We do this at this time so that the cause may proceed. These conclusions are not, on all the points, so fixed as to preclude further argument and consideration on the final hearing. The views which we now entertain of the questions made, are as follows:

1st—As to the jurisdiction of equity over the bill. Although the original and extended term of the letters-patent had expired before this suit was brought, we think the bill can be maintained in equity, on the ground that it seeks a discovery and accounting for profits made by the defendant's use of the plaintiff's property, which profits, if not trust moneys strictly, are of that nature, and necessarily require an investigation, which a court of law is not so competent to make as a court of equity.

2d—As to the effect of the assignment to Tanner of April 1st, 1852. By an amendment to the bill of complaint, it appears that on the same 1st day of April, 1852, Tanner executed an instrument to the inventors, Thompson & Bachelder, by which the latter were to participate in the gains and benefits which should accrue to Tanner by reason of

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here compiled and reprinted by permission.]

their assignment to him. Under the bill as amended, we are of the opinion that the said assignment of April 1st, 1852, by the inventors to Tanner, was intended to give to the latter the whole benefit of the invention, including the original term and any extended term.

3d—As to the extension of the patent on the 5th day of July, 1866. Assuming that Tanner executed a cotemporaneous agreement, such as is alleged in the amendment to the bill, the administrator of one of the inventors, and the other in person, having petitioned for the extension of the said patent, we are of opinion that it was within the competency of the commissioner of patents to grant such extension, since it was made at the instance of the inventors, and would inure to their benefit. Under these circumstances, although the legal title in the extension might be in the patentee, Tanner, the inventors would have a clear, equitable interest in it; thus satisfying the policy of the law in the encouragement and reward of inventors.

4th—As to the statutes of limitation. We are inclined to the opinion that the state statute of limitation has no application to suits in respect of the rights granted by letters-patent for inventions, but we leave the question open to further discussion. This bill was brought in February. 1877; the original term expired July 6th, 1866; the extended term July 6th, 1873. The act of congress of 1870, § 55 [16 Stat. 206], prescribed that "all actions shall be brought during the term for which the letters-patent shall be granted or extended, or six years after the expiration thereof." This limitation continued in force until the 1st day of December, 1873, when the revised statutes took effect, repealing it.

Since the original and extended term of a patent may be, and often is, held by different persons, and since the language of the limitation statute of 1870 is ambiguous, in view of the injustice to defendants of requiring them to account for profits made any time since the date of the original patent, in 1852, a period of twenty-five years, when the proofs may be lost, we are of the opinion that their right is barred to recover for profits or damages during the original term. An inquiry of profits or gains within a period of five years is difficult, as the profits gained depend upon many conditions. When we come to carry such an investigation back for almost a quarter of a century, accuracy of results is almost impossible, and the laches of a patentee coming forward at such a late date does not give him a very favorable position in a court of equity.

What is the proper rule to measure compensation in a court of equity, is a question not arising on the demurrer, and is not implied from the above use of the words "profits" and "gains."

5th—As to the liability of the present company to account for profits made by the prior company. On its face the bill shows no liability of the present company for the profits gained by the former company. This liability is based upon an allegation of merger. What is meant by that, in a legal sense, as applied to these two corporations, we do not know or understand. If any facts exist which make the present company liable for the acts of the former company in respect of this patent, such facts ought to be stated in the bill. The amendment to the bill, in this regard, shows no liability on the part of the present company for the use of the patent by the prior company. The plaintiff has not established his debt or claim against that company by a judgment. That company is not a defendant here. No facts are stated showing that the property of the prior company, which was acquired by the defendant company, was taken with a trust fastened on it to pay the debts of the prior company.

An entry will be made on the demurrers in conformity with these views. Ordered accordingly.

[For other cases involving this patent, see note to Sayles v. Chicago & N. W. Ry. Co., Case No. 12,414.]

Case No. 12,418.

SAYLES v. ERIE RY. CO.

[2 N. J. Law J. 212.]

Circuit Court, D. New Jersey. May 23, 1879.

PLEADING IN EQUITY—PLEA—REPLICATION—CORPORATIONS—SERVICE OF WRIT.

The plaintiff must reply to a plea or set it down for hearing on the next rule day, and on his failure to do so the defendant may have the bill dismissed, but if he neglects for a long time to take advantage of it the court will give the plaintiff further time. The Erie Railway is found within this district so as to give jurisdiction to the United States court.

In equity.

NIXON, District Judge. Plaintiff failed to reply to the plea or set down the same for hearing on succeeding rule day. It is true that under rule 38 defendant was entitled to have the bill dismissed. But the rule authorizes a judge in his discretion to allow plaintiff further time. Defendant has waited so long before entering order for dismissal or moving for a rule that he must be deemed to have waived his rights, and the case must stand for decision on merits of plea. The only question raised is whether the court can acquire any jurisdiction over defendant in view of the conceded fact that it is a foreign corporation located in and created by the laws of the state of New York. The bill avers that it is carrying on the business of operating a railroad and using railroad cars within the state of New Jersey. Such a corporation is found here for the service of process, and the local law defines how and upon whom the service may be made. Rev. St. N. J. tit. "Corporations," § 88. The re-

cent case of Williams v. Empire Transp. Co. [Case No. 17,720], departed from the former rulings in this court in proceedings against foreign corporations in obedience to the authority of the supreme court of the United States in Railway Co. v. Harris, 12 Wall. [79 U. S.] 65, and Ex parte Schollenberger, 96 U. S. 369. The plea is overruled, and 30 days is allowed the defendant within which to answer the bill on the merits.

Case No. 12,419.

SAYLES v. GRAND TRUNK RY. CO.

Circuit Court, N. D. Illinois. 1879.

WRITS—SERVICE OF PROCESS—FOREIGN CORPORATION—INFRINGEMENT OF PATENT.

[DRUMMOND, Circuit Judge, held that the court had jurisdiction of a bill filed against the Grand Trunk Railway Company of Canada, and based on an infringement of a patent committed by that corporation in Michigan; service having been made on an agent of the corporation at its office in the Northern district of Illinois, although neither that agent nor the business transacted in that office had any connection with the infringement.]

[Cited in Walk. Pat. 284, to the foregoing proposition. Nowhere reported; opinion not now accessible.]

See Wilson Packing Co. v. Hunter [Case No. 17,852].

Case No. 12,420.

SAYLES v. HAPGOOD et al.

[3 Fish. Pat. Cas. 632; 2 Biss. 189; Merw. Pat. Inv. 707; 2 Chi. Leg. News, 9.] [1]

Circuit Court, N. D. Illinois. Oct. Term, 1869.

PATENTS — IMPROVEMENT IN CULTIVATORS — NOVELTY.

1. When a man conceived a certain machine, no one knows except himself. When he described it, no one knows except himself and those to whom he described it. This is, from the nature of the case, the testimony upon which reliance must be placed.

[Cited in Johnson v. McCabe, 37 Ind. 539.]

2. Priority of conception, followed by a prior patent, gives priority of right.

[Cited in National Filtering Oil Co. v. Arctic Oil Co., Case No. 10,042.]

3. Letters patent for an improvement in cultivators, granted to James Dundas, February 8, 1859, and reissued, are void for want of novelty, the same invention having been conceived, and a machine constructed, by one Marsh, before the conception of the invention and the construction of a machine, respectively, by Dundas.

[Cited in Marsh v. Sayles, Case No. 9,119.]

This was a bill in equity, filed by the complainant [Thomas Sayles] as assignee of James Dundas, to restrain the defendants [Charles H. Hapgood and others], from infringing letters patent for an improvement in cultivators, granted to James Dundas February 8, 1859 [No. 22,859], re-issued October 16, 1866 [No. 2,380]. The claim of the original patent was as follows: "The arrangement of the half shovels, w, w, in connection with the bars, h, h and i, to be moved to the right or left at pleasure of the operator." The claims of the re-issued patent, re-issued October 16th, 1866, and assigned to complainant, were as follows: "First. The combination in a straddle-row cultivator of the following instrumentalities, viz: the two wheels, frame and a series of plows arranged in two gangs, with a central space between the gangs so as to till the soil simultaneously at both sides of a single row of plants which the machine straddles; all of these operating in the combination substantially as set forth. Second. The combination in a straddle-row cultivator of the following instrumentalities, viz: the two wheels, frame, the series of plows arranged in two gangs as aforesaid, and seat for the driver; all of these operating in the combination substantially as set forth. Third. The combination in a straddle-row cultivator of the following instrumentalities, viz: the two wheels, frame, the series of plows arranged in two gangs as aforesaid, and movable stocks; all operating in the combination so that while the wheels limit the penetration of the plows, the inner plows of the two gangs may be moved laterally to avoid the plants that are out of line in the row, substantially as set forth. Fourth. The combination in a straddle-row cultivator of the following instrumentalities, viz: the two wheels, frame, the series of plows arranged in two gangs as aforesaid, movable stocks as aforesaid, and driver's seat; all operating in the combination substantially as set forth. Fifth. The combination in a straddle-row cultivator of the following instrumentalities, viz: the two wheels, frame, the series of plows arranged in two gangs as aforesaid, driver's seat, and a connection between the movable plows, all operating in the combination substantially as set forth. Sixth. The combination in a straddle-row cultivator of the following instrumentalities, viz: the wheels, frame, series of plows arranged in two gangs as aforesaid, and mechanism to permit the plows to be raised relatively to the treads of the wheels, all constructed and operating in the combination substantially as set forth."

West & Bond and George Harding, for complainant.

Goodwin, Larned & Towle, for defendants.

DRUMMOND, District Judge. This is a bill in equity against the defendants for an infringement of the patent of James Dundas, issued in 1859, and reissued in 1866, for a certain improvement in cultivators, which consists, in substance, of an arrangement by which rows of corn are hoed or tilled at one operation, through fixed shovels, combined with shovels movable laterally, and with devices for raising or lowering them at the will of the operator, who rides on the machine,

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 707, contains only a partial report.]

which is borne on two wheels, with an axle high enough to pass over the rows of corn.

The plaintiff is the assignee of Dundas.

Various questions were discussed on the argument, but the only one upon which any stress was placed, or about which there was any serious controversy, was whether Dundas was the first and original inventor of the improvement in the cultivator, as claimed by him. No point was made upon the identity of the machines manufactured by the defendants and that patented to Dundas; but it is claimed on the part of the defendants that a man by the name of Hiram H. Marsh first invented the improvement claimed by and patented to Dundas, and the controversy depends upon which was the first inventor of the improved cultivator.

The conception first arose in the mind of Dundas in June or July, 1850 (in his deposition he says June), and it appears from the deposition of Dundas, and of his son, that at that time the father gave a description of a cultivator to the son sufficient to enable the latter to construct it. The son says that he began to build one in the winter of 1850, and that he and his father completed the wood work of it in the winter or very early in the following spring, but that it was not ironed until about the first of June, 1851.

This machine, thus constructed by Dundas and his son, was used during the season of 1851, in June or July. So that it appears from the plaintiff's testimony that the plan was first conceived in June or July, 1850, and described at that time, but not carried out into a complete and operating machine until the summer of 1851.

Dundas made application for a patent on the first of August, 1851, but from circumstances not necessary now further to refer to, then failed in his application, and, as has already been stated, the patent was not issued until 1859.

This is the state of the evidence as to the invention of Dundas.

Marsh came to Illinois, it would seem, some time in 1847 or 1848. He married on the 15th of October, 1849, and he and his wife went to live on a farm on Centre Prairie, about ten miles from Ottawa. Mrs. Marsh says that before their marriage, Marsh told her of an improvement in a cultivator which he had invented, and he described it to her. Jarvis Lawrence says that he moved into the neighborhood where Mr. Marsh was in March, 1850, and that Marsh, in the spring or summer of 1850, spoke to him of his improvement in a cultivator, telling him how it would operate. James P. H. Bates also says that Marsh boarded with him in 1847–8, and that at different times he used to speak of constructing a machine for cultivating corn by riding and straddling the rows with wheels; that this was in the season of 1848, while he was boarding with the witness. Uri Weaver also states that he became acquainted with Marsh in 1847 or 1848, and that he also spoke to him in May, 1850, of an improvement that he had invented in a cultivator for hoeing and tilling corn; that he had described it to him by taking sticks and explaining how he could make it operate.

This is substantially the testimony on the part of the defendants as to the conception of the improvement in the cultivator by Marsh, and of the description which he gave of it from time to time, and to different persons.

In the fall of 1850, Marsh and his wife went to Salem, Tippah county, Mississippi, and Marsh made a contract to teach school, which contract is in evidence, and is dated the 5th of December, 1850, and consequently, about the time of which there can be no mistake. This contract said that the school was to commence on the 1st day of January, 1851. I think the school was about eight miles from Salem, Mr. Marsh returning to Salem every Saturday, and Mrs. Marsh remaining in Salem in the meantime teaching music.

In the month of January, Marsh described to a mechanic of Salem, by the name of Ray, the kind of machine he had in his own mind, which he claimed was an improvement upon a cultivator, and gave instructions to him as to its mode of construction, and a machine similar to the one introduced in evidence on the part of the defendants, and referred to as model "B," was completed under his direction, and it was successfully operated in the presence of numerous witnesses, in a field of Cozart, at or near Salem, early in March, 1851, so that at that time, Marsh had carried his conception and ideas into practical effect by the construction and operation of an improved cultivator. The cultivator was used before the corn was planted in the spring. It was also used after the corn was planted and was considerably advanced, and the evidence is that corn was usually planted in that vicinity from the 10th to the 20th of March.

Marsh and his wife left Mississippi and came north that year (1851), and, by his direction, this cultivator was shipped to Illinois, but owing to some cause it never arrived here. What has become of it is unknown. During all this time, while Marsh had the project of the cultivator in his mind, and after it was constructed, it appears that he intended to make application for a patent, and on the 1st of July, 1851, he made the necessary affidavit, with the view of procuring a patent, and his application was filed in the patent office on the 5th of July.

On the 30th of July, 1851, Marsh's claim was rejected and a patent refused, and he becoming discouraged, the claim was not further prosecuted in the patent office.

This seems to be the state of facts with reference to the conception, description, construction and practical operation of the invention of Marsh, independent of his own testimony.

When comparing his testimony with the

testimony of other witnesses in the case, it would seem that his memory is not reliable as to dates. In June, 1864, he told Mr. Furst and Mr. Bond that he had made the invention about three months before the application for his patent, which application, as we have already seen, was in the beginning of July. Now, it is clear that he is mistaken as to this, because the testimony of the construction and use of a machine as early as February or March, 1851, seems conclusive. It also appears that Marsh made an affidavit on the 24th of March, 1866, in Chicago, in which he says that in January or February, 1851, he conceived in his own mind a plan for a corn cultivator, but did not make a drawing or model of the same, or fully explain the same to any one until the month of May of the same year, which it is clear was long after he had actually caused his cultivator to be constructed, and, besides, there is a letter in evidence from Munn & Co., dated the 31st of December, 1850, which refers to one from Marsh of the 17th of the same month, making inquiry as to the steps necessary to be taken toward securing letters patent for an invention, which must have referred to this improved cultivator. So that there can be no doubt that Marsh was mistaken in the dates mentioned in his affidavit of the 24th of March, 1866, just mentioned.

These are the facts as set forth by the evidence on the part of the plaintiff and of the defendants, and what is the truth in relation to them?

And, first, as to the application in the patent office. That is a matter of record, and about the time there can be no doubt. The application of Dundas was in August, 1851. That of Marsh was in July of the same year. Then, Marsh was prior, in point of time, in the patent office.

Secondly, as to the construction and practical operation of the machine. It is not claimed, and the proof does not establish, on the part of the plaintiff, that Dundas brought a practical operating machine into being before, some time during the season of 1851, and when it was considerably advanced. The testimony of the son is, as we have seen, that the iron work was not completed until June, 1851, and it does not seem to have been operated until the summer of 1851. This fact depends mainly, if not exclusively, upon the testimony of Dundas and his son, and, of course, is liable to error.

When was the machine of Marsh finished? As to this, if there is any reliance to be placed upon testimony, there can be no doubt whatever Marsh went to Mississippi, or was there in December, 1850. That time is fixed beyond all controversy. He was teaching school, and his wife was teaching music, in January and February, 1851, he a short distance from Salem and she in Salem. Then there is the concurrent testimony of many witnesses as to the construction and operation of the machine, various witnesses testifying that it was operated "before vegetation was started," "before the corn was planted," "before there was anything green," so that there really can not be any doubt as to the construction and operation of the Marsh machine. Then Marsh brought into being a machine which operated successfully before that of Dundas. He is prior, therefore, in point of time in the construction and operation of the machine.

The only remaining question is, thirdly, as to the time of the conception of the two machines. Here all we have on the part of Dundas is the testimony of the father and of the son. About this, of course, there may be room for forgetfulness, mistake, or error. When a man conceived a certain machine, no one knows except the man himself; when he described it, no one knows except himself and the person to whom he describes it. We have to rely upon their testimony in order to determine. If it were clear, in view of the fact that the invention was followed up by the issuing of the patent to Dundas, that he was prior in point of conception, then, perhaps, he would be entitled to the monopoly which is claimed by the plaintiff in this case. But we have the same sort of evidence, and, as it seems to me, even stronger, as to the conception of the Marsh machine. There are more witnesses who testify to the priority of the conception on the part of Marsh than there are to that on the part of Dundas. I have referred to the various witnesses who state that Marsh communicated the conception of this machine, and that it was, in point of fact, prior to 1850. Mrs. Marsh distinctly says that it was before her marriage. Of course, you may say she does not tell the truth, but the date of her marriage is a thing about which she would not be very apt to be mistaken, and she could refer to any event in connection with that and speak of it with reasonable certainty. So as to Mr. Lawrence; the time when he came to the neighborhood in which Marsh resided. And so as to Mr. Bates. On the whole, I think the weight of the evidence is, in this case, that the conception and construction of the Marsh machine was prior in point of time to that of the Dundas machine. And, therefore, that Dundas was not the first and original inventor of the improvement in a cultivator which was patented to him.

The bill will consequently be dismissed.

[For another case involving this patent, see Marsh v. Sayles, Case No. 9,119.]

Case No. 12,420a.

SAYLES v. LAKE SHORE & M. S. RY. CO.
SAME v. CHICAGO & N. W. RY. CO.
SAME v. CHICAGO, B. & Q. RY. CO.

Circuit Court, N. D. Illinois. Oct. Term, 1879.

[See 9 Fed. 515.]

SAYLES (MARSH v.). See Case No. 9,119.

Case No. 12,421.

SAYLES v. NORTHWESTERN INS. CO.

[2 Curt. 212.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1854.

REMOVAL OF CAUSES — JURISDICTION — OBJECTION AFTER REMOVAL.

If a foreign corporation sued in a state court, appear there and remove the suit to this court, under the 12th section of the judiciary act of 1789 (1 Stat. 79), it is too late to object to the jurisdiction of the state court, or to take any exception to the process, by which the corporation was brought in; and it is not a valid objection, that not being an inhabitant or found within the district, the suit could not have been commenced in this court.

[Cited in Barney v. Globe Bank, Case No. 1,031; Winans v. McKean R. & Nav. Co., Id. 17,862; Bushnell v. Kennedy, 9 Wall. (76 U. S.) 394; Atkins v. Fibre Disintegrating Co., Case No. 602; Sands v. Smith, Id. 12,305; Grover & B. Sewing Mach. Co. v. Florence Sewing Mach. Co., 18 Wall. (85 U. S.) 580; Moynahan v. Wilson, Case No. 9,897; Werthein v. Continental Ry. & Trust Co., 11 Fed. 692; Small v. Montgomery, 17 Fed. 866; Edwards v. Connecticut Mut. Life Ins. Co., 20 Fed. 453; Fidelity Trust Co. v. Gill Car Co., 25 Fed. 742; Erwin v. Walsh, 27 Fed. 580; Kansas City & T. R. Co. v. Interstate Lumber Co., 37 Fed. 6; Hills v. Richmond & D. R. Co., Id. 661; Porter Land & Water Co. v. Baskin, 43 Fed. 326; Bentlif v. London & C. Finance Corp., 44 Fed. 668; Tallman v. Baltimore & O. R. Co., 45 Fed. 158; Reifsnider v. American Imp. Pub. Co., Id. 434; Ahlhauser v. Butler, 50 Fed. 706; Morris v. Graham, 51 Fed. 53, 54; Caskey v. Chenoweth, 10 C. C. A. 605, 62 Fed. 716; New York, L. E. & W. R. Co. v. Estill, 147 U. S. 611, 13 Sup. Ct. 452; Wabash W. Ry. v. Brow, 13 C. C. A. 222, 65 Fed. 945, 947; Goldey v. Morning News, 15 Sup. Ct. 561.]

[Cited in Beery v. Irick, 22 Grat. 484; Craven v. Turner (Me.) 19 Atl. 867; Whiton v. Chicago & N. W. Ry. Co., 25 Wis. 427.]

[This was an action at law by William F. Sayles against the Northwestern Insurance Company on an insurance policy.]

F. A. Jenckes, for plaintiff.

Mr. Bradley, contra.

CURTIS, Circuit Justice. This action was brought in the supreme court of the state of Rhode Island, and upon the petition of the defendant, was removed into this court, pursuant to the 12th section of the judiciary act of 1789 [1 Stat. 79]. The defendant now moves to dismiss the action for want of jurisdiction. The ground of objection is, that the only service made was by an attachment of the goods and effects of the defendant, which, being a foreign corporation, was not and could not be found within this district. If this suit had been commenced by process out of this court, it would be a fatal objection that the defendant was not found within the district, or that process could not be served here on him personally. Because the 11th section of the judiciary act of 1789 [supra], requires personal service of process on the defendant, within the district where the suit is brought, if he be not an inhabitant of the district. But the jurisdiction over this case, does not depend on the eleventh, but on the twelfth section of the act. If it be a suit which that section authorized the defendant to remove, it empowers this court to take jurisdiction over it when removed. The question, therefore, really is, whether the suit was rightly removed. If it was, the motion to dismiss must be overruled; if it was not, the action must be remanded to the state court. It is not a valid objection to the removal of an action from a state to a circuit court, that the process was not served in conformity with the laws of the United States. The process being under the laws of the state, must be served in conformity with those laws, and the laws of the United States have no bearing on the matter.

If a non-resident citizen of another state, when sued in a state court without personal service of the process, could remove the action to the circuit court, and there have it dismissed because no personal service was made, the states would be effectually debarred from executing all their laws for making service upon the property of non-residents. Yet the power to make laws which shall bind by judgments, the property of non-residents, is one which confined within proper limits, belongs to every state, has been extensively used, and is of much practical importance to its citizens. It is true, such judgments are valid only for the purpose of binding the property attached. In some sense they are proceedings in rem. But, to the extent of the property proceeded against, their validity is clear, and there is no act of congress which was designed to interfere with them, or to restrain the states from allowing their recovery. Besides, it has been held in Toland v. Sprague, 12 Pet. [37 U. S.] 300, that the locality of the action within the district where the defendant is an inhabitant, or is found, is a personal privilege of the defendant, which he may waive, by appearing and pleading to the action. And I am of opinion, that when he appears in the state court, files a petition for leave to remove the action, gives a bond to enter it in the circuit court, and actually enters it there, he has thereby waived any personal privilege he might have had to be sued in another district. If pleading to the action amounts to a waiver of such a privilege, upon the ground that he ought not afterwards to be heard to object to the means by which he was brought into court, I do not perceive why these proceedings should not have the same effect. The defendant comes in, becomes the actor, treats the suit as one properly instituted, removes it to another court and enters it there, and then says he was not obliged to appear at all, and the state court in effect had no suit before it. This, I am of opinion, he cannot do. I con-

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

sider, that this court will not look back to inquire into, or try the question whether the state court had jurisdiction. The act of congress allows defendants to remove actual and legally pending suits from the state courts. If this were not such a suit, the defendant should not have brought it here. By bringing it here, he voluntarily treats it as properly commenced, and actually pending in the state court; and he cannot, after it has been entered here, treat it otherwise.

It is urged, that this will prevent citizens of other states from trying in this court the question whether the state court had jurisdiction. Not so. If the state court had no jurisdiction, and the defendant does not appear, its proceedings are all void; and may be shown to be so in an action brought in this court against any one who meddles with the person or property of the defendant, under the color of such proceedings. The only objections which the defendant will be precluded from trying here, are technical objections, which do not affect the merits; and I see no good reason why he should not be prevented from trying them here. The design of the act of congress was, to enable citizens of other states to remove their cases here for a trial of their merits; not to take technical objections to the form and mode of service of process. These remarks apply also to the other objection which has been taken to the form of the writ; though I am inclined to the opinion that the twenty-first section of the process act of the state, is to be taken in connection with the thirty-fourth and thirty-fifth sections; and that when a foreign corporation is sued, a writ of summons and attachment is the proper form, and may be served as a foreign, as well as a direct attachment of the property of such a corporation.

[For final hearing in this cause, see Case No. 12,422.]

Case No. 12,422.

SAYLES v. NORTHWESTERN INS. CO.

[2 Curt. 610.] [1]

Circuit Court, D. Rhode Island. June Term, 1856.

INSURANCE — FIRE — WARRANTIES BY INSURED — HOW CONSTRUED—FORCE PUMP.

1. By a warranty in a policy of fire insurance, the insured is held only to a bare and literal compliance with the exact meaning of his engagement; which is not to be extended by construction, to include any thing not necessarily implied in its terms.

[Cited in Wright v. Sun Mut. Ins. Co., Case No. 18,095.]

[Cited in brief in Delaware & C. S. Towboat Co. v. Starrs, 69 Pa. St. 40. Cited in Howard Fire & Marine Ins. Co. v. Cornick, 24 Ill. 462. Cited in brief in Kibbe v. Hamilton Ins. Co., 11 Gray, 166. Cited in Mickey v. Burlington Ins. Co., 35 Iowa, 178; Thomas v. Fame Ins. Co., 108 Ill. 103.]

2. The warranty of a force-pump in a mill, at all times ready for use, does include a warranty of power to work the pump; but not any particular kind of power.

[Cited in brief in Campbell v. New England Mut. Life Ins. Co., 98 Mass. 387. Cited in Poor v. Humboldt Ins. Co., 125 Mass. 277.]

3. A warranty that the force-pump shall be at all times ready for use, does not engage that a fire, being the peril insured against, shall not disable it; and whether it does so at one stage of the fire, or another, the warranty is not broken.

[Cited in Cady v. Imperial Ins. Co., Case No. 2,283.]

4. Where a policy provides that any representation of the assured made in the survey, shall be deemed a warranty, the court will construe the instrument strictly against the insurer.

[This was an action at law by William F. Sayles against the Northwestern Insurance Company. For a hearing on a motion to dismiss for want of jurisdiction, see Case No. 12,421.]

Mr. Jenckes, for plaintiff.

Mr. Bradley, contra.

CURTIS, Circuit Justice. This is an action on a policy of insurance against fire. The policy bears date on the 1st day of May, 1854, and insured the plaintiff in the sum of $2,500, against loss by fire on his bleachery and the movable machinery therein, situate in the town of Smithfield, in the state of Rhode Island. The defence set up, is the breach of two warranties. The policy declares that it "is made and accepted in reference to the proposals and conditions hereto annexed, which are to be used and resorted to, in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for; and a failure to observe or comply with any of the said proposals or conditions, or any violation thereof, shall render this policy void and of no effect." The twelfth condition annexed to the policy is as follows: "Whenever a policy is made and issued upon a survey, description, or representation of certain property, such survey, description, or representation, shall be taken and deemed to be a part and portion of such policy and a warranty on the part of the insured, as fully as if the same were therein written or referred to."

A survey is produced, bearing the same date as the policy, and it is agreed the policy was made and issued with reference thereto. In this survey are found the following questions and answers: "Is there a good forcing-pump in the factory, designed expressly for protection against fires, and at all times in condition for use?" Answer: "There is." "If so, in what part of the building is it, and is it so geared that it can be put in operation outside the mill? How much water will it throw per minute?" Answer: "It is in the basement story, and is geared so it can be put in operation outside of building."

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

I am of opinion that these statements by the assured concerning the force-pump, must be deemed warranties, entitled to the same effect as if they had been inserted in the policy, in the form of warranties. Indeed this has not been questioned at the bar. The argument has turned wholly upon the meaning and effect of these statements, considered as warranties, and upon the inquiry whether they had been substantially complied with.

The material facts, as to which there is no dispute are, that this bleachery was upon a stream of water, which did not afford permanent power sufficient to operate it; and consequently a steam-engine was used to drive the machinery, including the force-pump, when the water power was not adequate. On the night between the last day of April and the first day of May, the dam which raised the head of water was carried away by a flood; so that when the survey was dated, the force-pump could not be driven by water power. But, at that date, and down to the time of the fire, the steam power was sufficient to operate it. The fire took in the boiler-house, and rendered it impossible to work the force-pump by steam; and as it could not be worked by water power, it was not capable of use after the fire was discovered.

The defendants take two grounds; the first is, that inasmuch as the survey, and the diagram which accompanied it, show that there was a dam and a water-wheel connected with the works, the warranty must be construed to impose on the assured the duty of having the water power always in existence, and ready to operate on the force-pump; that the warranty is, in terms, that the pump is at all times in condition for use; and that taken in reference to the nature of the works as shown by the diagram and survey, this means, at all times in condition for use by means of water power.

But it must be remembered that we are here dealing with a warranty; which is a stipulation, on the literal truth or fulfilment of which the validity of the entire contract depends. And, that, as the insurer has the right to exact of the insured a literal performance, and cannot be compelled to accept a substantial compliance, or to show that the breach was any way material to his interest, so, on the other hand, the insured is held only to a bare and literal compliance with his engagement; which is not to be extended by construction to include what is not necessarily implied in its terms. Livingston v. Maryland Ins. Co., 6 Cranch [10 U. S.] 274; Hide v. Bruce, 3 Doug. 213; per Kent, J., in Kemble v. Rhinelander, 3 Johns. Cas. 134; 1 Arn. Ins. 588.

I think it is a fair inference, that a warranty of the existence of a forcing pump on these premises, at all times ready for use, extends to the fact that there is sufficient power to work the pump; though it must be admitted this comes very near to the case decided by Lord Mansfield and his associates in 3 Doug. That was a warranty that a ship "should have twenty guns." The guns were on board, but there were not men enough to work them; and it was held the warranty had been complied with, there being no pretence of fraud.

If the warranty were of a forcing pump in a dwelling-house, at all times ready for use, I should hold it satisfied by the existence of such a pump, in a condition to be worked; but one of the inquiries put here was, whether the pump was so geared that it could be put in operation outside the building. Considering the nature of the works and the uniform and notorious usage to have such a pump in such a position, driven by power, and the inquiry as to the gearing, it seems to me a necessary result that this warranty extended to the pump being so geared that it could be attached to and worked by some suitable power, such as is applied to drive such an engine. But I cannot find any stipulation that the power was of any particular kind, or derived from any particular source. It may be true that the insurers had reason to think the power employed would be a water-wheel. If they did so think, and deemed it material, they should have introduced it into the warranty, if they thought it proper to protect themselves by having it in that form. Not having done so, I cannot inquire what they expected. If any misrepresentation or concealment affected their interest, that must be tried by the jury. But it can have no bearing upon the construction of the written warranty, which is the only subject now under consideration.

The second ground taken by the defendants is, that this was a continuing warranty that the pump should at all times be ready for use; and that it was not capable of being used at the time of this fire. It is true, that during the progress of the fire, the pump became disabled. But surely, the statement that there is a pump on the premises at all times, in a condition for use, cannot be construed to mean that it shall continue in a condition for use after fire breaks out on the premises. This would render the policy little better than a nullity; for at some period during the progress of a fire, by which the premises are destroyed, a force pump thereon must cease to be in a condition for use. Thus construed, the policy would only insure against so much loss or damage by fire as should not prevent the working of the force pump; that being disabled, the policy would be void. I cannot give such a construction to this instrument. And whether the fire broke out near the pump, or its gearing, so as to disable it almost instantly, or more remotely, so as to allow it to be operated for a time, cannot affect the question whether the warranty was kept. I think the true construction of the warranty cannot be pressed further than this,—that the force pump shall be in a

condition for use at all times when not rendered useless by fire. I say not further than this, because I have some doubt whether this warranty, considered strictly as a warranty, does extend to the future; whether its true construction does not confine it to the then existing state of things; leaving the rights of the underwriters to depend on another clause of the policy, which guards them against changes of the risk from fault of the assured. But I have not thought it needful to pursue that inquiry, being satisfied that if it be a continuing warranty, it was not broken.

I am aware that the breach of a warranty is not excused even by the direct and irresistible operation of a peril insured against. Thus, a warranty to sail by a given day is not excused by an embargo, though such restraint was one of the perils insured against. Hore v. Whitmore, Cowp. 784. But the question in this case is, not whether a breach of a warranty to have the force pump in a condition for use is excused by the occurrence of a fire, but whether the insured did warrant it should not be disabled by fire. Being of opinion he did not, I think this ground of defence is not tenable.

It is further contended by the defendants, that there was a breach of a warranty respecting the material of which part of one of the buildings was composed. A diagram, made on a separate sheet of paper, is twice referred to in the survey. These references are as follows: Question. "Of what material is the building constituted, and with what is the roof covered?" Answer. "Wood and stone; roof covered with shingles." Question. "When built, size, number of stories, how high between joints, and how finished within?" Answer. "About the year 1834 or 1835; that is the main building; other buildings recently. (See diagram.)" Question. "Description and distance of adjacent buildings, of what construction, dimensions, and how occupied?" Answer. "See diagram." At the foot of the diagram is written, "The above is a ground survey of the Moshassuck Bleachery, showing that the buildings are all connected together. The basements of the main buildings, namely, No. 1, 2, and 3, are built of stone. The other buildings have no basements." The ground plan of No. 5 shows 46 by 17½ feet. Upon it is written, "Boiler house, stone and brick, roof wood." In point of fact, the boiler house proper was of stone and brick; but at the end thereof was a shelter in front of the boiler, about twelve feet long, one side of which was wood. The end, also, so far as it was inclosed, was of wood. It is insisted that this amounts to a breach of warranty.

Under the terms of this policy, already quoted, the insured warrants the truth of the survey. But the diagram is not in fact part of the survey, and cannot be deemed to be incorporated therein in legal effect, except in those particulars, and for those purposes, in regard to which it is referred to by the survey. And the survey nowhere refers to the diagram, as showing the materials of which the buildings insured are constructed. The references are confined to the size of the buildings insured, and whatsoever is shown as to any buildings adjacent to the premises insured. This interpretation of the extent of the warranty of what is shown on the diagram, is not only consistent with the language of the papers, but is demanded by good faith. If the insured were taken to warrant the literal truth of every particular on a complicated diagram, though wholly immaterial to any interest of the insured, the policy would be little better than a snare. Indeed, the clause of the policy which makes every statement in the survey a warranty, does in my judgment go further than sound policy and the fair protection of the substantial rights of insurers can justify. It is well known how incautious parties are respecting these printed stipulations; and I feel no disposition to extend the effect of such an one as this. If any thing contained on the diagram amounts to a material misrepresentation, it is a defence; but this involves matter of fact, to be inquired of by the jury.

The defendants can go to the jury on this question, if they shall so elect; otherwise, I shall direct a verdict for the plaintiff.

Case No. 12,423.

SAYLES v. OREGON CENT. RY. CO.

[6 Sawy. 31; 4 Ban. & A. 429; 8 Reporter, 424; 11 Chi. Leg. News, 383.] [1]

Circuit Court, D. Oregon. July 28, 1879.

PATENTS—LIMITATION—STATUTES—AMENDMENTS—OREGON CONSTITUTION.

1. Under section 721 of the Revised Statutes, the state statute of limitations applies to actions in the national courts, except where the laws of the United States otherwise provide.

2. The limitation contained in section 55 of the patent act of July 8, 1870 (16 Stat. 206), was repealed by operation of section 5596 of the Revised Statutes, but as to all actions and suits upon causes arising before said repeal—June 22, 1874—said limitation was continued in force by section 5599 of the Revised Statutes, and therefore an action to recover damages for the infringement of a patent before June 22, 1874, is not within the operation of the state statute of limitations.

3. Semble that under section 22 of article 4 of the constitution of the state of Oregon, a section of a statute can not be amended by simply repealing a clause or subdivision of it, and that therefore subdivision 5 of section 6 of the Oregon Civil Code, in which six years are given to bring this action, is still in force notwithstanding the attempt to repeal the same by the act of October 22, 1870 (Sess. Laws, p. 34).

[This was an action by Thomas Sayles against the Oregon Central Railway Company to recover damages for the infringement of a patent.]

[1] [Reported by L. S. B. Sawyer, Esq.; reprinted in 4 Ban. & A. 429; and here republished by permission.]

Addison C. Gibbs, for plaintiff.
Joseph N. Dolph, for defendant.

DEADY, District Judge. This action was brought to recover damages for the unlicensed use of a patented railway car-brake. The complaint states that the invention was patented to one Henry Tanner for the period of fourteen years on July 6, 1852, and afterwards, on July 6, 1866, the patent was extended for seven years; that on July 13, 1854, Tanner assigned the patent and extention for certain parts of the United States, including Oregon, to the plaintiff; and that the defendant, between July 6, 1871, and July 6, 1873, did make and use said brake in violation of said patent and the assignment aforesaid, to the damage of the plaintiff, four hundred and seventy-five dollars.

The defendant demurs to the complaint, and substantially alleges that the cause of action is barred by lapse of time. Section 55 of the patent act of July 8, 1870 (16 Stat. 206), provides that the circuit courts of the United States shall have cognizance of all actions arising under the patent laws, and that all such actions "shall be brought during the term for which the letters patent shall be granted or extended, or within six years after the expiration thereof." In the Revised Statutes, said section 55 is re-enacted as section 4921, less the limitation clause above quoted, which was repealed by operation of section 5596 of the Revised Statutes. Section 721 of the Revised Statutes re-enacts section 34 of the act of September 24, 1879, making the laws of the several states "rules of decision in trials at common law," except where the laws of the United States otherwise provide. Under this section it has been uniformly held that where congress had not otherwise specially provided, the state statute of limitations applies to actions in the national courts.

It follows from this statement of the case, that unless there is a saving clause in the repealing provisions of the Revised Statutes, the only statute of limitation now or since June 22, 1874, applicable to this class of actions, is that of the state. Upon the assumption that there is no such saving clause, the defendant contends that this action is barred by subdivision 1 of section 8 of the Oregon Civil Code, which limits the time for the commencement of the actions therein enumerated to two years from the time the cause of action accrued.

But there is a serious question whether the state statute does not give six years in which to bring this action. Originally, the clause in subdivision 1 of section 8 concerning actions for any other "injuries to the person or rights of another," under which it is sought to bar this action, was contained in subdivision 5 of section 6, that gives six years in which to sue upon causes of action therein enumerated. By the act of October 22, 1870 (Sess. Laws, p. 34), it was attempted to amend both sections 6 and 8 of the Code by simply repealing subdivision 5 of the former, and repealing and re-enacting the latter, so as to include in subdivision 1 thereof the cases before then provided for in said subdivision 5, and thereby reduce the time within which actions might be brought thereon from six years to two. It can hardly be doubted that this attempt to amend said section 6, by simply repealing a certain portion of it, is in direct violation of section 22 of article 4 of the constitution of the state, which provides that "no act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length."

Now, although section 8 may have been properly amended, yet, if section 6 was not, then subdivision 5 thereof is still in force; wherefore the result is that there are two periods of limitation in the statute for actions of this kind—one for six years, and the other for two. In such a case, the plaintiff may avail himself of the longer period, and the shorter is practically a nullity. But I think there is no reasonable doubt that section 5599 of the Revised Statutes contains a saving clause by which the limitation in section 55 of the act of 1870, supra, is continued in force for the purposes of this action. It reads: "All acts of limitation whether applicable to civil causes and proceedings, or to the prosecution of offenses, or for the recovery of penalties or forfeitures embraced in said revision and covered by said repeal, shall not be affected thereby, but all suits, proceedings, or prosecutions, whether civil or criminal, for causes arising, or acts done or committed prior to said repeal, may be commenced and prosecuted within the same time as if said repeal had not been made." It is difficult to conceive of anything plainer or more comprehensive than this. Read simply with reference to this case, it provides that any act of limitation applicable to actions for the infringement of patents embraced in the Revised Statutes, or covered by the repealing clauses thereof, shall not be affected thereby, but all such causes of action arising prior to said repeal may be commenced and prosecuted as if said repeal had not been made, which would be at any time within six years from the expiration of the patent or the extention thereof.

Counsel for the demurrer cites Sayles v. Richmond F. & P. Ry. Co. [Case No. 12,424], in which it seems to have been assumed that the limitation clause in section 55 of the act of 1870, supra, was unqualifiedly repealed by the Revised Statutes, and that therefore the limitation in actions and suits for the infringements of a patent, since June 22, 1874, under section 721 of the Revised Statutes, is to be found in the law of the state where the same is brought. But, as in that case the suit was not barred by either the national or state statute, it was not material to inquire further; and, in fact, the attention of

the court does not appear to have been called to section 5599, supra, which, as has been shown, expressly provides that actions and suits upon causes arising before the revision and repeal of June 22, 1874, "may be commenced and prosecuted within the same time, as if said repeal had not been made." The demurrer is overruled.

[For other cases involving this patent, see note to Sayles v. Chicago & N. W. Ry. Co., Case No. 12,414.]

SAYLES (PHETTIPLACE v.). See Case No. 11,083.

Case No. 12,424.

SAYLES v. RICHMOND, F. & P. R. CO.

[4 Ban. & A. 239; 3 Hughes, 172; 25 Int. Rev. Rec. 209; 16 O. G. 43; 7 Reporter, 743; 11 Chi. Leg. News, 281; 4 Cin. Law Bul. 313.] [1]

Circuit Court, E. D. Virginia. April, 1879.

PATENTS — LIMITATION OF ACTIONS — EQUITABLE JURISDICTION—DISCOVERY—ACCOUNT.

1. A patent was granted in 1852, for the term of fourteen years, and was extended in 1866 for seven years: *Held*, that the seven and fourteen years were, by section 4927, Rev. St., consolidated into one term, so as to make a statute of limitation apply to the period of twenty-one years as a single integral term.

[Cited in Hayden v. Oriental Mills, 22 Fed. 104.]

2. The subject of the limitation of suits for the infringement of patents, reviewed.

3. The application of state statutes of limitation to actions at law, for infringement of patents, considered.

[Cited in Sayles v. Oregon Cent. Ry. Co., Case No. 12,423; Hayden v. Oriental Mills, 15 Fed. 607.]

4. The nature and scope of the equitable jurisdiction, in patent causes, conferred upon the circuit courts by statute, stated.

5. Where, after a patent has expired, a suit is brought for its infringement, and the complainant and defendant are citizens of different states, the court will not entertain jurisdiction, under its general equity jurisdiction, where the bill is not for an account or a discovery.

[Cited in Atwood v. Portland Co., 10 Fed. 284.]

6. A bill brought to recover profits made by the defendant from the infringement of the complainant's letters patent, if it be not a bill for discovery, cannot be entertained as a bill for an account, in order to confer equitable jurisdiction.

7. Where the patent sued upon is the property of the complainant in his own right, and does not possess the character of fiduciary property, an infringer of the patent is not a trustee de son tort, and the court cannot upon that ground entertain equitable jurisdiction of the bill.

8. The cases in the circuit courts bearing upon the question of the trusteeship of an infringer, examined and cited.

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and by Hon. Robert W. Hughes, District Judge, and here compiled and reprinted by permission. The syllabus and opinion are from 4 Ban. & A. 239. The statement is from 3 Hughes, 172.]

This bill is brought to recover profits against the defendant [the Richmond, Fredericksburg & Potomac Railroad Company] from its unauthorized use of the complainant's improved railroad car-brake (known as Tanner's brake) for a number of years before the patent expired. The brake was invented by two men, Thompson and Bachelder, and by them the invention was assigned to Tanner in April, 1852. The brake was patented by Tanner in July, 1852 [No. 9,109]. Tanner assigned it to the complainant here, [Thomas] Sayles, in 1854. The patent was renewed for seven years from July, 1866. It finally expired on the 6th of July, 1873. Sayles filed this bill of complaint on the 8th January, 1879. The bill charges the unlawful use of the brake by the defendant from July 6th, 1856, to July, 1873. It prays for a discovery of the full amount of profits accrued to the company from such use of the brake; also for an account of profits; and finally that the defendant may be made to pay this amount of profits when ascertained. The bill is not in form a bill for discovery or for account. It, of course, is not a bill for an injunction, having been filed after the patent right of Sayles had finally expired. The defendant demurs to the bill, setting out as one ground of demurrer, that the complainant is barred from recovery by the statute of limitations; and, as another ground, that the bill does not make a case for relief within the jurisdiction of a court of equity.

A. H. Warner, for complainant.

A. McCallum and George Payson, for defendant.

HUGHES, District Judge. It is only necessary for me to pass on the two questions of limitation and of jurisdiction.

First, as to the statute of limitations. The 34th section of the judiciary act of 1789 [1 Stat. 80]—section 721, Rev. St. U. S.—is the only general statute of limitations known in federal legislation. In providing that the laws of the several states shall be the rules of decisions in trials at common law in courts of the United States, except where treaties, or acts of congress otherwise provide, congress virtually adopted the statute of limitation of each state as the limitation of actions brought in the United States courts held in that state. This point is so thoroughly settled that it is useless for me to cite authorities on the subject. But this section excepts, in terms, cases in which any acts of congress may provide other rules of decision; and congress did enact a special statute of limitations as to patents, in section 55 of the act of July 8, 1870, entitled an act "to revise, amend, and consolidate the statutes relating to patents and copyrights" (16 Stat. 206), the concluding clause of which declared that all actions should be brought within the term of the patent, or within six years after the expiration thereof. This clause was not repealed until

the 22d of June, 1874, when it was virtually repealed by section 5596 of the Revised Statutes of the United States, in having been omitted in the revisal from sections 4919 and 4921, which latter sections, in other respects, embodied sections 59 and 55 of the act of 1870. This repeal gave to the complainant the right to sue, under section 721, within five years from June 22, 1874 (Sohn v. Waterson, 17 Wall. [84 U. S.] 596; Ross v. Duval, 13 Pet. [38 U. S.] 62; and Lewis v. Lewis, 7 How. [48 U. S.] 778); and the present suit was, in fact, brought within that period. The suit is, therefore, undoubtedly, in time as to profits made by the defendant during the period of the extension of the patent—July, 1866, to July, 1873. The only question admitting of doubt is, whether or not it is brought in time to cover profits for the fourteen years extending from 1852 to 1866. Section 66 of the act of 1870, and section 4927 of the Revised Statutes, provides, in its last clause, that when a patent shall be extended for seven years after the expiration of the first period for which it was granted, it "shall have the same effect in law as though it had been originally granted for twenty-one years."

I have given all the attention of which I am capable to the ingenious argument of defendant's counsel in their contention that, in spite of this language, the limitation applied severally, first, to the fourteen years—barring all claims accruing specifically in that period; and, second, to the seven years—barring claims accruing afterward in that period; so that, if a suit is brought, as this was, within six years after the close of the latter period, it would be good to cover claims accruing therein, but would not be good to cover claims which had accrued anterior thereto. But it is too plain for doubt, in my mind, that the law, which is certainly written as has been quoted, really means what it declares, when it provides that the renewed patent "shall have the same effect in law as though it had been originally granted for twenty-one years." The necessary effect of this language is to consolidate the seven and fourteen years of the two patents into one term, as under one patent, and to make the limitation apply to the period of twenty-one years as a single integral term. Indeed, I can well imagine it to have been one of the objects of section 66 of the act of 1870, to establish a plain, intelligible period of limitation, to wit, six years after one single integral period of twenty-one years, rather than to enact a complicated statute of limitations, depending upon two periods of duration, two sets of dates, and two classes of claims. I cannot, therefore, sustain the demurrer. So far as it rests upon this ground I must hold that the claim of the complainant in this suit is not barred.

I come, therefore, to the more important question, whether the complainant's bill makes a case within the jurisdiction of a court of equity. This suit being one in which complainant and defendant are citizens of different states, and the jurisdiction of the court extending here to any case which may fall within its general jurisdiction as a court of equity, its power here is not a mere statutory jurisdiction confined to cases arising under patent laws, but it is the general power of an equity court. I doubt whether, under section 55 of the act of 1870, or section 4921 of the Revised Statutes, the United States circuit courts have jurisdiction in patent cases, except by injunction, where the parties are citizens of the same state. In cases where the jurisdiction is merely statutory, and would not exist but for the acts of congress giving special jurisdiction in patent cases, I doubt whether these courts could entertain suits in equity, except by injunction. It is a well settled canon of construction that jurisdictional legislation must be strictly construed, and I see nothing in the letter of section 4921, relating to patent suits in equity, to authorize any other proceeding in them by the circuit courts, as courts of equity, but by injunction, carrying with it, of course, proceedings incident to injunction. If so, the term of this complainant's patent having expired, and there being no case for an injunction, we have no jurisdiction in this suit merely as a patent suit under section 4921. This proposition, however, does not affect the present case. We are proceeding under the general powers of an equity court, and have jurisdiction of the case (if it can otherwise be entertained) by virtue of the parties, complainant and defendant, being citizens of different states. It was not contended, in the argument at bar, that the bill in this case can be entertained as a bill for discovery. In fact it is not framed on that theory, and does not contain the averments necessary to constitute it such a bill. It does not aver, that the information it seeks, rests alone in the knowledge of the defendant. The defendant is a corporation having no conscience to probe, and is incapable of taking an oath. It can give information only through its officers, and these may all be summoned, and may testify as ordinary witnesses. A "discovery" (in the technical sense) by the defendant is not necessary to the plaintiff's relief. There is, therefore, no case for a discovery made in this bill, as a bill of discovery. Nor is the bill framed on the theory and in the form of an ordinary bill of account. What it seeks is to recover profits resulting to the defendant from using, through a series of years, a mechanical invention without the owner's consent or authority. These profits do not consist in specific sums of money received by the defendant in so using the invention; they simply consist in the advantage and convenience which the defendant derived from using an ingenious piece of mechanism. What this advantage was, is a matter of estimate by experts or men of practical experience, as due in the lump. It is not a matter of items, of

money and accounts, of book-keeping, of buying and selling, of mutual dealing in goods or money. Nor is there any mutuality of account. If defendant's profits consisted of items at all, the items were all on one side. Because this is not a matter of account, because there was no mutuality of accounts, and because the case is not one for discovery, it follows that the bill cannot be entertained as a bill for an account as such. Indeed, in the argument at bar, the complainant's counsel did not claim jurisdiction on that ground. In truth, the argument at bar was devoted almost wholly to the question whether or not the profits derived by the defendant, as claimed by the bill, could be treated as trust funds; whether, as to them, the defendant was not a trustee de son tort, and whether the jurisdiction of equity to look after these profits as a trust fund, and to compel a discovery, an account, and a restitution of them, as a trust fund, could be sustained.

This question has never been adjudicated by the supreme court of the United States. Complainant's counsel cites decisions from other courts, from which he thinks it is inferable that courts of equity may take jurisdiction of suits to recover from infringers profits derived from patented inventions, on the ground of constructive trusteeship, and he refers to several recent conflicting decisions of the United States circuit courts on this question. But I think I may safely proceed as if the question were still an open one. I do not think that the reported cases cited by the complainant's counsel throw any clear light on the question, for they do not bear upon it. I do not perceive that the case of Crosley v. Derby Gaslight Co., 3 Mylne & C. 430, shows anything which should affect the case at bar. It is the report of the second hearing of the case, and is but a partial report. The only question was upon the construction of a former decree. It does not appear that the bill was not for an injunction, among other things. In a foot-note, the report of the case on an appeal from the first decree is mis-cited as in 4 Mylne & K. 72. I believe there is no such volume, and I have been unable to correct the reference, or find the case. The case of Livingston v. Woodworth, 15 How. [56 U. S.] 546, related to a planing-machine, and was an injunction suit, in which nothing was decided, except that the actual profits of an infringer of a patent could be recovered against the infringer as an involuntary trustee; but nothing was said on the subject, in the decision of the court. There was no question of jurisdiction in the case. In Cowing v. Rumsey [Case No. 3,296], which related to a cylinder-polisher, and was an action on the case, no question of jurisdiction arose. The judge there merely made an incidental remark, passim, to the effect that an infringer of a patent might be treated as a trustee in respect to profits derived by him from the use of the patent. In Burdell v. Denig, 92 U. S. 716, which related to a sewing-machine, and was an action at law to recover damages from an infringer of a patent, and where jurisdiction was not in contest, Mr. Justice Miller incidentally said that damages might be recovered at law, but that profits were the measure of recovery in equity, on the theory that the infringer might be treated as a trustee. In Birdsall v. Coolidge, 93 U. S. 68, which related to a machine for amalgamating gold and silver, and was an action at law, Mr. Justice Clifford made a remark that profits might be recovered in equity by considering the infringer of the patent as trustee for the patentee.

The question of jurisdiction did not arise in any one of these cases. Much less did the court, in a single instance, intimate, in the remotest manner, that, notwithstanding the existence of an adequate common law remedy, equity could take jurisdiction of a bill for profits arising from the use of a patent, solely on the ground of constructive trusteeship. I have looked through the reports in vain for any direct authority for such a jurisdiction. There is such a thing known in equity jurisprudence as a trustee de son tort; but in every mention of such a trustee in the books, the property in respect to which a person has been regarded as a trustee de son tort has possessed, before the interference with it, the character of fiduciary property. I think it clear law that it is only in respect to property already subject to a trust, and stamped with the fiduciary character, that a person can become a trustee de son tort.

In the present case, if the assignment of the patent from Tanner to Sayles had been in trust, for the benefit of beneficiaries recognized in law as such, and Sayles were here suing for the trust funds for the benefit of such beneficiaries, the defendant might, I suppose, upon the teaching of the authorities on the subject, be treated as a trustee de son tort, and be sued in equity. But I think that it may safely be held that, in any case of constructive trusteeship, the character of trustee de son tort does not attach in such manner as to give equitable jurisdiction over him, unless the property with which he interfered was already trust property when the interference occurred. The defendant here, therefore, is not a trustee de son tort, nor suable, as such, in equity. This much being clear, let us now suppose the case of a person who takes possession of and uses another's horse, wagon and team, or thrashing machine, without his knowledge, consent, or authority. In such a case, the law provides common law remedies, in which the defendant is afforded the constitutional right of a trial by jury. In such a case, the owner may recover damages in trespass for the tort; or, he may waive the tort, and sue in assumpsit on the implied promise to pay what is equitably due for the use and possession of the property. Will it be contend-

ed that a bill in equity would lie in such a case on the theory that the wrong-doer was a trustee de son tort, or trustee at all? Yet the theory of an implied promise to pay what is equitably due, is, except in name and form, identical with the theory of trusteeship, which is that the wrong-doer is custodian of the money so promised. The action of assumpsit in such a case is based upon the theory that the wrong-doer has impliedly promised to pay what ex æquo et bono is a fair equivalent for the use of the property. He is in law treated as a fiduciary, in custody of another's property. But, though this theory of trusteeship (for it is nothing else) is as old as the doctrine of assumpsit, no one has ever contended, until lately, that such a mere theory, employed by judges as a means of explaining, by analogy, the premise which they derive from the relation of the defendant to the property he has used, may be employed as the basis of a new departure in equity practice, and of an indefinite extension of the equity jurisdiction, in derogation of the common law, and constitutional right of trial by jury.

The case I have supposed is, in principle, precisely the case we have at bar; for there is no magical quality in the property of the patentee in his patent to distinguish this case from the one just supposed, where ordinary property had been taken and used without the owner's consent. We are not dealing with the patent case by virtue of the peculiar jurisdiction of this court in patent cases, but under its general jurisdiction as a court of equity. The defendant has used the complainant's property; and the fact that the property used is a patent, does not at all affect the question of jurisdiction. The patent was not trust property when the defendant began to use it, and, therefore, the defendant does not bear to it the relation of trustee de son tort.

The act of the defendant was nothing but the simple one of a person taking and using another's property, without authority, to his own advantage, and incurring a liability to compensate the owner for such use of the property. The case is, in principle, precisely identical with that of such a use of a horse, or a boat, or a wagon and team, or thrashing-machine—giving a right of action in assumpsit; and, until recently, I have never known it to be contended that compensation for such use could be sued for in equity, "on the theory of a constructive trusteeship," or on the "idea" that the wrong-doer was an "involuntary trustee." Courts have undoubtedly used such language in illustration of the theory of responsibility, on which they have held defendants liable in actions of assumpsit at law, and in bills of injunction in equity for the use of patent property; but language used on the bench for mere purposes of illustration cannot either fairly or safely be treated as authoritative decisions, and made the basis for assuming a jurisdiction not otherwise existing, and new to equity jurisprudence.

The bill will, therefore, be dismissed.

[For other cases involving this patent, see note to Sayles v. Chicago & N. Ry. Co., Case No. 12,414.]

Case No. 12,425.

SAYLES v. SOUTH CAROLINA R. CO.

[Cited in Sayles v. Richmond, etc., R. Co., Case No. 12,424. Nowhere reported; opinion not now accessible.]

S. B. WHEELER, The (ROGERS v.). See Case No. 12,021.

Case No. 12,426.

SCAIFE v. FULTON et al.

SAME v. SHERRIFFS et al.

[2 Ban. & A. 235; [1] 9 O. G. 1164.]

Circuit Court, E. D. Pennsylvania. March 11, 1876.

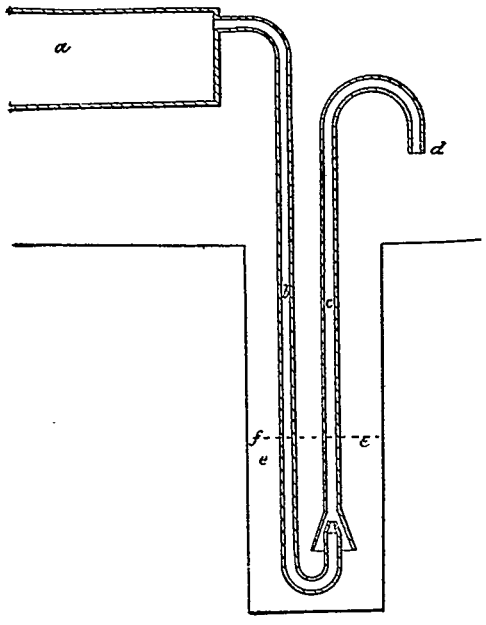
PATENTS—INFRINGEMENT—SPECIFICATIONS.

Upon the construction given by the court to letters patent number 92,718, granted to George W. Glass, July 20, 1869, for an improvement in ejectors, the defendants *held* not to have infringed.

In equity. These suits were brought [by William B. Scaife] to restrain an alleged infringement by the defendants [A. Fulton's Sons & Co. and Sherriffs and Loughrey] of letters patent No. 92,718, granted to George W. Glass, July 20, 1869, for an improvement in ejectors. The patented device consisted of a vertical discharge-pipe having a coniform lower end immersed in the water, and a steam or air pipe entering the lower end and discharging a jet of steam or air into the discharge-pipe under the surface of the water, whereby the latter was raised and ejected from the pipe. Defendants' device consisted of the vertical water pipe provided with a T or globe head at the upper end, through which a jet of steam passed across the upper end of the water-pipe, exhausting the air therein and causing a vacuum which permitted the water to rise and be discharged. The claims of the patent are: "(1) The combination of the pipes b and c, so arranged as to be used for the purpose of forcing, blowing, or ejecting liquids from wells, ships, or other place, as herein described and set forth. (2) The ejector, composed of the pipes b and c, the lower end of pipe b entering within the coniformed mouth of the pipe c, substantially as herein described. (3) The construction and combination for immersing in oil or water, in wells or other place, the lower end of pipes arranged so that, by the use of steam or air forced down one pipe,

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

[Drawings of patent No. 92,718, granted July 20, 1869, to G. W. Glass; published from the records of the United States patent office.]



liquids will be forced up the other, substantially upon the principle as herein described and set forth."

George Shiras, Jr., and J. J. Johnson, for complainant.

William Bakewell and T. B. Kerr, for defendants.

McKENNAN, Circuit Judge. The novelty of the invention claimed by the complainant here is contested, but I do not feel called upon to say whether successfully or not, because the bill must be dismissed on another ground. Whatever may be the capabilities of the invention described in the patent, its character and scope are so circumscribed by the specifications and claims that the respondents cannot be adjudged to be infringers.

The complainant's and the respondents' structures are operated by the application of different forces, and are of different construction, and are, therefore, not substantially identical. I deem it only necessary to make this general statement to indicate the reason for which the decree is made.

Bills dismissed at cost of complainant.

Case No. 12,426a.

SCAIFE et al. v. MAGENS et al.

[19 O. G. 791.]

Circuit Court, D. Kentucky. Feb. 21, 1881.

PATENTS—BOILERS—VALIDITY.

Reissue letters patent No. 4,467, granted July 11, 1871, to William B. Scaife, for improvement in boilers for ranges, stoves, &c., declared invalid and void.

In equity.

James J. Johnston, James Speed, and Thomas Speed, for complainants.

James A. Beattie and Strawbridge & Taylor, for defendants.

BAXTER, Circuit Judge. This day this cause having been heard on evidence of the respective parties thereto, as contained in the printed records of said parties filed in the cause this day, and on the exhibits therein referred to, and on the arguments of James J. Johnston, James Speed, and Thomas Speed for complainants, and of James A. Beattie and Strawbridge & Taylor for defendants, it is ordered, adjudged, and decreed that the reissued letters patent No. 4,467, dated July 11, 1871, to William B. Scaife, for improvement in boilers for ranges, stoves, &c., are invalid and void; and that the bill in equity in the above cause be, and is hereby, dismissed. And it is further ordered, adjudged, and decreed that the defendants recover of the complainants their costs herein expended.

And thereupon complainants prayed an appeal to the supreme court of the United States, which was granted.

[The records of the office of the clerk of the supreme court do not show any entry of an appeal in this case.]

SCAIFE v. SHERRIFFS. See Case No. 12,426.

Case No. 12,427.

In re SCAMMON.

[6 Biss. 130;[1] 6 Chi. Leg. News, 328; 10 Alb. Law J. 29; 1 Am. Law T. Rep. (N. S.) 372; 21 Pittsb. Leg. J. 207; 6 Leg. Gaz. 229.]

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

BANKRUPTCY—NUMBER AND AMOUNT OF CREDITORS — AMENDED ACT — CASES PENDING — REQUIREMENTS—VERIFICATION OF PETITION.

1. Creditors' petition must show affirmatively that the requisite number of creditors join therein. Such allegation may, however, be made upon information and belief.

2. In cases pending at the time of the passage of this amendment, the petitioning creditors must amend their petition, and insert the allegations as to number and amount of the petitioning creditors.

3. In all cases the creditors must make this allegation before the debtor can be required to show cause, or even file a schedule of his creditors.

4. Argumentum ab inconveniente can not be considered by the bankruptcy court; a creditor wishing the benefits of the law must comply with all its requirements.

5. The amended petition must be sworn to in the same manner as an original petition.

6. On the call of the calendar, a pending petition will not be dismissed, absolutely, but leave to amend will be granted.

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

7. The allegation that the requisite number of creditors join in the petition, is not sufficient, even when admitted by the debtor; the court must be satisfied that such is the fact.

This was a petition in bankruptcy, filed by the United States Mortgage Company against Jonathan Young Scammon. On the signing of the amendment of June 22, 1874 [18 Stat. 178], the debtor moved to dismiss the petition on the ground that it contained no allegation as to the number and amount of petitioning creditors as required by the amended act. This motion coming up on the day for the call of the bankruptcy calendar, all attorneys interested were present; and this decision was made with reference to all cases pending in this district.

[For prior proceeding in this litigation, see Case No. 12,430.]

Walker, Dexter & Smith, for petitioning creditor.

Lyman Trumbull and Ayer & Kales, for respondent.

BLODGETT, District Judge. I must confess that the question raised is not entirely free from doubt in my own mind. But there are some provisions of the law that are sufficiently clear. The thirty-ninth section of the original bankrupt act of March 2, 1867 [14 Stat. 536], is substantially and practically repealed, and a new section enacted in place of it. The new section enumerates the acts which shall constitute acts of bankruptcy, and for which a party may be forced into involuntary or compulsory bankruptcy, and proceeds as follows:

"And, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable." Rev. St. 1874, § 5021.

Now this must be done on the petition of that number of creditors. It is manifest, then, that from the time this becomes a law no person can be adjudged a bankrupt unless the requisite number of creditors join in the petition, because it must be upon their petition; and it is very clear to me that the practice indicated by the whole tenor of the law in respect to cases hereafter commenced is, that the petition must affirmatively show that the requisite number of creditors in number and amount have united therein. I do not think, as has been urged, that this allegation as to the number of creditors must necessarily be so positive that the party could be prosecuted for perjury upon it. It may be stated (and I shall so hold, until some higher court decides the contrary) upon the information and belief of petitioning creditors, that they do constitute one-fourth in number and one-third in amount of the aggregate creditors, because we all know that creditors are very liable to be misinformed by debtors as to the extent of their (the debtors') indebtedness. Cases occur almost daily in practice, in which debtors have represented to their creditors that they owed only a very small amount of debts, in which, when the facts came to be developed, their entire indebtedness largely exceeded the amount stated. Creditors, of course, in preparing petitions in the first instance, speak according to the light they possess at that time. I think, therefore, it will be a sufficient compliance with the provisions of the law that they state on their information and belief that they do constitute one-fourth in number and one-third in amount of the creditors of the debtor named.

Then the law provides that if the debtor wishes to traverse this allegation he can do so by a statement made in writing that the requisite number of creditors have not joined in the petition, whereupon the court shall require the debtor forthwith to file a schedule of his creditors with the court, which, of course, must be, so far as he is concerned, conclusive; and if the creditors succeed, within the time limited by the act, in obtaining the consent of the requisite number of the creditors mentioned in the schedule filed by the debtor himself, the proceedings can go on; otherwise the proceedings must lapse. It may be also found necessary in practice to adopt some rule by which the creditor may contest the truth of the schedule so filed by the debtor. So that I see no difficulty in administering the law under the amendment, in respect to cases commenced hereafter.

The only question that has given me trouble has been, how to apply the law to cases already pending, which have been commenced since the first of December last. Taking all the parts together, it appears to me that it has become necessary, since the passing of the amendatory act, that the creditors who wish to prosecute this class of cases should apply to the court for leave to amend their petitions, and join the requisite number of creditors in the prosecution of the cases. Otherwise we must hold as nugatory, and of no application, some part of the language of this section. After providing, in the way I have already read, that the person guilty of any of the several acts of bankruptcy enumerated, may be declared a bankrupt on the petition of the requisite number of creditors, the law then provides that, "in all cases commenced since the first day of December, 1873, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors,

whether one-fourth in number, and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt." Section 5021. This clause applies as well to cases to be commenced as to cases commenced since the first of December, 1873; and, as was well remarked yesterday in the discussion of this case, it is contrary to all the analogies of pleading in other cases, that a party should be called upon to deny a statement which has not been made against him. The language of the law is: "If such allegation as to the number or amount of petitioning creditors be denied by the debtor." There must be an allegation somewhere, then. The creditors, before they can require the debtor to file a schedule of his debts, must allege, in substance, that one-fourth of the creditors in number and one-third in amount have joined in the petition, or do unite in the petition, and in the request to have the debtor adjudicated a bankrupt. There must be some allegation of that kind before he can be called upon to deny it. And I can see no special hardship in this which the law may not properly impose. A creditor who has already filed a petition may as easily obtain the consent of the requisite number to prosecute as for a creditor who is about to commence proceedings to obtain such consent as a condition precedent. It seems to me that the jurisdictional fact on which the court has the right to proceed is that the requisite number of creditors have acceded to the continuance of proceedings. The court, indeed, loses jurisdiction over the case unless it is made to appear affirmatively by the petitioning creditors that the requisite number of creditors request and demand the adjudication of the debtor as a bankrupt. The allegation (as I stated at the outset) that the requisite number of creditors have joined in the petition makes a prima facie case, makes a case on which the court can grant a rule to show cause, and the debtor is allowed the privilege of coming forward and showing that the requisite number of creditors have not joined in the petition. But it also imposes on the debtor the obligation of disclosing the number of his creditors, their places of residence, the amounts of their debts, so that their assent can be obtained within a reasonable time.

Further, I derive much support in this view of the case from the clause of the act which reads: "And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and in cases hereafter commenced, ten days, within which other creditors may join in such petition." Section 5021.

Here is a difference of ten days given in favor of creditors who have already initiated proceedings, in the time granted within which to obtain the consent of the requisite number of creditors to the continuance of the proceedings. It seems to me that this clause was placed there on purpose to enable a creditor who had already instituted proceedings to take the initial step to amend his petition, and seek the co-operation of such a number of creditors as was necessary to retain the jurisdiction. It cannot be supposed from the whole language of the statute taken together, that congress intended to legislate this class of cases out of court entirely. The court cannot put that construction on the law. The only question is: Did congress intend that where a petition had been filed since the first of December, 1873, by a single creditor, representing perhaps not over $250, he should be allowed to proceed and prosecute that case to a conclusion, unless the debtor himself should come in and object and file a statement of the names of his creditors, and amounts of their respective debts, together with their residences, so that the creditor could obtain their assent? Taken with the clauses I have read, I do not think that can be construed to be the intention of the act; but it seems to me that the debtor is entitled, first, to have an allegation placed upon the record, that the requisite number of creditors do desire an adjudication. He may then deny that allegation and show that the requisite number of creditors do not desire his adjudication in bankruptcy. And when he has made that statement, the petitioning creditor has the right to take twenty days in which to obtain the assent of the requisite number. The reason for making a distinction between the time allowed in cases already pending and in cases hereafter brought, is manifestly this: Where creditors bring a case after the passage of the law, they are supposed to act in the light of what has already transpired, and have some information upon the extent of the indebtedness of the debtor. They are supposed to have investigated, so far as opportunities would enable them, the financial condition of their debtor, and ascertained approximately the facts in the case. With respect to cases commenced before the amendment went into force, they are supposed not to have made such investigation. Therefore extra time is given them before they will be put out of court. Now the creditor, under the practice suggested, in cases which are pending, could come into court and ask leave to amend his petition in the respect I have indicated. On the request being granted and the amendment made, the debtor will have the privilege, as in cases hereafter brought, of denying that the requisite number of creditors have assented. Then he will be required to file his schedule. The argument of inconvenience is one which the court cannot consider. The bankrupt law is a stringent provision for taking a man's business from his own control, and placing it in the hands of the court or his creditors for the purpose of closing his affairs. If creditors wish to do this, they must do it on the terms of the bankrupt law. The only question is, from whom shall the objection

first come, or by whom shall the allegation be first made that the requisite number of creditors have not joined in the petition for adjudication. Taking the whole scope of the act, it seems to me that in all petitions where adjudication has not already been passed, the allegation must come from the petitioning creditors, and it must be made to appear affirmatively that the requisite number do join in the petition.

Now, take section thirteen, which is an amendment of section forty of the original act. It reads as follows: "And if, on the return day of the order to show cause as aforesaid, the court shall be satisfied that the requirement of § 5021 (sec. 39) of said act as to the number and amount of petitioning creditors has been complied with, or if, within the time provided for in § 5021 (sec. 39) of this act, creditors sufficient in number and amount shall sign such petition so as to make a total of one-fourth in number of the creditors and one-third the amount of provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise it shall dismiss the proceedings, and, in cases hereafter commenced, with costs."

Thus, it appears, it becomes a matter of inquiry for the court to ascertain and adjudicate upon, whether the requisite number of creditors have joined; and the reason of that is very obvious. By other provisions in this same amendment to the law, a bankrupt who is forced into bankruptcy under the compulsory clauses of the act, is discharged without reference to the amount of dividend which he pays, while a bankrupt who goes into voluntary bankruptcy must pay a dividend at the rate of thirty per cent. It is to guard against collusive proceedings on the compulsory side of the docket that this provision is made, and it is made the duty of the court to investigate and find whether the requisite number of creditors have joined in the proceedings, and whether the proceedings are in good faith. The naked allegation in the petition in regard to the number of creditors who join in the proceeding, although admitted by the debtor, does not seem to be enough, but the court must inquire into the facts and be satisfied that the requisite number of creditors have joined in the petition; and must also be satisfied that the admission of such fact, if admitted by the debtor, is made in good faith.

It is hardly necessary to say, then, that I shall hold in all pending cases that it will be necessary for the petitioning creditors to amend their petitions within a reasonable time, otherwise the cases will be dismissed.

[For subsequent proceedings in this litigation, See Cases Nos. 12,428 and 12,429.]

NOTE. That the petition should show affirmatively that the requisite number of creditors in number and amount have joined in the petition, and that this allegation may be upon information and belief, see, also, In re Scull [Case No. 12,568]; Warren Sav. Bank v. Palmer [Id. 17,207]. If the allegation in regard to the joining of the requisite proportion of the creditors in the petition is defective, it may be amended. In re McKibben [Id. 8,859]. When creditors have once joined in the petition they cannot be allowed to withdraw, if any other petitioning creditor objects. In re Heffron [Id. 6,321].

Case No. 12,428.

In re SCAMMON.

[6 Biss. 145.] [1]

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

BANKRUPTCY—PETITION BY SINGLE CREDITOR.

Since the amendment of June 22, 1874 [18 Stat. 178], a petition by a single creditor will not be sustained, if it appear that he did not have good reason to believe that he constituted the requisite proportion of the creditors; and upon this question affidavits and depositions may be taken, and the debtor should not be required to file a schedule of his creditors, and the petition may be dismissed on motion.

In bankruptcy.

[For prior proceedings in this litigation see Cases Nos. 12,430 and 12,427.]

Wirt Dexter, for petitioning creditor.

Lyman Trumbull and B. F. Ayer, for respondent.

BLODGETT, District Judge. On the 12th day of May, 1874, the United States Mortgage Company filed its petition in bankruptcy, alleging that it was a creditor of J. Young Scammon to the amount of $150,089, as evidenced by a judgment rendered in its favor in the circuit court of Cook county, and alleging that said Scammon had been guilty of certain acts of bankruptcy, and praying that he might for said acts be adjudged a bankrupt.

After the passage of the act of June 22, 1874, amendatory of the bankrupt law, a motion was made by respondent to dismiss the proceedings, for the reason that it did not appear that one-fourth of his creditors in number, and the aggregate of whose debts amounted to one-third of the debts provable against his estate in bankruptcy, had joined in the petition. See [Case No. 12,427]. The petitioner thereupon took leave to amend, and afterwards amended its petition by alleging that it was "informed and believed that it constituted one-fourth in number, and that the debt due it from the bankrupt constituted one-third of the amount of debts provable in bankruptcy against the respondent." The original and amended petitions are both verified by Alfred W. Sansome, as the agent and attorney in fact of the petitioner—the petitioner being a non-resident corporation. The respondent thereupon filed his affidavit, setting forth in substance that the petitioner did not constitute one-fourth of his creditors who would be entitled to prove their debts against his estate if he should be adjudged bankrupt, and that said Sansome, the petitioner's agent, well knew that he, Scam-

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

mon, owed a much greater number than four persons who would be entitled to prove their debts against him in bankruptcy, and alleging that the amendment to the petition was not made in good faith, but solely for the purpose of vexing and harassing the respondent; and upon the statement in said affidavit respondent based a motion to dismiss said proceedings, on the ground that they were not instituted and prosecuted in good faith by the requisite number of his creditors.

This motion has been argued and submitted, both upon the question of fact as to Mr. Sansome's knowledge at the time this amended petition was filed as to the number of Mr. Scammon's creditors, and upon the law raised by said fact, if established. Depositions and proofs have been submitted pro and con, and I think the fact is clearly proven that Mr. Sansome did know, or at least have good reason to believe, at the time he filed and verified the amended petition, that the petitioner did not constitute one-fourth in number of Mr. Scammon's creditors who would be entitled to join in or prosecute proceedings against him in bankruptcy. This fact being assumed to be proven, the question is: Should the proceedings be dismissed because not prosecuted in good faith?

As the law now stands, a debtor guilty of any of the acts of bankruptcy mentioned in the law "shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable." Rev. St. § 5021 [18 Stat. 181].

As creditors cannot be presumed to know positively the condition of a debtor's affairs, nor the exact number of his creditors, it has been deemed a sufficient compliance with the law if the petition alleged in the first instance upon information and belief that those joining in it constituted the requisite number to commence proceedings. Such an allegation may, however, be met by a denial on the part of the debtor that the requisite number have joined in the petition, but in that case the debtor may be required to file a full list of his creditors, with their places of residence and the amounts due them respectively, and other creditors may have time in which to join in the petition. Here, however, the debtor insists that inasmuch as only one creditor, and that not constituting the requisite number, has presented this petition, and as it is made affirmatively to appear that the petitioning creditor knew through its proper agent that a sufficient number of creditors had not joined in the petition, the petitioner has no standing in court, and the proceeding can be dismissed on motion, without filing a list of creditors.

It is conceded on the part of the petitioner that these proceedings cannot go on unless it shall be made to appear that the requisite number of creditors either now are or shall hereafter become parties thereto; but it is contended that the debtor should come in and file a list of his creditors, with their residences, and the amount due to each, so that the petitioner may know who they are, and obtain, or attempt to obtain, their co-operation in this proceeding.

As I have already said, when creditors acting in good faith aver that they constitute the requisite number to proceed in bankruptcy, I think the debtor is put upon answer and is obliged to furnish them the facts in regard to the number of his creditors and amount of his debts, if he claims that the requisite number have not united in the proceeding, but this is on the assumption that those filing the petition are proceeding in good faith. There can, however, be no doubt that it is essential to the jurisdiction of the court that the requisite number of creditors shall, in some form, unite in the petition to have a debtor adjudged a bankrupt, and nothing less than that number, on a prima facie case, have the right to invoke the aid of the court. The evident intention of the law is to leave it for the requisite quorum of a man's creditors to say whether they will put him in bankruptcy or not. One creditor alone, unless he is one-fourth in number of all a debtor's creditors, cannot prosecute bankruptcy proceedings, nor would it seem consistent with the spirit of the bankrupt law that any number less than one-fourth of a man's creditors, or those honestly believing themselves to be so, can call upon their debtor under the guise of bankruptcy proceedings to give them a list of his creditors.

It may be said that a debtor is under obligation to state his affairs in full to his creditors at any and all times, and that they are, from this relation to him, entitled to the truth. And this may be conceded as a matter of moral obligation, but when creditors invoke the stringent remedy of the bankrupt law they must do it by strict compliance with its provisions. They can have the information through the means of the bankrupt law only by complying with its terms. Here we have a single creditor, acting through an agent, appealing to the bankrupt law, and it appears that at the time he filed his amended petition he knew that the debtor owed a large number of other persons, and that his principal alone did not constitute one-fourth of the creditors of the debtor. Upon this state of facts he had no right to call upon the court to put the debtor in bankruptcy. His standing was certainly no better when he filed his amended petition than it would be now if the debtor were to file his list, and no one of the other creditors, or not enough of them, join him.

What under certain circumstances creditors might find out by the filing of the list, under a rule of this court, this creditor knew before he proceeded with the amended petition. And notwithstanding these proceedings have now been many weeks before the court, none of the creditors of this debtor, except this single petitioner, have asked to be made a party to this petition. I think, therefore, that the fair pre-

sumption must be that the requisite number of creditors do not wish to prosecute bankruptcy proceedings, and this proceeding, having been commenced by a single creditor, with knowledge that it alone could not maintain it, the proceeding should be dismissed.

An order will therefore be entered to that effect.

[For subsequent proceeding in this litigation, see Case No. 12,429.]

NOTE. The absence of the allegation as to number and amount of petitioning creditors in a petition filed by a single creditor is not supplied by the admission of the debtor, even if made in writing, unless the court is satisfied that the admission is made in good faith. In re Keeler [Case No. 7,638].

Case No. 12,429.

In re SCAMMON.

[6 Biss. 195;[1] 11 N. B. R. 280; 7 Chi. Leg. News, 42; 9 West. Jur. 175.]

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

BANKRUPTCY — PRACTICE IN FILING PETITION UNDER AMENDED ACT.

1. Under the amendment of June 22, 1874 [18 Stat. 178], if it appears that the requisite number of creditors have not joined in the petition, the court will dismiss it on motion, without requiring the debtor to file a schedule.

2. On such motion the court will hear affidavits and evidence offered by either party, and will order the person verifying the petition to be examined before the register.

[3. Cited in Re Keiler, Case No. 7,647, and in Re Hamlin, Id. 5,994, to the point that it is within the power and duty of the court to set aside summarily any process obtained by fraud and deception practiced upon itself.]

In bankruptcy. This was an involuntary petition filed by the United States Mortgage Company against Jonathan Young Scammon, prior to the amendment of June 22, 1874. Soon after that amendment a rule was entered upon the petitioning creditor to file an amended petition according to the requirements of this amendment [Case No. 12,427]. In response to this, it simply amended the petition by inserting the allegation that the petitioning creditor constituted one-third in amount and one-fourth in value of the respondent's creditors [Id. 12,428]. Respondent then moved to dismiss the petition, filing an affidavit to the effect that he was indebted in large amounts to numerous persons; that two judgments were standing against him in the United States court for this district, and several others in the state courts, and that the secretary of the company, when he made the affidavit to the amended petition, knew that respondent was indebted to a large number of persons.

Lyman Trumbull, for motion.

Wirt Dexter, contra.

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

BLODGETT, District Judge. Since the recent amendment to the bankrupt act, the petition is required to show with as much certainty as is attainable that the creditors uniting in the petition actually constitute the proportion required by the act. But inasmuch as it is usually impracticable for a creditor to give a full or precise statement of the debtor's liabilities, I have held that the allegation might be made upon information and belief. [In re Scammon, Case No. 10,430.] The petitioning creditors must, however, be held to good faith in the matter, and cannot recklessly file a petition for the purpose of making the respondent file a statement of his creditors. It would be intolerable if any one or two creditors, upon either a real or pretended claim, could by a simple allegation, in the words of the amendment, compel a business man to spread upon the records a statement of his liabilities. Such a fishing petition cannot be entertained under the act as amended. If it appear to the court by affidavit, or otherwise, that at the time of filing the petition the creditors joining in it knew that they did not constitute the requisite number, the petition should be dismissed; and it seems to me that a motion is the proper method in which to bring the matter before the court. Upon this question both parties have the right to be heard. Either party may bring in affidavits or evidence by Saturday morning next, and the respondent may have an order for examination and cross-examination before the register of the secretary of the company who made the affidavit.

Case No. 12,430.

In re SCAMMON.

[10 N. B. R. 66;[1] 1 Cent. Law J. 328; 20 Int. Rev. Rec. 33.]

District Court, N. D. Illinois. June 26, 1874.

BANKRUPTCY — AMENDED ACT — SUITS PENDING — NUMBER AND AMOUNT OF CREDITORS.

1. By the amendment of June 22, 1874 [18 Stat. 178], every petition to force a debtor in bankruptcy filed since December 1, 1873, is required to contain the allegation that the petitioners are one-fourth in number and one-third in value of the creditors of the debtors. This applies as well to cases pending as to those that may hereafter be brought.

[Cited in Re Angell, Case No. 386; Re Comstock, Id. 3,077; Re Raffauf, Id. 11,525.]

2. This allegation may be made in the petition on information and belief.

[Cited in Re Mann, Case No. 9,033.]

In bankruptcy.

BLODGETT, District Judge. By the recent amendment to the bankrupt law, some radical changes are made in the proceedings of voluntary or compulsory bankruptcy. The thirty-ninth section [of the act of 1867 (14

[1] [Reprinted from 10 N. B. R. 66, by permission.]

Stat. 536)] has been practically repealed, and a new section substituted. By this section, as it now stands amended, various acts are declared acts of bankruptcy, and the law then proceeds to say that any person guilty of said acts, or any of them, "shall be deemed to have committed an act of bankruptcy, and subject to the conditions hereinafter prescribed, and shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof at least in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable. * * * And the provisions of this section shall apply to all cases of compulsory or of involuntary bankruptcy commenced since the 1st day of December, 1873, as well as those commenced hereafter. And in all cases commenced since the 1st of December, 1873, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence, and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount have petitioned that the debtor be adjudged bankrupt. * * *"

The question now raised is, whether cases pending, which have been commenced since the 1st of December last, can proceed without an amendment of the petition, so as to show affirmatively that the requisite number of creditors desire the debtor to be adjudicated bankrupt, or must the debtor in such cases object in the first instance, and file a schedule of his creditors? There is no doubt in my mind that in new cases the petition must show affirmatively that the requisite number of creditors join in the petition. Not that the creditors petitioning must swear positively that they constitute a fourth in number and a third in value of a debtor's creditors, but they should at least allege it according to their best information and belief, because we all know that debtors frequently misstate the amount of the debts to their creditors, and creditors have no means in the first instance of verifying the truth of the debtors' statements to them. So that I think an allegation that those petitioning constitute a fourth in number of the creditors and a third in value of the provable debts, would make a good prima facie case, so far as this clause is concerned. If the debtor comes in and denies this allegation, then he can be ruled to file a correct list of his creditors, with their residences and the amount due them respectively, and a time is given in which to obtain the report of the requisite number of them to the proceeding. The evident spirit and intent of the amendment is that all cases pending, commenced since the 1st of December last, shall conform to, and proceed upon the requirements of the law in the same manner as new cases. The language is: "If the allegation as to the number or amount of petitioning creditors be denied by the debtor." And this is declared to apply as well to pending cases as to those hereinafter commenced. Now, by all the analogies from the rules of pleading, a party is not required to deny an allegation which has not been made. It seems to me it would be absurd to require a debtor to come in and deny the allegation that a fourth in number and third in amount of his creditors had not joined in the proceedings against him, when the record contained no such allegation. The creditors should first make the allegation, and then it will be time for the debtor to deny it and furnish a correct list of his creditors. Nor do I see that there is any hardship in this. It being clear that the proceedings cannot go on without the assent of the requisite number of creditors, their assent seems to me indispensable to enable the court to retain jurisdiction of the case, and the petitioning creditor may as well amend his petition in the first instance by obtaining the assent of the requisite number as to require the debtor to exhibit his schedule. As I construe the law, the debtor is not obliged to give a schedule of his creditors until a prima facie case is made against him. Certainly a debtor against whom a new petition is filed cannot be compelled to disclose the names and residences of his creditors, and amounts due to each, without such prima facie case being made, and I do not see why any different rule should apply to one against whom proceedings were pending when the law passed.

I therefore conclude that in all cases pending which have been commenced since the 1st of December last, the petitioning creditor should take steps to secure the joining of a fourth in number and third in amount of the creditors within some reasonable time, and that the debtors are entitled to a rule that unless the requisite number of creditors do so join within such time as the rule may require, the proceeding shall be dismissed. This saves the rights of creditors in all cases when the limitations of the law would apply if the petitions should be dismissed and new proceedings commenced.

[For subsequent proceedings in this litigation, see Cases Nos. 12,427–12,429.]

Case No. 12,431.

SCAMMON v. BOWERS et al.

[1 Hask. 496.] [1]

District Court, D. Maine. Dec., 1873.

BANKRUPTCY — TITLE OF ASSIGNEE — GOODS PREVIOUSLY PAID FOR.

1. An assignee in bankruptcy takes only such title to the bankrupt estate as the bankrupt had.

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

2. In equity, the purchaser of goods to be delivered as manufactured, may retain, as against the assignee in bankruptcy of the manufacturer, goods previously paid for and delivered to him after he knew that the manufacturer had become insolvent.

In equity. Bill by [John Q. Scammon] the assignee of a bankrupt to recover the proceeds of a large quantity of cigars received by the respondent, [Roscoe L.] Bowers, from the bankrupt, between April 15 and September 28, 1869, in fraud of the bankrupt act [of 1867 (14 Stat. 517)]. Answers were filed, setting up a lawful title to the cigars in Bowers, as purchased under a contract of April 10, 1869. The cause had been heard on bill, answer and proofs, and a decree rendered for the orator to the full extent of the prayer in his bill [Case No. 12,434], but a re-hearing is now awarded on motion of respondents. Abbott was adjudged bankrupt December 14, 1869, and is a party defendant to the bill. He resided in Saco and operated a factory for the manufacture of cigars. Bowers had kept Abbott's books from memoranda that he furnished usually at the close of each day's business.

[For prior proceeding in this litigation, see Case No. 10.]

Edward Eastman and Josiah H. Drummond, for orator.

Rufus P. Taply, for respondents.

FOX, District Judge. Bowers' rights depend on the agreement of April 10th, and upon what has taken place under it. This agreement, the court is not satisfied was in fraud of Abbott's creditors, and must therefore be considered as fair and legal, and Bowers is entitled to all the legal and equitable rights which spring from it. By it, in short, he was to purchase and pay for the product of Abbott's factory, and Abbott was bound to deliver the same. The prices for the various brands of cigars were fixed and determined upon between them, as a part of the contract. At the time this contract was made, Abbott was indebted to Bowers for monies advanced, which were paid by the cigars as they were delivered. Abbott afterwards was in advance, by delivery of his goods to Bowers, but the balance was soon changed, as on the first of August, Bowers was in advance to Abbott $2,434.83. In August Bowers received from Abbott in goods $5,668.50 and paid to him $4,954.14. In September, Bowers received $4,878 and paid $2,250. The goods thus received over and beyond the payments for the months of August and September to the amount of $3,342.26 are claimed to have constituted a preference in fraud of the provisions of the bankrupt act.

That Abbott was insolvent on the first of August and had been for a long time previous, at least as early as January, is admitted in Abbott's answer, although he claims he did not know or suspect such was his condition, and the other evidence in the case fully establishes his insolvency at that date. Bowers denies that he had reasonable cause to believe Abbott was insolvent in August and September; but the court is well satisfied, that considering his intelligence and acquaintance with business, he must have at that time been fully aware of Abbott's condition. The entries made by him from time to time on Abbott's books clearly manifested that he was increasing his liabilities to an alarming extent, and that his assets were nearly all exhausted. The shifts which he resorted to under the ostensible pretence of consignment, indicated to any man of any business capacity, that his condition was desperate, buying large quantities of stock on time, and without manufacturing it, turning it over in very large quantities to Bowers as security on the advances of his notes.

The whole amount of goods so consigned was in excess of $10,000, and a portion of these by Abbott's books can be traced from the entries there made by Bowers. It appears, that June 18, Abbott purchased of Mr. Ellis goods to amount of $815.05, which at same valuation, were consigned to Bowers June 21. On June 2, he bought of J. L. Dean $84 worth of goods, and June 21 of Wilder and Estabrook $682.50, which were consigned in same manner to Bowers June 23. On August 19, he bought of J. H. Feeney $1,014.65 and same day of Mr. Ellis $926.12, both of which lots were, August 21, consigned to Bowers. On August 19, he purchased from Wilder and Estabrook $1,020.15 of tobacco, which was consigned to Bowers August 25. These three last bills, amounting to $5,075.75, were paid for by a draft at sight in favor of Jos. Hobson, and nearly the whole amount was applied by Hobson in payment of his claims against Abbott for borrowed money, some of which had been due since December previous.

So likewise the sale to Joseph Hobson September 14 of stock to amount of over $5,600, and which has been the subject of inquiry in this court and adjudged fraudulent, was well known to Bowers, and the amounts received by him subsequently should be affected by his knowledge of the transaction, and were received by him when he could not but have known the condition of Abbott's affairs. Boothby's testimony most conclusively proves that Bowers was well aware of Abbott's condition August 20, and upon this branch of the case, the court has no doubt, that from the first of August, Bowers was conscious of Abbott's insolvency, and was desirous of procuring the goods from Abbott for which he had made his advances, and that from time to time, he made such further advances as were necessary to facilitate the manufacture of the stock on hand, continuing so to do, until by the agency of himself and Hobson, Abbott's whole stock, with the exception of about $1,500, was exhausted.

Abbott being insolvent, and these goods having been received by Bowers from him

when he was aware of such insolvency, can he hold them as against the assignee? At the former hearing the court was of opinion that he should not, and that the transaction constituted a preference in contravention of the bankrupt law. The able argument of the learned counsel at the re-hearing caused me to doubt the correctness of the views which I had previously entertained, and an examination of the authorities has satisfied me that I was in an error, and that under the agreement of April 10, Bowers had a right to require of Abbott the delivery of the goods which he had paid for, and by a proceeding in equity against Abbott, could have obtained a delivery of them if he had insisted on withholding them from him.

Under the agreement, it is probable that at law Bowers acquired no title to the goods until delivery; but in equity, I think a right to the goods, as they are manufactured and paid for, did attach in his behalf, which equity would enforce as against Abbott or his assignee. Fraud not being established, the assignee takes only the rights of the bankrupt, and he is affected by the same equities the bankrupt would be, in relation to the estate. Such is the doctrine as established in this circuit as I understand the authorities, and so the law must be administered until I am advised differently by the supreme court.

The question however here is not what would be the right of Bowers to receive this property from the assignee, but what were Bowers' rights as against Abbott at the moment of delivery of the goods. By the contract between these parties, the advances made by Bowers to Abbott, I think, did not create the ordinary relation of debtor and creditor, although of course, if Abbott refused to deliver the property, Bowers in an action at law could have recovered such advances. These sums, as between the parties, were not loans of money to be repaid, but they were payments on account of articles to be manufactured and delivered as wanted at fixed values. Bowers could not call upon Abbott to pay back to him the money advanced, but Abbott had a right to deliver to him the specific articles on account and for which the payments had been made. He had the right to tender him the article itself, if according to the agreement, and compel him to receive it. The agreement was originally executory, but by it the parties agreed, the one to buy, the other to sell the products of the factory. Bowers completes his portion of the agreement by paying for the articles which are subsequently produced, and such an agreement is in equity binding upon the parties and the property when it is manufactured, although the title of a bona fide purchaser without notice might be protected.

This executory agreement is a continuing one, resulting in a vested equitable right, so that when he gets possession of the property, he does it under and by virtue of the agreement, and when delivered up to him by the other party, it is in pursuance and satisfaction of the original agreement, which is thus executed. Such a contract in equity carries with it all that is necessary to the completion of it. There was therefore an implied power and authority to demand and receive the goods as they were manufactured, and the "inevitable result must be, that a power, founded on contract to take possession of such goods of a particular nature as the owner of the power may subsequently manufacture or acquire, and hold them as the property of the owner, will confer an authority lying beyond the reach and control of the party by whom it is given, and entitle the person on whom it is conferred to take all the measures necessary to render it effectual for the end in view."

In Langton v. Horton, 1 Hare, 549, a mortgage of oil, to be caught, &c., was sustained in equity as against an attaching creditor. The vice-chancellor in his opinion says: "Is it true then that a subject to be acquired after the date of a contract cannot in equity be claimed by a purchaser for value under that contract? It is impossible to doubt, for some purposes at least, that by contract an interest in a thing not in existence at the time of the contract may in equity become the property of a purchaser for value. The course to be taken by such a purchaser to perfect his title, I do not now advert to." And in Mitchell v. Winslow [Case No. 9,673], a mortgage of all the tools, &c., which might be placed in a certain factory, was held to constitute an equitable lien as against the assignees of the mortgagors, and the mortgagees were authorized to retain the property of which they had taken possession after the insolvency. Judge Story says: "It seems to me a clear result of all the authorities, that whenever the parties by their contract intended to create a positive lien or charge, either upon real or personal estate, whether then owned by the assignor or contractor or not, or if personal property whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto under him, either voluntarily or with notice or in bankruptcy."

A lien may exist, without any remedy for its enforcement, though in Sullivan v. Tuck, 1 Md. Ch. 59, where a person pledged his growing crops to his agent, who was to advance money and accept drafts drawn thereon, and the person died insolvent and largely indebted to his agent, the court granted a decree for a specific performance, and the crops were ordered to be forwarded to him. Here the question of how this lien or equity should be enforced by Bowers does not arise. Abbott recognized that it existed, carried out according to its terms his contract, de-

livered to Bowers the property, which under the contract and the payments he had made on account of it had in equity become Bowers' property, and I am now well satisfied that such a proceeding should not be adjudged in violation of any of the provisions of the bankrupt act, notwithstanding at the time that Bowers received the goods, he was well aware of Abbott's insolvency, and intended to protect himself from any loss by reason of the same.

In Nickerson v. Baker, 5 Allen, 142, it was decided that a subsequent delivery of a deed of real estate to the grantor, who had previously bargained for the land and paid for it, is valid although the grantor was then insolvent, and the party receiving the deed had reason to believe him to be so. The court says: "The grantor did not stand in the relation of debtor to the plaintiff, he owed him no money nor was he liable to be charged for any indebtedness therefor. His only duty was to make the conveyance of the estate, for which the money was paid. Upon the payment of the entire purchase money to the vendor, in equity he held the estate in trust for the benefit of the party paying the same. The execution of the deed may, under the circumstances, be held to relate back to the time of payment of the money and the first existence of the duty to give a deed." These remarks it appears to me are as applicable to a contract for a sale of personal as well as of real estate; and I can entertain no doubt that if a party had paid his vendor the full purchase money for a ship at sea, and received an agreement that the vessel should be delivered and a bill of sale executed on her arrival, that equity might compel the performance of such a contract by the vendor or his assignee, if he should become bankrupt.

It is said, that this view is in conflict with Bank of Leavenworth v. Hunt, 11 Wall. [78 U. S.] 391, and the opinion of the supreme court as pronounced by Field, J. That was an action at law, and it was decided, that the assignee could recover from the grantee, the value of a stock of goods received by him from the bankrupt under an agreement to deliver the same as security when requested, made at the time of a loan of money, such delivery being long subsequent to the loan, and after the party had become insolvent, and a preference was thereby intended by the parties.

Such agreement did not amount to a conveyance, and no title passed thereby until the delivery. The conveyance being within four months of the bankruptcy proceedings, and being intended as a preference of an ordinary debt, was at law in violation of the bankrupt act, and could be invalidated by the assignee; and I believe most of the cases in which the principle has been asserted, that a security subsequently executed in pursuance of a prior agreement can only take effect from its execution, are cases at law, dependent on the strict legal rights of the party, and not proceedings in equity where equitable liens could be recognized and enforced. Such were Forbes v. Howe, 102 Mass., 427, and Simpson v. Carleton, 1 Allen, 109. These two authorities are sustained by the insolvent act of Massachusetts, which provided "that any security given for the performance of any contract, when the agreement for such security is part of the original contract, and the security is given at the time of making such contract, shall not be deemed a preference;" clearly implying, that the security to become effectual must be complete and perfect at the making of the original contract.

In Ex parte Ames [Case No. 323], Lowell, J., says: "Such an agreement merely amounts to an agreement to give a preference if one should become necessary. I have not seen or known of any case, which brings up the somewhat nicer question, whether specific and definite security, unconditionally stipulated for in writing, may be given after a lapse of time and change of circumstances. This may depend on whether the contract is one that a court of law or equity would enforce in invitum; for I apprehend and have often decided, subject to a correction that has not yet been made, that the assignee stands no better than the bankrupt in all matters of title, excepting where there is actual or constructive fraud."

Arnold v. Maynard [Case No. 561], was decided by Judge Story in 1842, and he then held, that a mortgage subsequently given in accordance with a verbal promise when the debt was contracted might constitute an act of bankruptcy. The next year, Mitchell v. Winslow [Id. 9,673], was decided by the same very learned judge, and it is quite clear that in his view there could be no conflict between the two cases.

To sustain mortgages, subsequently executed in accordance with a previous agreement, would certainly afford occasion for preferences in contravention of the provisions of the bankrupt act, and would be a means of constantly defeating the purposes of the act, and it may well be that a court of equity should not apply its broad doctrines to sustain agreements which are likely to produce such results, and thereby afford a preference to a creditor, contrary to the spirit of the law; but the present case is entirely free from this objection, as the contract did not create the relation of debtor and creditor; but on the contrary, it was a purchase and sale, and payment for the property in advance, and so no debt existed to be preferred.

So far therefore as Bowers had paid for the goods he received, I think he is entitled to retain them or their value as against the assignee; but it appears, that he did not pay for all the goods thus received, but was indebted on that account in the sum of $1,007.53, which amount he now claims to apply to

a balance due him on his consignment account. The last payment or advance made by him on that account was August 26, to Jos. Hobson, $5,075.75. That transaction was a loan, made when Abbott was insolvent, and Bowers was well aware of his condition and of the amount thus paid to Hobson; nearly all was for old debts, the payment of which was a preference; to allow Bowers now to apply to the consignment account the balance he has received from the sale of the cigars is clearly giving him a preference, which cannot be sanctioned under the bankrupt act; and as his claim to retain this amount is in fraud of the act, I am of opinion that the complainant may recover it in the present bill.

Decree accordingly.

Case No. 12,432.

SCAMMON v. COLE et al.

[3 Cliff. 472;[1] 5 N. B. R. 257.]

Circuit Court, D. Maine. Sept. Term, 1871.

BANKRUPTCY—APPEALS—ILLEGAL PREFERENCE.

1. The United States bankrupt act now in force [14 Stat. 517] confers jurisdiction in equity upon the district courts in certain cases, and appeals may be taken from the district to the circuit courts in all such cases where the debt or damage claimed amounts to more than five hundred dollars, provided the appellant complies with the conditions specified in section 8 of the act.

[Cited in Flanders v. Abbey, Case No. 4,851.]

2. A mortgage given to secure the payment of two promissory notes, the consideration of which being pre-existing debts of the bankrupt, for almost all of which the mortgagees were liable either as sureties or indorsers, is void when it appears that it was made within four months next preceding the filing of the petition in bankruptcy, for the express purpose of giving a preference; that the mortgagors were insolvent and the mortgagees had reasonable cause to believe that the mortgagors were insolvent at the time of the execution of the mortgage, and that the conveyance was made in fraud of the provisions of said act.

[Cited in Giveen v. Smith, Case No. 5,467; Martin v. Toof, Id. 9,167; Toof v. Martin, 13 Wall. (80 U. S.) 47; Buchanan v. Smith, 16 Wall. (83 U. S.) 307, 308. Cited in brief in Walbrun v. Babbitt, Id. 581. Cited in Wager v. Hall, Id. 595; Scammon v. Hobson, Case No. 12,434; Sedgwick v. Sheffield, Id. 12,624; Michaels v. Post, 21 Wall. (88 U. S.) 398; Brooke v. McCraken, Case No. 1,932; Hamlin v. Pettibone, Id. 5,995; Bucknam v. Goss, Id. 2,097. Cited in brief in Napier v. Server, Id. 10,010. Cited in Dutcher v. Wright, 94 U. S. 557.]

Bill in equity [by John I. Scammon, assignee, against Thomas H. Cole and others] praying that the respondents might show cause why certain property and the proceeds thereof should not be adjudged to have been the property of certain bankrupts, Chadbourne and Nowell, at the time a petition in bankruptcy was filed against them in the district court. On July 11, 1868, a creditor of the firm of Chadbourne and Nowell of Biddeford, in this district, filed in the office of the clerk of the district court a petition in bankruptcy against the firm, and on December 2d following they were adjudged bankrupts. Pursuant to the decree the appellee was appointed assignee of the estate of the bankrupts, and a conveyance of all their property was made to him as such assignee by the register in bankruptcy having charge of the case. It was alleged that the debtor on June 17th of the same year, and within four months before the filing of the said petition, being insolvent or in contemplation of insolvency, made a conveyance to the appellants of the personal property described in the bill of complaint, with a view to give to the grantees a preference as creditors of their firm, they, the said appellants, having reasonable cause to believe that the grantors were insolvent, and that such conveyance was made in fraud of the provisions of the bankrupt act. Possession by the appellants of the property conveyed, and demand of the same by the assignee, and their refusal to deliver the same, were also alleged by the complainant, and he prayed that the respondents might be summoned to appear and answer the complaint, and show cause, if any they had, why the property or the proceeds thereof should not be adjudged the property of the bankrupts at the time the said petition was filed, and that the same should be delivered to the complainant as such assignee. Service was duly made, and the respondents appeared and filed separate answers. They severally admitted that the bankrupts at the time alleged made a mortgage to them of the goods and chattels specified in the bill of complaint, but they alleged that it was given for a present consideration, and explicitly denied that the mortgagors, at the time the instrument was executed, had any knowledge that they or either of them were insolvent, and they also denied that the debtors gave the mortgage, or that they, the respondents, took the same with any view to give or to secure to them any preference as creditors of the bankrupts, or to prevent their property from being duly distributed under the bankrupt act. Proofs were taken in the district court, and the cause was heard, and a decree entered that the conveyance made by the bankrupts to the appellants was illegal, fraudulent, and void, and that the cause be referred to a master to take an account of the property received by the respondents. [Case No. 12,433.] Due report was made by the master, specifying the property received by the respondents under the mortgage, and the net proceeds of such portion of the same as they had sold and appropriated to their own use. Such of the property as remained in their possession they were required, by the final decree of the district court, to deliver to the complainant, and that he should also recover of them, for such

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

portion of the property as they had sold, the sum of $956.12, together with costs of suit. Appeal was duly taken by the respondents to this court, and the parties were fully heard upon the merits of the controversy. Certain exceptions were taken to the master's report, but were not pressed at the argument, and need not therefore be noticed.

J. and E. M. Rand, for complainant.
A. A. Strout, for appellants.

After a review of the facts of the case, and certain references to the pleadings, both of which are to be found in the statement, THE COURT proceeded to say:

CLIFFORD, Circuit Justice. Jurisdiction is conferred upon the district courts in certain cases, by the act of congress establishing a uniform system of bankruptcy, and section 8 of the act provides that appeals may be taken from the district to the circuit courts in all such cases when the debt or damages claimed amount to more than $500, provided the appeal is claimed within ten days after the entry of the decree, and the appellant complies with the other conditions specified in that section.

Preferences, as well as fraudulent conveyances, if made within four months before the filing of the petition by or against the bankrupt, are, under certain conditions, declared void by section 35 of the bankrupt act. Those conditions, so far as they are applicable to this case, are as follows: "That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, * * * makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, * * * having reasonable cause to believe such person is insolvent, and that such * * * payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited."

Three things must appear in order that the transaction may fall within that provision and be affected by it, as alleged in the bill of complaint. (1) That the payment, pledge, assignment, transfer, or conveyance was made within four months before the filing of the petition by or against the bankrupt, and with a view to give a preference to some one of his creditors, or to a person having a claim against him, or who was under some liability on his account. (2) That the person making the payment, pledge, assignment, transfer, or conveyance was insolvent or in contemplation of insolvency at the time the preference was given or secured. (3) That the person receiving such payment, pledge, assignment, or conveyance, or to be benefited thereby, had reasonable cause to believe that the person making the same and giving or securing such preference, was insolvent, and that the payment, pledge, assignment, transfer, or conveyance was made in fraud of the provisions of the bankrupt act.

All these matters are fully alleged in the bill of complaint, but they are distinctly denied in the answers, so that the complainant takes the burden of proof in the first instance. Much discussion of the first requirement to maintain the bill of complaint is unnecessary, as the record shows that the mortgage in question was made to give a preference to the mortgagees, and was executed by the bankrupts only twenty-five days before the petition in bankruptcy was filed in the district court. By the terms of the mortgage it appears that it was given to secure two promissory notes, signed by the mortgagors, of even date with the mortgage, one given to the first-named appellant for the sum of $1,272.50, and the other to the other appellant for the sum of $1,547.61, both payable on demand with interest. Both notes were given for pre-existing debts of the bankrupts, for all of which the appellants were liable, either as sureties or indorsers, except a small sum due to one of the mortgagees.

Prior to the decree in bankruptcy, the mortgagors were engaged in buying and selling furniture, and the proofs show that they were largely indebted, and that the mortgage covered all their personal property, except one horse, not subject to attachment by the laws of the state; and that the senior partner of the firm, as a part of the same transaction, mortgaged to the appellants all his real estate, to secure the payment of the same two notes. Neither the firm nor the other partner appears to have owned any real estate, so that the two mortgages covered all of their attachable property, whether belonging to the firm or to them as individuals.

Fraudulent preference is the gravamen of the charge, and the complainant, as the assignee of the estate of the bankrupts, prays that the respondents may be required to answer the complaint, that the mortgage of the personal property may be set aside, and that the property therein described may be adjudged the property of the bankrupts at the time the petition was filed.

Made as the mortgage was, within four months next preceding the filing of the petition in bankruptcy, and for the express purpose of giving a preference to the appellants as the creditors of the mortgagors, the first material allegation of the bill of complaint is established.

Were the mortgagors insolvent or in contemplation of insolvency at the time the mortgage was executed? is the next material inquiry arising in the case as presented in the pleadings. Beyond doubt they owed debts

greatly exceeding the value of all their property, and they mortgaged it all to the appellants to secure less than one third part of their indebtedness. Liberally estimated, their whole property did not exceed in value the sum of $6,700, and they had mortgaged it all, including their stock in trade, to secure the two notes described in the mortgage deed, giving the mortgagees of the personal property the right to enter and take possession of the same at any time whenever they should see fit. They owed not less than $11,000, as appears by the record, and it is not pretended that any portion of the same, other than what was adjusted between the parties to the mortgage and was included in those two notes, is secured in any manner. All sums due to the appellants, or for which they were liable as sureties or otherwise, on account of the mortgagors, were included in the mortgage, but no provision was made for the other creditors or for any portion of their indebtedness, except what is included in the mortgage; whether the mortgagors knew it or not, it is clear to a demonstration that they were actually insolvent at that time, and it would be difficult, if not impossible, in view of the proofs, to hold that they were ignorant of the fact, as they had several times been obliged to procure renewals and extensions, and some of their paper was still overdue, and the testimony of the first-named appellant shows that the senior member of the firm told him when the mortgage was given, or the day before, that they had notes in the bank which were overdue and others coming due which they desired to arrange, adding that the notes "bothered" them, as it took much time to attend to them when they ought to be at work. Viewed in the light of the proofs in the case, as more fully set forth in the record, it is so clearly shown that the mortgagors were insolvent at the time the mortgage was executed, that it does not seem necessary to pursue the inquiry.

Two inquiries of fact are involved in the third condition specified in the clause of the section under consideration: Whether the mortgagees had reasonable cause to believe that the mortgagors were insolvent at the time they executed the mortgage to the appellants. Whether they had reasonable cause, at that time, to believe that the mortgage was made in fraud of the provisions of the bankrupt act. Separate answers were filed by the respondents, and they respectively denied that at the time of the making of the mortgage they believed, or had any reasonable cause to believe, that the mortgagors were insolvent or "in contemplation of insolvency," as alleged in the bill of complaint.

Proof that the respondents had actual knowledge that the mortgagors were insolvent at that time is not required in order to maintain the bill of complaint, but the allegation in that behalf is sustained if it appears that the mortgagees had reasonable cause for such belief, as that is the language of the thirty-fifth section of the bankrupt act. Actual knowledge is not made the criterion of proof in this matter, nor is it necessary that it should appear that the respondents actually believed that the mortgagors were insolvent; but the true inquiry is, whether the appellants, as business men, acting with ordinary prudence, sagacity, and discretion, had reasonable cause to believe that the debtors were insolvent in view of all the facts and circumstances known to them at the time they received the transfer of the property. Coburn v. Proctor, 15 Gray, 38.

Such a party cannot be said to have reasonable cause to believe that his grantor or mortgagor is insolvent unless such was the fact, but if it appears that the party making the conveyance was actually insolvent, and that the means of knowledge upon the subject were at hand, and that such facts and circumstances were known to the party receiving the conveyance as clearly put the assignee, transferee, or grantee of the property upon inquiry, it would seem to be just to hold that the party receiving the assignment, transfer, or conveyance, even if he omitted to make inquiries, had reasonable cause to believe that his assignor or grantor was insolvent. Ordinary prudence is required of the purchaser in respect to the title of the seller, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge it is reasonable to suppose he would have acquired if he had performed his duty. Hill v. Simpson, 7 Ves. 152; Kennedy v. Green, 3 Mylne & K. 722; Smith v. Low, 1 Atk. 489; 3 Sugd. Vend. 471; Jones v. Smith, 1 Hare, 43; Pringle v. Phillips, 5 Sandf. 157; Booth v. Barnum, 9 Conn. 286; Pitney v. Leonard, 1 Paige, 461; Carr v. Hilton [Case No. 2,437].

Constructive notice of the kind mentioned is held sufficient in many cases, upon the ground that when a party is about to perform an act by which he has reason to believe that the rights of a third person may be affected, an inquiry as to the facts is a moral duty, and diligence an act of justice. Whatever fairly puts a party upon inquiry is sufficient notice in equity where the means of knowledge are at hand, and if the party under such circumstances omits to inquire, and proceeds to receive the transfer or conveyance, he does so at his peril, as he is then chargeable with a knowledge of all the facts which, by a proper inquiry, he might have ascertained. Hawley v. Cramer, 4 Cow. 717; Williamson v. Brown, 20 Law Rep. 397.

Apply that rule to the proofs in the record, and it is too clear for argument that the finding of the district court under this issue was correct, as fully appears from the evidence to which reference has already been made in examining the preceding proposition. Sufficient information might easily have been obtained, as a large amount of the paper of the bankrupts was in the bank where one of the appellants was a director. Suppose, however,

that the rule of constructive notice is not applicable in the case, still it is quite obvious that the same conclusion must be reached, even if the proper rule of decision is the one ordinarily applicable in equity suits. Where the facts charged in the bill as the grounds of obtaining relief are clearly and positively denied in the answer, and are only supported by one witness, the rule is well settled in equity as administered in the federal courts, that the court will not decree in favor of the complainant. Union Bank v. Geary, 5 Pet. [30 U. S.] 111; Delano v. Winsor [Case No. 3,754]; Parker v. Phetteplace [Id. 10,746].

Such an answer is evidence in favor of the respondent, and unless it is disproved by something more than the testimony of one witness, it is conclusive. Clark's Ex'rs v. Van Riemsdyk, 9 Cranch [13 U. S.] 160; Hughes v. Blake, 6 Wheat. [19 U. S.] 468; Daniel v. Mitchell [Case No. 3,562].

Congress, however, may prescribe a different rule in such litigations, and congress has provided to the effect that if all the other conditions specified in the section concur, and it appears that the person who received the pledge, assignment, transfer, or conveyance had reasonable cause to believe that the person from whom he received it was insolvent, that the assignee of the bankrupt's estate, under those circumstances, may recover back the property or its value, as already more fully explained. 14 Stat. 534.

Different causes of action will doubtless require different forms of remedy, but the section under consideration contains no intimation that the rule of evidence is any more stringent in a suit in equity than in an action at law, but the language of the section applicable in all cases is to the effect that it must appear that the party making the pledge, assignment, transfer, or conveyance was insolvent at the time the same was made, and that the party receiving it had reasonable cause to believe that such was the fact. Actual knowledge of a given fact may be proved by circumstances, even in an ordinary equity suit, where, from the nature of the pleadings, the testimony of a single witness, without corroboration, would not be sufficient, and it is equally clear that circumstances may be sufficient to show that the transferee, mortgagee, or grantee of the property of an insolvent person had reasonable cause to believe that he was insolvent at the time the transfer, mortgage, or conveyance was made. Willing ignorance, as where a party wilfully shuts his eyes to the means of information which he knows are at hand, is regarded in many cases as equivalent to actual knowledge, and it is difficult to see why that rule should not be applied in the case before the court. May v. Chapman, 16 Mees. & W. 355; Goodman v. Simonds, 20 How. [61 U. S.] 343; The Lulu, 10 Wall. [77 U. S.] 202.

Concede, however, that by the true construction of the provision, the rule of constructive notice does not apply in such a case; that such an assignee, transferee, mortgagee, or grantee is not obliged to make any investigation; that the only proper inquiry in the case is whether the party receiving the transfer, mortgage, or conveyance, in view of the attending circumstances and of all the facts known to him concerning the business and pecuniary condition of the party making the transfer, mortgage, or conveyance, had reasonable cause to believe that the other party to the instrument of transfer, mortgage, or conveyance was insolvent at the time the same was made, still the same conclusion must follow, as it appears to the entire satisfaction of the circuit court that the appellants, as reasonable men, acting with ordinary prudence, sagacity, and discretion, "had good ground to believe" that the debtors were insolvent when they received the mortgage. Support to that conclusion is found in the testimony of the appellants as well as in that of the first-named mortgagor, and it is confirmed to the entire satisfaction of the court by the circumstances attending the execution of the mortgage.

Extended comments upon the evidence are unnecessary in this court, as the question was very fully examined in the opinion of the district judge, where all or nearly all of the material portions of the evidence are reproduced. Suffice it to say, the entire available means of the mortgagors did not exceed $6,700, and their debts, including the two notes secured by the mortgages, did not fall short of $11,000, showing beyond all doubt that they were deeply insolvent. Their paper, on which the appellants were liable to the amount of $1,250, was then overdue and unpaid, as is fully proved. Money which they had borrowed to a large amount was due to other parties, the payment of which might be demanded at any moment. Extensions had several times been granted to them, but the evidence shows that forbearance did not enable them to meet their liabilities, and it is doubtless true that these embarrassments prevented them at times from attending to their regular business. Recent extensions were obtained on liabilities where the appellants were not sureties, and the mortgagors owed other creditors whose demands were overdue and for which no provision was made.

Many of these facts were known to the appellants, or became known to them during the negotiations which preceded the transaction in question, and they also knew that all of their own claims and indebtedness were secured by the mortgage, and that the mortgagors had no other property to secure what they owed to their other creditors. Obviously, the effect of the transaction was to give ample security to the appellants and to withdraw from every other creditor of the mortgagors all means of securing their demands, except by attaching the mortgaged property. Evidence of intended preference is disclosed

in every feature of the transaction, and the circumstances, taken as a whole, are persuasive and convincing that the appellants had reasonable cause to believe that the mortgagors were actually insolvent.

Inquiries were made by the appellants, how much money the mortgagors desired to raise and what debts they proposed to pay or to secure, and the whole purpose of the applicants in desiring to mortgage their property was pretty fully explained. They also inquired how much they owed in Boston, and were told that the amount did not exceed $1500 or $2000, but the necessity or propriety of securing any other creditors than the appellants was not even made the subject of conversation. Sustained as the charge is by all the circumstances in the case, the conclusion of the court is that the allegations of the answer are disproved, and that the appellants did have reasonable cause of belief, as is alleged in the bill of complaint.

Suppose that is so, still the complainant is not entitled to an affirmance of the decree unless it also appears that the mortgage was made in fraud of the provisions of the bankrupt act, which is the only other disputed fact to be examined in the case. Before entering into any examination of the proofs exhibited in the record, it becomes necessary to inquire and determine whether the rule of evidence prescribed in section 35 of the bankrupt act applies to cases arising under the first clause of the section, or whether its application is confined exclusively to those arising under the second, which is the six months' clause, declaring certain sales, assignments, transfers, or other conveyances void if made within that period.

Whenever any person, being insolvent or in contemplation of insolvency within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent or to be acting in contemplation of insolvency, and that such payment, sale, assignment, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under the bankrupt act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation or effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the provision is that "the assignee may recover the property or the value thereof, as assets of the bankrupt." Those two clauses are connected, the clause declaring certain sales, etc., void, if made within six months before the petition by or against the bankrupt was filed, following the clause forbidding preferences and ending with a period after the word "bankrupt." Then follows the provision to be construed which reads as follows: "And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud."

Argument to show that the transfer and conveyance in this case was not made in the usual and ordinary course of business of the debtors, is quite unnecessary, as the proofs show that they were retail dealers, and that they mortgaged all their property to the appellants, leaving more than two thirds of their indebtedness wholly unsecured, so that if that provision applies to the first clause of the section, the burden of proof is unquestionably shifted upon the respondents. Had the provision in question preceded the second clause, the argument that the second clause was unaffected by it would have been entitled to great weight, and if so, and it was intended to make it applicable to both, then it must follow the second or be repeated, which could hardly be expected, judging from the usual course of legislation. Connected together as the two clauses are in the same section, it seems reasonable to suppose that congress intended that the special rule of evidence prescribed should apply to cases arising under both, especially as every word of the provision except the word "sale" is as applicable to the first clause of the section as to the second, and even that is not entirely inapplicable to the case before the court, as the mortgage contains a stipulation that the mortgagees may enter whenever they see fit and take possession of the mortgaged property for their better security.

Both of these clauses were borrowed substantially from the insolvent law of Massachusetts, the first corresponding with section 89 of that law, and the second clause corresponding with section 91 of the same law. Gen. St. Mass. 593, 594. Separated, as the two enactments were in that law, by an intervening section, the argument that the special rule as to the burden of proof which is prescribed in section 91 applied only in cases arising under that section, was much stronger than in the case before the court, as the two clauses of the enactment in the bankrupt act are connected together and form a part of the same section; but the supreme court of that state held, notwithstanding that the two enactments were separated by an intervening section, that the provision in question applied to cases arising under section 89 as well as to those arising under section 91, which contains that provision. Nary v. Meerill, 8 Allen, 452; Metcalf v. Munson, 10 Allen, 491.

Apparently it was the fact that the two sections were separated by an intervening one which occasioned the "difficulty in construing" the provision, but no such embarrassment exists in the case before the court, as congress has eliminated that difficulty by uniting the two enactments in one section, and by re-enacting both since the decisions of the supreme court of that state were published, without employing a word to indicate

that the construction adopted by that court is not correct.

Assume that the special rule of evidence mentioned applies to cases arising under the first clause as well as to those arising under the second, then it follows that the circumstances attending the execution of the mortgage and the transfer of the property afford prima facie evidence that the transfer was made in fraud of the provisions of the bankrupt act. Attempt was made in argument to overcome that presumption, but it is sufficient to say that it was wholly unsuccessful.

Decree affirmed with costs.

Case No. 12,433.

SCAMMON v. COLE et al.

[1 Hask. 214; [1] 3 N. B. R. 393 (Quarto, 100).]

District Court, D. Maine. July, 1869.

BANKRUPTCY — INSOLVENCY — USUAL COURSE OF BUSINESS—KNOWLEDGE OF INSOLVENCY.

1. Insolvency, within the meaning of the bankrupt act, is an inability to pay debts in the ordinary course of business as persons in trade usually do.

2. A mortgage, given within four months of bankruptcy, by a debtor who was insolvent, to a person liable as surety or indorser upon the debtor's notes, to secure the payment of a loan with which such notes were paid, and with an intent to give the mortgagee a preference, the mortgagee having reasonable cause to believe the debtor insolvent, is a preference within the 35th section of the bankrupt act [of 1867 (14 Stat. 534)].

[Cited in Singer v. Sloan, Case No. 12,899; Hall v. Wager, Id. 5,951; Goodenow v. Milliken, Id. 5,535; Martin v. Toof, Id. 9,167; Buchanan v. Smith, 16 Wall. (83 U. S.) 307.]

3. A mortgage, so given, is not a transaction in the usual and ordinary course of business, and is prima facie fraudulent.

[Cited in Mathews v. Riggs, 80 Me. 107, 13 Atl. 48.]

4. Such mortgagee's knowledge of the insolvency of the debtor is immaterial, if he had reasonable cause to believe him insolvent.

[Cited in Buchanan v. Smith, 16 Wall. (82 U. S.) 308; Singer v. Sloan, Case No. 12,899.]

[This was a bill in equity by John I. Scammon, assignee, against Thomas H. Cole and others.]

Bill by the assignee of Chadbourne & Nowell, bankrupts, to set aside a mortgage made by them within four months of their bankruptcy as a preference under section 35 of the bankrupt act. Respondents by answer denied that the mortgage was a preference, but averred that it was given as security for a loan made at the time. The cause was heard upon bill, answer and proofs.

John Rand, for orator.

Almon A. Strout and George F. Shepley, for respondents.

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

FOX, District Judge. This is a bill in equity, brought by the assignee of the bankrupts to set aside a mortgage of their stock in trade, fixtures, tools, baggage wagon, and pung, made by them to the respondents on the 17th of June, 1868, to secure the payment of their notes of that date, one given to Cole for $1,272.50, and one to Hooper for $1,547.61, payable on demand with interest.

Chadbourne & Nowell were furniture dealers at Biddeford, and were adjudged bankrupts on the petition of one of their creditors, filed on the 11th of July, 1868. This mortgage covered all the firm estate, excepting one horse which was not subject to attachment by the laws of this state, and as a part of the same transaction, Chadbourne at the same time mortgaged to the respondents all his real estate, to secure the payment of these notes. Nowell is not shown to have had any separate estate. The value of the property in question does not definitely appear. All the evidence on this point is from Chadbourne, who states, that a few days after the execution of the mortgage they took an account of stock, and that their assets, including all demands due the firm, were $6,687.

It is claimed that this mortgage of the partnership estate was in fraud of the 35th section of the bankrupt act. The examinations of Chadbourne and of the respondents have been read in evidence by the complainant. Chadbourne testifies: "The firm commenced business in 1864, each partner contributing $1,500 as capital. June 16th I informed Cole that the firm had some paper in the bank that was overdue, and they wanted to raise money to pay it, and asked his advice what to do. Cole inquired what we wanted to do, and I told him we thought of mortgaging our stock to raise some money. Cole said he would see Hooper, and thought he could arrange it. After that I went with Cole to Hooper. Cole said: 'If you will give us a mortgage on your stock of goods and on your real estate, we will assist you.' They asked how much I wanted to raise. I told them about $3,000. They asked for what we wanted it; told them to pay $1,250 to First National Bank of Biddeford, part of which was overdue and had Hooper's name on it; about $750 was then overdue, and $500 was falling due; that there was $300, with Hooper's name on it, at the First National Bank of Saco; that we wanted $500 of it to pay my note to Gardner Libby, on which Cole and A. Jones were sureties, and which was overdue; that there was a note at the savings bank, given by Nowell, on which Cole and I were sureties, and that we owed Cole $250 for borrowed money. I think we told Cole we were liable to be called upon for these liabilities at any time, and that as we were going to mortgage our stock to raise some money, we might as well get enough to pay this, so that we might go along in our business. Cole said, if we would

give a mortgage of the stock and real estate, as we had proposed, they would furnish us with money to pay our liabilities. There was some conversation at the interview when the papers were made in relation to our other liabilities. They inquired how much we owed in Boston. I replied that my partner told me that we owed about $1,500. I may have said $1,500 or $2,000. I think they asked me if I knew how much we owed and that I told them I did not know but would ascertain. Hooper gave up the notes to me that were in the bank $1,250, and $300 in money. Cole paid note to G. Libby and interest, $522, and now holds it, and also the note in the savings bank for $500 against Nowell as principal and Cole and myself as sureties. We gave a note to Hooper for $1,550, and to Cole for $1,272.60, both of which were secured by both mortgages. That note to Cole was to pay the two notes above mentioned, and our indebtedness of $250 for borrowed money. The defendants did not know, to my knowledge, that we were unable to pay our liabilities as they became due, but they did know the notes in the bank were overdue and unpaid. The firm did not know that they were unable to meet their liabilities as they fell due. We made the mortgage to raise money to meet the notes which were due and about coming due; did not give them this mortgage to secure a preference. The firm was then insolvent." On cross examination he testifies, "We did not know and had no reason to believe we were insolvent at this time. We did not contemplate bankruptcy or insolvency, or expect to stop our business; did not know our condition until we took account of stock afterwards. We had two extensions from T. M. Holmes & Co. of Boston the last of 1867, and again about June 1st, 1868; had several extensions from Boston creditors."

From a schedule, annexed to Chadbourne's examination, it appears the firm was indebted over $10,000, but I do not find on this list the Libby note, or the note to the savings bank. These were, to be sure, individual liabilities, which, if added to this amount, would make their joint and several liabilities over $11,000.

The 35th section of the bankrupt law declares "that if any person being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, * * * makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, &c., or conveyance, &c., having reasonable cause to believe such person is insolvent, and that such payment, &c., conveyance, &c., is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited. * * * And if such sale, &c., is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud."

To invalidate the transfer it must appear that the debtor, at the time, was insolvent or in contemplation of insolvency, and that he intended to give a preference to a creditor, or person having a claim against him, or to one who is under a liability for him.

In this case Chadbourne admits the firm was deeply insolvent at the time the mortgage was given, but he avers that they were not aware that such was their condition until afterwards, when an examination was made as to their assets and liabilities, and it appeared that they could not pay more than twenty or twenty-five per cent. Chadbourne did not keep the books, and may not, therefore, have been so conversant with their real condition as his co-partner, whose testimony is not before me, but who, I cannot but believe, was well aware of the insolvency of the firm.

In the determination of questions in bankruptcy, it must be remembered that "insolvency," as used in the bankrupt act, does not mean an absolute inability to pay one's debts at a future time, upon a settlement and winding up of all a trader's concerns, but a trader may be said to be in insolvent circumstances when he is not in a condition to pay his debts, in the ordinary course, as persons carrying on trade usually do. This definition has been substantially adopted by every district judge in the country, before whom the question has arisen.

I. What was the situation of this firm June 17th? Their assets of every kind, including all debts due to them, were a little under $6,700, and Chadbourne was also the owner of his homestead and a small lot adjoining. Their liabilities, individually and as a firm, were in excess of $11,000. A note in the Biddeford bank of $500 had been overdue for more than a week; another note of $250, in the same bank, had been overdue some days, and both were renewals of former notes, and were endorsed by Hooper, one of the respondents. The same bank had two other and similar notes, each for $250, and the Saco bank a similar note for $300, all of which would soon fall due, and which Chadbourne admits they could not pay, excepting by a mortgage of their stock. Chadbourne's note of $500 was also due to Gardner Libby, on which Cole was surety, and there was a note of Nowell's for $500 at the savings bank on which Cole and Chadbourne were responsible, and for all which, as Chadbourne states, they were liable to be called upon at any time. They owed Cole $250 for borrowed money, one-half of which had been standing four or five months. They had also been obliged to apply to some of their general

creditors for an extension of their liabilities, and twice in particular, to their heaviest creditor, T. N. Holmes & Co., to whom they were at this time indebted $1,080, being for two acceptances of $216 each, and a third of $216.70, given June 12, 1868, in renewal of the following notes, which were given in settlement of merchandise account, to wit: One for $219.50 dated Aug. 10th, 1867, on three months; one for $323.75 dated January 3d, 1868, on four months, and one for $83, April 1st, 1868, on four months; one draft for $206, dated June 12th, 1868, on three months, and one for $215.60 of June 20th, the two last being given in settlement of accounts for merchandise. They had also renewed a note of Marrett, Poor & Co.'s of April 25th, and to quote Chadbourne's language, "We had applied to our Boston creditors several times for an extension of our notes and accounts during the year 1868, and prior to the 16th of June."

They were owing Joseph Dennet $400 for money loaned years before, and for which he held their note payable on demand; William O. Brown $1,200 for money loaned April 1st, 1867, for which he had a similar note, and from their schedule, it appears they were indebted to others to the amount of about $1,200 for money borrowed by them at various times, some as far back as December, 1867. There were also two notes held by the banks for $350, but as neither of the respondents were answerable upon them, these notes were not paid or secured.

These facts satisfy me, notwithstanding the statements of Chadbourne, who may not have had a clear understanding of the legal definition of insolvency, that they could not but be aware, at this time, of the firm's being insolvent. Twelve hundred and fifty dollars of their paper on which the respondents were liable were then overdue and unpaid. A large amount of borrowed money was due to other parties, which they were liable to be called upon to discharge at any moment, and none of which could they meet, excepting by the suicidal course of mortgaging their stock in trade. They had obtained several extensions of their business liabilities, especially from Holmes & Co., one of whose notes for $219.50 had remained overdue and unpaid from the 10th day of the preceding November until the 12th day of June, only five days before this mortgage was executed, when it was taken up and included in new drafts given in extension, together with another note of $323.75, which fell due May 3d, and remained unpaid until included in these drafts.

Their business for more than six months had not "been carried on as traders usually do business;" their business notes were overdue and unpaid; they owed more than $2,000 for borrowed money, some of it due for more than a year; their bank liabilities were also overdue and unsatisfied, and in my view, on the 16th of June they were not only insolvent, as they admit the fact to have been, but they were fully conscious of the existence of all the circumstances which made them insolvent; and under such a state of facts, but little reliance can be placed by the court in the statement of the bankrupt, that at that time they had no reason to believe they were insolvent.

II. Was this mortgage executed by the bankrupts with a view to give a preference to any creditor or person having a claim against them, or who was under any liability for them?

The mortgage was not given to secure the original liability of the respondents, but they loaned to the bankrupts the money to discharge these liabilities, with the exception of the amount due Cole, and received the mortgage to secure these amounts. It is claimed by the answer, that the mortgage therefore was given to secure a present consideration, and not an existing liability.

Such a construction of this transaction cannot be sustained under the provisions of the bankrupt act; if it could be, all an endorser or surety need do to obtain valid security for his liability would be to lend his principal the amount with which to pay the debt, and receive back a mortgage as security for the loan. Such a proceeding, within the purview of the bankrupt act, is nothing more than an exchange or substitution of securities, a mere attempt and contrivance to relieve or protect an endorser or surety, and whatever means may be adopted to accomplish this purpose, it will prove invalid under the bankrupt law, when it is designed and used to obtain a preference for the party who is under a liability for the bankrupt. In the present case, the security in all respects would have been equally valid, if it had been so drawn as in terms to indemnify the respondents as endorsers or sureties on the notes for which they were liable.

The testimony of Nowell, who was the bookkeeper, and probably more conversant with the condition of the firm than Chadbourne, has not been taken, as he has left the state, and we must judge of his motives and purposes from the course adopted and its natural consequences. Chadbourne states that his purpose in making the mortgages was to meet the notes that were due and about coming due, and that he did not give them to Hooper and Cole to give them a preference over the other creditors.

Whilst I have no doubt that he desired to meet these notes, I feel equally confident that he did intend, by these mortgages, to protect Hooper and Cole against loss, and that they should be secured at any rate against all liability; all the circumstances compel me to this conclusion. Both members of the firm knew that they had not met their payments as they fell due; their liabilities to the amount of $1,500 were then overdue, including the money due to Cole, and they had no means to pay these sums, excepting the money re-

ceived from Hooper and Cole on this security.

On the 12th of this very month, they were indebted to Holmes & Co. over $1,000, part of which was on notes which were overdue, and one of which had been so for six or seven months. Instead of giving them any security or preference, they asked and obtained an extension for the whole amount. They were owing two other notes to the banks on which other parties were sureties or endorsers, one of which, at least, was a renewal, but neither of these notes was paid or secured although they were soon payable. They were owing other parties in Biddeford and Saco about two thousand dollars for borrowed money, some of it for more than a year, but none of these did they think proper to secure in any way, but they did secure every dollar for which either of these respondents could in any way be made accountable for the firm or either of its members, although a portion of it was not then due and payable.

If their object, as is now claimed, was to relieve themselves from their bank liabilities and paper falling due, why did they not pay these other notes, which were held by these same corporations? Why make this distinction, and pay those, and only those, for which the respondents would be accountable, leaving all the others unpaid or unsecured?

Again, why should the firm pay the savings bank Nowell's individual debt? This was not a firm liability, it was Nowell's private note, on which Cole and Chadbourne were sureties, and so far as it appears, was not due at that time, and if it had been, such institutions are always ready to loan their funds on good security, and the bank would not, probably, have pressed for payment, if the parties were in good credit, and desired further time or a renewal of the loan.

Why pay Chadbourne's note of $500 to Gardner Libby? What reason, other than to protect the surety Cole, is shown for selecting this liability of one of the members of the firm and discharging it with the co-partnership assets, whilst there were over due and unpaid large amounts of borrowed money loaned the firm, and for which the lenders had no security.

It thus appears that they were not satisfied with discharging the claims against the firm, upon which these respondents were liable, but they also undertook to discharge, with the firm property, the individual liabilities of each member to the amount of $500, or rather, to allow Cole to pay these individual liabilities for which he was accountable as surety, and receive therefor, from the firm, the partnership note for the amount thus paid, secured by a mortgage of the partnership estate. The firm was under no liability for this amount. It could not be made accountable for it, or be compelled to apply its property to its discharge. Chadbourne took legal advice about these mortgages, and was probably aware that as these claims then stood neither the holders nor the sureties could look to the firm for payment. Why should the firm pay or assume these demands, or charge its property with the payment of them, unless the object and purpose was to relieve the sureties upon them from their liability? If this was the design, then the course adopted, of giving the company note for the amount so paid by Cole in discharge of their individual claims and of securing this note by a mortgage, was proper to accomplish the object, excepting for the provisions of the bankrupt law. But unless done for that purpose, what excuse can be suggested for the members of a firm applying one thousand dollars of its company property in discharge of their private debts, the firm at the time being insolvent? They had no right to so conduct with the property of the partnership for which they were then indebted more than they could pay, and they could not but be aware that thereby they were diminishing, to that extent, the assets which they had for the payment of their partnership creditors, who had an equitable claim upon their property, under these circumstances, for their security. When insolvents in such a condition so dispose of their partnership effects, I think it is an extremely charitable construction of their conduct, if I only infer that it was done for the purpose of preferring those who are benefited thereby. To many minds, I apprehend, it would present itself as worthy of a much severer judgment.

The excuse now suggested, that they wanted to take up the paper which was thus paid, so that they could give their attention to their business, is futile and vain. In the first place they left outstanding against them claims for nearly as large an amount of borrowed money as was paid, some of which was due to the very banks to which their payments were made. The very instant the mortgages of all their joint and separate estates were known to their creditors, their credit with them would be entirely ruined and destroyed. The slightest investigation of their affairs would develop still more clearly their deep insolvency, and not a dollar could afterwards be obtained by them on credit. The inevitable consequence of such mortgages, as everybody well knows, is to put an end to further credit for a party, and break up and terminate his business; and especially would such be the results, when none of the demands due for merchandise were secured. The bank loans of the firm and private demands of the partners were protected by the mortgage. The bankrupts are not shown to have been wanting in ordinary intelligence. I must therefore hold them to have been well aware of, and intending the ordinary and usual result of such a proceeding, and that they could not have supposed that they would be able to continue their business after the execution of this conveyance, and that they intended a preference to the respondents by this assignment.

III. Did Cole and Hooper have reasonable

cause to believe the bankrupts insolvent, and that this conveyance was made in fraud of the act, that is, that a preference was intended?

Cole and Hooper swear, that they did not know but that the bankrupts could pay their liabilities as they fell due in the ordinary course of business, that they had no knowledge of their insolvency, or suspicion that they had not property to pay their debts, and had no belief, or reason to believe, that either of them were insolvent, or in contemplation of insolvency or bankruptcy.

On reference to the 35th section of the bankrupt law, it will appear that the question is not what the party benefited by the conveyance actually believed as to the condition and intention of the bankrupt, but it is, what he had reasonable cause to believe on this subject. The language is, "the person receiving such conveyance, having reasonable cause to believe such person is insolvent, and that such conveyance is made in fraud of the provisions of this act."

The very same section declares, that when such conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be prima facie evidence of fraud.

This last provision is found at the close of the paragraph, which declares certain conveyances fraudulent when made within six months, and is not at the close of the preceding paragraph, declaring certain conveyances in preference of creditors and others fraudulent if made within four months. It may be contended therefore, that the presumption of fraud is applicable only in fraudulent conveyances, and not to preferences.

The provisions of the 35th section of the bankrupt act were extracted almost verbatim from the insolvent law of Massachusetts, and are to be found in the 89th and 91st sections of chapter 118, Gen. St. Mass., the 89th prohibiting fraudulent preferences, and the 91st fraudulent conveyances. At the close of the 91st sec. it is declared that "if such sale, &c., is not made in the usual and ordinary course of business of the debtor, that fact shall be prima facie evidence of such cause of belief." In the bankrupt act, the language is, "shall be prima facie evidence of fraud."

In Massachusetts, notwithstanding this provision is found at the close of the 91st section, and is not in the 89th, it has been decided, that it applied to causes under both sections. See Nary v. Merrill, 8 Allen, 451; Metcalf v. Munson, 10 Allen, 493. I am inclined to adopt this view as the true construction of this clause in the 35th section of the bankrupt act, especially as all the provisions are there united in a single section, and not found in different sections as in the Massachusetts act. Such, I understand, is the construction which has been given to this clause by the district courts.

It is too plain for argument, that this mortgage was not in the usual course of the bankrupts' business; it is therefore to be taken by me as fraudulent, unless the contrary is established. The burden is on the respondents to explain the transaction; this they have attempted to do by their absolute and unqualified statements, that they had no knowledge of the insolvency of the bankrupts, and had no belief or reason to believe that such was their condition, and that they did not receive the same with an intent to obtain a preference. Much of this statement was clearly inadmissible, and should have no influence upon the judgment of the court.

The question raised by the statute is not the actual belief of the respondents, but is what they have reasonable cause to believe, and if the acts and circumstances satisfy my mind that they had reasonable cause to believe that the bankrupts were insolvent and intended a preference, I am bound to declare the conveyance void, although I might be satisfied that the respondents were credulous enough to have believed the contrary.

In Coburn v. Proctor, 15 Gray, 38, Biglow, J., has clearly and conclusively expounded the like provision in the Massachusetts insolvent law. He says: "The actual belief of the defendants as to the solvency of the debtor was wholly immaterial. The only inquiry which, under the statute, was relevant to the issue was, whether the defendants had reasonable cause to believe the debtor insolvent, that is, whether in view of all the facts and circumstances, which were known to the defendants concerning the business and pecuniary condition of the debtor, in connection with the time and mode of the transfer of the property taken, they, as reasonable men, acting with ordinary prudence, sagacity and discretion, had good ground to believe that the debtor was insolvent. This was the only legitimate subject of inquiry as to the belief of the defendants, which could be properly gone into before the jury. It was not intended by the statute to make the actual belief of the party concerning the solvency of the debtor one of the standards by which to test the validity of the transfer of property to him. Such a belief might or might not be well founded. It would be an uncertain and fluctuating standard. That which would satisfy the mind of one man would be wholly insufficient to convince another; and those facts, which would fall far short of producing a belief in a person who was disinterested and impartial, might have a different effect upon the same person when acting under a strong influence of self-interest. In the place of a test so uncertain and unsatisfactory as the belief of a party, formed under a great bias, the statute established one much more safe and definite, equally applicable to all persons alike, and easily understood and readily applied by a jury—the belief of a reasonable

man taking a transfer of property under like circumstances."

Turning now to the facts and circumstances as here developed, what conclusions should a disinterested and impartial mind draw from them? One of the respondents was a director of the bank to which the bankrupts at this time were indebted $1,500, of which $750 was past due and unpaid; and for this the other respondent was liable; and although Cole swears that at the time he received the mortgage, he only knew that one note was past due at the banks, Chadbourne says: "That Cole and Hooper both knew from what was said to them, that these notes in the bank were overdue and unpaid." And it would certainly be somewhat unusual, if a bank director in Biddeford was ignorant that two notes held by the bank amounting to $750, and which had been taken in renewal of former discounts, remained overdue for some time, particularly when such director was himself a surety for the principal for larger sums due to other parties, a portion of which was also overdue. It is quite unreasonable to ask the court to presume a party to be so inattentive to his trust as a director, and so ignorant of the condition of one for whom he was so largely accountable.

From the evidence, I must conclude that Cole and Hooper were aware that the paper of the bankrupt to the amount of $1,250, and upon which one or the other were sureties, was overdue at the time of the negotiation of the mortgage, and that similar paper to a larger amount would soon fall due, none of which could the bankrupts discharge, excepting by a mortgage of their estate, as the bankrupts then informed them.

The language of Blatchford, J., in Re Dibblee [Case No. 3,884], is quite applicable. He there says: "But, one overdue debt is sufficient to put a party in the condition of owing a debt which he is unable to pay. If, at the time the sheriff appeared with the execution to levy on the stock of goods, the firm owed this debt, and were unable to pay it in the ordinary course of their business, they were then insolvent in the language of the bankruptcy act and its meaning. No matter how many other debts there were not yet due, if they were unable to pay that debt in the 'ordinary course of their business,' they were insolvent. The ordinary course of their business does not mean an ability to turn out goods, or bills receivable, or assets, or securities, to pay that one particular debt, at the same time leaving other debts, which are certain to become due, unprovided for, and not leaving sufficient assets in the hands of the debtors to meet them when they become due. It is not in the ordinary course of business for a party who has a store of goods and other securities, and owes a mature debt, to turn out a large portion of those goods, or to take the most valuable of his securities and turn them over to the creditor to extinguish that debt, if sufficient assets do not remain to pay the rest of his contracted debts in the ordinary course of his business. That is an extraordinary course of business, and not the ordinary course of business." That remark well characterizes this mortgage now under consideration. It was an extraordinary proceeding. These respondents not only had reasonable cause to believe the bankrupts were then insolvent, but from the information communicated to them by the bankrupts at the time of the negotiation for the security, I find that they had actual knowledge of the insolvency.

The bankrupts having intended a preference of the respondents, did they not, at the time, have reasonable cause to believe such was the design in giving the mortgage? Having already dwelt at some length on the facts and circumstances which have satisfied me that the bankrupts intended a preference, it is not necessary that they should again be repeated. It is sufficient to say, that I find that Cole and Hooper were perfectly cognizant of the most important of them, and as men of ordinary intelligence, they could not but have had reasonable cause to believe that it was intended to give them a preference. They were aware, that all demands for which they could be held liable, as well for the individual members as for the firm, and whether the same had matured or not, were to be paid, whilst other demands, held by the same banks, and upon which other parties were responsible as sureties, were left wholly unsecured; that by this arrangement, debts not due were anticipated, and thereby the discount which was paid was lost. The circumstance, that more than one thousand dollars of the property of the firm was thus applied to the discharge of the personal liabilities of the partners, and not to the firm debts, cannot but have a very great effect on my judgment.

The defendants then well knew that the firm was heavily indebted for their stock in trade, and it should have remained unincumbered to be applied to the satisfaction of those debts, and the respondents should not have received this property for the security of their individual claims. They should have known it was grossly unjust, and that a firm thus conducting with their partnership assets could not be dealing fairly and honestly with the property. When it is found necessary to apply so large a proportion of firm property to the security of the individual indebtment of the partners, a court of equity should require plenary proof that it was not designed as a preference.

From all the evidence, I am forced to the conclusion, nowithstanding the statements of the respondents in their own behalf, that finding a large amount of the paper upon which they were responsible for the bankrupts was due and unpaid, and that a still larger amount would soon mature, in order to secure and

protect them, this scheme of paying these demands, both the overdue and those not yet matured, and taking a mortgage for the amount thus paid, was devised by the parties. It is quite apparent that they distrusted the solvency of the bankrupts, and were desirous of being relieved from their responsibilities. They did not propose to make these advances without security, and judging from their conduct, they were determined to be secured beyond all question. Chadbourne says his proposition at first was to mortgage the stock, but Cole demanded in addition a mortgage of Chadbourne's real estate. If they had no doubt of the bankrupts' ability to pay their liabilities, why take any security the effect of which would be so detrimental to the credit of the firm? If they were in good credit and believed by the respondents to be responsible, and the stock was so large as to afford ample security, why not at least be contented therewith, and be satisfied with the mortgage of that only, leaving the real estate of Chadbourne unincumbered? This would not answer their purpose; they were not willing to rely on the chattel mortgage, but they proposed and received in addition thereto a mortgage of all Chadbourne's real estate. Not satisfied with the lien on Chadbourne's homestead, they included in the mortgage the adjoining lot worth but a few hundred dollars, the whole proceeding, quite clearly indicating to my mind their distrust of the financial condition of their debtors, and their purpose to obtain security upon all the property which the bankrupts had to convey.

The parties appear to have been aware of the provisions of the bankrupt act, for Cole testifies: "I consulted with Mr. Goodwin as to these mortgages, asking him if Chadbourne had spoken with him in regard to them, and he said that he had, and that he would make them out. I think that a question arose as to the validity of mortgages under the bankrupt law. He said that under certain circumstances they were not good. I think that he may have stated the circumstances."

Being thus advised of the provisions of the bankrupt act, it seems to me that these parties undertook to evade and circumvent it by paying the existing demands and taking new security therefor, which they claim by their answers as a present consideration for the mortgage. Such a proceeding cannot receive the sanction of a court administering the bankrupt law; and if the final result should be an entire loss to these respondents of all right to share in the bankrupts' estate it may not be entirely without profit and advantage, as it may prove a salutary lesson to them and the public generally, not to attempt to evade the provisions of so just and equitable a law as the bankrupt act.

They have read in evidence the testimony of the president and cashier of one of the Biddeford banks, and of other residents of that place, that in the opinion of these witnesses Chadbourne and Nowell, at the time of giving the mortgage, were solvent and in good credit, and that they would have loaned them money. A conclusive answer to this testimony is the belief of these respondents on these points, to be determined from their own conduct. They were unwilling to make the loan at that time, without receiving as security all the real and personal estate, both of the firm and of its members, and were so doubtful of the solvency of the firm that they were not content with the mortgage of all the company property. From their business relations with the bankrupts, I may well infer that the respondents were better cognizant of their situation and were unwilling to trust to their personal responsibility.

Decree for complainant declaring the conveyance void. Case referred to master to take account of property remaining, as well as of that sold by respondents.

[NOTE. Due report was made by the master, specifying the property received by the respondents under the mortgage, and the net proceeds of such portion of the same as they had sold and appropriated to their own use. Such of the property as remained in their possession they were required, by a final decree of this court, to deliver to the complainants. An appeal was then taken to the circuit court, where the decree of the district court was affirmed. Case No. 12,432.]

Case No. 12,434.

SCAMMON v. HOBSON.

[1 Hask. 406.] [1]

District Court, D. Maine. May, 1872.

FEDERAL COURTS—FOLLOWING STATE PRACTICE—WITNESS—BANKRUPTCY—ILLEGAL PERFORMANCE—KNOWLEDGE OF INSOLVENCY.

1. The examination of the respondent in equity as a witness by the orator does not operate as a release to him of the matters touching which he is examined.

2. Parties being competent witnesses in the courts of the state become so in the federal courts by act of congress of July, 1862 [12 Stat. 588].

3. Examinations of parties in equity do not subject the party taking them to the same consequences that formerly resulted therefrom.

4. A creditor taking security from his debtor is chargeable with the knowledge ordinary diligence of inquiry into the circumstances of the debtor would have given him.

5. Circumstances, like the maturing of the debtor's commercial paper in large amounts, the selling of large amounts of his stock before it reached him, out of the ordinary course of trade, known to a creditor about to take security, call upon him to make inquiry into the solvency of his debtor.

6. The answer under oath of a respondent in equity, false in material particulars concerning which the respondent could have made no mistake, is unreliable as to all other matters contained in it, and may be disregarded by the court.

7. A conveyance by an insolvent debtor to his creditor in fraud of the bankrupt act of certain property, a part of which is to secure a debt and

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

a part is a sale for cash, is an entirety and the assignee in bankruptcy of the debtor may recover the value of the whole.

In equity. Bill by [John I. Scammon] an assignee in bankruptcy [against Joseph Hobson] to set aside a sale of the bankrupt's property to the respondent as made in fraud of the bankrupt act [of 1867 (14 Stat. 517)]. The cause was heard on bill, answer and proofs.

[For prior proceedings in this litigation, see Case No. 10.]

Josiah H. Drummond, for orator.
Edwin B. Smith, for respondent.

FOX, District Judge. The complainant as assignee of Wm. F. Abbott, who was adjudged a bankrupt on the 14th of December, 1869, on a petition filed by his creditors October 19, 1869, has brought this bill to recover from the respondent the value of a large lot of tobacco conveyed to him by the bankrupt September 14, 1869, in fraud of the provisions of the bankrupt law. The answer admits that Abbott was insolvent at the time of this transfer, but denies that the respondent had then any reason to believe that such was Abbott's condition, or that any preference was had or designed by the sale of the tobacco.

In contradiction of the answer, the complainant read in evidence a document purporting to be an examination of the respondent taken before a magistrate by consent, "to be used in like manner and with like effect, as if taken under an order of court and before a master in chancery to be used in this cause." This examination with an affidavit of Hobson annexed thereto establishes most conclusively the untruth of the answer in most material matters. But it is claimed by the counsel of the respondent, that the complainant having elected to examine the respondent, and read the examination at the hearing, has by so doing waived his right to a decree against him on the facts to which he was examined. The rule as stated (3 Greenl. Ev. § 316) is, "that the examination of a defendant by the plaintiff as a witness, ordinarily operates as an equitable release to him so far as regards the matters to which he is interrogated." I am not aware of any case in the courts of the United States where this practice has been adopted; but admitting that such was the established rule as formerly recognized by the high court of chancery, I have no doubt that the same is now abrogated by the change in the law compelling parties to testify as witnesses. In 3 Greenl. Ev. § 316, note 5, it is stated that the rule is now abrogated and a decree may be had by virtue of the statute of 6 & 7 Vict. c. 85.

This precise question arose in Harford v. Rees, 9 Hare, Append. 70; and it was decided "that the plaintiff since the statute of 14 & 15 Vict. 99, may examine as a witness a defendant in a suit in equity, without prejudicing any of his rights to a decree in the same suit against him."

The act of congress of 1862, c. 89, declares, that "the laws of the state in which the court shall be held, shall be the rules of decision, as to the competency of witnesses in the courts of the United States in trials * * * in equity, &c." Rev. St. Me. 1871, c. 82, § 82, provides, "no person shall be excused or excluded from being a witness in any civil suit or proceeding at law or in equity by reason of his interest in the event thereof as a party," etc. Under this provision, if this cause was pending in the state courts, the complainant could have compelled the respondent to testify as a witness. He was by the laws of Maine a competent witness for the complainant, and being thus competent, he by force of the act of 1862 was alike competent in the federal courts in this state.

It is contended that the evidence of the respondent as presented should have the effect of an examination, and that the same result must follow as would if the examination had been had prior to this change in the law; that it is entitled an examination of the respondent taken, by consent, and that it was not taken as a deposition and evidence in the cause. It is true, it is entitled an examination, but that is simply the language of the magistrate, and was not by any order of the court, and it is quite manifest, that owing to the absence of an officer duly authorized to take testimony to be used at the hearing, the parties consented to take the respondent's testimony before this magistrate with like effect, as if taken before a master in chancery and to be used in the cause. It could never have been the intention of the complainant by thus proceeding to waive all claim for redress against the respondent, and if the counsel for the respondent at the time understood such would be the effect, common honesty and good faith on his part required that he should advise the counsel of the complainant that he should insist on this objection, which could at once have been obviated by the testimony being taken according to the usual practice of this court.

As the law now is, examinations of parties as formerly practiced, and with the results that then followed from the examination, are no longer in force; no matter what designation may be given to the statement by the magistrate, the court is in no respect concluded by any title he may think proper to bestow upon it, but it is rather its duty to examine for itself the instrument, and ascertain what in truth it is, and how far it may be in conformity to and authorized by the law; and having so done, no doubt is now entertained by the court that this statement of the respondent can have only the same effect as if it had been formally taken as the deposition of a party in the cause, and that by producing the same as evidence, the complainant has not thereby waived his right to redress against the respondent.

This examination of the respondent with the accompanying affidavit proves that the respondent is a manufacturer of lumber at Saco, that on the 14th of September, 1869, he was under heavy liabilities incurred for Abbott's accommodation amounting to $8,900,—$3,900 of which were Hobson's promissory notes for various sums given to Abbott between the 11th and 19th of May, 1869, on four months, and which Abbott was bound to provide for at their maturity. $1,500 fell due September 15th. On the 14th Abbott sold to Hobson 13,000 lbs. of tobacco of the value of $5,619.28. Some of it was taken quietly from the cars to Hobson's barn. Abbott was a manufacturer of tobacco, and such a sale of unmanufactured stock was not in the ordinary course of his business, and was therefore prima facie fraudulent under the provisions of the bankrupt act.

From the purchase of the tobacco, Hobson agreed to pay and discharge at their maturity, these notes loaned by him to Abbott to the amount of $3,900. In what manner the balance was to be paid does not distinctly appear. Hobson says, "I think I paid Abbott some cash, but can't state how much, can by referring to my cash book." He however gives no information as to anything that appears upon the cash book, and we can only infer that if anything favorable to him was found therein we should have been advised of it.

The large amount which Abbott was accountable for to Hobson, the immediate maturity of so many of his notes which he had loaned to Abbott, and the unprecedented course of selling so large an amount of stock before it had reached the factory, in order to relieve Hobson and secure him from his liabilities, absorbing so large an amount of the stock, which it is not shown had been paid for by Abbott, and the want of which would necessarily impair the operations of the concern and destroy any credit which Abbott before that might have possessed, are all cogent circumstances calling upon Hobson to exercise ordinary diligence in respect to the title of Abbott, and by these facts he was put upon inquiry, and is chargeable with all the knowledge it is reasonable to suppose he would have acquired if he had performed his duty. Scammon v. Cole [Case No. 12,432].

From the facts clearly established, the court is convinced that Hobson was at that time well aware of Abbott's insolvent condition, and that this sale of the tobacco was designed by these parties for the purpose of securing Hobson in part from his liabilities for Abbott's accommodation.

This view of the transaction is directly in conflict with Hobson's statements in his answer, in which he says, "I paid Abbott that sum, $5,619.28 for the tobacco, and the money went to pay the then maturing liabilities of Abbott to parties in Boston, Saco, and the wages of his men. * * * The tobacco was not transferred or delivered to me as security for my own liabilities, but for cash used to meet the then accruing bills and notes of Abbott's various creditors."

This answer must be taken as true until it is shown to be false; but its falsehood is clearly established by the other statements under oath of Hobson, from which it is clearly beyond controversy, that $3,900 of this amount, instead of being paid by him in cash to Abbott, and used to meet the then accruing bills and notes of Abbott to various creditors, was retained by Hobson to pay his own notes loaned to Abbott for his accommodation, and falling due in a few days, and which by this new arrangement Hobson assumed to pay, and exonerated Abbott from his liability by surrendering to him his obligation to discharge the notes at their maturity and indemnify Hobson therefrom. The court is quite certain that no one from the perusal of the answer would ever conjecture the true state of this transaction. Instead of its being a full, frank, honest disclosure of the trade and the application of the payments realized from it, so that the court would be truly informed as to all that had taken place, and in what manner the purchase money had been appropriated, the court regrets to be compelled to observe that it finds this answer untrue and evasive, concealing and misrepresenting the whole transaction, and intended to mislead and deceive the court in relation thereto, falsely asserting that the respondent had paid the whole of the purchase money in cash, and that the tobacco was not transferred or delivered to him as security for his own liabilities, when $3,900 of it was within a week applied by Hobson in discharge of his own liabilities incurred on account of Abbott. "Falsus in uno falsus in omnibus." The answer being untrue in this material matter, about which the respondent could not be mistaken, and he not showing the disposition made by him of the balance of the purchase money, or that he had paid any of it to Abbott, as he could easily have done by his cash book if such was the fact, the court is compelled to discredit the whole answer, and can place no reliance on any part of it as evidence of the actual state of the transaction.

The court has heretofore been obliged in a pointed manner to express its reprobation of the loose and reckless manner in which parties have seen proper to present to the court answers to bills in equity. Thus far, I apprehend, they have gained but little advantage by such practice, and I trust that henceforth the court may not have occasion to thus comment on the answer of a respondent, as it is a most unpleasant duty, but one which the court does not feel at liberty to disregard.

The transfer being shown to have been in fraud of the bankrupt act by a fraudulent preference to the amount of $3,900 at least. I am inclined to the opinion that the court

should not apportion or diminish the damages below the full value of the property, and hold the respondent accountable only for that sum, even if it had been shown by reliable evidence that Abbott at the time of the sale was paid by Hobson the balance of the purchase money. The transaction being impeached for fraud, and for that cause declared void and invalid, the entire transaction is annulled and without any force, virtue or effect as against the assignee in bankruptcy, and he is entitled to recover the full value of the property thus fraudulently conveyed to respondent.

Decree for complainant for $5,619.28 and interest from February 15, 1870.

[Upon rehearing, there was also a decree for complainant. Case No. 12,431.]

Case No. 12,435.

SCAMMON v. KIMBALL.

[5 Biss. 431; 6 Am. Law T. Rep. 424; 8 N. B. R. 337; 18 Int. Rev. Rec. 118; 4 Chi. Leg. News, 284; 2 Ins. Law J. 775; 5 Leg. Gaz. 321.] [1]

Circuit Court, N. D. Illinois. Sept., 1873.[2]

CORPORATIONS—UNPAID SUBSCRIPTIONS TO STOCK—SET OFF—RULE IN BANKRUPTCY—FIDUCIARY DEBTOR.

1. A claim against an insurance company for loss under its policies cannot be a set-off against an unpaid subscription to its capital stock.

2. Though the charter of the company only required the stockholder to pay in a part of his subscription, the balance was in the nature of a trust fund for the creditors of the company.

3. Though in a solvent company the debts might be considered mutual and the set-off allowed, the fact of insolvency changes the rule.

4. A stockholder coming into equity for relief should first do equity by making good his share of the capital stock. Lawrence v. Nelson, 21 N. Y. 158, approved.

5. Though the bankrupt law recognizes rights of set-off, it was not intended to enable one occupying a fiduciary relation to take advantage of the bankruptcy of the company.

[Cited in Jenkins v. Armour, Case No. 7,260.]

6. Set-off cannot be allowed except between parties sustaining the simple relation of debtor and creditor, and this principle excludes the case of the treasurer of an insurance company.

This was a bill in equity by Jonathan Young Scammon, against Mark Kimball, assignee of the Mutual Security Insurance Company of Chicago, to set off his claims against the company for losses on policies of insurance, against his liability on unpaid subscriptions to the capital stock of the company, and his indebtedness to the company for money deposited with him, and to enjoin the prosecution of suits at law against him by the assignee. At the time of the fire in Chicago, on the 8th and 9th of October, 1871, Scammon held several policies of insurance against the company, as indemnity for loss by fire, upon which he sustained losses to the amount of over $50,000. Its losses in that fire rendered the company insolvent, and it was shortly afterwards put into bankruptcy by its creditors. The assignee, while admitting the liability of the company, denied that the debt could be set off against the demands of the company, and filed a cross-bill asking for a decree against Scammon for these demands. The claims of the company against Scammon were, first, for unpaid subscriptions to the capital stock; and second, for money on deposit with him as a private banker. The first claim arose as follows: The charter of the company authorized the subscribers to the stock to pay a small percentage of their subscriptions in money, and to give note or personal security for the remainder, and declared that when $50,000 of the capital stock was subscribed, and five per cent. paid, and the remainder secured, business could be commenced. The complainant was one of the original subscribers for a considerable amount of the stock and paid in one installment, and gave promissory notes to the company, secured as required, for the remainder. This balance had never been paid in. The other demand was as follows: From the organization of the company, in 1864, the complainant had been a director and a member of the executive and financial committee, and one of its chief managers. After the stock was subscribed and a portion of it paid, he proposed to take the amount, hold it subject to call, and pay interest at ten per cent. This offer was never distinctly and in form accepted by the board of directors, but the complainant, being a banker at the time, held the money, and interest was credited on the current balances. This was acquiesced in by the directors and by the company for some years. There were other assets which appear at first to have been paid to the treasurer or secretary, and deposited to the credit of the company in the Mechanics' National Bank, of which the plaintiff was president. The money in his hands was used as required. In 1868 a further call was made on the stock subscription, and afterwards, what was obtained, as well as other funds, appears to have been deposited in the Mechanics' National Bank to the credit of the company. In 1870, the complainant was elected treasurer, and so continued up to the time of the fire, October 8 and 9, 1871. In 1870, the complainant objected to paying ten per cent. interest, and after July, 1870, the interest was credited to the company at only eight per cent. After his election as treasurer, the money of the company was permitted to remain in his hands as before, by general acquiescence, and no change was made in the books or reports. No bond or security was ever given by Mr. Scammon as treasurer, nor was any ever required of him.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 4 Chi. Leg. News, 284, contains only a partial report.]

[2] [Reversed in 92 U. S. 362.]

There was nothing on the books of the company to show that the money was loaned to the complainant, but they contain reports made from time to time, with interest credited. The books, reports, and all the records of the company, returned the money in the hands of the complainant as cash, or cash assets, or cash in bank, and after September, 1869, all money was charged to the treasurer. At the time of the fire the complainant had in his hands, under the circumstances above mentioned, the sum of $39,188.33, belonging to the company.

Geo. W. Smith and Samuel W. Fuller, for complainant.

The transaction with complainant was a loan to him. The charge for interest and its payment, the method of depositing and calling for moneys, etc., are all of the character which dealings between borrower and lender naturally and usually bear. No trust attached to the moneys in the hands of borrowers. Prior to the year 1870, and to his appointment as treasurer, complainant stood as any other person to the company, competent to contract with it, and to become a borrower of its moneys. The office of treasurer only required him to keep the custody of moneys which came to him as treasurer. It did not prevent him from becoming either a debtor or creditor of the company. The present relations of the complainant and defendant are the result of an agreement made by the company when solvent, and to this agreement all the officers and stockholders of the company were parties. The policyholders who are now creditors of the company, have received, or are about to receive, the gains which accrued from it, and the complainant should not be excluded from the privileges which belong to a borrower of money having a cross demand. He holds these moneys under an agreement to pay interest, which fact constituted him a debtor of the company, and gives him the right to make this set-off upon the principles established in the case of Drake v. Rollo [Case No. 4,066], heretofore decided by the court.

Williams & Thompson, for assignee.

The evidence of an arrangement or contract was incompetent, having no tendency to establish a contract of loan. Directors, when assembled, must act as a body, and conversation among them is no evidence of their action. Butler v. Cornwall Iron Co., 22 Conn. 335; Essex Turnpike Co. v. Collins, 8 Mass. 292; Bank of Columbia v. Patterson's Adm'r, 7 Cranch [11 U. S.] 299. The charter of the company forbids the loan of the capital stock of the company, except upon security. The contract, therefore, which the complainant attempts to establish, is forbidden by law, and is void. For some general principles applicable to the construction of charters, see Com. v. Erie & N. E. R. Co., 27 Pa. St. 339; Auburn & C. Plank Road Co. v. Douglass, 9 N. Y. 444; Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519–587. Charters of corporations are strictly construed by the courts, and no powers are held to be granted by them except those expressly given, or such as clearly exist by necessary implication. The mode of using the capital of the company is determined by the charter. If the transactions in reference to the funds of the company amount to a loan to one of the directors, without any security whatever, and without any stipulation as to time, then there was a violation of the charter, the contract was void, and the fund was still the fund of the company, in the hands of a director, not invested by contract of loan or otherwise. Directors of corporations are agents and trustees, and their contracts with the corporation are regarded with disfavor, and scrutinized with jealousy and suspicion. The strictest proof of the fact of the contract, and of its fairness and justice, is required. The fund which was taken by the complainant was a trust fund for the payment of the debts of the company. It was charged with this trust before it was taken, and it could not be divested of it by the manipulations of the complainant. Curran v. State of Arkansas, 15 How. [56 U. S.] 304; Wood v. Dummer [Case No. 17,944]; Vose v. Grant, 15 Mass. 505; Spear v. Grant, 16 Mass. 9; Nathan v. Whitlock, 3 Edw. Ch. 228, 9 Paige, 151; Richards v. New Hampshire Ins. Co., 43 N. H. 263; Koehler v. Black River Falls Iron Co., 2 Black [67 U. S.] 715; Robinson v. Smith, 3 Paige, 222; Charitable Corp. v. Sutton, 2 Atk. 400. When it was reported to the stockholders and to the public that these funds were "in hand" or "in bank," the stockholders and the public had a right to assume and believe that so much, at least, of the company's assets were available for the payment of liabilities without set-off, defalcation or discount of any kind; and when they are sought to be charged with a set-off by one of the largest creditors, and one occupying the most intimate relations to the company, the transactions by which such a state of things is brought about, are, in law, fraudulent, and cannot be sustained. One holding a position of trust cannot use it to promote his individual interests by buying, selling, or in any way disposing of the trust property. Butts v. Wood, 37 N. Y. 317; Coleman v. Second Ave. R. Co., 38 N. Y. 201. One occupying the double relation of manager and creditor of a bank, cannot bind the bank by any act of his concerning his own funds. Claflin v. Farmers' & Citizens' Bank, of Long Island, 25 N. Y. 293. As to the effect of the relation of a director to the corporation upon contracts made by him with his company, see Stacy v. State Bank of Illinois, 4 Scam. 91; Benson v. Heathorn, 1 Young & C. Ch. 326. A treasurer is a trustee in the strictest sense of the term, and trustees cannot borrow the trust funds. Perry, Trusts, § 453, and cases

cited in note 9; Ex parte Lacey, 6 Ves. 626; Pocock v. Reddington, 5 Ves. 794.

George W. Smith, in reply.

The power of the directors was limited only by their discretion in the performance of their duties. Sess. Laws Ill. 1853, p. 394, § 4. The non-recorded acts of a corporation may be proved by parol, and it may be bound by an implied contract, provided such act is within the scope of its authority. Abb. Dig. Corp. 223, 281; Maher v. City of Chicago, 38 Ill. 266; Langsdale v. Bonton, 12 Ind. 467. The company had power to make this contract. "The capital stock may be loaned upon promissory notes or bills of exchange, or otherwise, not having more than twelve months to run." Sess. Laws 1853, p. 396, § 13. That the evidence of indebtedness in the form of a note is wanting, is not material, the essential thing being the personal responsibility of the borrower. The account kept by the company with the complainant was a sufficient compliance with the law, and, further, the words "or otherwise," warranted a lending in the manner now in question. Directors are not, by reason of their office, incapacitated from dealing with the corporation as individuals. The same rules apply here that apply to trustees purchasing of the cestui que trust. And the trustee may purchase from the cestui que trust, provided there is a distinct and definite contract, and one in which there is no fraud and no advantage taken. Beeson v. Beeson, 9 Pa. St. 280; Davoue v. Fanning, 2 Johns. Ch. 252. None of the cases cited by the defendant on this point militate against the position assumed by complainant. The stockholders repeatedly applied the interest moneys derived under this contract, as dividends upon the stock notes, and recognized the agreement in every way in which it was possible to do so. The case of Drake v. Rollo [supra], recognized the equitable claim of the complainants in that case, although one of them was at the time the chief officer of the company. His appointment as treasurer made no change in law in the position of the complainant under the contract, as it made none in fact. If there were any disabilities resting upon complainant, the stockholders might, and did, waive them.

DRUMMOND, Circuit Judge. The first question is, whether the plaintiff has the right to set off his losses under policies of the company against his subscription to the stock. In one sense, what the plaintiff owes the company on his stock is a debt due the company. What the company owes the plaintiff on his policies of insurance, is a debt due the plaintiff. The debts are mutual, in that they exist from one to the other reciprocally. And if the debt due from the plaintiff were an ordinary debt, then, as we have already decided in the case of Drake v. Rollo [Case No. 4,066], the set-off would be allowed, although the result would be to pay the plaintiff his claim against the company in preference to other creditors. We are to apply the bankrupt law to the law of the state creating the corporation. The charter authorized the company to commence business on the payment of five per cent. of the amount subscribed, provided the payment of the remainder of the stock was secured.

The purpose of this was to accommodate the stockholders, by permitting secured promises to pay to stand in the place of the money. It was still intended as a fund to protect the creditors of the company, and the charter pointed out the special manner in which the fund should be made available in case of necessity, and which has been followed in this case. So long as the company was solvent, there might not be any serious objection to the stockholder insisting that his loss on a policy should be an answer to a call to pay his subscription to the stock, because if he were to pay his subscription, the company would be obliged immediately to refund to the extent of the loss. In that case no one is injured by the allowance of the set-off. But where the company is bankrupt, it is different. Some one must sustain a loss, and the question is, whether the stockholder who has not paid his stock subscription, and who happens to have a policy on which the company is liable, shall bear his share of the loss, or shall be paid in full to the extent of his subscription. Does the fact of the solvency or bankruptcy make no change in the rule? We think it does, and that there is a difference in principle between the two cases. We have the right to judge of causes from their effects, and to reason accordingly, and certainly we ought not to sanction a rule which produces so much loss to the general creditors of the company, unless by following a different course we trench upon some settled principles of law or equity. Where a party borrows from the capital of the company, takes out a policy, sustains a loss, and in case of insolvency and bankruptcy, claims to set it off, we allow the set-off because he is an ordinary debtor of the company, and therefore comes within the rule that one debt answers another, however hard it may occasionally be, and doubtful on general principles of ethics. But in this case the plaintiff is not an ordinary debtor of the company. The charter has permitted him to retain a part of the capital of the company, and hold it in trust for the creditors. And, it seems to us, that to allow him, under the circumstances of the case, to pay himself in the way he seeks for his losses under the policies, would enable him to take advantage of his fiduciary relations, and obtain a preference over other creditors, not warranted by the equitable principles of the bankrupt law, and contrary to the manifest intent of the charter of the company.

In a court of equity, as a set-off may be allowed which is not sustainable at law, so we suppose, though generally equity follows the

law, there may be a set-off, technically good at law, which, owing to the relations of the parties, may not be admissible in equity. In this case the plaintiff comes into a court of equity for relief, and we think he should first do equity by making good his share of the capital stock, on the strength of which the company obtained its credit, and was enabled to start in business. This has become equity, because he is in one sense a trustee of that fund, and because, further, the company is insolvent and in bankruptcy.

Some very late English authorities were cited by the plaintiff's counsel, which it is insisted, are decisive of this case in favor of the set-off.

The first was In re Duckworth (1866-67) 2 Ch. App. 578. It is difficult to comprehend this case fully without an examination of the various statutes referred to. The party had subscribed for certain shares of stock in a company; he was also a creditor. The company was wound up under a special statute. Afterwards the party made an assignment for the benefit of his creditors, which was registered in bankruptcy. The question was between the representative of the company, under the winding-up act, and the trustees, under the bankruptcy registration, as to the right of the latter to set off the debt from the company to the party, against calls for the subscription, and the court held that the set-off was allowable, on the ground apparently that the case was one of ordinary mutual debts, and so within the statute in bankruptcy as to set-off. It was admitted that if the court of chancery, as such, had been adjudicating the case, the set-off would not be allowed, because the true construction of the winding-up act cut it off. But treating it as a court of bankruptcy, and not as a court of equity, and independent of the differences between that case and this, the reasoning of the court is not very satisfactory. The judge merely says, that it is his opinion that there would be a set-off under a particular section of the statute.

The other case is In re Universal Banking Corp. (1869-70) 5 Ch. App. 492, and is similar to the first and relies upon it. So far as these cases show that a subscriber to the stock of a company may set off a demand due from the company against his subscription, under the circumstances set forth, there may be certain analogies between those cases and this, though the debts are treated throughout as ordinary debts, and no consideration seems to have been given to any relation of trust existing between the parties. And besides, as already intimated, there are various statutes referred to, which may have more or less affected the views of the court. The winding-up act seems to concede that the principle of set-off, in case of contribution, is wrong, as it prohibits it.

These cases were both decided after the passage of our bankrupt law, and therefore could not have entered into the consideration of the law makers. But there are some decisions in this country which do not agree with the principle of those late English cases.

It seemed to be admitted by the counsel for the plaintiff, that in the case of mutual companies, so-called, the rule did not apply of allowing set-off. One case may be referred to —Lawrence v. Nelson, 21 N. Y. 158—where the party had given what is termed a "premium note," and had sustained a loss—one a debt due him from the company, the other by him to the company—and he sought to set off his claim on the policy against his premium note, and the court held that this could not be done in that case, because the note constituted a part of the capital of the company, and in case of insolvency to suffer it to be done would be giving one creditor an unfair advantage over another.

The bankrupt in that case was called a mutual company, though technically a stock company, but we are somewhat at a loss to understand the alleged difference between the two cases; it is true we can call one a joint stock company and the other a mutual company, but names do not change things. In both the "bills payable" constitute a part of the capital of the company, and a trust fund for the benefit of creditors. In both the party owing the bills receivable has met with a loss on a policy of the company. The difference, if any, seems to be in favor of the premium note as claiming a set-off, because that is given for the policy, and by a species of arrangement stands indirectly as a part of the capital, whereas here the bills receivable have to be treated directly as a part of the capital and were given with that special purpose. It seems to us that the argument of the court in the case of Lawrence v. Nelson applies to this case.

It is said that the bankrupt law has not taken away any of the rights of set-off, but has recognized and enforced them. That is so, but the bankrupt law [of 1867 (14 Stat. 517)] was not intended to encourage anything inequitable, or to enable one to take advantage of the bankruptcy of an individual or of a company, to obtain payment in full, while others could only have a pittance, and especially when those seeking the advantage occupied relations of trust.

It follows, from what we have said, that we are of the opinion that the plaintiff has not the right in equity to set off his losses on the policies against his liabilities for the payment of the stock of the company. We think that the obligation of every person who subscribes and owes for stock in such a company as this, is, in case of its insolvency, to pay what he owes for the benefit of the creditors.

The other question is as to the equitable right of set-off of the claims under the policies against the funds which the plaintiff held as the treasurer of the company. Here the position of the plaintiff was unquestionably that of trustee. The only point is, whether that was changed by the contract, or,

rather, understanding of the parties. It may be admitted that the fair inference is that the plaintiff had the right to use the money, because the payment of interest implies that; but it is impossible to consider this part of the case fairly, without bearing in mind the peculiar relations of the parties to each other. If the plaintiff had authority to employ the funds, as treasurer, he was obliged to have them always ready to answer the necessities of the company. He was still, as to them, a trustee, and not an ordinary debtor of the company. It was the case of a trustee using trust funds with the consent of the cestui que trust, but always on the condition that they were to be so used that he could meet the object of the trust.

The evidence shows that at the time of the fire the plaintiff had in his hands the funds of the company. It was as treasurer. Having met with losses on his policies, he claims the right, so to speak, of sequestering the funds in his hands as treasurer to answer his losses as a general creditor of the company. If we concede that this may be permissible in case of an ordinary debtor, we think it would not apply to one occupying the situation of this plaintiff. He would be receiving the obligations of the company upon different terms from an ordinary policy-holder, and he would occupy a vantage ground over others.

There are several difficulties in the way of a set-off on the special facts of the case. The plaintiff was elected treasurer in 1870. Whatever arrangement was made, if at all, was prior to that time. The most that can be said is that after he was elected treasurer, the funds in his hands, while they were, from time to time, reported as cash or capital, drew interest, which was accounted for, and this with the acquiescence of those who may be presumed to represent the company. There was no distinct contract made with him while he was treasurer which would constitute him the debtor, and nothing more, of the company.

The plaintiff was not only the banker of the company, but its treasurer, considered as sustaining those relations to the company pertaining to the office. It is very clear that whatever may have been the view of the plaintiff, the directors and the company did not regard the plaintiff as the mere borrower of the funds in his hands, and before a set-off would be admissible as between the company and its treasurer, in case of the insolvency or bankruptcy of the former, there ought to be satisfactory evidence that he, as to the money, had taken the position of an outside party; in other words, that he had, as to the money, ceased to be the treasurer of the company.

We need not refer to the question, whether if it was a loan to the treasurer by the directors, it was a violation of law, and therefore invalid. We prefer to place it on the ground that under some of the conceded facts of the case, the set-off is not maintainable, unless there is established the simple relation of debtor and creditor. This, we think has not been done, and therefore we overrule the claim of set-off.

The original bill will be dismissed, and a decree will be rendered for the assignee on the cross-bill for $54,145.90, the amount due on both demands.

[On appeal to the supreme court, the decree of this court was reversed. 92 U. S. 362.]

NOTE. As to the right of set-off in cases where assured of an insolvent insurance company are debtors of the corporation, see Drake v. Rollo [Case No. 4,066]; Hitchcock v. Same [Id. 6,535]; Sawyer v. Hoag [Id. 12,400], affirmed by supreme court in 17 Wall. [84 U. S.] 610. This last case is closely allied to the text. Consult Weston v. Barker, 12 Johns. 276.

Case No. 12,436.

SCANLON v. UNION FIRE INS. CO.

[4 Biss. 511.] [1]

Circuit Court, N. D. Illinois. March, 1869.

INSURANCE—CONDITION IN POLICY.

A condition in an insurance policy, avoiding it if the property should be sold or conveyed without the consent of the company, is not broken by the sale of an interest in the property. The policy still covers the interest remaining in the insured.

[Cited in Blackwell v. Insurance Co., 48 Ohio St. 539, 29 N. E. 278; Powers v. Guardian Ins. Co., 136 Mass. 109.]

Action upon an insurance policy for $2,500, dated September 17, 1867. At the time of the issuing of the policy, the plaintiff [John Scanlon] was admitted to be the owner of the property insured, but on the 11th of January, 1868, and previous to the fire, he formed a co-partnership with two other parties, and the property insured was put in as partnership assets. The company claimed that this vitiated the whole policy under the clause providing that, "if the said property shall be sold or conveyed, or if this policy shall be assigned without the consent of the company obtained in writing hereon, then, and in every such case, this policy shall be null and void."

DRUMMOND, District Judge (charging jury). The question is whether there was, within the meaning of this clause in the policy, a sale or conveyance of the property, in such a way as to render it void. It is to be observed that the language of this condition is general, "That if the said property shall be sold or conveyed," &c. It is not, that if the property, or any part of it, or any undivided interest in it, shall be sold or conveyed, the policy shall be void; it is not that if there is any change in the condition of the property, or in the interest of the plaintiff, the policy shall be void; but simply "if the property shall be sold or conveyed." The question is, whether the true construc-

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

tion of this clause is not that, in order to vitiate the policy it is essential that the whole of the interest of the insured in the property shall be sold or conveyed; and such, I think, is the true construction of the condition. In order to avoid the policy, he must sell the whole of his interest in the property, and so long as he holds an interest in the property the policy is binding. It was competent for the insurers to declare that if a part of it were sold, that should avoid the policy. It was also competent for them to declare that if there was any change in the condition or title of the property, that the policy would be void; but that is not this condition. Therefore, I think the policy covers whatever interest Scanlon owned in the property insured after he entered into the articles of co-partnership, and at the time of the loss. It is for you to determine what that interest was.

The jury found for the plaintiff, and assessed his damages at $1,042.50.

NOTE. For further authorities in accordance with the text, see Manley v. Ins. Co. of North America, 1 Lans. 20. Contra, McEwan v. Western Ins. Co., 1 Mich. N. P. 118. Where a policy provides that for "any sale, transfer or change of title in the property," it shall be void, the death of the assured and vesting of the title in his heirs renders the policy void. Lappin v. Charter Oak F. & M. Ins. Co., 58 Barb. 325. Where one sold property for $75,000, retaining a lien for $50,000, it was such a "transfer or change of interest" as to avoid the policy. Bates v. Commercial, etc., Ins. Co., 2 Cin. R. 195. And if a mortgage for the purchase money is taken back the policy is avoided. Savage v. Howard Ins. Co., 52 N. Y. 502, where cases on this point are collated. Contra, that a sale and mortgage back does not "change the title" to avoid the policy, Kitts v. Massasoit Ins. Co., 56 Barb. 177. See, also, Burger v. Farmers' Mut. Ins. Co., 71 Pa. St. 422. Consult, also, 1 Phill. Ins. § 880.

SCANNELL, Ex parte. See Case No. 5,787.

Case No. 12,437.

SCARLETT v. VAN INWAGEN et al.

[9 Biss. 157; 8 Reporter, 673; 12 Chi. Leg. News, 49.] [1]

Circuit Court, N. D. Illinois. Oct., 1879.

PRINCIPAL AND AGENT—SPECIAL CONTRACT—NOT DISCLOSED—LIABILITY OF PRINCIPAL.

1. If an agent acting under a special contract with his principal, fails to disclose the special nature of such contract to those with whom he deals, the principal must suffer the consequence of such neglect on the agent's part.

2. C., a commission merchant or broker in Baltimore, arranged with defendants, who were brokers in Chicago, dealing on the Board of Trade, to send them orders for other parties, for the purchase or sale of grain for future delivery according to the rules of the board. It was also agreed that the defendants in keeping the account of such transactions should know no one but C., but that each account should be in some manner designated so that it might be known who was the party ordering the purchase or sale through C. In this manner the business was carried on for sometime, the plaintiff being one of the parties ordering deals through C. In a suit by plaintiff for the recovery from defendants of the money paid by him to C., which was remitted to defendants, and for the profits realized by the defendants on these orders: *Held*, that the defendants by their agreement with C. to execute his orders, made him their agent to solicit and obtain such orders; that the presumption would be that the defendants acted for the person who gave C. those orders, especially when the name of such principal was disclosed; and that the defendants were liable to plaintiff, and could not hold any of the fund in their hands to reimburse themselves for any claim for balance against C.

3. The defendants were bound to know that they were acting for the plaintiff, and the nature and extent of their relation to him.

[This was a proceeding by Robert W. Scarlett against James Van Inwagen and others.]

Dent & Black, for plaintiff.

Wm. H. King, for defendants.

BLODGETT, District Judge. This is an action for money had and received by the defendants for the plaintiff's use. The facts as shown by the proofs on which the plaintiff claims to recover are, that in January, February and March, 1878, the defendants, Van Inwagen and Hamill, were engaged in business in this city as grain brokers and commission merchants. That much of their trade consisted in making contracts for their customers for the purchase or sale of grain and provisions for future delivery, pursuant to the rules, regulations and usages of the Chicago Board of Trade.

In the early part of January, 1878, one W. A. Cumming, who was a resident of Baltimore, Md., and about to commence business in that city as a commission dealer and broker in breadstuffs, made an agreement with defendants, by which they were to execute such orders as he might send them for the purchase or sale of grain in this market, and that the commissions for such trade should be divided between them, or, to state it more accurately, the defendants' commission for such services was understood to be one-fourth cent per bushel, and a rebate of one-eighth of a cent per bushel was to be made by the defendants to Mr. Cumming on all transactions which they made on his orders.

It was expressly agreed that the defendants were to know no one in these dealings but Cumming; that all the orders which he sent them and which they executed, were to be treated by them as his (Cumming's) own, and that defendants were to look to him, and him alone, for any and all sums that might become due to them in such business.

At the request of Cumming, the defendants agreed to keep the account of the different purchases or sales which they might make on his orders, by such terms—either names or numbers—as he might direct, so as to sepa-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 8 Reporter, 673, contains only a partial report.]

rate or designate on the defendants' books, the different persons or interests for whom Cumming was dealing, or purported to be dealing.

In pursuance of this arrangement, Cumming returned to Baltimore, and opened an office, and held himself out to the public as a broker and commission dealer in breadstuffs. Between January 31, and March 28, 1878, Cumming sent to the defendants for the plaintiff in this suit, divers orders for the purchase and sale of grain. These orders were sent by telegraph, and were all substantially in the following form—with changes as to amounts and dates: "Baltimore, February 15, 1878. Messrs. Van Inwagen & Hamill, Chicago.—At ten, sell 15 March Wheat, Scarlett. (Signed) W. A. C."

Some of the orders were to sell and others to buy grain, but all involved in this suit, except one, which was corrected in a day or two, contained the name of the plaintiff, Scarlett.

The defendants' answers or responses to such order by telegraph were substantially in the following terms: "Chicago, February 15, 1878. W. A. Cumming, Baltimore.—Sold 15 March, Scarlett, at 10. Van I. & H."

I give these copies simply as illustrations of the manner in which this business was transacted. The defendants entered these transactions on a separate page in their ledger, with the word Scarlett written in brackets, immediately following that of Cumming. The accounts of other transactions made by the defendants on orders sent by Cumming, seem to have been kept on the defendants' ledger, in the names of the persons mentioned in the body of the telegram, with the initials W. A. C. in brackets, with the exception of the account involved in this suit, which was kept in the name of W. A. Cumming, with the word Scarlett following Cumming. Whenever they closed out the transactions, they forwarded to Cumming a statement in substantially the following forms:

Account Purchase and Sale.

20,000 bushels wheat, by Van Inwagen & Hamill, Chicago, on account and risk, W. A. Cumming, (Scarlett.)

Account Purchase and Sale, 20,000 Bushels Corn.

By Van Inwagen & Hamill.

Account and risk, W. A. Cumming.

(Scarlett.)

Feb. 8, bought 20 M., 2 corn 42.....	$8,400	
" 18, sold " " " " 42⅜.....	8,475	
		$ 75
Commissions		50
Profit to your credit.....		$ 25

During the time in which these various orders were sent to the defendant by Cumming, for the plaintiff, and frequently in the same telegram containing plaintiff's order were other orders to purchase or sell grain for another name, such as "Kimball," "Kelley," etc.; and as I have said, these transactions were entered upon the defendants' ledger with the name of the party mentioned in the body of the telegram, with Cumming's initials following.

To secure themselves against loss on all these transactions, defendants were in the habit of drawing on Cumming for such sums as they from time to time thought necessary; without applying the proceeds of such drafts to any of Cumming's special orders, but intending to keep margin enough on hand to secure all his orders, treating them for that purpose as one account. The defendants' cash account with Cumming showing him debited with items for commissions, losses and insurance, and credited with proceeds of drafts, rebate, commissions and profits upon the various deals which were had where profits were realized.

About the 20th of March, 1878, the defendants closed out all transactions had by them on Cumming's orders, and the result, stated as one account, left Cumming in debt to the defendants in the sum of $789.29, which was settled by the defendants taking Cumming's notes for that amount, which, though now over-due are not paid. As drafts were made by defendants on Cumming for margins, he would call upon plaintiff for what he stated was his (plaintiff's) proportion of such draft, and the plaintiff paid to Cumming, on such requisition, the aggregate sum of $2,400, as follows: February 8th, $600; February 15th, $300; March 9th, $1,500.

And the profits realized by the orders given by the plaintiff amounted, in all, to $2,250, as shown by the statements rendered by the defendants to Cumming, as follows:

Profits on 20,000 May corn, reported sold February 18.....$	25 00
Profits on 15,000 bushels, March wheat, reported sold Feb'y 16.....	275 00
Profits on 10,000 bushels, March wheat, reported sold Feb'y 25.....	250 00
Profits on 50,000 bushels, April wheat, reported sold March 8.....	1,125 00
Profits on 15,000, April wheat, reported sold March 29.....	575 00
	$2,250 00

The proof also shows that during the time these transactions were being had between Cumming and the plaintiff, Cumming stated to the plaintiff that Scarlett was a particular friend of his, connected with the firm of R. G. Dun & Co., a man of property and thoroughly responsible; and the proof shows that the plaintiff, at the time was a clerk in the firm, and another man named Scarlett, with different initials, was a partner in said firm; and it also appears that the plaintiff knew the form in which the orders were given to defendants, and saw the responses or answers to those orders soon after they were received by Cumming. He was also informed by Cumming of the receipt of statements of profits on these several orders, but he says in his testimony, which is not contradicted, that these statements were not

handed to him, and that he was not aware until some days after all these deals were closed that this statement showed that they were for the account and risk of Cumming only. There is no proof in the case showing that the plaintiff knew the terms of the special arrangement made between Cumming and the defendants, and the affirmative testimony of the plaintiff is that he knew nothing of this special arrangement by which the defendants were to know Cumming only, as the party to whom they were to account.

This suit is now brought by Scarlett to recover from the defendants the sums which he paid to Cumming and which Cumming testifies he remitted to defendants, and the profits realized by defendants on the orders given them by Cumming on the plaintiff's account; it being admitted that plaintiff, before the commencement of this suit, demanded payment of the defendants, stating the ground of his claim, and that defendants refused payment and denied any liability to plaintiff.

The plaintiff claims that Cumming was the agent of the defendants to obtain and transmit orders to them, and that the defendants, in executing these orders, knew, or had such notice as is equivalent to knowledge, that they were executing plaintiff's orders and that Cumming had no interest in them, save his share of the commission.

While it is contended on the part of the defendants that all their dealings were with Cumming; that by their agreement, they were to deal only with him, and were not to know or be responsible to his customers; the sole question in the case is: Does this special agreement with Cumming protect defendants from plaintiff's demand, under the facts in the case?

That the defendants acted in entire good faith, and with the belief that they were responsible only to Cumming, I have no doubt. But does such good faith protect them, if by their dealings they left or placed Cumming in a position where he might impose upon or defraud others? The arrangement, as made between the defendants and Cumming, contemplated that he was to obtain and transmit to them orders from other persons for the purchase and sale of grain. The proof shows the defendants knew Cumming was a man of no means, and not pecuniarily responsible; that he had no money on which to operate on his own account; that he expected to operate for others and made provision for keeping the account of his operations, for different persons, separate on the defendants' books; that as early as the 2d of February, the defendants were informed by letter from Cumming, that Scarlett was a citizen of Baltimore, pecuniarily responsible, and that he had operations in this place through other brokers, before giving the orders to defendants through Cumming. It must also be borne in mind, that the character in which Cumming placed himself was that of a general agent; his sign over the office door, "Commission Dealer in Breadstuffs," indicated that his business was that of a middleman, or negotiator between sellers and buyers; when he, in the due course of his business, proposed to transmit to the defendants plaintiff's order for the purchase or sale of grain, there was nothing done either by Cumming or defendants, to put the plaintiff on notice or inquiry that the defendants became only the agents of Cumming in executing plaintiff's orders. There is certainly, it seems to me, enough in proof to show that the defendants knew, from the inception of plaintiff's dealings with them through Cumming, that Cumming was not giving the orders on his own account.

Defendants, by their agreement to execute Cumming's orders, made him their agent to solicit and obtain such orders, and if Cumming failed to disclose the special nature of his contract with defendants to those with whom he dealt, then defendants should suffer the consequences of their or Cumming's neglect.

What Cumming did was to represent to plaintiff that he was authorized to solicit orders for the purchase or sale of grain in this market, to be executed by the defendants.

This made him the defendants' agent for that purpose, and the presumption would be that the defendants acted for the person who gave him these orders, especially when the name of the principal was disclosed, or sufficient information given to indicate who the principal was. The agreement between Cumming and the defendants must, I think, when all taken together, be construed as a contract on the part of Cumming to indemnify the defendants from any loss that should accrue on orders given through him. He agreed to stand between the defendants and loss, so that they need not look behind him to his customers for any deficiency that might occur in their dealings; but I cannot believe that the court should give the agreement the scope contended for by the learned counsel for the defendants, and hold that persons dealing with them through Cumming, without notice of this limitation on his authority, are bound by it.

It was urged with much earnestness on the trial, by the learned counsel for the defendants, that the defendants should not be made liable beyond the terms of their contract with Cumming, unless the proof shows them guilty of some bad faith to the plaintiff. Two answers to this occur to me: First—It may be said he (Cumming) should not be allowed to hold himself out as general agent for the transaction of this business, when, in fact, he was only a special agent, with limited powers. Secondly—Cumming being defendants' agent, they are bound by any contract he made in their behalf in the due course of the business which both Cumming and the defendants purported to be engaged in; that is, such busi-

ness as is usually done by brokers or commission men.

In Evans v. Waln, 71 Pa. St. 69, Waln employed one Markoe, a broker in Philadelphia, to sell certain railroad stock for him. Markoe placed the stock in the hands of one Wister, another broker in Philadelphia, who sent it to defendants, the firm of Evans, Wharton & Co., brokers in New York, to sell. The defendants sold the stock, but insisted upon deducting from the proceeds a balance due them on general account from Wister, who had failed. On the trial of the case, defendants offered to prove that it was the custom of stockbrokers, when dealing with stockbrokers in other cities, to put all transactions between them into one account, and remit or draw for the general balance. This offer of proof being rejected, on error assigned the court said: "Nor was there any error in rejecting the offer to show that it is the custom of stockbrokers, when dealing with stockbrokers in other cities, to put all the transactions between them into one account, and to remit or draw for the general balance. Such a custom, if proved, would have constituted no defense to the plaintiff's action. Admitting its existence, the defendants had no right to credit Wister's account with the proceeds of the stock. He was not the owner of it, and he had no title or claim to its proceeds. * * * Besides, it does not appear that they did credit him with the proceeds, and no offer was made to show that any such credit was given. It is clear, then, that whether the custom was known to the plaintiff or not, this case is not within its operation. And if so, evidence of its existence would not help the defendants, and was, therefore, rightly rejected. But if the defendants had received the stock from Wister—knowing as they did that it belonged to the plaintiff—they would have had no right to apply the proceeds arising from its sale to the payment of Wister's indebtedness. If there is a custom among stockbrokers, when dealing with others, to appropriate money belonging to the principal to the payment of his broker's indebtedness, the sooner it is abolished the better: 'Malus usus est abolendus.' A custom so iniquitous can never obtain the force or sanction of law, and the marvel is that it should be set up as a defense to this action."

The only distinction between this case and the one now under consideration is, here the defendants set up a special agreement between themselves and Cumming, by which they claim to put all transactions between them "into one account and remit or draw for the general balance." The same principle is sustained by many authorities, among which are: Semenza v. Brinsley, 114 E. C. L. 467; Cheap v. Cramond, 6 E. C. L. 645; Dunlap, Paley, Ag. 330-334.

The case is, in many respects, analogous to that of a member of a copartnership, who specially stipulates that he shall not be liable for the debts of the firm. And yet the courts hold uniformly that such an agreement does not protect the partner from liability to creditors who trust the firm without notice of such special agreement.

In such case, the partner is made liable beyond his contract, on the ground that he cannot be allowed to set up a special contract of this kind against an innocent creditor. Indeed, I incline to the opinion that the liability of defendants in this case could be sustained in the light of most respectable authority on the ground of a partnership between defendants and Cumming. The agreement to participate in commissions making them liable, as partners, as to all business sent them by Cumming.

The evidence shows that the money paid by plaintiff to Cumming, and by him forwarded to defendants, was applied to the credit of Cumming's general account, and that defendants had no notice of the amount so paid by plaintiff. It would seem at first to be a harsh rule to compel defendants to repay to plaintiff money which they never knew they received from him, but the answer is that it was their duty to know whose money Cumming remitted to them. If, as I have said, they are bound to know they were acting for plaintiff, then they were bound to know the nature and extent of their relation to him.

Case No. 12,438.

In re SCHAPTER.

[9 N. B. R. 324.] [1]

District Court, S. D. New York. 1874.

BANKRUPTCY—REMOVAL OF ASSIGNEE—FAILURE TO ATTEND REFERENCE.

1. Where an assignee applies to the court for directions, and a reference is ordered to obtain the necessary information upon which to base the direction, and the assignee fails to attend the reference, but acts independently, he will be held to the strictest account.

2. Though the facts disclosed in a case may justify the removal of an assignee, he cannot be removed except upon an application made for this purpose, under section eighteen, general order twenty-three and form number forty-one.

[In the matter of the application of Samuel Schapter, an assignee, for directions.]

D. C. Calvin, for creditor.

C. M. Dickinson, for assignee.

BLATCHFORD, District Judge. The assignee, on the 16th of July, 1873, twenty-six days after his appointment, presented to this court a petition setting forth that, at the time of his appointment, the principal part of the property of the bankrupt consisted of a mortgage on certain personal property in the building known as the "Atheneum Theatre, No. 585 Broadway, New York," and of a mortgage on the lease of said theatre; that such personal property was the chairs and other furniture of a theatre; that the two

[1] [Reprinted by permission.]

mortgages were given January 21st, 1873, to one Traphagen, in trust for the bankrupt, by a son of the bankrupt, on the conveyance of the personal property and the assignment of the lease by the bankrupt to his said son; that five days after the appointment of the assignee Traphagen assigned the mortgages to the assignee; that they are given to secure twenty thousand dollars, on which about two thousand five hundred dollars has been paid; that said conveyance and said assignment to the bankrupt's son were without consideration and for the purpose of placing the same beyond the reach of the bankrupt's creditors; that shortly before the appointment of the assignee the son abandoned the theatre; that the assignee took possession of the premises and foreclosed the mortgage on said property, and it was sold under such foreclosure on the 5th of July, 1873, and bidden in by the assignee, as such, and for the benefit of the bankrupt's estate, for two thousand five hundred dollars, there being no other bidders at the sale; that at the time he took possession of said premises and said property the agent of the owner of said property agreed to recognize him as rightfully in possession of said property, and to maintain him in said possession if he would pay, from that time, the weekly rent of two hundred and twelve dollars and fifty cents, payable by the terms of the lease; that he has since paid it in order to protect said property; that a large part of said personal property consists of articles adapted solely to theatrical purposes, and could not be used to advantage in any other theatre; that if said personal property were sold now and sold separately from said lease, it would be almost entirely sacrificed; that the lease does not expire until May 1st, 1876; that the season for theatrical performances does not open until about the 1st of September, and said property cannot now be sold without great loss to the bankrupt's estate; that the mortgage on the lease was given to secure the payments on the mortgage of personal property, and there is now due on the latter about ten thousand dollars; and that the assignee is now negotiating with parties who desire to lease said theatre until the theatrical season opens, at a rent at least equal to the amount required to be paid by said lease, and is assured that if he can obtain authority to lease said theatre he can at once effect a lease of the same that will save the estate of the bankrupt from further expense until the mortgage on said lease can be foreclosed, and he acquire title to all of the same, and offer for sale together said personal property and said lease.

The prayer of the petition is for an order authorizing the assignee to lease said premises until he can acquire title to and sell said lease, and authorizing him to pay the rent of said premises until he can let said premises, and dispose of said property and lease. This petition was sworn to by the assignee on the 15th of July, 1873. Upon it an order was made by the court referring it to the register in charge of the case to inquire into the facts set forth in it and in certain affidavits which accompanied it, and, if in his judgment for the best interests of the estate, to make an order authorizing the assignee to sublet the said premises and the said personal property upon such terms as the assignee and register shall approve, and to pay the rent of said premises until he can rent the same, or sell such interest as he may have in said lease and said personal property, on terms to be approved by the assignee and the register.

It is clear, from the language of the petition, that the assignee was of opinion that he had not acquired title to the lease; that he desired to do so by foreclosing the mortgage thereon; that he was of opinion that he had acquired title to the personal property by foreclosing the mortgage thereon; and that he contemplated letting the premises and the personal property only until about the 1st of September; and was negotiating with parties who desired to lease the theatre until that time, at a rent sufficient to save the estate from expense. The manifest purport of the petition is, that the mortgage on the lease could be foreclosed by the 1st of September, so as then to have a sale of the lease and of the personal property together, and that until that time it was possible and desirable to sublet the theatre and let the personal property, so as to cover the rent accruing on the lease. Such was the intent of the order made on the petition. The lease is for four years from May 1st, 1872, at a weekly rent, in advance, of one hundred and seventy-five dollars, from May 1st, 1872, to May 1st, 1873, of two hundred and twelve dollars and fifty cents from May 1st, 1873, to May 1st, 1874, and of two hundred and twenty-five dollars from May 1st, 1874, to May 1st, 1876.

The assignee took no steps under the order of reference to the register, but made efforts to sublet the premises, and finally, as the best thing he could do, let them and the personal property to one Sherman, until the 1st of August, 1874, at a weekly rent of two hundred and twenty-five dollars until October 1st, 1873, of two hundred and thirty-seven dollars and fifty cents, thereafter and until January 1st, 1874, and of two hundred and fifty dollars thereafter and until August 1st, 1874. Sherman, after a week, turned the premises and property over to the bankrupt, he agreeing to perform the terms of Sherman's hiring from the assignee. The bankrupt turned the premises and property over to one Craig, and Craig is now receiving a rent of three hundred and twenty-five dollars per week therefor. On the 5th of August, 1873, Charles Devlin, a creditor of the bankrupt, for a debt duly proved, presented a petition to the court setting forth that the purchase made by the assignee on the foreclosure was made in the interest of the bankrupt; that the sale was so conducted as to prevent fair competition; that the notice

published of the mortgage sale (it being a foreclosure by advertisement) contained no notice as to who was the owner of the property or of the mortgage, or for whose benefit the mortgage was to be foreclosed; that while a material and valuable part of said lease consisted of the right of ingress and egress to and from the premises from Broadway, no reference thereto was made in such notice; nor did the notice state that the property was theatre property, or what was the unexpired term of the lease; that since the sale the bankrupt has assumed the possession and control of the property, and claims the ownership and management thereof; that the petitioner is apprehensive that under the said order of reference a hearing may be had before the register without any notice to the creditors, and that, by the connivance of the assignee and the bankrupt, the property may be improvidently leased secretly and for the benefit of the bankrupt, for the reasons: that the assignee has frequently held private consultations with the bankrupt, and has placed the property under his care and control, and has refused to communicate his proceedings to the creditors; that the assignee has received an offer to rent the premises from one Wolcott, a theatrical agent, and, instead of answering the offer, immediately communicated it to the bankrupt, who boasts that he has control of the same and has paid the rent of the premises, and intends to keep the former occupants and the petitioner (who had an assignment of said property and lease as security for advances made to the bankrupt's son, and who is interested as such assignee as well as creditor of the bankrupt, in procuring the best possible sale of said property) out of the same; and that the present time (the petition being sworn to August 5th, 1873), is a favorable one for the sale of said property, as theatrical managers are now seeking engagements for the coming season, and the property can now be disposed of at the best advantage for the creditors of the bankrupt. The prayer of the petition is that the property may be sold by the assignee on due and proper notice to all the parties interested, including the creditors of the bankrupt, and that the order of July 16th, 1873, may be modified to that effect.

On the 5th of August, 1873, the court made an order of reference to take testimony as to the facts set forth in such petition, and particularly as to the propriety of the sale of the property mentioned in the petition. The testimony so taken, which is now presented, occupied much time in the taking and covered a wide range. It establishes, I think, the fact that the foreclosure proceedings were so conducted as not to be likely to produce competition in bidding at the sale, or any such price for the property as would probably have been produced if the proceedings had been conducted properly and solely with a view to obtain the largest price, on a sale which could have given to the purchaser a good title to the lease.

The published notice of sale is open to the criticisms made on it in the petition of Devlin, and the entire proceedings at the sale were such as to lead to the inference that no idea that there was to be or should be a bona fide sale could have been entertained by any of the parties concerned. The evidence shows that both the lease and the personal property were pretended to be sold, and that the assignee bid in both of them for the benefit of the estate. Thus far there was no prejudice to the estate. In one way there was a benefit to it, for the foreclosure as to the movable personal property was regular, and the title to it thus became absolutely vested in the assignee. But the foreclosure by advertisement, of the lease, could amount to nothing, on such length of notice as was given and published, as a statutory foreclosure. Yet it was not wise to sell the movable personal property apart from a sale of the lease, because a sale of the two together would produce more for the estate than sales of the two separately. The effect, however, of a pretended purchase of the lease by the assignee, and of his claim of title, as assignee, to the possession of the premises, and of the movable property, was to deter all persons from resisting his claim, as an officer of this court, and to enable him to manage the property as he pleased. What has since occurred, coupled with the failure of the assignee, to proceed and regularly foreclose the mortgage on the lease, and the other evidence in the case, has satisfied me that the assignee suffered himself to be made use of to promote a scheme to get the property back into the hands of the bankrupt, by tying it up through a letting which should prevent its being sold till the letting should expire. The lease being limited in duration, every week of it that expired it was of so much less value as a whole, its only value consisting in what it could be sublet for per week, over and above the weekly rent, to the original lessors. Hence, the only way to realize the largest possible sum for it, for the benefit of the creditors of the estate, was to foreclose as soon as possible the mortgage on the lease, and sell the lease and with it the movable property. Instead of that, the right of occupation for a year was parted with, presumably postponing a sale for that period. This was done without the sanction of the court, and in the face of the petition by the assignee, and the order of reference thereon, before referred to.

It is true that the assignee secured, by his leasing to Sherman, over and above the rent to the original lessors, twelve dollars and fifty cents a week until October 1st, 1873, and twenty-five dollars a week thereafter and until January 1st, 1874, and thirty-seven dollars and fifty cents a week thereafter and until May 1st, 1874, and twenty-five dollars

a week thereafter and until August 1st, 1874, and that he must account to the estate in respect thereof. It is true, also, that some prompt letting of the premises was necessary either to save the lease from being forfeited for non-payment of rent, or to save the estate from being burdened with the expense of paying the rent without having it reimbursed. But no letting such as this, without the authority of the court, and contrary to what had been represented in the petition of the assignee to be the proper course, and attended by all the circumstances which preceded and surrounded this letting, can be sanctioned by the court. So long as the owner of the premises recognizes Craig as rightfully in possession through the assignee, under the lease, and so long as Craig claims such possession under the assignee, and the occupants under Craig recognize their occupation under him, and the owner receives his rent from Craig, it will be proper to hold the assignee to account in respect of rent for the subletting, (but at what rate will remain to be determined) although the assignee really had no title to the lease so as to sublet it, but was all the time only the owner of a mortgage on it. That the lease is valuable is shown by what has transpired. It seems to be worth at present over one hundred dollars a week; but as the assignee only owns a mortgage on it he cannot sell it except by foreclosing such mortgage. The mortgage ought to be foreclosed at once, and the lease be sold. The letting of the premises and of the movable property, not having been authorized or sanctioned by the court, those who are in possession under such letting can claim no rights as against such order in the premises as the court may now make.

In regard to the suggestion made on the agreement, that the assignee ought to be removed, the petition does not ask for it, and proceedings for the removal of an assignee must be conducted in accordance with section eighteen of the act, and general order number twenty-three, and form number forty-one.

An order will be entered in accordance with this opinion.

Case No. 12,439.

SCHARLOCK v. The GLOBE.

[Crabbe, 278.] [1]

District Court, E. D. Pennsylvania. Aug. 5, 1839.

SHIPPING—MATE—NEGLIGENCE IN LOADING—LIABILITY—WAGES.

1. Where it is endeavored to charge a mate, on the ground of negligence, for a difference between the amount of goods landed from a vessel, and that required by the invoice, it must be clearly shown what amount was placed on board, and what landed.

2. A mate cannot be charged, on account of negligence, for not keeping a proper account of the goods taken on board a vessel, when he was ordered on other duty, by the captain, during the loading of the ship.

This was a libel, by [Charles H. Scharlock] a mate [against the bark Globe, Ames, master] for wages.

It was alleged, in the answer, that, when the cargo of the Globe was landed, at Philadelphia, there were two hogsheads of sugar less than the number required by the invoice; and that the libellant was justly answerable for this deficiency, because of his negligence in keeping the accounts.

Mr. Hirst, for libellant.

J. Campbell, for respondent.

HOPKINSON, District Judge. The amount of wages claimed is not disputed, but a déduction is claimed for two hogsheads of sugar, said to be short in the cargo. The libellant was first mate of the barque; and it is said that he is liable for this deficiency. We must first ascertain that there is a deficiency, that is, that all the cargo put on board, at Pernambuco, has not been delivered here. To ascertain this we should know what was put on board, and what was delivered. We know neither, accurately. As to what was put on board, we have an invoice and bill of lading. The first was made in the counting-house of the shippers, who can answer for its accuracy. Did that quantity leave the stores? Was it delivered to the vessel? It had to go from the stores to the wharf, or beach, and thence, by lighters, to the vessel. Who kept the account? Who testifies what went from the stores, and what was put on board? Why may not the loss have happened in the transportation? We do not know what was put on board; the accounts are various, some making it more, some less, than the invoice. What was landed here? We have no satisfactory evidence. A young man, who kept no tally or account but by his memory, says that there were 1777 hogsheads landed, that is, two hogsheads short. But in so large a number it is not possible to rely upon his unsupported accuracy. The mate, who did keep a tally, told some of the witnesses, on the wharf, that there were 1780, that is, one too many. There is no certainty here. But the counsel for the respondent has put his case on the only ground it could rest upon. Fraud or embezzlement is not pretended, but the charge is negligence; and the negligence was this, that, it being the duty of the first mate to attend to shipping the cargo, and to see that it is all right and corresponds with the invoice and bill of lading, if the invoice and bill of lading had a greater number than actually came on board, he should have corrected the error.

These principles are, in general, true; but how do they apply to this case? In the first place, we have no evidence that the mate was ever informed what was in the bill of lading or invoice; or that they were ever shown to

[1] [Reported by William H. Crabbe, Esq.]

him, or attempted to be compared with his account of the cargo. The captain signed the bill of lading in conformity with the invoice, and does not seem to have inquired further about it. But, secondly, a more satisfactory answer is, that this business of taking in the cargo, was not wholly trusted to the mate; that he was sent away, by the captain, on other business, and a great part of the sugar, above four hundred barrels, were taken in, of which no account was taken by anybody. We cannot make the mate answerable for this negligence of other persons, while he was absent, on other duty.

The account will stand thus:

Whole amount of wages,	$128 00
Credits allowed,	53 80
	$74 20

Decree for the libellant for $74 20, and costs.

SCHATZ (SCHLITZ v.). See Case No. 12,459.

Case No. 12,440.

SCHAUM v. BAKER et al.

[2 Am. Law T. (N. S.) 15.]

Circuit Court D. Maryland. Nov. 1874.

PATENTS—ASSIGNMENT UNDER INSOLVENT LAWS—PATENTEE'S TITLE.

Of the effect of a general assignment under state insolvent laws upon the title of a patentee during original and extended term of the patent. Use as evidence of utility.

Action on the case for infringement of patent. The plaintiff proved that his intestate, Frederick Schaum, was the first and original inventor of certain new and useful improvements in the construction of glass furnaces, for which letters patent were granted to his said intestate on the 25th of April, A. D. 1854, application therefor having been made on the 17th of June, A. D. 1853; that said letters patent were extended to plaintiff, under Act 1836, § 15 [5 Stat. 123], on the 23d day of April, A. D. 1868. The improvement claimed was the making of the external and internal configuration of the breastwork of the furnace wall with re-entering portions, so as to partly embrace the pots and furnish room for additional or extra teaze or ring holes. That the defendants had, during a period of fourteen months, constructed and used furnaces embodying the configuration of the breast wall, as described in said letters patent, was not denied. Plaintiff offered evidence to prove that, by the use of the said improvement, one-third more ware could be made at the same expense, which defendants denied. Plaintiff further proved that the said improvements were extensively used by defendants and others. Defendants proved that, in 1856, plaintiff's intestate applied for the benefit of the insolvent laws of the state of Maryland, and executed an assignment of all his property, estate, rights, and claims to a permanent trustee for the benefit of his creditors. Defendants further proved that their firm, Baker Bros. & Co., was formed in July, 1872; the suit being instituted in October, 1873.

T. Alex. Seth and Harry E. Mann, for plaintiff.

F. J. Brown and F. W. Brune, contra.

GILES, District Judge (charging jury). 1. That the patent of Frederick Schaum was for two purposes: The construction of glass furnaces by making the external and internal configuration of the breastwork of the furnace wall with re-entering portions, so as—First, to partly embrace the pots; and, secondly, to furnish room for additional or extra teaze or ring holes, more than were to be found in the glass furnaces known and constructed at or before the date of the patent.

2. That the plaintiff was entitled to recover if the jury should believe that plaintiff's intestate was the first and original inventor of a new and useful improvement in glass furnaces, for which he received letters patent, and that said letters patent were extended to the plaintiff, the administrator of the original patentee, then deceased, and should further find that the defendants had, since the granting of said extension and since July 1, 1872, constructed and used a glass furnace or furnaces substantially embracing the improvements described in said letters patent.

3. That, considering the question of utility in the preceding instruction, the jury are instructed that the fact of extensive use by defendants and others is evidence of utility.

4. That, if the jury believe that plaintiff's intestate, Frederick Schaum, in 1856, applied for the benefit of the insolvent laws, and made an assignment to his permanent trustee, the plaintiff is not entitled to recover for breaches of the original patent.

The defendants offered the following prayer, which was rejected:

That, if the jury find that the said Frederick Schaum applied for the benefit of the insolvent laws of Maryland, in 1856, and that William George Read was duly appointed his trustee, then all the interest of said insolvent in said patent and his right to an extension passed to said trustee, and the plaintiff is not entitled to recover.

Verdict for plaintiff.

Case No. 12,441.

Ex parte SCHAUMBURG.

[1 Hayw. & H. 249.] [1]

Circuit Court, District of Columbia. Dec. 31, 1846.

PRESIDENT—REMOVAL FROM OFFICE.

On a petition for a rule on the president of the United States, the secretary of war and the adjutant general of the army of the United states, to show cause why a writ of mandamus shall not issue to reinstate the petitioner to his rank and position in the army register, *held*, that the power to remove vests in the power to appoint; that this power is a discretionary one conferred by the constitution upon the executive, and cannot be questioned by the courts, and that mandamus will not lie in such case.

The petitioner [James W. Schaumburg] claimed that he had a legal vested right to the office of first lieutenant in the 1st regiment of dragoons in the service of the United States, to rank from March 1, 1836, and that in violation of his rights and of the law he is kept out of the use, enjoyment, proper service and emoluments and honor of said office.

Geo. M. Bibb, John H. Eaton, and Richard S. Coxe, for petitioner.

On the above application THE COURT made the following decision:

The application in this case is for a rule to show cause why a mandamus should not issue, &c., to restore Lieutenant Schaumburg to the service and the army register as first lieutenant of dragoons, from which official army register President Polk ordered the name of James W. Schaumburg, Esq., to be erased, as having been irregularly printed there, but without reproach to Mr. Schaumburg. We are perfectly satisfied that the rule ought not to be granted. We think the subject of the petition is one which the constitution has confided exclusively to the executive discretionary power, and that it is not for this court to inquire into the grounds or reasons of the president's action in the case. The appointment was made by the president and confirmed by the senate. The commission was during pleasure. Whose pleasure? That of the appointing power, no doubt; and as incident to the power of appointing in such cases, is the power of removal.

In Ex parte Honer, [see Ex parte Hennen, 13 Pet. (38 U. S.) 259], Judge Story, in delivering the opinion of the court, says: "In the absence of all constitutional provision or statutory regulation, it would seem to be sound and necessary rule to consider the power of removal as incident to the power of appointment; and it has been settled that in all such cases, although the officer was appointed by the president and senate, the power of such removal is vested in the president alone."

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

Case No. 12,442.

SCHAUMBURG v. UNITED STATES.

[35 Leg. Int. 29; 25 Pittsb. Leg. J. 99; 13 Phila. 466; 5 Reporter, 551; 17 Alb. Law J. 172; [1] 24 Int. Rev. Rec. 76.]

Circuit Court, E. D. Pennsylvania. Jan. 8, 1878. [2]

UNITED STATES — ACTION AGAINST PAYMASTER — CLAIM OF SET-OFF.

The act of March 3, 1797 [1 Stat. 515], does not contemplate the adjudication of any sum against the United States. A defendant who is sued by the United States is not entitled to a finding in any form of a sum due him by the United States in excess of the claim for which he was sued.

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

[This was an action by the United States against James W. Schaumburg. Upon refusal in the court below to give certain instructions to the jury (case unreported) the defendant brought error.]

Chas. Henry Jones and Geo. W. Biddle, for plaintiff in error.

J. K. Valentine, U. S. Dist. Atty., and Hood Gilpin, Asst. U. S. Dist. Atty., for defendant in error.

McKENNAN, Circuit Judge. This suit was brought by the United States, in the court below, upon the bond of the plaintiff in error, as paymaster in the army, to recover a balance of $320, due by him in settlement of his accounts. At the trial of the cause he exhibited proof that he was a commissioned officer of the army of the United States, and that there was due to him a large sum for arrears of his pay, as such officer. He, thereupon, asked the court to instruct the jury "that the defendant as well as the plaintiff is entitled to a finding by the jury, of the credits, by stated amounts, in which the court may enter judgment, the finding to be in the form of a special verdict." This instruction the court refused, adding, "that as this credit is admitted to exceed the whole of the plaintiff's demand, the verdict should be for the defendant," and so the jury found generally. The refusal of the court to give this instruction is assigned for error in this court.

It is not contended, nor could it be, that the plaintiff in error could maintain a suit elsewhere than in the court of claims, against the United States for its indebtedness to him, nor that he could assert it as a counter demand to the claim in suit, without the authority of an act of congress to that end. This latter privilege is accorded to him, if at all, by the act of March 3, 1797 (1 Stat. 515), which provides, that where a suit is instituted against any person indebted to the United States, the court shall, on motion,

[1] [17 Alb. Law J. 172, contains only a partial report.]

[2] [Affirmed in 103 U. S. 667.]

grant judgment at the return term, unless the defendant shall, in open court, make oath or affirmation that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the consideration of the accounting officers of the treasury and rejected, specifying each particular claim so rejected, in the affidavit. It further provides, that in such suits, no claim for a credit shall be admitted upon the trial but such as shall appear to have been submitted to the accounting officers of the treasury for their examination, and by them disallowed, unless it shall appear that the defendant, at the time of trial, is in possession of vouchers, not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States, or some unavoidable accident. Now there is nothing in the terms of this act which authorises any federal court to adjudge any sum against the United States, or to render judgment for any balance of accounts in favor of a defendant who is sued by the United States, or which indicates any intended abdication by the United States of its immunity from suit. As was held in Reeside v. Walker, 11 How. [52 U. S.] 290, to permit a demand in set-off to become the foundation of a judgment would be the same thing as sustaining the prosecution of a suit. Such a proceeding could not be upheld against the government except by a mere evasion, which would be as useless in the end, "as it would be derogatory to judicial fairness." So also in De Groot v. U. S., 5 Wall. [72 U. S.] 431, the court say: "No judgment can be rendered against the government, although it may be judicially ascertained that, on striking a balance of just demands, the government is indebted to the defendant in an ascertained amount." See, also, U. S. v. Eckford, 6 Wall. [73 U. S.] 484. These cases decisively sustain the refusal of the court below to give the instruction asked for, in the form in which it was asked. But the plaintiff in error was not entitled to a finding in any form, of a sum due him by the United States in excess of the claim for which he was sued. He cannot derive any aid, in this direction, from any state law or practice touching the right of defalcation. "This is a question which arises exclusively under the acts of congress, and no local law or usage can have any influence upon it. The rule as to set-off in such cases must be uniform in the different states, for it constitutes the law of the courts of the United States in a matter which relates to the federal government." U. S. v. Robeson, 9 Pet. [34 U. S.] 324. The nature and extent of his right then must be determined by the import of the act of congress conferring it.

Now there is no good reason why an act of congress should be construed to permit a defendant, who is in default in the payment of his debt to the government, in effect and substance, to maintain a suit against it, when a like privilege is denied to all others who are, in no sense, delinquent, unless the act plainly says so. But, as was before said, the act of 1797, does not contemplate the adjudication of any sum against the United States. It merely enables a defendant to obtain credits, to which he is "equitably entitled," which have been disallowed by the proper accounting officers, as against the debt sued for. The authorised use of them is strictly defensive, and when he has proved a sufficient counter demand to extinguish the claim against him, its statutory efficiency is completely exhausted. So it is expressly held in U. S. v. Eckford, supra, where the court say: "Such a claim for a credit shall be admitted, and if proved, should be allowed in reduction of the alleged indebtedness of the defendant, even to the discharge of the entire claim of the plaintiffs, but there is not a word in the provision conferring any jurisdiction upon the court to determine that the United States is indebted to the defendant for any balance, or to render judgment in his favor for the excess of the set-off over his indebtedness as proved in the trial." In every aspect of the question then the instruction given by the court to the jury was correct. This is practically decisive of every other question in the cause; and it is, therefore, unnecessary to consider the remaining errors assigned upon the record. Even if sustained, no result more favorable to the plaintiff in error could be produced than the one attained. In any phase of the evidence offered by him he could not claim more than a general verdict in his favor, and that the jury, under the direction of the court, have found. The judgment is affirmed.

[This judgment was affirmed by the supreme court, where it was carried on writ of error. 103 U. S. 667.]

Case No. 12,443.

SCHEDDA et al. v. SAWYER.

[4 McLean, 181.] [1]

Circuit Court, D. Ohio. July Term, 1846.

TAX TITLE—PURCHASE BY AGENT—RESPONSIBILITY TO PRINCIPAL—HEIRS—ACT DONE IN NAME OF DECEASED PERSON.

1. A person who assumes to act as agent in redeeming land sold for taxes, is held to have acted in that capacity. And if he shall take advantage of such act, to obtain a title in his own name, for the land, and by a subsequent procedure to perfect the title, he is responsible in the character he at first assumed, and will be held to answer to those in whom the title was vested.

[See Baker v. Whiting, Case No. 787.]

[Cited in Krutz v. Fisher, 8 Kan. 98; Murdock v. Milner, 84 Mo. 103; Onsen v. Cown, 22 Wis. 336.]

2. A demurrer to a bill, admitting the above facts, is overruled, and the defendant required to answer.

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

3. A title made in the name of a deceased person, under the act of congress of 1836 [5 Stat. 31] enures to the benefit of his heirs.

[Cited in Lamb v. Starr, Case No. 8,022.]

[Cited in brief in Johnson v. Parcels, 48 Mo. 549.]

4. At common law any act is void, which is done in the name of a person deceased.

[This was a bill in equity by Ann C. H. Schedda and others against Nathaniel Sawyer. Heard on demurrer.]

Mr. Stanbery, for complainants.

Taft & Key, for defendant.

OPINION OF THE COURT. In this case the bill states that on the —— day of 178– a Virginia military land warrant for two thousand six hundred and sixty-six and two-thirds acres was issued to William Ludeman, for his services, etc., numbered 818, which was deposited shortly after, in the office of the principal surveyor, for entry. That on the 24th of June, 1784, one thousand acres were entered by virtue of said warrant by entry No. 165, in Kentucky, leaving one thousand six hundred and sixty-six and two-thirds acres to be located in the Virginia military district in Ohio. That in March, 1786, said William Ludeman died, at Richmond, Virginia, leaving a last will made 1st March, 1786, by which he devised to his sisters, Christina, Sophia and Catharine Juliana, said one thousand acres certificate, and one thousand six hundred and sixty-six and two-thirds acres of land, which are to be located on the Scioto. That the residue of said warrant, was located in two entries, No. 684 for one thousand four hundred and ninety-four acres, August 7th, 1787, and surveyed May 27th, 1794. And No. 3380 for one hundred and seventy-two and two-thirds acres, 25th August, 1798, and surveyed September 1st, 1798. That said Christina intermarried with Francis W. Hampe, both of whom are dead, since the death of the testator, leaving heirs, all of whom are complainants. That the said Catharine, after the death of the testator, died, leaving several heirs, who are also complainants. That on the 29th December, 1823, the said entry, 684, was sold for taxes, and penalties, etc., for the years 1821, '22 and '23, to one Joseph Riggs, for forty-nine dollars and eighty-five cents and three mills, and said Riggs received from the county auditor a certificate of purchase. That about the 9th of August, 1824, the defendant, Sawyer, applied to Riggs to redeem said lands, stating to him that he was the agent of Ludeman's heirs, or of persons acting for them, and seeking to redeem as such agent. That Riggs, on the 9th of August, 1824, received from defendant the amount paid for the taxes, and assigned said certificate to him. That said land was, at that time, worth from two to five thousand dollars. That on the 9th of October, 1824, defendant, to carry out his fraud, presented said certificate to the county auditor, and procured a deed to himself for said land, from the auditor. That to strengthen his said fraudulent title, defendant, at the March term, 1825, of Adams common pleas, filed his bill quia timet, against the unknown heirs of William Ludeman, and claiming a decree on the footing of his said tax title. And at the October term, 1826, of said common pleas, after publication, against said unknown heirs, a decree pro confesso passed, that said unknown heirs should release all title to said land to Sawyer, and in default thereof, that the decree should operate as such conveyance. That about the 23d May, 1829, the defendant obtained from the surveyor of military district a copy of the plat and certificate of survey, by representing himself as agent for Ludeman's heirs, or by some other means; and on the 26th November, 1830, obtained a patent for said land in his own name. That said decree and patent were obtained by fraud, and by fraudulent statements of the defendant, in order to strengthen his title under the tax sale. That said patent was improperly obtained by defendant; but it conferred on him the legal title which he holds in equity, in trust for complainants. That afterward, defendant, by representing himself to be the agent for Ludeman's heirs, obtained from the surveyor the plat and certificate of survey made in the other entry for 172 acres, and caused a patent to issue thereon, to William Ludeman, which patent is now in defendant's hands. That the complainants, and those under whom they claim, have always been out of the United States, and had no knowledge, until within the last two or three years, of the fraud of defendant. That since the date of the patent for 684, defendant has sold to innocent purchasers parcels of said tract, of whose names complainants are ignorant. That large sums are due from such purchasers, etc. And the bill prays for an account, and for land unsold, etc.

The defendant filed a demurrer to the bill. It is contended the complainants show no title, because the entry No. 684, for 1494 acres, was made Aug. 7th, 1787, and the survey thereof was made May 27th, 1794, all subsequently to Ludeman's death, which happened in March, 1786. From these facts it is supposed that the entry and survey, having been made in the name of a dead person, are void. In the case of Galt v. Galloway, 4 Pet. [29 U. S.] 332, and also in McDonald v. Smalley, 6 Pet. [31 U. S.] 261, the supreme court held that entries in the name of deceased persons were void. But the counsel insists that the court has never decided that a survey executed prior to the act of congress of the 2d of March, 1807 [2 Stat. 424], was void. The proviso in that act is, "that no location, as aforesaid, within the above-mentioned tract shall, after the passing of this act, be made on tracts of land for which patents had previously issued, or which had been previously surveyed." This, it is urged protected the

land from a new location, subsequent to the act. This will probably be the decision of the supreme court when the question shall arise in that court. It has decided that the entry in the name of a dead man is void, on the ground that at common law, all transactions in the name of a deceased person are void. And it may not be clear of doubt, that the above act of congress intended to protect a void survey. A survey without a warrant would be literally within the law; and yet such a survey, being a fraud on the government, could hardly claim protection under the act. The case where an entry is made in the name of a deceased person, is not fraudulent—it is only void, having been made in the name of a person who can have no agency in matters which belong to the living.

By the act of 20th May, 1836, congress have provided that patents issued in the name of deceased persons, shall enure to their heirs, as fully as if the grant had been made to the decedent during life. This is undoubtedly a proper statute, as it relieves from a mistake in behalf of heirs.

But there is another ground on which the complainants may safely rest; and that is, the principle recognized by the court in the case of Galloway v. Finley, 12 Pet. [37 U. S.] 264. The defendant Sawyer, from the statements in the bill, all of which are admitted by the demurrer, whether authorized or not, assumed to act as the agent of the complainants, or of those under whom they claim, in redeeming the land from the tax sale. And, in view of this question, it is immaterial whether he acted under authority or not. He assumed so to act, and in equity he will be considered as so acting. And he is now estopped from denying the title under which the complainants claim. It is the title under which his title originated. Having, by a most singular course of proceeding, endeavored to strengthen this title, and make it his own, he is not now permitted to impugn it, and still claim under it.

The next ground assumed in support of the demurrer is, that the decree of the court of Adams county is final and conclusive, and can not be impeached collaterally, or in any other mode, except by an appeal or a bill of review. The answer to this argument is, that the bill alleges that the decree was obtained through fraud. This is the allegation of the bill, and the demurrer admits the truth of it. All judgments may be impeached for fraud. There is no human transaction, however solemn, but what may be impeached on this ground.

It is argued that the bill does not charge an agency in redeeming the land from the tax sale. The bill declares that he represented himself as agent for complainants. Unless he acted in that capacity, having no interest in the land, he had no right to redeem it. He is not only alleged in the bill to have acted as agent, but the act itself shows that he so acted.

The title of the defendant must be considered as a whole, and not as susceptible of being divided into parts. From the statements in the bill, there seems to have been a settled purpose, by the defendant, to possess himself of the land, from the first step, until the right, as he supposed, was consummated by the patent and the decree of the court. If there are any explanatory circumstances, they may be made to appear hereafter, and possibly may give a new and more favorable aspect to this case. But, as it now stands, it is a case clear of all doubt. The demurrer is overruled.

Case No. 12,444.

SCHEERDT v. SCHELL.

[N. Y. Times, Jan. 18, 1859.]

Circuit Court, S. D. New York. Jan., 1859.

CUSTOMS DUTIES — APPRAISEMENT — PAYMENT UNDER PROTEST.

[This was an action by Julius Scheerdt against Augustus Schell to recover certain duties alleged to have been illegally exacted.]

Mr. Griswold, for plaintiff.

Mr. Hunt, for defendant.

Before INGERSOLL, District Judge. This was an action brought to recover back certain additional duties imposed by the defendant as collector of this port upon certain goods imported by the plaintiff. On appraisement the value of the goods was raised more than ten per cent., from which the plaintiff appealed, and merchant appraisers were thereupon appointed, who raised it, but not so much as the others; and thereupon the collector fixed upon the highest value. The plaintiff protested, upon the ground that the collector fixed upon the value without notice to the plaintiff or hearing any evidence; that the papers did not show that the merchant appraiser was a discreet and proper person, and a citizen of the United States; and that the twenty per cent. was calculated not only upon the appraised value, but upon the amount of the commissions also.

The judge directed the jury to find a verdict for the defendant.

Case No. 12,445.

In re SCHEIFFER et al

[2 N. B. R. 591 (Quarto, 179); 1 Chi. Leg. News, 261; 1 Leg. Gaz. 30.] [1]

District Court, E. D. Minnesota. April Term, 1869

BANKRUPTCY — PARTNERSHIP — ELECTION OF ASSIGNEE—APPOINTMENT BY REGISTER—OBJECTIONS—HOW MADE.

1. In cases where co-partners are adjudged bankrupts, the partnership creditors only can

[1] [Reprinted from 2 N. B. R. 591, by permission. 1 Leg. Gaz. 30, contains only a partial report.]

participate in the election of assignees. The assignees must be elected by the majority in number and value of the creditors who have proved their debts, and not by the greater part of those present and voting. The election of the assignee, or the appointment by the register in cases where no election is made by the creditors, must be approved by the judge; and until approval the assignee has no power to act.

2. As the register can appoint only where there is no opposing interest, no creditor can change his vote after the meeting has adjourned, and thereby cause a failure to elect. If a mistake occurs, or the creditor has good cause to object to the choice made, he can make his objection to the judge, before whom the whole subject will be heard and determined. Where the judge refuses to approve the appointment of the assignee elected by the creditors, he may, under section 13, cl. 4 [of the act of 1867 (14 Stat. 522)], order a new election by the creditors. The fifth clause, section 18, applies to cases where the assignee has been removed or has resigned, and not to cases where the judge disapproves the action of the creditors.

[Cited in Re Wetmore, Case No. 17,466.]

[In the matter of Scheiffer & Garrett, bankrupts.]

TREAT, District Judge. This is a case of involuntary bankruptcy. At the meeting of creditors, held for the purpose, the greater part in number and value who had proved their debts against the co-partnership voted for Miltenberger as assignee, if the vote of Storrs & Brother is counted. It appears that the last-named vote was on the list of Miltenberger, who thus received all the votes cast; but that, after the meeting had adjourned, permission was given to erase the vote of Storrs & Brother, or withdraw the same, on the statement of the attorney who cast it, that it was cast by mistake for Miltenberger instead of Webster. Thereupon the register, after the said vote had been thus withdrawn, holding that no election had been made, as by law required, proceeded to appoint two assignees, Miltenberger and Wooster. The purpose of the register was thus to secure a due representation in the administration of the estate, of what seemed to him to be conflicting interests—an important object when conflicting interests exist, and the sole assignee is not likely to be impartial, but an object best effected, generally, by refusing to approve the choice made, and the appointment of a disinterested person.

The facts presented call for an interpretation of the law in several important particulars. Although there may be some doubt as to the true construction of sections thirteen and thirty-six, yet a careful analysis shows the following to be the requirements of the law: As this is a case of co-partnership bankruptcy, the creditors of the co-partnership who have proved their debts have the sole right to vote for assignee. "The choice is to be made by the greater part in value and number who have proved their debts, and not by the greater part," &c., of those present and voting. Such is the plain import of the statute, and the reasons for such a provision must readily suggest themselves. If the greater part in value and number of those who have proved their debts do not appear, or vote for the same person, then there is a failure on the part of creditors to make a choice. It is for the creditors, in the first instance, to choose more than one assignee, if they deem more than one to be necessary. If no choice is made by the creditors, and if there be no opposing interest, the register may appoint one or more; but his appointments, as well as the election by creditors, are in all cases "subject to the approval of the judge." In other words, until the judge has approved the selection, no one should enter upon the duties of assignee. That has been so frequently decided by this court, that it ought to be fully understood by this time. Indeed, some of the rules adopted when the bankrupt law first went into operation, were based on that plain provision of the act. If the judge disapproves, the election or appointment fails. The register has no power to approve, nor is his appointment more than the designation to the judge of a suitable person for the trust. Neither the second nor third clause of the thirteenth section is independent of the fourth clause. The act contemplates, throughout, that no person shall serve as assignee without the previous approval by the judge, and the rules establish, that in the cases which they specify (but in no others) the approval may be entered as therein specified. Those rules require the register, when he reports the choice made by creditors, to report also whether the selection is satisfactory; and the reason therefor, is the obvious fact that, being present at the election, and familiar with the details of the case, he is specially qualified to form a correct opinion as to the fitness, or unfitness, of the choice made, and thus aid the judge. It is true that one of the forms appended to the act and general orders, seems to be based on the idea that the register has, in some cases, the power to "approve and confirm," but there is nothing in the act to justify any such view.

In all cases not embraced within the specific terms of the third special rule for this district, the choice by creditors or designation by a register must be submitted to the judge for his official judgment and action thereon; and no assignment should be made by a register until the judge's approval is certified to him. As the register may appoint only when there is no opposing interest, no creditor can change his vote after the meeting has adjourned, and thereby cause a failure to elect, and give to the register the power to act independent of the other creditors; for if by such a change the choice is defeated, how can he say there is no opposition to his making an appointment—no opposing interest? The meeting having adjourned, and the creditors being without notice of what has since occurred, they would have no means of making their opposition known. If a mistake occurs, or a creditor before the approval has good cause for objecting to the choice made, he can make his objection to the judge, before whom the whole subject will be heard and determined. It is not only proper, but a conscientious discharge of duty, for the

register to bring to the notice of the judge all matters occurring before him in the conduct of the proceedings, so that the judge may be fully and fairly advised thereof. In this case he has done so, and very properly. When the judge refuses to approve the choice made by the creditors, shall he act under the fourth clause of section thirteen, and order a new election, or the fifth clause of section eighteen, relating to vacancies, whereby the court may itself appoint or order an election at a regular or special meeting called for the purpose? The fifth clause of section eighteen more properly pertains to a vacancy caused after an assignee has been duly appointed and approved, and the fourth clause of section thirteen to the cases where the judge refuses to approve.

In the case under consideration, however, it appears that Miltenberger was duly chosen by the creditors, and the subsequent withdrawal of the vote by Storrs & Brother was unauthorized. Hence the register had no authority to appoint. No objection has been made to Miltenberger, who is known to be fully qualified for the trust. This selection by the creditors will be approved and the appointment of Webster disapproved, as unauthorized by law. If any of the creditors shall hereafter show cause why an additional assignee should be appointed by the court, such an appointment will be made or a new election ordered.

Although not pertaining to this case, it is well to state, so that no possible misunderstanding or confusion may arise hereafter, that no assignment must be made to persons chosen or appointed assignees until an approval thereof has been duly entered of record. If the election or appointment is within the specific provisions of the third special rule, the entry of approval will be made as therein provided; otherwise there must be the formal action by the judge which the rule and the act contemplate. If assignments are hereafter made by registers without due compliance with the directions herein given, they will be set aside. In all cases whatsoever, the approval of the judge must be certified to the register before he executes an assignment; and a register's appointment, as well as the creditor's choice, if not embraced within the term of the special rule, must be specially submitted to, and passed upon by the judge, before further action is had thereon.

SCHELL (ABRANCHES v.). See Case No. 21.

SCHELL (BAILEY v.). See Case No. 745.

SCHELL (BENKARD v.). See Case No. 1,307.

SCHELL (CHRIST v.). See Case No. 2,699.

SCHELL (FIELD v.). See Cases Nos. 4,771 and 4,772.

SCHELL (GREENLEAF v.). See Cases Nos. 5,781 and 5,782.

SCHELL (HUTTON v.). See Cases Nos. 6,961 and 6,962.

SCHELL (IRVIN v.). See Case No. 7,072.

SCHELL (JONES v.). See Case No. 7,493.

SCHELL (KNIGHT v.). See Case No. 7,887.

SCHELL (KNOEDLER v.). See Cases Nos. 7,889 and 7,890.

SCHELL (REIMER v.). See Case No. 11,676.

SCHELL (WETTER v.). See Case No. 17,470.

Case No. 12,446.

SCHELTER v. YORK et al.

[Crabbe, 449.] [1]

Circuit Court, E. D. Pennsylvania. Sept. 11, 1841.

SEAMEN — ASSAULT ON BY MASTER — WEAPON — PUNISHMENT—DAMAGES.

1. A sword is an improper weapon with which to strike an unresisting seaman, when there is no appearance of mutiny.

2. It is contrary to every principle of justice for a captain to condemn and punish a seaman immediately he is complained of by the mate, and without investigation of any kind.

3. In fixing the amount of damages in a case of assault and battery, the court will consider the situation of the parties and the various aggravating or mitigating circumstances of the case.

This was a libel for assault and battery [by Frederick Schelter against Henry York and John Hennessey]. The case came on for a hearing, before Judge HOPKINSON, on the 10th September, 1841.

H. Hubbell, for libellant.

Mr. Hirst, for respondents.

HOPKINSON, District Judge. The libel charges York, the master, and Hennessey, the mate of the ship Adelaide, with assaults and batteries. The transactions complained of occurred at the quarantine ground, a few miles below this city, on the return of the ship from a voyage to London.

In regard to the mate, this is the only charge against him by the libellant, or any of the crew, on the whole voyage out and home, and he has shown a good character. The vessel was about getting under way, at eight o'clock in the morning, to come up to the city. There was naturally some impatience to get off. The libellant is admitted to be slow in his movements and phlegmatic in his temper—as, indeed, is constitutional in most Germans—and he did not move quite actively enough for an American seaman. One witness says that the mate pushed the libellant, another that he shoved him; one that he struck him with the back of his hand. There is no evidence of the kick alleged in the libel to have been given. As to the bucket of water thrown over the libellant, it is a common mode of making a sluggard move quickly, and surely no great punishment in the month of August. As to the scuffle which took place in the forecastle, we do not know enough about it to say who was in the

[1] [Reported by William H. Crabbe, Esq.]

wrong. On the whole I do not see that, as regards the mate, there is any ground for damages, either on account of any violence or cruelty to the libellant, or any example to others; there was in his case no excess of punishment, or improper weapon used.

As to the captain, there are no other specific charges against him, as respects the libellant or the rest of the crew, on the passage out or home. At London, the libellant and another made some complaint against him because they wished to leave the vessel, and for ill usage, but nothing specific has been shown. They both rejoined the ship, and have shown no ill usage out or home, up to the arrival at the quarantine ground. The whole case rests upon that transaction. I have spoken of a scuffle or encounter, between the mate and the libellant, in the forecastle, in which both parties seem to have used their own means of attack and defence, and both received some slight injury. The mate came on deck, and complained to the captain, showing marks of blood on his mouth, but whether this came from wounds inflicted on the mate, or from those of the libellant, does not appear. The captain then called to the libellant to come up out of the forecastle, and caught up a belaying pin to strike him: this the libellant prevented; the captain then went and got his broadsword. For this there was no necessity, there being not the least appearance of mutiny or disobedience of any kind. The libellant was ordered to be tied up, and, while they were doing so, the captain struck him three or four times with the sword, cutting his neck; but whether he struck with the flat side, the back, or the edge, does not appear, probably not with the edge, or the injury would have been greater. It was very improper, however, to use a sword at all upon a man making no resistance, actually in the hands of the two officers, about to be tied up to be flogged, and begging for mercy. The libellant was afterwards severely beaten, strange to say, by the captain himself. With a cruel coolness he was told that so many lashes were for the mate, so many for the captain himself, and the rest for the libellant's misconduct on the voyage. It is to be observed that this was done when the voyage was within a few hours of being ended, and when there was no occasion for an example of discipline.

It is said that the libellant called on the crew to help him. There is some uncertainty as to the time when this was done, and more as to the language used. One witness says that before the libellant was tied up he called all hands to witness it, and that afterwards he said, "For God's sake, come and help me." Another witness gives the same account, and describes the captain as flourishing the cutlass over his head as if he was going into action. The reasons assigned by the captain for this punishment were the complaint of the mate, and the libellant's misconduct during the voyage. For the first, the captain never inquired into the circumstances, never heard what the man had to say, but at once condemned and punished him. This was contrary to every principle of justice. For the second, we have never heard of the misconduct alluded to. If there had been any it should have been punished when the offence was committed.

I think this is a case for damages, but, at the same time, I must have regard to the situation of the respondent, and, considering all the circumstances of the case, not turn justice into oppression, because he has been guilty of an abuse of power. Decree for the libellant for fifty dollars and costs, as regards the respondent York, and that the libel be dismissed as to the respondent Hennessey.

Case No. 12,447.

In re SCHENCK.

[5 N. B. R. 93.] [1]

District Court, D. New Jersey. 1872.

BANKRUPTCY — APPLICATION FOR DISCHARGE — WHEN TO BE MADE.

Bankrupt filed a petition for his discharge more than one year after adjudication, setting forth in said petition that no debts had been proved, and no estate had come into the hands of the assignee for distribution. No debts in the case had been proved, and assets to the amount of ten dollars and eighty cents had come into the hands of the assignee. *Held*, that bankrupt should have filed his petition for discharge within one year after adjudication, and failing to do so, discharge must be refused.

[In the matter of P. C. Schenck, a bankrupt.]

NIXON, District Judge. The application of the bankrupt for his final discharge bears date on the first day of March, eighteen hundred and seventy-one. It represents that no debts have been proved against him, and that no assets have come to the hands of the assignee for distribution. Upon this application a rule to show cause was granted, returnable on the twenty-first day of March last before the court, requiring all persons in interest to show cause on that day why the prayer of the petitioner should not be granted. The report of the register, Mr. Elmendorf, with the papers in the case, was filed with the clerk on the twenty-seventh day of March. The register's report shows that assets to the amount of ten dollars and eighty cents, had come to the hands of the assignee, that no creditors have proved their debts against the said estate, and that the applicant was duly adjudged a bankrupt on the fifteenth day of June, eighteen hundred and seventy-one. This case involves the proper construction of the twenty-ninth section of the bankrupt act [of 1867 (14 Stat. 531)], and the power of the court to grant a discharge when no debts have been proved

[1] [Reprinted by permission.]

against the bankrupt or no assets have come to the hands of the assignee. The applicant has allowed more than one year to elapse after the order of adjudication, before he made his application for his discharge. Has this court the power under such circumstances to grant a discharge? I think not. The words of the section are: "If no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee," the bankrupt may, "at any time after sixty days, and within one year from the adjudication of bankruptcy, apply to the court for a discharge from his debts." This is a privilege that the section gives to the bankrupt, and which he must exercise within the time designated or not at all. I am aware that there has been some conflict of opinion amongst the judges in this matter, but I think that all doubt has been quieted by the congressional construction of the act, given by the committee on the revision of the law, in their report to congress on the twenty-ninth day of February, eighteen hundred and sixty-nine, and I feel constrained to follow their interpretation of the section, until advised by proper authority that a different one is admissible. The application for a discharge is denied.

Case No. 12,448.

SCHENCK et al. v. The FREMONT.

[1 Bond, 57.] [1]

District Court, S. D. Ohio. April Term, 1856.

COLLISION—RIGHT OF WAY—RIVER NAVIGATION—MUTUAL FAULT.

1. In a suit for collision, to entitle the libellant to a decree for full damages for the injury, it must appear not only that the respondents' boat was in fault, but that the libellant's boat committed no error which contributed to the collision.

2. An up-going boat has a right to choose which side of the down boat she will take, and to signal accordingly, but has no right to insist on this rule when its observance will render a collision probable.

3. As a general rule, the proper place of a down boat is in the main channel.

4. Where there is mutual fault, by the well-settled rule of maritime law, there must be a division of the damages; and such is the decree in this case.

[This was a libel by Ulysses P. Schenck and others against the steamboat J. C. Fremont, to recover damages sustained by collision.]

Lincoln, Smith & Warnock, for libellants.

Fox & French, for respondents.

OPINION OF THE COURT. The case set out in the libel is, substantially, that before daylight, in the morning of January 5, 1855, the steamer Switzerland, with a cargo on board, and a loaded barge in tow on the larboard side, was proceeding on a voyage from Cincinnati to New Orleans, and that a short distance above the town of Ghent, in Kentucky, and when near the Kentucky side of the river, the steamboat J. C. Fremont was seen to leave the wharf-boat at the town of Vevay, on the Indiana side, and soon after, instead of passing up near the shore of Vevay Island, crossed the river toward the Kentucky side, and in thus crossing, came in contact with the barge of the Switzerland, striking it on its starboard quarter, carrying away the forward part of its bow, causing it to take in water rapidly, injuring its lading, disabling it from proceeding, and thereby occasioning great injury to the libellants, in the expense incurred in repairs, damage to the cargo, and the detention of their boat. It is averred in the libel that the loss and injury thus sustained, was caused wholly by the fault, negligence, and want of skill of those in charge of the said steamer Fremont, and that no fault is imputable to those intrusted with the management of the Switzerland and the barge connected with it. The respondents aver, in their answer, that the Fremont was proceeding from Louisville to Pittsburg; and, that having landed at the town of Vevay, for the transaction of its business there, started out from the wharf-boat of said town, and crossed the river, to near the Kentucky side, and then proceeded up the river, near the shore, the usual place of an ascending boat, at that stage of water; and that while thus going up, the Switzerland, with a barge in tow on the larboard side, was seen coming down on the larboard side of the Fremont, and continued that course till within one hundred and fifty yards of the said boat, when the Switzerland changed its direction toward the Kentucky shore, and thus proceeding, the barge struck the larboard bow of the Fremont, thereby breaking its planks, timbers, etc. The answer alleges that the collision took place about half a mile above said town of Ghent, the Fremont then being in the proper place of an ascending boat, and that it was due wholly to the improper navigation of the Switzerland, without any fault on the part of the said Fremont.

This brief statement of the material allegations of the libel and answer is sufficient to show the matter in controversy in this case. It also shows that the claims of these parties, as to the facts involved, are so directly in conflict that they can not be reconciled, and wholly exclude the supposition that both are consistent with truth; and, as is almost proverbially common in suits growing out of marine collisions, each party has been successful in sustaining by evidence the assumptions set up respectively in the pleadings. Thus the court is presented with a case, in which the evidence, as to the more essential facts, is palpably contradictory and discrepant. Under such circumstances, the duty devolving on a court of fixing on a satisfactory basis for a decree is not always easy or pleasant.

It may be premised, that in the consideration of the facts of this case, the conclusion is read-

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

ily reached that the collision in question could not possibly have occurred without fault of one or both of these boats. On whatever other ground it may be placed, it is certain it can not be attributed to inevitable or unavoidable accident. Indeed, it is hardly possible to conceive of circumstances in which a collision was less necessary, or less excusable. This conclusion fairly follows from facts not in controversy in the case. The libellants' boat, coming in at the head of Vevay Island, was distinctly seen by the pilot of the Fremont; and the latter boat was as distinctly seen by the pilot of the Switzerland, being then in the act of putting out from the wharf-boat, at Vevay. The boats were first mutually seen a little after five o'clock in the morning. The night had been light and fair, but it had become somewhat cloudy toward morning, still it was not so dark but that the boats could be easily seen. The distance between the points where the boats became mutually visible did not exceed two miles, and was probably not more than a mile and a half. An island, the lower end of which is nearly half a mile from the Vevay wharf-boat, stretches up close to the Indiana side of the river, and is something more than one mile in length. The shores, both on the island and the Kentucky side, are nearly straight, so that there is hardly any noticeable bend in the river, and nothing to intercept the view from the Vevay wharf-boat to the point where the Switzerland came in view, at the head of the island. About one-third the distance down, from the head of the island, the river is, by actual measurement, four hundred and fifteen yards in width, and gradually widens, till, at the lower end of the island, it is four hundred and ninety-two yards. At the time of this collision there was nine or ten feet of water in the river; and from the Vevay wharf to the head of the island, there was but little variation in the depth across from near the island shore to the Kentucky side. The proof is conclusive, that along either shore, or in the middle of the river, there was sufficient depth of water for the safe navigation of these boats. And it is equally clear, that between the points indicated, there is no obstruction or impediment of any kind. The channel, or that part of the river between the island and the Kentucky shore, having the swiftest water, is one-third or one-fourth the width of the river from the latter shore, or, measured by yards, the distance varies from something upward of one hundred to one hundred and fifty. But, as before noticed, the water is deep on either side of the channel, along and near to both the island and Kentucky shores.

Yet, under circumstances so favorable to the safe passage of boats on this part of the river, and which would seem almost to exclude the possibility of a collision between a descending and an ascending boat, the Switzerland's barge and the Fremont were brought into violent contact, and injury, direct and incidental, has been sustained to a considerable amount. And now the inquiry which presents itself is, whether this injury is attributable solely to the faulty management of one of these boats, or do the facts warrant the conclusion that both are in fault. As already stated, the claim of the libellants is for compensation for the whole of the injury sustained by them, and this claim is based on the theory that their boat was not in fault, but that the injury resulted wholly from the careless and unskillful navigation of the Fremont; and, if the evidence sustains this position, the maritime law will afford the redress sought for. But, to justify a decree on this basis, it is not enough that the libellants prove a want of caution, vigilance, and skill in the management of the respondents' boat. It must appear that those intrusted with the management of the libellants' boat are free from censure, and have done nothing which may be supposed to have contributed essentially to the disaster. As promotive of the great interests of navigation and commerce, the maritime law is stringent in its requirements of caution and skill in the management of boats and vessels. And a party who has failed to comply with these exactions presents no sufficient ground to recover the entire damages resulting from a collision.

In the consideration of this case, I do not propose to notice minutely, the great mass of evidence which has been introduced. I will merely advert to such prominent features of the transaction involved, as seem to indicate, with sufficient certainty, the decree which should be pronounced. The evidence of the parties, in some essential particulars, as to the course and navigation of these boats, from the time they were seen by the pilots of each, is in such direct conflict as to render any attempt to harmonize it entirely futile. Seven witnesses for the libellants, including the pilot and others who were on their boat, substantially agree in these statements, that the Switzerland, according to the usual course of navigation for a descending boat, came near to the Kentucky shore, at the head of Vevay Island, and continued down that shore, at a distance from it, variously estimated at from thirty to sixty-five yards, without any variation of course, to the place of the collision. These witnesses also concur in saying, that the Fremont, when first seen, was starting out from the Vevay wharf-boat; and that it proceeded up on the Indiana side, in the direction of the foot of the island, and kept near the island shore, about one-third the length of the island, and then changed her course nearly straight across the river, and in the crossing, struck the bow of the barge about fifteen feet from its stern, nearly at right angles. They also agree in saying the barge was on the larboard side of the Switzerland, and so fastened to it, that the bow projected thirty-five or forty feet forward of the steamer's bow; and that

the blow of the Fremont cut off the forward part of the barge, causing the water to flow in freely, and parting the lines by which it was fastened to the steamer. The testimony of these witnesses, as to the course of the two boats before the collision, and their relative positions when it took place, is corroborated substantially by four other witnesses, some of whom were on the Vevay wharf-boat, and some on the deck of a steamer lying there when the Switzerland came in view at the head of the island, and who testified that they noticed the course and movements of both boats up to the time of the collision.

On the part of the respondents, four witnesses who were on the Fremont, among whom are the pilot and mate on watch at the time, state, in substance, that on putting out from the wharf-boat at Vevay, the steamer did not go up to or near the foot of the island and along the island shore, but crossed almost straight across to the Kentucky side, and straightened up within fifteen or twenty yards of the shore, nearly opposite an old mill, which is only two hundred yards above a line drawn straight across from the wharf-boat. They also say the Fremont kept up that shore, without any change of course, to the place of the collision. And the pilot says the Switzerland, when the boats struck, was pointed toward the Kentucky shore. This evidence, given by the respondents, sustains the allegation of their answer, but it is clearly disproved by the libellant's evidence, before referred to. Unless this evidence is arbitrarily repudiated, it must be held as conclusively established that the Fremont did not cross directly from the wharf to the Kentucky side, and was not near that shore when he signaled for it, but was making a crossing a little above the foot of the island, in such a way as almost unavoidably to cross the path of the down-going boat, and necessarily to incur the hazard of a collision.

The usual course of navigation for an ascending boat, starting from the Vevay wharf-boat, as proved by a number of experienced and intelligent river navigators, unless business requires a straight crossing from the wharf-boat, is to go up to near the foot of the island, and then along and near to the island shore, about one-third or one-half the length of the island, and then to wear out gradually toward the Kentucky side. These witnesses state that the water is deep along the island, and there being little or no current, is preferred by up-stream boats. Same witnesses, however, say this course is not universally pursued. It would seem, however, to be the proper course for an up-going boat, when a boat was seen coming down from the head of the island. And if the Fremont had been thus navigated, it is certain no collision would have happened.

It is insisted, however, that by the acknowledged law of the river, it is the right of the up-going boat to choose which side of the river it will take, and therefore it was the right of the pilot of the Fremont to cross to the Kentucky side. This rule is affirmed by the board of supervising inspectors, under the act of 1852, in case the ascending boat gives the signal required to notify the descending boat of his choice. But it is very clear no pilot has a right to insist on this rule when its observance would incur the hazard of a collision. It has always been a paramount law of navigation that no circumstances will justify a course of action that must necessarily, or even probably, lead to such a result. Hence it is a part of one of the rules adopted by the supervising inspectors that "no vessel shall be justified in coming into collision with another, if it be possible to avoid it."

Without pursuing this subject further, I must conclude, from the weight of the evidence before me, that the Fremont was wrong in attempting to cross the river in front of a down-coming boat. It is proved that those having charge of this boat were informed at the Vevay wharf-boat that the Switzerland was expected about that time, and was to land there. When the Fremont left the wharf, the other boat was in view at the head of the island. The distance between the boats, when first seen, did not exceed two, or at most, two and a half miles. The Switzerland, it is proved, was running at a speed of about ten miles an hour, and the Fremont at about seven miles an hour. The added velocity of the two boats would therefore be seventeen miles an hour, or nearly at the rate of a mile every three minutes. Supposing the distance from the head of the island, where the Switzerland was first seen, to the Vevay wharf-boat, to be two and a half miles, the boats would pass each other in something less than five minutes. But if, as the weight of the evidence proves, the Fremont started across a short distance above the foot of the island, making allowance for the distance the other boat would get down while the Fremont was reaching the point at which it started across, the boats must have been then very near each other. Now, it is in evidence by a witness, to whom entire credit is due, that it is never safe for a boat to cross the path of the down boat, if the two boats are at a less distance than two and a half miles apart. And he states it as his uniform practice, when wishing to cross the river, with a descending boat in view within the distance above stated, to lie to till the boat has passed. This course is the safe and prudent one, and its observance would avoid the possibility of an accident by collision.

The conclusion that the Fremont was pointed toward the Kentucky side, and not straight up the river, at the time of the collision, is greatly strengthened by the above proof that

the bow of the steamer struck the barge nearly at right angles. Such is the statement of several witnesses who saw the collision, and such is the inference to be drawn from the nature of the injury which the barge sustained. This is further inferable from the fact that after the barge was struck, and parted from the boat by the force of the blow, the Switzerland, having still some headway, struck the Fremont on its larboard side, abreast of the boilers. This would indicate pretty clearty that the Fremont must then have been quartering across the river, and not straight with it.

I can not, therefore, hesitate in the conclusion that the pilot of the Fremont committed a great error in attempting to cross the river before a descending boat. It was wholly unnecessary, and apparently without excuse. That it was a principal cause of the collision is clear beyond controversy.

But it is insisted that the Switzerland was also in fault in not coming down in the channel of the river, that being the proper place for a descending boat, and that this error contributed to the collision which occurred. In the consideration of this part of the case, I shall not advert to the evidence in relation to the signals given by these boats. This evidence is involved in such obscurity and doubt by the contradictory statements of the witnesses, that it is impossible to arrive at any satisfactory conclusion as to the facts. And if it is clear that the pilot of the Switzerland committed a culpable error in putting his boat in the wrong place, it is not, perhaps, material to ascertain what signals were given, or the order in which they were made. By the well-understood usages of the river, applicable, certainly, wherever the river is wide and affords a sufficient depth of water for its entire width, the place of a descending boat is in the channel, or that part where the current is the strongest. This is the rule sanctioned by the supervising inspectors, and is, in itself, reasonable. If, then, it is admitted that the Switzerland gave the first signal, indicating the purpose of the pilot to go down on the Kentucky side, it would seem, under the circumstances of this case, that he was asking what he had no right to claim. The width of the river opposite Vevay Island has already been stated, as also the fact that there was sufficient depth of water anywhere between the island and the Kentucky shore. The evidence is that the channel is about one-third or one-fourth of the width of the river from the Kentucky shore. For about half the distance down the island the channel would be from one hundred to one hundred and thirty yards out from that shore, and toward the lower end of the island, where probably the collision took place, from one hundred and thirty to one hundred and sixty yards out. Now, it is beyond all controversy that at the time of the collision the distance of the boats from the Kentucky shore did not exceed thirty yards. Without noticing the other testimony as to this point, there is one fact which seems to settle it beyond doubt. That fact is, that immediately after the collision, and as the result of the striking of the bow of the Switzerland against the Fremont, the latter boat was forced on to the shore, or so near to it that some of the crew jumped off without the aid of a plank. This could not have happened on any other supposition than that the boats were in close proximity to the shore. Several of the libellants' witnesses state the distance at from thirty to fifty yards, while those on the Fremont put it at twenty-five or thirty yards.

It results from this view, that when the collision occurred the Switzerland was about one hundred yards from the proper place of a descending boat. And it seems clear that this was such an essential departure from the settled rules of navigation as to justify the inference that there was a want of due vigilance, care, and skill on the part of those having the management of this boat. It is not excused by the fact that there was a barge in tow on the larboard side, as the evidence is that although it would be convenient to go down close to the Kentucky shore, to afford more room for rounding to at the Vevay wharf, there is no positive necessity for it, and it does not form an exception to the known and settled usages and rules of navigation.

There is another aspect of this case to which I will very briefly refer, which, in my judgment, affords a ground for the inference that there was a want of caution and care in the management of these boats which properly subjects both to liability for the injury sustained by this collision. It has been before remarked that the evidence in relation to the signals given is so conflicting and unsatisfactory as to preclude the possibility of knowing the truth in regard to them. After a very critical examination of the evidence, I confess I have not been able to reach any conclusion on this subject. There are, however, some general views which may be pertinently stated in reference to this part of the case, and from which the inference of mutual culpability in these boats may be fairly deduced. And, in the first place, I may remark that no omission of any act necessary to avoid a collision is justifiable. Notwithstanding the almost inextricable confusion in which the evidence has placed this case in reference to the signals, there are still grounds for the conclusion, either that all the signals given were not heard, or, if heard, were not understood by the pilots, respectively, of these boats. It was, then, obviously the duty of both, having reasonable grounds even for a suspicion that there was any misunderstanding or misconception on this subject, at once to have stopped their engines, or, if the case required it, to have backed, until they should know with certainty the safe course to pursue. These precautions were not observed by either of these pilots. If, as the libellants claim, the Fremont improperly started across the river,

with the apparent purpose of crossing in front of the Switzerland, the pilot should instantly have stopped and backed. The distance then separating the two boats was such that this measure would most certainly have avoided a collision. The pilot of the Fremont, having reason to believe his signals were not heard, or not understood, and seeing the other boat persisting in her course, should also have stopped and backed. Now, although it is in proof that both boats did reverse their engines, it was when they were so near as to render a collision unavoidable.

In the argument, it was insisted by the proctor for the respondents that the doctrine of the maritime law, which recognizes the rule of a division of the damages in a case of mutual fault, had not been authoritatively sanctioned by the courts of admiralty in this country. It is, however, well known that this principle has prevailed for many years in the courts of the eastern districts of the United States. It has not, till recently, been distinctly affirmed by the supreme court of the United States. In the case of The Catharine v. Dickinson, 17 How. [58 U. S.] 170, the court say: "Under the circumstances usually attending these disasters, we think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance in navigation."

But, without taking more time in presenting my views of this case, I will state that on the grounds indicated, it seems to me, it is one of mixed or mutual fault, justifying an equal apportionment of the damages sustained between the two boats, and such is the decree in this case.

Case No. 12,449.

SCHENCK v. MARSHALL COUNTY.

[1 Biss. 533.] [1]

Circuit Court, N. D. Illinois. Oct., 1866.[2]

RAILROAD COMPANIES — COUNTY BONDS IN AID — ISSUE—FORMALITIES—ESTOPPEL.

1. County bonds in all respects regularly issued by the board of supervisors, except that the notice of the election, at which the authority to issue the bonds was given, proceeded from the county court, instead of the board of supervisors, but on which the county had paid interest for nine years, are valid in the hands of bona fide holders.

2. The election having been held in due form, there is simply a defective execution of the power, and not a defect in the power itself.

3. On questions of commercial law this court, although respecting the opinions of the supreme court of the state, is not bound by its decisions.

4. A municipal corporation may be estopped by its own acts, as well as a private individual.

5. The board of supervisors being authorized under certain circumstances to issue bonds, and having issued them, the presumption is that they were issued conformably to the authority, and the board is estopped from denying their validity in the hands of a bona fide holder.

[Cited in brief in Turner v. Peoria & S. R. Co., 95 Ill. 136.]

This was an action of assumpsit by Robert C. Schenck, to recover interest due on coupons attached to bonds, issued by the board of supervisors of Marshall county, upon their subscription to the capital stock of the Western Air Line Railroad Company. The defense was, that on February 28, 1853, when the election was held to decide as to whether the county should subscribe to the stock of the said corporation, the county was acting under township organization. That the notice for the election proceeded from the county court, instead of the board of supervisors, and that as the bonds were issued by the board, without any further authority, they were void. The county subscribed, and the bonds were issued by the chairman of the board, properly authenticated by the county seal.

Scammon, McCagg & Fuller, for plaintiff, arguing that the defect in the notice, all the subsequent proceedings being regular, did not invalidate the bonds in the hands of bona fide purchasers, cited: Commissioners of Knox Co. v. Aspinwall, 21 How. [62 U. S.] 539; Woods v. Lawrence Co., 1 Black. [66 U. S.] 386; Moran v. Commissioners of Miami Co., 2 Black. [67 U. S.] 722; Gelpcke v. City of Dubuque, 1 Wall. [68 U. S.] 175; Van Hostrup v. Madison City, Id. 291; Meyer v. City of Muscatine, Id. 384; Thompson v. Lee Co., 3 Wall. [70 U. S.] 327; Rogers v. Burlington, Id. 654. As to ratification and estoppel by payment of interest: President, etc., of Town of Keithsburg v. Frick, 34 Ill. 405; Society for Savings v. City of New London, 29 Conn. 174; Tash v. Adams, 10 Cush. 252; State v. Van Horne, 7 Ohio St. 327; State v. Trustees of Union Tp., 8 Ohio St. 394; Trustees of Goshen Tp. v. Shoemaker, 12 Ohio St. 624; Gould v. Town of Venice, 29 Barb. 443; Farmers' & Mechanics' Bank of Kent Co. v. Butchers' & Drovers' Bank, 16 N. Y. 125; Clark v. City of Janesville, 10 Wis. 136; Mills v. Gleason, 11 Wis. 470. That the United States courts will not always follow the decisions of the local courts: City of Chicago v. Robbins, 2 Black [67 U. S.] 418; Gelpcke v. City of Dubuque, 1 Wall. [68 U. S.] 175. That not every irregularity invalidates the bonds in the hands of bona fide holders: Taylor v. Taylor, 10 Minn. 107 [Gil. 81]; Commissioners of Knox Co. v. Wallace, 21 How. [62 U. S.] 539; Zabriskie v. Cleveland, C. & C. R. Co., 23 How. [64 U. S.] 381.

B. C. Cook, for defendant.

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

DRUMMOND, District Judge. In this case, where the demurrer was argued yesterday, the question raised upon the demurrer substantially disposes of the case. The law of

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[2] [Affirmed in 5 Wall. (72 U. S.) 772.]

1849, it was contended, was changed by subsequent acts, throwing upon the board of supervisors what had previously been done by the county court; and inasmuch as the notice of the election was given by the county judge and not by the board of supervisors, it is claimed that the bonds which were issued to the railroad under an election, by the board of supervisors, were void. This identical question in relation to the bonds of Marshall county, (similar bonds), has been before the supreme court of this state, and that court has ruled that inasmuch as the notice was improperly given, the bonds were void in the hands of bona fide purchasers for value. There can be no other argument, we think, made in favor of the defendant in this case than what arises from this decision. The question is whether that decision is binding upon this court in a case of this kind. We have examined the opinion of the supreme court of this state, upon this point, and, as I have already said, it decides the same question that is involved here, and decides it against the validity of the bonds. We think, with all proper respect, that decision of the supreme court of the state cannot be sustained upon principle, nor under the authority of decisions of the supreme court of the United States. With all due respect to the supreme court of this state, we think that it is, to all intents and purposes, simply a defective execution of the power, and not a defect in the power itself. These bonds were issued by the board of supervisors of Marshall county. By law they were authorized to issue them, when the notice was given, and the election was held. The notice was something that had to precede the issuing of the bonds, but it is said came from the wrong source. It ought to have come from the board of supervisors instead of from the county court. It was simply a notice of the election. The election was held in due form, the vote was taken, and in all other respects the law was complied with. If the law had said in words that all bonds issued without a compliance in every particular with the pre-requisites of the law, should be held void under all circumstances, perhaps there would be some force in the position taken by the supreme court of the state, but the law simply declares, before the bonds shall be issued, this notice shall be given. The authority to issue the bonds is the board of supervisors. In a case that was very fully considered by the supreme court of the United States, it was held that the presumption was, that when a particular board (in that case a board of county commissioners) was authorized, under certain circumstances, to issue bonds upon notice, when the bonds were issued, the presumption was that the pre-requisites of the law had been complied with, and that when the bonds were in the hands of an innocent purchaser the county should be held responsible, although, in point of fact, one of the prerequisites of the case had not been complied with. This is a commercial question. It is a question affecting a citizen of another state, in relation to commercial paper. We think that the decision that has been cited strikes at the very foundation of nearly all the bonds that have been issued under this or similar laws, because it is very rare indeed, where the law requires certain officers to perform acts, that every thing essential is performed precisely in the form that the law requires. We have to look at the great object sought to be accomplished by these and similar laws. We think that when the material pre-requisites of the law have been complied with, and the bonds have been issued in conformity with the main features and provisions of the law, and the money has been obtained on them by the county, and they have been transferred in open market to bona fide holders for value, the county ought to be held responsible. Again, in this case, after these bonds had been issued by the board of supervisors, who, it will be recollected, it is contended, should have given the notice, taxes were assessed to pay the interest upon these bonds, year after year, and the agents of the county participated in the election of officers of the railroad to which these bonds were issued as a subscription to its stock. The taxes were assessed and paid by the county for the interest on these bonds for about six years. The only ground which can be taken in this aspect of the case, as it seems to us, is to hold that a municipal corporation, like a county, cannot be estopped by its own acts in relation to a bond about which there has been some informality in the issue. That question has been, as we think, decided by the supreme court of the United States, and that court held that a municipal corporation may be bound, as well as an individual, by its own acts; and admitting there was a question as to the validity of the issue of these bonds, we think it is too late for the county of Marshall to raise that question, after they have, for a series of years, in this way, ratified and confirmed their issue. The statute the supreme court of the state has construed, adopting the principles of the common law. This court construes it according to the same principle, and we think, construing it in conformity with those principles, we can arrive at no other result than that which has already been stated. It is painful for us to come in conflict on a question of so much importance as this with the supreme court of the state, but we think such great principles are involved in this decision that we do not feel inclined to yield our own individual opinions, the more especially as the case can be reviewed by the supreme court of the United States. The demurrer will be overruled and judgment will go for the plaintiff on the demurrer.

This case was carried to the supreme court, and all the facts are fully stated in the reported case (5 Wall. [72 U. S.] 772), where the judgment of the court below is affirmed.

NOTE. The decision of the supreme court of Illinois, declaring these laws invalid, is in the case of Marshall Co. v. Cook, 38 Ill. 44. That a corporation is bound by an estoppel is declared in New England Car Spring Co. v. Union India Rubber Co. [Case No. 10,153]. A municipal corporation. Bissel v. City of Jeffersonville, 24 How. [65 U. S.] 287; Mercer Co. v. Hacket, 1 Wall. [68 U. S.] 83. Municipal corporation estopped from denying validity of bonds. Moran v. Miami Co., 2 Black [67 U. S.] 722; Mercer Co. v. Hacket, 1 Wall. [68 U. S.] 83; Van Hostrup v. Madison City, Id. 291; Meyer v. Muscatine, Id. 384; Mygatt v. Green Bay [Case No. 9,998]; Luling v. City of Racine [Id. 8,603]. See, also, Woodhull v. Beaver Co. [Id. 17,974].

United States courts not always bound to follow the decisions of state courts. Swift v. Tyson, 16 Pet. [41 U. S.] 18; Pease v. Peck, 18 How. [59 U. S.] 595; Robinson v. Commonwealth Ins. Co. [Case No. 11,949]; Williams v. Suffolk Ins. Co. [Id. 17,738]; Thomas v. Hatch [Id. 13,899]; Meade v. Beale [Id. 9,371]; Carroll v. Carroll's Lessee, 16 How. [57 U. S.] 275. See, also, Goedgen v. Supervisors of Manitowoc Co. [Case No. 5,501], June term, 1870.

That the payment of interest on bonds is an affirmance of their validity, was also held by Miller, J., in case of Luling v. City of Racine [supra]. That the doctrine of estoppel applies to corporations, as to matters within the scope of their powers, though no actions be found in their records, see Hooker v. Eagle Bank of Rochester, 30 N. Y. 83; Howe v. Keeler, 27 Conn. 538; Hart v. Stone, 30 Conn. 94; Argenti v. City of San Francisco, 16 Cal. 256.

Mere irregularities do not vitiate a bond in the hands of a bona fide holder. Butz v. Muscatine, 8 Wall. [75 U. S.] 575; Mercer Co. v. Hacket, 1 Wall. [68 U. S.] 83; Butler v. Dunham, 27 Ill. 474; Commissioners of Knox Co. v. Nichols, 14 Ohio St. 260. Consult, also, Town of Grand Chute v. Winegar [15 Wall. (82 U. S.) 355], decided by the supreme court at the December term, 1872.

A ratification by the legislature of bonds issued by a municipal corporation under a statute is, in all respects, equivalent to original authority, and cures any defects of power or irregularities in its exercise. Beloit v. Morgan, 7 Wall. [74 U. S.] 619; City of Kenosha v. Lawson, 9 Wall. [76 U. S.] 477.

Case No. 12,450.

SCHENCK v. PEAY et al.

PEAY v. SCHENCK et al.

[Woolw. 175; 2 Am. Law T. Rep. U. S. Cts. 111; 10 Int. Rev. Rec. 54; 1 Chi. Leg. News, 363; 11 Int. Rev. Rec. 12.] [1]

Circuit Court, E. D. Arkansas. April, 1868.

COURTS — JURISDICTION IN RESPECT OF CITIZENSHIP OF PARTIES TO CROSS BILLS.

1. A cross bill will be sustained in the federal court, where a defendant is compelled to avail himself of that mode of defence, in order to protect himself from an injustice resulting to him from the position in which the cause stands, although the parties plaintiff and defendant, or some of them, are citizens of the same state; provided the defendants in such bill are already before the court, and are, as parties to the original bill, subject to its jurisdiction.

[Cited in Lowenstein v. Glidewell, Case No. 8,575; Eaton v. Calhoun, 15 Fed. 156; Jesup v. Illinois Cent. R. Co., 43 Fed. 496.]

2. The federal court, in determining whether a bill is original and independent, or ancillary and auxiliary to a matter already before the court, does not confine itself to the line which, in chancery pleadings, divides original from cross and supplemental bills, but looks to the essence of the matter, and to principles adopted by it with reference to the question of its jurisdiction of the parties.

3. S., a citizen of Ohio, filed his bill against P. and B., citizens of Arkansas. As against P., he asked that his title to the real estate, the subject of the suit, should be quieted; and as against B., who claimed an interest in the premises, by a title the same as S.'s, he sought partition. P. filed his cross bill to have the title of both S. and B. declared void. *Held*, the cross bill is a proper mode of defence, necessary to a complete determination of the controversy brought before the court by the original bill; it is ancillary to the main cause and brings no new parties before the court; it is not liable to objection by demurrer.

[Cited in Bland v. Fleeman, 29 Fed. 673; Belding v. Gaines, 37 Fed. 820.]

4. The court of chancery will only with great reluctance and hesitation take the possession of property from a defendant having a clear legal title thereto, when the relief sought is founded on a disputed equity.

[Cited in Ruggles v. Southern Minn. R. Co., Case No. 12,121; Overton v. Memphis & Little Rock R. Co., 10 Fed. 867.]

5. But it may be done under proper circumstances. There is no absolute rule against it.

[Cited in Ruggles v. Southern Minn. R. Co., Case No. 12,121.]

6. But if the party against whom the appointment of a receiver is sought has himself shown a fatal defect in the title under which he claims, he stands in a different position from a party whose legal title and possession are assailed, and who has not admitted the truth of the allegations against him.

7. Proceedings in pais, for the purpose of divesting one person of the title to real estate, and conferring it on another, must be shown to be in exact pursuance of the statute authorizing them, and no presumption will be indulged in their favor.

8. Where authority of this kind is conferred on three or more persons, in order to the validity of its exercise, all must participate or have an opportunity of participating, in the proceedings.

9. The action of two out of three commissioners, to all of whom a power is confided, cannot be upheld when the third took no part in, and knew nothing of, the transaction, and had no opportunity to exert his legitimate influence in determining the course to be pursued.

[Cited in Martin v. State, 23 Neb. 384, 36 N. W. 554.]

10. A statute provided a board of three tax commissioners to assess taxes on real estate, and in case of their non-payment, to sell and deliver possession of the property to the purchaser. Three commissioners were appointed, but only two acted or qualified. *Held*, there was no board of commissioners ever in existence, the two without the third not constituting a board. The intention of congress in requiring three was, that no less number should act.

[Cited in Union Pac. Ry. Co. v. Burlington & M. R. Co., 3 Fed. 111.]

11. Congress may pass retroactive statutes, provided they are not ex post facto.

[See Albee v. May, Case No. 134.]

12. But in construing statutes, for which a retrospective effect is claimed, to give them such construction, the intention of the legislature in

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission. 2 Am. Law T. Rep. U. S. Cts. 111, and 10 Int. Rev. Rec. 54, contain only partial reports.]

that regard must either be expressly declared, or must appear by unavoidable implication.

[Cited in Brooke v. McCraken, Case No. 1,932; Tinker v. Van Dyke, Id. 14,058.]

13. A statute declaring, in the future tense, that a majority of a board of tax commissioners shall have full authority to transact the business of the board, and that no proceeding of the board shall be void or invalid in consequence of the absence of one of them, refers to the exercise of the power granted for the future to a majority of the board.

[Cited in Union Pac. Ry. Co. v. Burlington & M. R. Co., 3 Fed. 111.]

14. Such a statute does not cure defects in title arising out of past transactions.

15. Such act does not cure the defect of the non-existence of any tax board whatever.

This case came before the court upon a demurrer to the cross bill, and a motion on behalf of the plaintiff therein, for an injunction and a receiver. Schenck, a citizen of Ohio, filed the original bill against Peay and Bliss, citizens of Arkansas, in respect of some real estate in the city of Little Rock, in the last mentioned state, and alleged therein the following case: Section 5 of the act of June 7, 1862 (12 Stat. 422), provides, that the president of the United States, by and with the advice and consent of the senate, may appoint a board of three tax commissioners for each of the states then in insurrection against the federal government, whose duty it was to advance along with the federal armies into the insurrectionary districts, and assess upon the real estate therein due proportions of the direct tax imposed upon the state under the act of August 5, 1861. The federal forces having advanced into, and occupied the county of Pulaski, Hulings Cowperthwaite, Enoch H. Vance, and Daniel P. Tyler were duly appointed a board of direct tax commissioners for said state; but Tyler, one of the members of the board, did not qualify, nor enter upon the discharge of the duties of his office. The other two commissioners proceeded to assess the direct tax upon the lots in the county; and the time limited in the act for the payment of taxes having expired, they proceeded to offer the lots for sale at auction. The defendant Bliss became the purchaser of them, and was by said commissioners placed in possession. Bliss having sold and conveyed to Schenck an undivided fourth of the property so by him purchased, the latter in his original bill, asks, as against the former, a decree of partition of the property, and as against Peay, the original owner of it, that his title so acquired may be quieted by a decree of the court declaring his rights.

Peay answered this bill, and accompanied his answer by a cross bill against Schenck and Bliss. In both these pleadings he alleged, among other things, that one of the board did not join in the exercise of the authority conferred upon it by the statute, and that therefore these proceedings were void; and also, that there were other irregularities that invalidated the sale. These irregularities were, that the levy and apportionment of the tax was 50 per cent. in excess of the amount which the law authorized the commissioners to impose, and the attaching to the neglect to pay the taxes within the time limited certain penalties of an oppressive character. Fraud is also charged in the cross bill against Bliss and one of the tax commissioners. Depositions were taken, which were used upon the motion to support the allegations of the bill. The record tends strongly to establish the following facts upon this branch of the case: Cowperthwaite, one of the commissioners, came to Little Rock in the capacity of tax commissioner sometime in the winter of 1864–5. He and Vance opened an office and proceeded to apportion the direct taxes on the real estate within the corporate limits of the city. Shortly afterwards Bliss and Cowperthwaite became very intimate. Bliss had the freedom of the office of the commissioners, and access to the tax books and papers therein, a privilege oppressively denied to others. Cowperthwaite assumed the entire management of the business of the office. Vance exercised no authority in respect thereof. Cowperthwaite announced that owners of property must appear, not by their agents or attorneys, but in person, to pay their taxes; and he refused generally to receive the taxes except when they were tendered by the owners of the property in person. He also caused it to be generally understood that it would be regarded a military offence by the commanding general of the department, for any one to offer to pay the taxes on property when the owner was absent, engaged in the Rebellion, or was within the rebel lines. The defendant Peay in this case was in this predicament. At the time of the sale, Bliss was confessedly without means or property of his own, and he stated that the money to make the purchases was furnished him by other parties. In one instance, Bliss was requested to permit a third party to bid in, at the sale, without competition, a certain parcel of property for the owner, who was absent; to which request Bliss answered that he could not consent to do so, because he had agreed to bid it in for one of the tax commissioners. He was the chief bidder at the tax sales, his bids amounting to $27,690, for property valued at $209,000; the taxes upon which, after adding the penalty of 50 per cent. interest and costs, were $460.51. The yearly rents at that time were $27,500. No payment of any part of the bids was made by him, and yet, by virtue of writs of possession, issued to the marshal by the commissioners, he was placed in possession of the property purchased; and he paid his bids, or some of them at least, with the money which he realized from the rents of the property. Other facts were alleged, and appeared by the depositions, of illegal and oppressive action on the part of the commissioners toward property owners, and also gross partiality and favoritism towards Bliss. Enough has been stated to show why the dis-

cretionary power of the court, invoked upon the motions, was exercised in behalf of the plaintiff in the cross bill. Some time after these proceedings were had, congress passed the act of March 3, 1865 (13 Stat. 502), declaring that a majority of the board of tax commissioners shall have full authority to transact all business and to perform all duties required by law to be performed by such board; and that no proceeding of any board of tax commissioners shall be void or invalid in consequence of the absence of any one of said commissioners. The plaintiff in the cross bill asks therein a decree against both Bliss and Schenck, declaring the proceedings under which they claim the property void, and to restore him to the possession thereof.

Rice & Benjamin and Mr. Jonby, for Schenck and Bliss.

Watkins & Rose, Gallagher & Newton, and Stillwell, Wassell & Moore, for Peay.

MILLER, Circuit Justice. This is a bill in chancery brought by the complainant to quiet his title to certain real estate, as against Peay, and for partition thereof, as against Bliss. The title which he asks to have quieted and confirmed, is derived from a sale for taxes levied upon the real estate mentioned in the bill, under the act of congress of 1861, and the amendatory act of 1862, passed to enforce the collection of the tax in the insurrectionary districts. The defendant Peay files his answer and cross bill, when the proceedings under which the plaintiff claims were had, in which he states that he was, and still is, the true owner of the lots in controversy; that for several reasons detailed in the answer and cross bill, the proceedings were void and conferred no title on Bliss, the purchaser at the tax sale; and that the plaintiff, who purchased from Bliss, is therefore without title. He makes Bliss, as well as the plaintiff, a defendant to this cross bill, and prays that the tax sale may be declared void, and his title quieted, and the possession of the property, which had been delivered to Bliss by the tax commissioner, restored to him. He also prays for the appointment of a receiver pending the litigation, and for other relief.

The plaintiff and Bliss filed a demurrer to this cross bill, based on the proposition that the bill cannot be entertained in this court, because Peay and Bliss are both citizens of the state of Arkansas. If this were an original bill, brought by the plaintiff therein, as an independent measure of relief, it could not be sustained. Bliss was the sole purchaser, at the tax sale, of the property in dispute, and the certificates of sale are in his name, and Schenck, who alleges a right in himself to only an undivided fourth part, derived his claim by purchase from Bliss. It is clear, therefore, that as between Peay as plaintiff, and Bliss as defendant, both being citizens of Arkansas, no original and independent suit of this character can be maintained in the federal courts. On the other hand, it is insisted that Schenck, who is a citizen of Ohio, and the plaintiff in the original bill, asks, as against Bliss, merely a partition of the premises, and that Peay has no interest in this branch of the case; that the principal relief sought by him is a decree quieting his title as against Peay; and that in this branch of the case, Bliss's interests consist with the plaintiff's, and that it thence appears that the interests of Schenck and Bliss are equally adverse to Peay's. It is also said that the matter of the cross bill is strictly defensive, and necessary to be presented in order to bring before the court fully the defences of the plaintiff therein to the original bill. If this be true, the demurrer must be overruled, for it is the established doctrine of this court, that where a party defendant finds it necessary for his defence, and to prevent an injustice resulting to him from the position in which the case stands, he is at liberty to file a cross bill, if the case is pending in chancery, or an original bill, if the case is one at law, although the parties defendant to said bill, or some of them, may be citizens of the same state with himself. The only limitations to this principle are, that the bill must be necessary to the defence of the party filing the bill, and it must be filed against parties already before the court, and subject to its jurisdiction, either as plaintiffs or defendants in the original suit. Dunn v. Clarke, 8 Pet. [33 U. S.] 1; Clarke v. Mathewson, 12 Pet. [37 U. S.] 164; Cross v. De Valle, 1 Wall. [68 U. S.] 1. And in determining whether a bill is original and independent, or is ancillary and auxiliary to a matter already before the court, we are not confined to the line which, in chancery pleadings, divides original bills from cross bills and supplemental bills, but may look to the essence of the matter, and to principles which, as regards parties, the federal courts have adopted in reference to their jurisdiction. Minnesota Co. v. St. Paul Co., 2 Wall. [69 U. S.] 632; Freeman v. Howe, 24 How. [65 U. S.] 450.

The main question raised by the original bill is the validity of the title conferred by the tax sale, and the relief sought is to have that title quieted and confirmed. The cross bill refers only to matters connected with the validity of the same tax title, and prays as its sole relief, to have it set aside and declared void. In reference to the partition, the cross bill is silent, and the relief asked concerning a receiver is purely incidental to the progress of the suit, and could be had without the aid of the cross bill on mere petition. It seems to us, therefore, that the cross bill is essentially a mode of defence appropriate to the case; that it is necessary to a complete determination of the controversy brought before the court by the original bill; that it is ancillary to the main cause; and that, as it brings no new parties before the

court, it is not liable to the objection taken by the demurrer. The demurrer is therefore overruled.

The application for the appointment of a receiver is urged upon the ground that Bliss is insolvent, except as to the property held under these tax sales; that the property in controversy is covered with valuable buildings, is located in the city of Little Rock, and is paying large rents, of which Bliss is the recipient; that the title of defendants is not only void in law, but that the tax proceedings were accompanied by such positive acts of fraud on the part of Bliss and one of the tax commissioners, that, for these reasons alone, the sale should be held to be void. These allegations of the cross bill are well supported by depositions taken in the suit. In reply to this, it is urged that the defendants in the cross bill are in possession of the property, under the legal title; that the questions of fraud remain to be investigated, and are denied generally by affidavit; that the defendants have not yet answered, nor been required to answer, the cross bill, because the demurrer has thus far remained undecided; that it is contrary to the rules of courts of equity to appoint a receiver when the defendant is in possession, under the legal title; and that the parties should be permitted to remain in statu quo until the case is decided upon the merits. It is undoubtedly true that, where the relief sought is founded upon a disputed equity, a court of chancery will with great reluctance and hesitation take the possession from a defendant holding the clear legal title. But under proper circumstances this may be done, and there is no absolute rule against it. Hugonin v. Basely, 13 Ves. 105. And if the motion before us presented a case where the legal title was in the defendants, and could be declared void only by reason of fraud in the sale, we should hesitate very much before appointing a receiver. The defendant in the cross bill is himself plaintiff in the original bill, and in that bill has set out in detail the facts on which his title depends, and has on that statement asked the judgment of this court as to its validity. If in this statement he has shown that the proceedings, under which alone he claims title, have conferred no title, he stands in a different attitude from a defendant whose legal title and possession are assailed, and who has admitted nothing which tends to prove the truth of the matters alleged against them.

We are of opinion that the plaintiff in the original bill has disclosed a fatal defect in his own title. The act of June 7, 1862 (12 Stat. 422), after directing that the president shall declare, on or before the 1st day of July thereafter, in what states or parts of states the insurrection exists, authorizes him to appoint three persons for each of said states, who shall constitute a board of tax commissioners for said state. It is made the duty of these commissioners, as the federal armies shall advance into the insurrectionary limits, to assess upon the real estate within the districts, as they are successively occupied, the portion of the direct tax imposed on the state by the act of 1861 which that real estate should properly bear. The entire proceeding for the collection of this tax, including the sale and delivery of possession to the purchaser of the lands on which it was assessed, was confided by the law to this board. The original bill alleges the proclamation of the president including Arkansas as an insurrectionary state; the occupation by the federal forces of the county of Pulaski, in which the lots in controversy are located; and the appointment, by and with the advice and consent of the senate, of Hulings Cowperthwaite, Enoch H. Vance, and Daniel P. Tyler, as a board of direct tax commissioners for the state of Arkansas; and then adds, "that said Tyler, one of the members of said board of tax commissioners, appointed as aforesaid, did not qualify and enter upon the discharge of the duties of his office until some time after the sale of the real estate hereinafter mentioned and described for taxes." It then goes on to allege the assessment of the direct tax on the lots in question by the other two commissioners, their sale of the lots to Bliss, and that after his purchase they put him in possession. We understand it to be well settled that where authority of this kind is conferred on three or more persons, in order to make its exercise valid, all must be present and participate, or have an opportunity to participate, in the proceedings, although some may dissent from the action determined on. The action of two out of three commissioners, to all of whom was confided a power to be exercised, cannot be upheld when the third took no part in the transaction, and was ignorant of what was done, gave no implied consent to the action of the others, and was neither consulted by them, nor had any opportunity to exert his legitimate influence in the determination of the course to be pursued. Such is the uncontradicted course of the authorities, so far as we are advised, where the power conferring the authority has not prescribed a different rule. 2 Kent, Comm. 293, note a, 633, and authorities cited there, note b; Com. v. Canal Com'rs, 9 Watts, 466; Green v. Miller, 6 Johns. 39; Kirk v. Bell, 12 Eng. Law & Eq. 385; Crocker v. Crane, 21 Wend. 211; Doughty v. Hope, 1 N. Y. 79; Id., 3 Denio, 252, 253. The case before us goes even beyond this; for according to the statement of the bill, there never was a board of commissioners in existence until after the proceedings in regard to his title were completed. The law required three commissioners. A less number was not a board, and could do nothing. The third commissioner for Arkansas, although nominated and confirmed, did not qualify or enter upon the duties of his office until after the sale of the lots to the defendants. There was therefore no board of commissioners in existence authorized to assess the tax, to receive the money, or to sell the property. If congress

had intended to confide these important functions to two persons, it would not have required the appointment of the third. If it had been willing that two out of the three should act, the statute could easily have made provision for that contingency, as has since been done by the act of 1865.

Nothing is better settled in the law of this country than that proceedings in pais for the purpose of divesting one person of title to real estate, and conferring it on another, must be shown to have been in exact pursuance of the statute authorizing them, and that no presumption will be indulged in favor of their correctness. This principle has been more frequently applied to tax titles than to any other class of cases. We cannot presume, therefore, that congress intended that less than three commissioners could conduct these proceedings, and still less that they intended that, in regard to the important matters confided to the board, any action should be taken when there was no legally organized board in existence.

It is said, however, that this defect is cured by section 3 of the act of March 3, 1865 (13 Stat. 502), which declares, "that a majority of a board of tax commissioners shall have full authority to transact all business and to perform all duties required by law to be performed by such board, and no proceeding of any board of tax commissioners shall be void or invalid in consequence of the absence of any one of said commissioners." As this act was passed after the proceedings relied on by complainant as conferring title on him, we must give it a retroactive effect, in order to reach the case.

The law concerning retrospective statutes has been so much discussed in this country and in England, that it would be an affectation of learning to cite authorities upon the subject. It is undoubtedly within the power of congress to pass retrospective statutes which do not come within the definition of ex post facto laws. As this prohibition of the constitution relates exclusively to criminal laws, it does not affect the power of congress to pass such a law in regard to the matter before us. But when we are called upon to construe statutes claimed to be retroactive, the rule is firmly settled that we can only give them that effect when there is something on their face putting it beyond doubt that the legislature so intended; or, to express it in other words, the legislature must have expressly declared the statute to be applicable to past transactions, or the intent must appear by an unavoidable implication. No such inference can be drawn from the statute before us. The first declaration is in the future tense, that a majority of the board shall have authority to transact business, and the second branch of the provision, that no such proceedings shall be void or invalid in consequence of the absence of any one of the commissioners, has very natural reference to the exercise of the power granted for the future to a majority of the board. It is not by such language as this that titles defective on account of past transactions are cured. The language of a statute which so violates the rule of policy against retrospective laws, as in effect to take the title from one man and give it to another, must be much more clear and explicit in stating that intent than the one under consideration. No fair and natural construction of its terms will justify attaching to it such an effect. But if the section we have cited could be held to have a retroactive effect, the case before us does not come within its purview; for it requires a board of tax commissioners to be in existence, and then provides that a majority of that board can act. We have already shown that, according to the allegations of the bill, no such board was in existence; that none had ever been organized when the two commissioners assessed the tax and sold the defendant's property. The act of 1865 does not pretend to hold that the sale shall be valid where there is no board in existence, where one of the commissioners never qualified, and where, consequently, no authority was ever vested in three which might be exercised by two.

We are therefore of opinion that the original bill shows on its face that the complainant has no title to the property which he claims, of which he is in possession, and from which he has for several years received the rents and profits. And as this showing accompanies the assertion of the legal title on which he relies to defeat the appointment of a receiver, that title can have no such effect. As the circumstances disclosed in the depositions are all such as should incline us to use the discretionary power of the court in favor of the appointment of a receiver, the order will be made for such appointment; and also for an injunction restraining the defendants in the cross bill, Schenck and Bliss, from interfering with the receiver, or exercising control over the property, until the further order of the court.

[NOTE. Subsequently, this cause came on for final hearing, and a decree was entered for complainant in the cross bill. Case No. 12,451. An appeal was then taken to the supreme court, but was finally abandoned, after the judgment of that court in Bennett v. Hunter, 9 Wall (76 U. S.) 326. A motion was afterwards made by the defendants Schenck and Bliss for an order directing the receiver to turn over to them the possession of the property, and the rents in his hands, on the ground that the party who appeals or files a supersedeas bond is entitled to have delivered to him any money or property in the hands of a receiver, or in the custody or control of the court. The motion was overruled. Case No. 12,451.]

Case No. 12,451.

SCHENCK v. PEAY et al.[1]

PEAY v. SCHENCK et al.

Circuit Court, E. D. Arkansas. April Term, 1869.

TAXATION—TAX SALE—STATUTE—REPEAL—LIENHOLDERS—TENDER.

1. The act of July 20, 1868, declaring that acts performed by any two of the tax commissioners shall have the same effect as if performed by all three, though retrospective, is not therefore repugnant to the constitution. Such act does not give validity to the acts of two commissioners unless three were in office.

2. A person appointed to an office without authority, and who never performed an official duty as such officer, is not an officer, de jure or de facto.

3. Where an office is created and takes effect during a session of the senate, and a subsequent session of congress passes without the same being filled, the president cannot make a valid appointment to such officer during a recess of the senate.

4. A subsequent statute, inconsistent with or repugnant to a former statute, repeals it by implication.

5. A court of equity will set aside a tax sale where there was fraud and collusion between the officer making the sale and the purchaser.

6. Under the act of congress of June 7, 1862, providing for the collection of direct taxes in insurrectionary districts, the penalty of 50 per cent. could not be assessed on lands at the date of the apportionment of the direct tax. An assessment of the penalty simultaneously with the apportionment was unauthorized, and rendered void a sale for taxes under such assessment and apportionment.

7. Congress may declare a forfeiture for nonpayment of taxes that will take effect ipso jure. But the courts will not give it such construction unless the intention that such should be the effect clearly appears.

8. A lien creditor of the owner of the fee is an "owner of the land," in the meaning of the act of 1862, and for the purpose of paying taxes on the land on which he has a judgment or attachment lien, or for the purpose of redeeming the same from tax sale.

9. A lawful tender of the tax on lands to the officer authorized to receive it is tantamount to an actual payment, and divests the authority of the officer to sell the land for taxes.

[This was a bill in equity by Washington L. Schenck against Gordon N. Peay and Calvin C. Bliss, and a cross bill by Gordon N. Peay against Washington L. Schenck and Calvin C. Bliss. The cause was heard upon a demurrer to the cross bill, and a motion on behalf of the plaintiff for an injunction and a receiver. An order was made for the appointment of a receiver and also for an injunction restraining Schenck and Bliss from interfering with the receiver. Case No. 12,450. The cause is now before the court for final hearing.]

Rice & Benjamin and T. D. W. Yonley, for Schenck and Bliss.

Watkins & Rose, Gallagher & Newton, and Stillwell, Wassell & Moore, for Peay.

CALDWELL, District Judge. The opinion of the court, delivered in this case at the last term, by Justice Miller, on the motion for the appointment of a receiver, contains a statement of the case and the pleadings down to that time, and I shall content myself with taking up the case where that opinion left it, regarding that opinion as the law of the case on all points covered by it.

After the judgment of the court given on the motion to appoint a receiver, and on the 5th day of October, 1868, Schenck filed an amended bill, in which he alleges that his information in relation to the appointment of a board of direct tax commissioners for this state was derived from hearsay, and not from official sources, and that the averment in his original bill that said board of tax commissioners, as originally appointed, consisted of Hulings Cowperthwaite, Enoch H. Vance, and Daniel P. Tyler, was a mistake of fact; that on or about the 15th day of July, 1868, he caused further inquiry to be made as to when said board of commissioners was appointed, and of whom it consisted, and whether a full board of commissioners was in commission at the time of the opening of the tax office by Commissioners Cowperthwaite and Vance, and found that the president, in pursuance of the act of congress creating said board, "did, some time in July, 1864, during the recess of the senate of the United States, appoint and commission a board of direct tax commissioners for the district of Arkansas, consisting of the said Hulings Cowperthwaite, Enoch H. Vance, and Josiah Snow," each of whom qualified as required by law, "and that afterwards, to wit, in the month of February, 1865, the names of the said Hulings Cowperthwaite, Enoch H. Vance, and Josiah Snow were regularly sent to the senate of the United States for confirmation, and the said Cowperthwaite and Vance regularly confirmed as such tax commissioners, and the said Josiah Snow rejected, and that thereupon Tyler was appointed by the president and confirmed by the senate."

In his amended bill, Schenck admits that "it is true, as set forth in complainant's original bill, that but two of said commissioners, to wit, Cowperthwaite and Vance, were present, acting or to act as such commissioners, at the time of the opening of said tax office, or at any time until after the sale of the real estate mentioned in complainant's said original bill for the payment of the direct tax due thereon," but avers that, during all that time, there were three commissioners duly appointed and in com-

[1] [Published from copy furnished through the courtesy of Hon. Henry C. Caldwell, Circuit Judge. The syllabus is reprinted from a condensed report of the case by Hon. John F. Dillon, Circuit Judge, in 1 Dill. 267. Partial reports are likewise contained in 10 Int. Rev. Rec. 54, 2 Am. Law T. Rep. U. S. Cts. 112, 1 Chi. Leg. News, 363, and 11 Int. Rev. Rec. 22.]

mission, and that in such case two might lawfully perform the duties and execute the powers conferred by the law on a board of three tax commissioners, "but that if this is not so, the defect in the title acquired by Bliss, by his purchase at the tax sale, growing out of the absence of one of the commissioners," is fully and completely cured, and said title rendered valid, by the provisions of an act of congress approved March 3, 1865 [13 Stat. 501], entitled "An act further to amend an act entitled an act for the collection of direct taxes in the insurrectionary districts, within the United States, and for other purposes, approved June seven, eighteen hundred and sixty-two," and an act entitled "An act concerning the tax commissioners for the state of Arkansas, approved July 20, 1868," as the same could or would have been had all three of said tax commissioners been present and acting from the time of the opening of said tax office until after the sale of said property. Like averments in relation to the appointment of commissioners and the curative acts of congress are contained in the answers of Schenck and Bliss, respectively, to the cross bill filed by Peay.

Peay, in his answer to the amended bill, admits that, some time in the summer of 1864, and while congress was not in session, the president appointed Cowperthwaite, Vance, and Snow tax commissioners for the district of Arkansas, but denied that Snow ever qualified as such commissioner in the manner prescribed by law, and denies that there was, at any time before the sale for taxes of the property in question, "a full board of direct tax commissioners for the said district of Arkansas, duly appointed, commissioned, and qualified to act as such." In reference to the acts of congress relied on by Schenck as curing the defects in this title, Peay says these acts were procured by the exertions and fraudulent representations of Cowperthwaite, one of the tax commissioners, and Bliss, and sets out very minutely the facts and circumstances connecting Cowperthwaite and Bliss with the passage of these acts, denies their validity, particularly assailing the act of July 20, 1868, and denies that, if valid, they have the effect claimed for them.

That section 3 of the act of March 3, 1865 (13 Stat. 501), does not heal the infirmity in the tax title, has already been shown in the opinion of the court, delivered by Justice Miller at the last term. Does the act of July 20, 1868 [15 Stat. 123], cure the defect? That act declares "that the acts and proceedings which have been had or performed by any two of the tax commissioners in and for the state of Arkansas, shall have the same force and effect, as if had and performed by all three of said commissioners." Unlike the act of 1865, this act is retrospective in its terms and operation, and this is the only difference between this act and the third section of the act of 1865. It is earnestly insisted by defendants' counsel that this act is unconstitutional; that though states may (when not prohibited by their constitutions) pass retrospective laws, congress cannot. There is no such distinction as is here attempted to be made. The power of congress to pass laws on subjects within the acknowledged scope of the constitutional grant of legislative power is not restricted to laws prospective in their operation. Many retrospective statutes have been passed by congress, and whenever their power to do so has been questioned, it has been sustained. U. S. v. The Peggy, 1 Cranch [5 U. S.] 103; Sampeyreac v. U. S., 7 Pet. [32 U. S.] 222; The Prize Cases, 2 Black [67 U. S.] 670-671.

Without undertaking to define the boundaries of legislative power in this direction, it is sufficient to say that this act is not obnoxious to the constitutional objections brought against it. See opinion in this case at last term. [Case No. 12,450.] The legal effect of the act is to give to the official action of two commissioners "the same force and effect, as if had and performed by all three of said commissioners." This act does not dispense with the necessity of "a board of three commissioners," but simply provides that the acts "of any two of the tax commissioners" shall have the same force and effect as if had and performed by "all three of said commissioners." Before the complainant can be benefited by this act, it must appear that "all three of said commissioners" had an official existence at the time the material acts were performed by the two commissioners which, it is claimed, resulted in divesting the defendants' title to the property in question. It is alleged in all the pleadings, and conceded in the argument, that the appointments of Cowperthwaite, Vance, and Snow, as direct tax commissioners for the district of Arkansas, were the first and original appointments to that office; that they were made in "the recess of the senate," and "when congress was not in session," and without the advice and consent of the senate.

In the documentary evidence submitted by the complainant are what purport to be copies of the first commissions issued to these commissioners. They bear date July 5, 1864, and recite that the appointment is made "by and with the advice and consent of the senate." This recital in the commissions, it is conceded at the bar, is a mistake. The appointments were made in July, 1864, in the recess of the senate, and the same parties nominated to the senate for confirmation, in February, 1865, when two of them, Vance and Cowperthwaite, were confirmed, and Snow rejected, and Tyler was thereupon nominated to and confirmed by the senate. On the 25th of August, 1864, Snow took the oath of office required by law, and on 9th of September of the same year he filed a bond which it appears was never approved by the secretary of the treasury as required by the 5th section of the act of 1862.

Snow never reported for duty, never drew any salary as such commissioner, and never did any act under or by virtue of his appointment as such commissioner, and was not in the district from the date of his appointment until the spring of 1868, which was long after the collection of the tax had been suspended, and the office of the tax commissioners closed.

1. Under this state of facts, was Snow a direct tax commissioner for the district of Arkansas? It is conceded that, if Snow was de facto in the exercise of the duties of the office of commissioner, his official acts as such de facto commissioner would be as valid as if he had a valid appointment to the office. But, to make him an officer de facto, it is not enough to show a void commission, but it must also appear that he was de facto in the exercise of the duties of his office. An officer de facto is one who performs the duties of an office with apparent right, and under claim and color of appointment, but without being qualified in law so to act. A person who has no legal title to an office, and who has never performed a single duty pertaining to such office, is not an officer, either de facto or de jure. See Bouv. Law Dict. tit. "De Facto," and authorities there cited. Snow never fully qualified. His bond was never approved. He never exercised or performed, or attempted to exercise or perform, a single duty or function as such commissioner, and never was within the territorial limits of his official jurisdiction. The fact that his name had ever been used in connection with the office was unknown to the purchaser at the tax sale for more than three years after the purchase. When one, under color of right, exercises the duty of a public office, he is an officer de facto, and his acts are held valid, as respects the rights of third persons, and as concerns the public, to prevent a failure of justice. This rule extends only to prevent mischief and injury to such as confide in the acts of persons so acting without right. 7 Johns. 549; 7 Serg. & R. 386. In this case Bliss did not purchase on the faith of Snow being an officer, either de facto or de jure. He never had the reputation of being such an officer. More than a year after the purchase, Bliss and his grantee come into court and base their title to the property in question on the acts of Cowperthwaite and Vance alone, and allege that they were the only commissioners in office. They do not now claim any right or title by virtue of any act of Snow as commissioner, because he never performed a single official act. They must, then, in order to meet the requirements of the act of July 20, 1868, show that he was an officer de jure. Have they done so?

2. The office in question was created by the fifth section of the act of June 7, 1862 (12 Stat. 422), which provides that "the president of the United States, by and with the advice and consent of the senate, may appoint a board of three tax commissioners for each of said states in which such insurrection exists." No appointment of such commissioners was made for this district at that or the subsequent session of congress; but in July, 1864, after congress had adjourned, and in the recess of the senate, the president appointed Snow a "direct tax commissioner for the district of the state of Arkansas." It will be remembered that this was the first or original appointment to this office. The complainant relies upon this commission to establish title in Snow to the office. It is objected that the commission is void, and invested Snow with no title to the office. If the president did not have authority to make the appointment in the time and manner that he did, his commission amounts to no more than if it had emanated from the secretary of the treasury, or any other officer acting without authority in the premises. In either case, it might be "color of office," that would make the acts of Snow, if he had performed any, good as a de facto officer; but in neither case would the commission alone prove title in Snow to the office, or entitle him to be regarded as such officer in law. If the president had the authority to make an original appointment to this office when the senate was not in session, that authority must be found in the constitution. It is not to be found in the act creating the office, or in any other act of congress. The constitutional provisions on the subject of the president's power to appoint are: First, that he shall nominate, and by and with the advice and consent of the senate, shall appoint, all officers whose appointments are not otherwise provided for in the constitution, and which shall be established by law; second, that the president shall have power to fill all vacancies that may happen during the recess of the senate by granting commissions which shall expire at the end of the next session. Const. art. 2, § 2.

It is not pretended that, under the first of these clauses, an appointment by the president, without the "advice and consent of the senate," would be of any validity. It is under the second clause that the validity of Snow's appointment is attempted to be sustained. The question turns upon the construction of the words, "vacancies that may happen during the recess of the senate." The office to which he was appointed was created by an act of congress two years prior to his appointment. There had been two sessions of congress, and the office had not previously been filled. It seems clear that this was not a vacancy that happened during the recess of the senate. The office was created and went into effect while the senate was in session. The vacancy, if that term is at all appropriate in this connection, was created by congress, and existed while the senate was in session, and therefore did not "happen during the recess of the senate." It may have existed, but did not happen, during the recess of the senate.

The following is Mr. Webster's definition of the word "happen": "First. To come by chance; to come without previous expectation; to fall out. Second. To take place; to

occur." And the same learned lexicographer, in giving a definition to the word "vacant," says, among other things: "Vacancy adds the idea of a thing having been previously filled."

The question of the proper construction of this clause of the constitution has frequently been referred by the executive department of the government to the attorney general. The facts in the cases referred to have been various, and the opinions not always such as can be reconciled. The identical question here raised was referred by Mr. Polk in 1845 to the then attorney general, Mr. Mason, who made the following response: "The only question involving executive authority and action is, 'Have you now, in the recess of the senate, the power to appoint the district judge, the district attorney, and the marshal whose offices were created by the act entitled "An act supplemental to the act for the admission of the states of Iowa and Florida into the Union," approved March 3, 1845?' The question has often occurred, and the interpretation of the constitution has been so well established, that I cannot doubt on it. If vacancies are known to exist during the session of the senate, and nominations are not then made, they cannot be filled by executive appointments in the recess of the senate. And the rule is the same where offices are created by law taking effect during the session of the senate, and no nominations are made." 4 Opp. Attys. Gen. U. S. 361. And the opinion of the supreme court of Illinois (People v. Forquer, 1 Breese, 104) is not less pointed and direct. Mr. Sergeant, in his work on Constitutional Law (page 373), and Judge Story, in his work on the Constitution (section 1559), in commenting on this clause of the constitution, quote, in a manner to imply approval, the action of the senate in 1822, when that body declared "the word 'happen' had relation to some casualty not provided for by law," and that, "if the senate be in session when offices are created by law which have not as yet been filled, and nominations are not then made to them by the president, he cannot appoint to such offices during the recess of the senate, because the vacancy does not happen during the recess of the senate," and that, "in many instances where offices are created by law, special power is on this very account given to the president to fill them during the recess," and it is added "that in no other instances had the president filled such vacant offices without special authority of law."

It would be a work of supererogation for me to go into a lengthy argument and citation of authorities on this question, after the learned and exhaustive opinion recently delivered on the question by Judge Cadwallader, of the district court of the United States for the Eastern district of Pennsylvania. Case of the District Attorney [Case No. 3,924]. I am satisfied to rest my opinion on the authority of that case. It is a judicial exposition of the clause of the constitution in question, pronounced, as the opinion itself shows, after full argument and a careful consideration of the question, both on principle and authority, and is justly entitled to great weight.

The office to which Snow was appointed in the recess of the senate, having been created and not filled at the session of congress at which it was created, nor at the next subsequent session of that body, his appointment was without authority of law and void; and Snow not being a commissioner, either de jure or de facto, it follows that there were but two commissioners in office, or acting as such, during the time the proceedings were had under and by virtue of which the complainant claims title to the property in question, and that his title is void for that reason. I have previously shown that the act of July 20, 1868, could have no operation unless it was established that "all three of said commissioners" were in office during the time mentioned. For myself, I would be satisfied to rest the decision of this case on this point; but, as there are many other cases of the same character pending in this court in which the pleadings and proof may not present this question, and as the other questions in this case, that must arise in the cases yet to be tried, have been elaborately argued by counsel, who are also counsel in the other cases, and it is desired to have the opinion of the court upon them, regarding this as a test case, I will proceed to dispose of the other questions.

3. Peay, in his cross bill, charges a conspiracy and combination, on the part of the defendant Bliss and one of the tax commissioners, to deprive him of his property by fraudulent, illegal, and oppressive means, and that the tax title in question was acquired in consequence of that agreement, and by the grossly illegal and fraudulent action of the commissioners and Bliss. And he also alleges and relies upon various irregular and illegal acts in the proceedings of the tax commissioners, which will be noticed hereafter. The particular acts relied upon to establish fraud are set out in great detail, and to support these averments the depositions of some 30 or 40 witnesses have been taken and read on the hearing. Schenck and Bliss deny the allegations of fraud, and rest on that denial. The depositions on this point establish these facts: That Cowperthwaite came to Little Rock, in the capacity of tax commissioner, some time in the winter of 1864–65; that he and his co-commissioner, Vance, soon after opened an office, and proceeded to apportion the direct tax on the real estate within the corporate limits of that city; that about that time Bliss and Cowperthwaite became very intimate; that Bliss was much of the time in the office of the tax commissioners, and had the freedom of the office, and access to the tax books and papers pertaining to the office, a privilege that was denied to others; that Cowperthwaite assumed the sole control and

management of the business of the office, his co-commissioner, Vance, acting under his directions, and having little or nothing to say in the conduct of the business; that Cowperthwaite announced and gave out that owners of property must appear in person to pay their taxes, and that he adhered to this rule and refused to receive taxes except when tendered by the owners of the property in proper person, though in a few instances it was relaxed for the benefit of favored parties; that he also gave out that it would be regarded as a military offense by the commanding general of the department for any one to attempt to pay the taxes on property when the owner was absent, engaged in the Rebellion, or within the rebel lines, and the defendant in this case was in that predicament; that the effect of this threat in the then disturbed and unsettled condition of this country, where military authority was paramount and martial law prevailed, was to deter agents and other persons from paying or offering to pay the taxes on the property of their principals and friends, and that, but for the fear and terror thus inspired, little or none of the property taxed would have been delinquent or gone to sale; that he refused to permit the owners of property to pay their taxes, unless they appeared in person and produced their title papers, or other evidence, to satisfy him that they were the legal owners of the property in 1861, holding that no person engaged in the Rebellion could make a valid conveyance of his property, and that the grantee of such a person could not pay the taxes upon the property; that he declared the spirit and intention of the direct tax law was to sell the property, and not to collect the tax, that it was "the twin sister of the confiscation law, and more complete in its operation"; that his official action was in consonance with his understanding of the object and purposes of the law; that in February, 1865, Cowperthwaite went to Washington city; that, when he returned, some time in March, he brought with him a copy of the act of March 3, 1865, and stated that he drew the act, and had it passed, and that he went to Washington for that purpose; that about the time of his return from Washington, the purpose of Bliss to purchase largely at the coming tax sale on the 4th of May became known; that Bliss, at that time, was confessedly without means or property of his own, and stated that the money to make the proposed purchases at the tax sale was furnished by "other parties"; that Cowperthwaite stated he was tendered a position in Virginia, but that he took that of tax commissioner for this state "because he could make more money here"; that, when a witness requested Bliss to permit him to bid in at the tax sale, without competition, a certain parcel of property for the owner, who was absent, Bliss told him he could not consent to do so, because he had agreed to bid it in for one of the tax commissioners; that Bliss was the chief bidder at the tax sale, where his bids amounted to $27,690 for property valued at $209,000, the taxes upon which, after adding penalty of 50 per cent., interest, and costs, were $460.51, and the yearly rents of which, at that time, were $29,500. And the evidence tends to show that certificates of purchase were issued to Bliss, and that he was put into possession of the property purchased by him by the marshal, by virtue of writs of possession issued by the commissioners, in accordance with the provisions of section 1 of the act of 1865, before he had paid his bids for said property, and that he finally paid his bids on some of them with money realized out of the rack rents, then prevailing in this city, consequent on the presence of a large army with its attendant train of camp followers, which he received as lessor of the property after he was put in possession. Bliss, in his answer to the cross bill, denies that the certificates of purchase were delivered before he paid his bids, but he does not deny that he was put in possession before the bids were paid, and he "admits that a portion of said purchase money was realized out of the rents of said property, but he avers that the greater portion thereof was paid out of means other than said rents." But this denial relates to the rents of the property here in suit, and is not inconsistent with the supposition that the balance of the money was derived from the rents of other property purchased by him at the tax sale and not embraced in this case. Opposed to the mass of depositions establishing these facts is the answer of Bliss, unsupported by a single witness. The commissioners, and Cowperthwaite particularly, who could, if the facts would warrant them or him in so doing, deny or explain this evidence and these suspicious circumstances, and repel the inference of fraud justly deducible therefrom, are not brought on the stand.

Enough has been shown to overthrow the answer, and warrant a reasonable and just conclusion against the defendants in the cross bill on this issue, in the absence of explanation or contradiction, which it was in their power to make if the facts would warrant it; and, not having made it, or offered to do so, the court cannot do otherwise than adopt the conclusion to which the proof tends. Section 3 of the act provides: "It shall be lawful for the owner or owners of said lots or parcels of land, within sixty days after the tax commissioners herein named shall have fixed the amount, to pay the taxes thus charged." Of course, this section does not require owners to appear in person to pay their taxes, or to produce proof of title as upon a trial in ejectment, or to show that they owned it anterior to the passage of the confiscation laws; and yet the commissioners, on their own motion, added all these onerous and extraordinary requirements as conditions precedent to the right of the owners to pay their taxes. Agents, attorneys in fact, tenants, lien cred-

itors, and others, who during this 60 days sought to pay taxes for their principals, debtors, or friends, as the case might be, were denied the right so to do. And in this very case the taxes on the property sold were twice tendered by lien creditors before the sale. Not only so, but to prevent the payment or tender of taxes by agents and others for absent owners, Commissioner Cowperthwaite gave out that an effort on their part so to do would be regarded as a military offense, to be punished summarily and with the rigors of martial law,—an intimation, under the circumstances, entirely effectual to accomplish the end desired. And of all this Bliss not only had notice, but it is a fair inference from the proof that he connived at, counseled, and abetted these illegal proceedings, in order that he might have an opportunity to bid the property in at the tax sale, and that, in this enterprise, he had the active aid and co-operation of at least one of the commissioners. For, while the proof is overwhelming as to the illegal and oppressive action towards property owners, it also shows that the action of said commissioner toward and with Bliss was equally illegal for its gross partiality and favoritism. It was not illegal for them to give Bliss the freedom of their office, if they chose to do so, nor to permit him to examine the tax books, because all persons had that right, though it seems to have been denied to some persons at least; but it was illegal and fraudulent for them, or either of them, to engage Bliss to purchase property for them at the tax sale, and to put him in possession of property bid in by him at the tax sale before he had paid his bid therefor, and for the purpose of enabling him to pay such bid out of the rents of the very property itself.

In reviewing these proceedings, it is just and proper that we should take into consideration that, at the time they were had, this city was in fact a military camp in "enemy's territory"; that the Rebellion was then flagrant, and all loyal men were earnestly hoping and working for its overthrow. And it is not surprising to find that men full of patriotic ardor, acting under such circumstances, should have their judgments warped, and deem it to be a personal or official duty to do many things to which the law cannot lend its sanction. Indeed, it would be remarkable if proceedings of this kind, had under such circumstances, and considering that the persons to be principally affected by them were absent, engaged in the Rebellion, or within the rebel lines, should be marked with that regularity, and that fairness and regard for the rights of property owners, that ordinarily characterize such proceedings in peaceful times and settled communities.

While these facts may, in one aspect of the case, be considered in explanation and extenuation of the commissioners' action, they cannot impart legal sanction to such proceedings. Congress, looking to the difficulty attending the collection of the taxes under such circumstances, made this law unprecedentedly rigorous in its provisions. But the commissioners could not add to its rigors, or confederate with others for that purpose. They were civil officers, intrusted with the execution of a naked power, under a statute that plainly defined their duties. They were to apportion and collect the tax according to law, and, if the tax was not paid, sell the property in the manner pointed out by the statute. If the law did not reach a certain class of taxpayers as effectually, in their opinion, as the demands of the occasion required, they could not supply the defect by any action of their own. It was no part of their duty to punish rebels. "The power of punishment is alone through the means which the law has provided for that purpose, and, if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety." Mr. Justice Davis, in Ex parte Milligan, 4 Wall. [71 U. S.] 119. They could not lawfully make any distinction, in their official action, between a rebel and a loyal man, except where the law made such distinction, and that it did not do until the point of redemption was reached. It is the act, and not the motive, that constitutes fraud in law, in many cases, and in proceedings of this kind fraud may exist without any mercenary motive on the part of the officer. The arrangement between one of the commissioners and Bliss, that Bliss should purchase a certain parcel of property for the commissioner at the tax sale, may have been made without any intention in fact to defraud, in a moral sense, the owner of the property or the government, and yet, in law, such a purchase would be fraudulent and void, both as to the government and the owner of the property. Considerations of public policy forbid such a proceeding, because the direct and necessary tendency is to encourage and invite fraudulent action. Chandler v. Moulton, 33 Vt. 245, and cases there cited. "The sale is open to all except the commissioners themselves, who are the vendors, and cannot therefore both buy and sell." Fox v. Cash, 1 Jones [11 Pa. St.] 207.

Though the commissioners acted without expectation of pecuniary advantage to themselves, but animated by a desire to punish rebels and advance the interests of Bliss, yet, if the accomplishment of these ends involved a breach of legal and official duty, to which Bliss was privy, such action is, in law, fraudulent and void. For, in addition to those acts which are held to constitute actual moral fraud, any act of omission or commission, contrary to legal or equitable duty, trust, or confidence, justly reposed, and which is injurious to another, though it falls short of moral fraud, is within the remedial jurisdiction of a court of equity. Will. Eq. Jur. 147; Kerr, Fraud & M. 2. The result of such action was not the less injurious and oppressive

to those who suffered by reason of it than if it had been prompted by the most mercenary or corrupt motive. Public officers cannot use their official position, and exceed the limits of their jurisdiction or authority, to advance the interests of one citizen at the expense of the legal rights of others; and where such action is participated in by the party to be benefited thereby, the sanction of a court of equity cannot be invoked for its protection. It is a maxim of the law that fraud vitiates everything. Tax sales are not excepted from the operation of this maxim. On the contrary, it is said, a more rigid scrutiny into their fairness is demanded, because of the gross inadequacy of the price usually paid at such sales, and the great inducements held out for the perpetration of fraud in the conduct of them. Blackw. Tax Titles, 396. And what is here said applies with redoubled force to a tax sale had under the circumstances this was.

To conclude this branch of the case, my opinion is that these proceedings, including the sale of the property to Bliss, are marked by such and so many flagrant violations of law and official duty, and such systematic, unwarranted, and oppressive action against the owners of property to defeat the payment of taxes, and such marked and unauthorized favoritism to Bliss, and so many circumstances tending to show collusion between the commissioners, or one of them, and Bliss, that no court of equity can fail to put its seal of condemnation upon the tax sale, and stamp it as fraudulent and void. And in this conclusion I am supported by the opinion of the court, delivered by Justice Miller at the last term, on the motion for a receiver, where it is said: "This application is urged upon the ground * * * that the title of the defendants is not only void in law, but that the tax proceedings were accompanied with such positive acts of fraud on the part of Bliss and one of the tax commissioners, that for these reasons alone the sale should be held to be void; and these allegations of the bill are well supported by depositions taken in the suit." I may add that many depositions, tending strongly to strengthen this conclusion, were read on the final hearing that were not then taken, and of course were not read on the motion to appoint a receiver. Schenck, having confessed in his answer that he is not a bona fide purchaser for a valuable consideration, is affected equally with Bliss by this fraud.

4. But, granting that there was a full board of tax commissioners, and that the tax proceedings were free from fraud, were they otherwise regular and valid? Before proceeding to notice the several points relied on as invalidating the sale, it is necessary to determine what weight, as evidence, shall be given to the certificate of purchase. The seventh section of the act provides that the purchaser shall "be entitled to receive from said commissioners their certificate of sale, which said certificate shall be received in all courts and places as prima facie evidence of the regularity and validity of said sale and the title of the purchaser." And the following provision occurs at the end of the same section: "And provided further, that the certificate of said commissioners shall only be affected as evidence of the regularity and validity of sale by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of this act." The case has been argued on the assumption that the two clauses in this section above quoted embraced all the statutory provisions on the subject. Under this clause the existence of the facts (1) as to whether the property was subject to the taxes, (2) whether the taxes had been paid, (3) whether the property had been redeemed, are left open to be questioned. If the property was subject to the tax under the law, and the tax was not paid, and the property not redeemed, and the certificate is regular on its face, is there any other matter or thing so vital to the authority of the government, to sell land for taxes, or to the rights of the delinquent owners of property, that congress may not declare they shall be conclusively presumed to have taken place? See 1 Greenl. Ev. §§ 15–17, 32; Murray's Lessee v. Hoboken Land Co., 18 How. [59 U. S.] 272. The right of a state legislature to declare such a presumption in this class of cases has been denied by the supreme court of Indiana (White v. Flynn, 23 Ind. 46), and doubted, at first, in Iowa (Allen v. Armstrong, 16 Iowa, 508; Adams v. Beale, 19 Iowa, 61), and afterwards its application denied, when the deed on its face shows a noncompliance with the requirements of the law (Boardman v. Bourne, 20 Iowa, 134), and finally declared not to be within the constitutional power of the legislature (Corbin v. Hill, 21 Iowa, 70). The court of appeals of Virginia, in commenting on this clause of the act of congress, says: "It cannot apply to a case where the defect of authority is apparent on the face of the certificate." Turner v. Smith, 18 Grat. 837. See Cooley, Const. Law, 367–369, and cases there cited; also cases cited in Brightly, Fed. Dig. p. 51, § 15.

If the determination of this question was necessary to the decision of the case, I should not be prepared to admit that the clause in question was repugnant to the constitution, but, holding, as I do, that it has been repealed, any discussion of the constitutional question is rendered unnecessary. By the second section of the act of March 3, 1865 (13 Stat. 501), the president was authorized and required to issue patents to the holders of these certificates. By the sixth section of a joint resolution passed February 25, 1867 (14 Stat. 568), the section of the act last referred to was repealed, and it is enacted that "certificates of sale shall be received in all courts and places as prima facie evidence of the regularity, and

validity of said sale, and of the title of the purchaser or purchasers under the same, as provided in section 7" of the original act, which provision I have already quoted. This is the last statute in point of time, and must control: If two inconsistent acts be passed at different times, the last is to be obeyed, and is, by implication, a repeal of all prior statutes, so far as it is contrary and repugnant to them. The last clause of the seventh section of the act of 1862 and this joint resolution are repugnant, and both cannot stand. If the certificates are prima facie evidence only, they cannot be conclusive, and if they are conclusive, they are more than prima facie evidence of a fact. And that it was the intention of congress to supersede the last proviso to section 7 is plainly shown by the declaration in the joint resolution, that they "shall be prima facie evidence as provided in section 7" of the act of 1862. Now, it is provided, in the body of that section, that they "shall be prima facie evidence." How could congress more clearly declare its intention to adopt this provision of the section as the rule determining the force of these certificates as evidence? Where two statutes were passed on the same day, one limiting a judgment lien to two years, and the other extending it to five, and a statute passed two years afterwards recognized the former statute as existing and in full force, it was held it would prevail over the latter, by force of such legislative recognition. Planters' Bank v. Black, 11 Smedes & M. 43. And see Sedg. St. & Const. Law, pp. 125, 129, 415; U. S. v. Irwin [Case No. 15,445]; Johnson v. Byrd [Id. 7,376].

5. The first objection taken to the regularity and validity of the proceedings of the commissioners is that the levy and apportionment of tax was 50 per cent. in excess of the amount the law authorized the commissioners to impose. It appears affirmatively that the commissioners, in addition to the per centum of tax they were authorized to apportion on the lands in the state, added thereto, at the time the apportionment and assessment was made, a penalty of 50 per cent., thus imposing on owners of property a penalty equal to one-half of their taxes before they were in default, and before, indeed, they had had an opportunity to pay, or could possibly have paid, their taxes. This penalty was imposed simultaneously with the apportionment of the tax, and no property owner was permitted to pay his tax without also paying this penalty. The first and second sections of the act, so far as they relate to a penalty, do no more than fix the liability of the land for the penalty of 50 per cent. in the event of delinquency. It is nowhere said it shall be charged and collected simultaneously with the tax, and before the owner has made default in the payment of his tax, or the land has become delinquent. On the contrary, the third section of the act expressly provides that, at any time within 60 days after the "tax" is apportioned, the owner "may pay the tax," and obtain a receipt that will discharge his land "from said tax," the word "penalty" not occurring in the section, and for the obvious reason that it would be out of place there, and, if it did not render the section repugnant to the constitution, would make it repugnant to natural justice and common right; and courts will not give to a statute a construction that will work such results, if it is susceptible of any other. A penalty is a punishment imposed by statute as a consequence of the commission of some act prohibited by law, or the omission to do some act or perform some duty required by law. What act had the owners of property done, or what had they omitted to do, that a penalty should be inflicted upon them simultaneously with the levy and apportionment of the tax, and before they could have paid it, if they had been ready and desirous so to do? Before a court would give a statute such a construction, it would have to be so clear, explicit, and mandatory in its terms as to leave no room for any other reasonable interpretation. But, taking the whole statute together, it is plain the intention was that the penalty should take effect and become an absolute charge upon the land after, and not before, default was made in the payment of the tax. The third and seventh sections of the act, when taken together, show this intention. The third provides the owner may, at any time within 60 days after the apportionment, "pay his tax," and the seventh section declares that, "in case the taxes on said land are not paid as provided for in the third section" of the act, then the commissioners may sell the land for the "taxes, penalty, and costs." The word "penalty" is carefully and properly omitted from the third section and in the first clause of the seventh section; and when it occurs in the first and second sections of the act, it is used to fix the liability of the land for the penalty that may be incurred by delinquency, and upon default of payment; and when it occurs in the seventh section, it is to authorize a sale for the tax, penalty, and costs, default having previously been made in the payment of "the taxes on the land," "as provided for in the third section" of the act. Any other construction would, in effect, make the penalty a part of the tax, and would be tantamount to a provision that the direct tax apportioned among the several states should, in the states in insurrection, be 50 per cent. greater than the apportionment made "according to their respective numbers," as required by the constitution.

If an act of congress admits of two interpretations, one of which brings it within, and the other presses it beyond, their constitutional authority, the courts will adopt the former construction. U. S. v. Combs, 12 Pet. [37 U. S.] 72. The provision of the constitution, in relation to the apportionment of direct taxes gives to congress no power to discriminate between the states. The provision is mandatory. "It shall be apportioned according to their respective numbers." But it is said this is a penalty. Pen-

alty for what? Can congress apportion among the several states, according to their respective numbers, a direct tax, and then, as to some of the states, declare "a penalty of 50 per centum of said tax is hereby added thereto"? In the case supposed, what would be the difference between the tax and the penalty? Both are imposed at the same time, assessed at the same time, collected at the same time, and no possible escape from either except by payment. The truth is, in the case supposed, it would be an excessive apportionment of the direct tax, and calling it a penalty would not make it any the less an excessive apportionment of the tax. "Is the proposition to be maintained that the constitution meant to prohibit names and not things?" Chief Justice Marshall, in Craig v. State of Missouri, 4 Pet. [29 U. S.] 438. "The legal results would be the same, for what cannot be done directly cannot be done indirectly. The constitution deals with substance, not shadows." Mr. Justice Field, in Cummins v. State of Missouri, 4 Wall. [71 U. S.] 325. But it is said this penalty was imposed in order to defray the enhanced expenses attending the collection of the tax in the states in insurrection, and that the insurrection itself is a sufficient justification for such action, and will warrant the court in giving the statute the construction claimed for it.

As to the first proposition, it is a sufficient answer to say that the constitution of the United States expressly declares that "direct taxes shall be apportioned among the several states according to their respective numbers," and not according to the expense or difficulty of collecting the same in the several states. Much stress in the argument was laid on the fact of rebellion, and the act in question being, as it was said, a "war measure," which counsel assumed operated to exempt this act and the proceedings of the tax commissioners, the one from those canons of construction of universal application in the interpretation of statutes, and the other from the application of those rules and principles of law by which the validity of tax sales are universally tested. The use attempted to be made in this case of "war measures," and that indefinite quantity known as the "war power," would put such measures above all constitutional restraint, and those engaged in their execution above all law. This erroneous doctrine has been emphatically condemned and put at rest by the supreme court. "The constitution of the United States is a law for rulers and people, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism. But the theory of necessity on which it is based is false, for the government within the constitution has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority." Ex parte Milligan, 4 Wall. [71 U. S.] 120. And from this proposition there was no dissent. The chief justice, speaking for the minority of the court in that case, says: "We agree in the proposition that no department of the government of the United States, neither president, nor congress, nor the courts, possesses any power not given by the constitution." Id. 136, 137. That congress, in passing this act, shaped its provisions in view of the Rebellion, is plain, and hence we have a statute for the collection of these taxes in the states in insurrection unprecedented in the rigor of its provisions, and which find as a matter of policy and justice their only justification in the abnormal condition of the country in which they were designed to operate. Certainly, a law under which, supposing the commissioners to comply with its terms, a man irrevocably loses his land if the taxes are not paid within six months—the law gives two months in which to pay taxes, the sale takes place two months thereafter, and two months are given after sale in which to make redemption, making, in all, six months—after the tax book is made up, is rigorous enough. Especially so, when we consider that the law contemplates the tax book shall be made up under protection of military authority, without any notice to property owners, and in a country where civil war was flagrant. Congress acted in full view of the facts, and made this law what it is, and the court cannot add to its rigors in one direction, and relax its requirements in another, for the protection of titles acquired under it. It may be conceded that congress intended, by the stringent provisions of this act, not only to collect the tax, but to have it operate as an inducement to the rebels to return to their allegiance, and, failing in that, that they should lose their property by its vigorous operation. Still these other objects hoped to be obtained by the law were to flow as incidents from its legal and valid execution and enforcement. For, certainly, if one may not violate a law, or exceed his authority to accomplish the declared purpose of a statute, he cannot do it in order that the incidental good hoped to be derived from its enforcement may be attained.

It must not be forgotten that the power to levy the tax and provide for its collection is derived from the constitutional grant of power to congress to "levy and collect taxes," and not from the Rebellion. While the Rebellion was undoubtedly the incentive to the stringent provisions contained in the act, it did not supply the power to enact them, and cannot be invoked to uphold irregular or illegal

action under them. No one will seriously pretend this penalty could be assessed as a penalty on the states for rebellion or insurrection. Nor will it be contended that it could be imposed on the owners of property for a like reason. Such an interpretation would render it obnoxious to the constitutional inhibition of ex post facto laws. It would be even worse than an ex post facto law, because it would be imposing a penalty on infants, nonsane persons, feme coverts, aliens, and many loyal men, equally with the rebel owners of lands. The assessment of this penalty was premature and illegal, and avoids all the subsequent proceedings. Any other rule of construction would put it in the power of a tax collector to coerce owners of property to pay any amount of excessive and illegal tax he might demand, under penalty of losing their lands if they refused to pay it. Indeed, I did not understand it to be questioned, in the argument, but what, if the assessment of this penalty was premature, it avoided the tax sale. Cooley, Const. Law, 520, and cases there cited; Blackw. Tax Titles (2d Ed.) 154, and cases there cited. Other objections to the regularity and validity of the tax sale arise out of acts occurring after the expiration of the 60 days allowed for the payment of the tax.

6. It is objected by the defendants in the cross bill that the complainant cannot avail himself of these irregularities, because he had no interest in the sale, and no right or title to the lands to be affected by it. This objection is based upon the assumption that, by the provisions of section 4 of the act, the land "became forfeited to the United States" at the expiration of the 60 days allowed to pay taxes; that this forfeiture was absolute, and ipso jure vested the title in the United States without and before a sale, and without the doing of any other act whatever. Section 3 of the act, as we have seen, provides that at any time within 60 days after the commissioners have fixed the amount of tax, the owners may pay the same; and section 4 provides that "the title in and to each and every piece or parcel of land, upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States, and, upon the sale hereinafter provided for, shall vest in the United States, or in the purchasers at such sale, in fee simple," etc. Whatever may be the correct interpretation of this section, it is clear no forfeiture occurred in this case at the expiration of the 60 days, for the reason that the amount of tax, "as above provided," never was apportioned and levied according to law. The addition of the penalty at the date of levying the tax being illegal, the forfeiture could not and did not attach. Before a statutory forfeiture, that by its own force divests an owner of his title to lands, can have effect, it must appear that all the prior proceedings were in exact conformity to law. A levy that is 50 per cent. greater than the law authorizes is illegal and void, and no title can be acquired under or by virtue of such a levy, either by sale or forfeiture. It may be laid down as a principle of universal law that, in order to enforce these forfeitures, the courts require the same degree of strictness which is applied to ordinary tax sales in order to divest the title of the owner. Blackw. Tax Titles (2d Ed.) p. 460, and cases cited.

7. But, granting that the prior proceedings were regular, did the forfeiture, ipso jure, vest the title in the United States and divest the title of the owner at the expiration of the 60 days? On the one hand it is claimed that it did, and on the other that the provision is unconstitutional. I would not notice the constitutional question had it not been pressed by one of the counsel with unusual earnestness and ability, and did his argument not find support in a recent decision of a state court of the last resort, entitled to the highest respect. Bennett v. Hunter, 18 Grat. 100. In the case just referred to, a majority of the court held that the provision under consideration was repugnant to the constitution because (1) it deprived a man of his property without "due process of law," which is the point relied on by counsel in this case; (2) that this principle cannot "avail the United States in respect to lands, the title to which was not derived from them, which are not held under their authority, and to which they have not either actually or in theory the paramount title," and that such a right "cannot be claimed without touching upon the local sovereignty of the states, and their paramount title and jurisdiction." It is not perceived how the sovereignty of the states is touched by a law of congress for the collection of a direct tax, that operates directly on individuals and the property of individuals, and that does not affect the state in her corporate capacity, nor tax her lands. And though it is true of Virginia, it is not true as to most of the states, that the title to lands within their limits was not derived from the United States. In many of the new states the title was so derived, and the citizens of these states obtained their titles by patent directly from the United States, and in many instances the states themselves have been the recipients of the bounty of the United States, and obtained title by her grant to great quantities of the public lands, to aid in the construction of internal improvements, establish schools, etc. But it is not material from what source the title to land is derived. In this country the feudal system, as a law of tenures, is abolished, and every man is the absolute owner of the soil to which he has acquired title in conformity to law. It is nevertheless true that every man holds his lands, however absolute his property therein, subject to the right of the government, both state and national, (1) to forfeit it for the nonpayment of taxes lawfully levied for the support of the government, and (2) to the right of eminent domain. 1 Hil. Real Prop.

40, 41; 1 Washb. Real Prop. 41–44; 3 Kent, Comm. 513; Blackw. Tax Titles, pp. 2, 459.

It is conceded, in the opinion referred to, that it would be competent for a state legislature, in such cases, to pass the title by the mere force of the forfeiture declared by the statute. Certainly, such right is not an open question in Virginia, which was one of the first states to exercise the right, having, as early as 1790, passed a statute of this kind, and subsequently, and at a much later date (1834), passed a similar act. And though these acts were often assailed as being repugnant to the constitution, that court has uniformly sustained their constitutionality. Wild's Lessee v. Sarpell, 10 Grat. 405; Levasser v. Washburn, 11 Grat. 572. And the doctrine in these cases is fully supported by the decisions in other states. Blackw. Tax Titles, tit. "Forfeiture." It is believed the constitution of every state in the Union contains, either in exact words or legal effect, the provision found in article 5 of the amendments to the constitution of the United States, which declares that "no person shall be deprived of life, liberty, or property, without due process of law." And if those words in a state constitution do not operate to restrain a state legislature from declaring an absolute forfeiture of lands for nonpayment of taxes, it is difficult to understand why they should have a different operation in the constitution of the United States, and on the power of congress over a subject confessedly within the powers of the national government, and within the express grant of legislative power to congress. The grant of power to congress "to levy and collect taxes, * * * to pay the debts, and provide for the common defense and general welfare of the United States" (Const. art. 1, § 8), is plenary, and is followed by a provision authorizing congress "to make all laws which shall be necessary and proper for carrying into execution" that power. Can the authority of the states to collect their taxes be any broader or more ample? It is granted that the national government is one of limited powers, but its power to tax its citizens, and collect that tax for its support and preservation, is not only one of the powers expressly given, but one without which it could not exercise the powers expressly delegated to it. It is an inherent right in all governments, and must have been implied in this, if it had not been expressly granted. And as long as "this constitution, and the laws of the United States which shall be made in pursuance thereof," continue to be the "supreme law of the land," this inherent right in all governments, granted by the constitution in plenary terms to the United States, "to levy and collect taxes" for its support, cannot be impeded or restricted by any department of a state government on the ground that its exercise infringes upon state sovereignty in some manner so remote as not to be seen or felt in its practical operation and effect. The truth is, it does no such thing. The argument that it is an unlawful interference with "the paramount jurisdiction of the states over the lands in their jurisdiction" is based on an erroneous impression as to the effect the acquisition of the title by the United States to lands within the states has on the jurisdiction over such lands. The ordinary jurisdiction remains the same, and is not different from what it would be if the lands were owned by a private citizen, save in the matter of taxes, a burden which, by comity or positive law, is not imposed by either government on the lands of the other. Nor can any department of a state government prescribe or direct the mode and manner in which the United States shall collect her taxes, or restrict her right to impose penalties or forfeitures for their nonpayment. "The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception." "When the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such power." Chief Justice Marshall, in McCullough v. State of Maryland, 4 Wheat. [17 U. S.] 410, 423.

But, it is said, while states may, the United States may not, denounce an absolute forfeiture of lands for taxes; but that, in the case of the United States, there must be what the common law calls "inquest of office." Now, this common-law doctrine, that an inquest of office is necessary to vest forfeitures in the crown, has no more application to the United States, and the measures she may adopt for the collection of her revenues, than it has to the states, and like measures on their part; and it has no application to either when the statute supersedes it in clear and express terms, and it clearly appears that it was the intention of the legislation to vest the forfeiture by the mere force of the statute. In Fairfax's Devisee v. Hunter's Lessee, 7 Cranch [11 U. S.] 632, Mr. Justice Johnson says: "There is nothing mystical, nor anything of indispensable obligation in this inquest of office. It is, in Great Britain, a salutary restraint upon the exercise of arbitrary power by the crown, and affords the subject a simple and decent mode of contesting the claim of his sovereign; but the legislative power of that country may assert, and has asserted, the right of dispensing with it, and I see no reason why it was not competent for the legislature to do the same." And that it may be done for violations or nonobservance of the revenue laws is settled. "Where

a forfeiture is given by statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature." Chief Justice Marshall, in U. S. v. Grundy, 3 Cranch [7 U. S.] 377. And see, to the same effect, The Florenzo [Case No. 4,886]; Sedg. St. & Const. Law, 97; Smith v. Maryland, 6 Cranch [10 U. S.] 286; U. S. v. 1960 Bags Coffee, 8 Cranch [12 U. S.] 398; U. S. v. Repentigny, 5 Wall. [72 U. S.] 211, 267, 268. In the last case cited, Mr. Justice Nelson, who delivered the opinion of the court, says: "And we agree that, before a forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent. A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of assuming the forfeiture is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings."

A sale of lands for taxes, by ministerial or executive officers, is not "office found," in the technical meaning of those words at common law, and if the United States is to be restricted by this common-law rule in the measures she adopts to enforce payment of her revenues, she cannot seize and sell or forfeit any property for unpaid taxes until a judicial investigation has been had. And that the words, "law of the land," have no application, in the sense contended for, to the measures the government may adopt to enforce the collection of its revenues, is clearly and conclusively shown in the very learned opinion of Justice Curtis, in Murray's Lessee v. Hoboken Land & Imp. Co., 18 How. [59 U. S.] 272. In the course of that opinion, after showing the proper interpretation of those words as applied to the case before the court, he says: "It may be added that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or public officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to." Of the power of the United States to denounce an absolute forfeiture of lands as a consequence of the nonpayment of the direct tax thereon, I have no doubt. The question will always be, as in this case, one of construction and not of power.

8. And now, does the forfeiture under this act vest at the expiration of the 60 days allowed to pay the taxes, or upon the sale of the land provided for in the seventh section? The language of the section is, "And upon the sale hereinafter provided for shall vest in the United States, or in the purchaser at such sale in fee simple," etc. If the title vested by force of the forfeiture, why this language? And if the land was already the absolute property of the United States, why provide, as is done in the seventh section, that said "commissioners shall be authorized at said sale to bid off the same for the United States, at a sum not exceeding two-thirds of the assessed value thereof"? Why should the government "bid off" land to which it already had a perfect title? Such language is not appropriate in directing the sale of land that belongs to the United States. A minimum price is fixed on public lands, and, if they do not sell for that sum, they are not "bid off" to the United States, but remain unsold. The ninth section of the act shows still more conclusively that this forfeiture did not vest until after the sale. By this section the commissioners are given authority to lease "said lots and parcels of ground," where the owners "have not paid the tax thereon, as provided for in the third section of this act, and the same shall have been struck off to the United States at said sale," thus making the purchase of the United States at tax sale a condition precedent to the right of the commissioners to lease the lands. Again, the eleventh section provides that the board of commissioners, under the direction of the president, may be authorized, instead of "leasing the said lands vested in the United States, as above provided, to sell the same," etc. It is manifest the words, "vested in the United States, as above provided," have reference to the provisions of section 9, between which section and section 11 there is a direct sequence and connection. And see Acts 1865, § 8; 13 Stat. 501. And the language used in the last proviso, now repealed, to section 7 of the act confirms this construction. Under that proviso the owner was allowed, among other grounds, to contest the validity of the tax certificate, by showing "that the taxes had been paid previous to sale." Now, does not this language clearly imply that the taxes may be paid any time "previous to sale"? If the forfeiture was absolute at the expiration of the 60 days, and no act of the owner either in paying or tendering the tax, or irregularity in the proceedings of the commissioners after that time, could be inquired into, the language would have been that the validity of the certificate might be contested by showing "that the taxes had been paid previous to forfeiture," instead of "previous to sale." There is not one sentence or word, aside from the word "forfeiture" itself, in the whole statute, that does not go to show that the intention of congress was that the title to these lands should not vest in the United States until after sale. And in this conclu-

sion I am supported by the opinion of that court from whose judgment, on the question of the power of congress to impose such a forfeiture, I have felt constrained to dissent. Bennett v. Hunter, 18 Grat. 126. If the other construction was given to the statute, it would result that all the lands and lots in this state, and elsewhere in the insurrectionary states, upon which the tax was apportioned and not paid within 60 days, and which were not sold because the collection of the tax was suspended, or for any other reason, were now the absolute property of the United States,—a result disclaimed by every department of the government, and that would be quite as startling to that department of the government whose special duty it is to look after and know what lands do belong to the public domain, as to the unsuspecting owner himself. Any other construction would make the sale of the land result in an actual benefit to the owner, because, if the forfeiture is absolute at the expiration of the 60 days, there is no redemption, and no means of divesting the forfeiture; whereas, if it is sold, the owner has 60 days after sale in which to redeem. When those familiar rules for the construction of statutes denouncing penalties and forfeitures are applied to this act, all doubt as to its proper construction is removed. The other points in the case may be disposed of in a few words.

9. It is in proof that Dr. John Kirkwood was a creditor of Peay, the owner in fee of the property in question, and that he had a valid attachment lien on all the property, and as such lien creditor, as well as for Peay, he tendered to the commissioners, before the sale of the property, all the taxes, interest, and costs due on the same, which they refused to receive. It is further shown that the fact of this tender was announced in Bliss's presence by the commissioner when he offered the property for sale, and that Bliss purchased with full notice of the fact that the taxes, penalty, and costs had been tendered. It further appears that, soon after the sale, and within the 60 days allowed for redemption, Dr. Kirkwood, who, it is shown, was a loyal man, and had never, in any manner, been implicated in the Rebellion, and whose lien on the property was still in full force, went before the commissioners, "in his own proper person," and took an oath "to support the constitution of the United States," as required by the act, and again tendered the taxes, penalty, and costs due on the property, and demanded that he be allowed to redeem the same. The last tender was made in strict conformity to the very letter of the act, and by a person expressly authorized to redeem, by the terms of the act, which declares that "any loyal person of the United States," having valid lien upon or interest in the same, may, at any time within 60 days after said sale, appear before the said commissioners, and, upon taking the oath and paying the taxes and expenses as therein provided, "may redeem said lots and lands from said sale." The commissioners refused the tender before sale, holding that no one but the legal owner of the fee of the property, in proper person, could pay the taxes, and the last tender was refused on the supposition that that part of section 7, giving to lien creditors a right of redemption, had been repealed by section 4 of the act of March 3, 1865 (13 Stat. 501), in which supposition they were mistaken, the last act mentioned being cumulative merely, and in no manner inconsistent with or repugnant to the right of a lien creditor to redeem. The last act simply provides that, in case the land is not redeemed by any one, the lien creditors may, with certain limitations, have their liens satisfied out of the proceeds of the sale of the lands in the treasury.

Independent of the provisions of the act, expressly giving them the right to redeem, lien creditors would have had that right. The following summary of the law on this point by Mr. Blackwell is fully supported by the authorities: "It may therefore be laid down as a general rule that any right, whether in law or in equity, whether perfect or inchoate, whether in possession or action, amounts to an ownership in the land, and that a charge or lien upon it constitutes the person claiming it an owner, so far as it is necessary to give him the right to redeem." Blackw. Tax Titles, 496 (2d Ed. 423, 424), and cases there cited; Dubois v. Hepburn, 1 Pet. [26 U. S.] 1–23; Adams v. Beale, 19 Iowa, 61, 68, 69; Burton v. Hintrager, 16 Iowa, 348. And if a person having a charge or lien upon land is an owner, so far as it is necessary to give him the right to redeem, a fortiori, he may pay the taxes on the land before the sale. And Dr. Kirkwood having the right to pay the taxes on this property, his tender of them in proper person was equivalent in law to the like tender by the owner of the fee, and ipso facto divested the commissioners of all right or authority to sell the property. A law that would require the citizen to appear in his own proper person to pay the tax on his lands, and that denied to his agents and lien creditors the right to pay such tax, would be such a departure from the known purpose and object of revenue laws, such an infringement upon the well-established rights of the citizen, and so opposed to the plain and obvious dictates of reason and justice, that nothing but the most irresistible language, affirming the one proposition and expressly excluding the other, would induce a court of justice to suppose a design on the part of the law-making power to effect such objects. Such a requirement, when we reflect that no inconsiderable portion of the lands are owned by persons incapacitated to perform any act (infants, insane persons, and feme coverts), and where, from the great distance to be traveled, and the age and infirmities of other owners, it would be physically impossible for them to comply with the law, would be against com-

mon right and reason,—a sufficient reason, according to Lord Coke, for declaring void an act of parliament itself. And see 1 Kent, Comm. (10th Ed.) 503; Riggs v. Martin, 5 Ark. 506. But congress has attempted no such thing in this act, as is claimed. A just and fair interpretation of the act, in this respect, makes it consistent with common right and reason. The words "owner," or "owner in person," do not exclude an agent, or one having an interest in or lien on, the land, from paying the tax, and for the obvious reason that the words "or agent, or other person interested," or equivalent words, are necessarily implied by the law, and what is implied in a statute is as much a part of it as what is expressed. U. S. v. Babbit, 1 Black [66 U. S.] 61; Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 221. It is held that, under the act of congress now in question, a mere stranger may pay the tax any time before sale, and that a tender by such stranger is effectual, and avoids the sale. "If the money is paid, no matter by whom, before a sale is made, the reason for the making a sale ceases, and the authority to make it ceases also. If the money, instead of being actually paid, is tendered to the commissioners, and they refuse to receive it because not tendered by the owner in person, the legal effect is the same as if it had been paid." Bennett v. Hunter, 18 Grat. 147, 148. And the tender to redeem, made in conformity to law, divested the title acquired under the purchase at the tax sale as effectually as if the money had been received by the commissioners, as it ought to have been, and the redemption regularly entered in the books of the commissioners. See Corbett v. Nutt, 18 Grat. 641, 642.

10. It is also shown that the sale of the property was made by one commissioner, Cowperthwaite, in the absence of his co-commissioner, Vance, who was, at the time of the sale, beyond the limits of the city of Little Rock, which was all the territory in which the taxes had then been apportioned in the district, and the absent commissioner is not shown to have been consulted or advised with, in reference to said sale or the manner of conducting the same. One of a board of three commissioners could not, under the acts of 1865 and 1868, perform the most material act in the proceedings of the board, and the only act that could divest owners of the title to their property, without the presence and concurrence of at least one of his co-commissioners. The sale, having been made by Cowperthwaite alone, without the presence or advice of his co-commissioner, is void for that reason. The fact that Commissioner Vance subsequently signed the certificates of purchase is not, in itself, sufficient to obviate this objection. The government, the bidders, and the owners of property, were alike entitled to his presence, influence, and advice in conducting the sale, and his voice in settling the questions that might then arise, as well as to see that the sale was fairly and properly conducted, without prejudice to the rights of any. His subsequently signing the certificates of purchase, without personal knowledge of the facts, is not equivalent in law to his presence at the sale, and the performance of his duty, and the exercise of his just influence in conducting the same. It is a well-settled rule of construction, in tax-title cases, that no fact can be made out by intendment, and no presumption indulged, in favor of such title. And the court will not presume that the absence of two commissioners of a board of three worked no prejudice on so important an occasion. In the case of Town of Middletown v. Town of Berlin, 18 Conn. 189, where one member of a board of five had assumed to perform some duties pertaining to the levy and assessment of taxes, his acts were held void, and the court said: "It is believed that no case can be found which will justify the performance of a duty, required of an aggregate body, by one only, as has been attempted here." See Blackw. Tax Titles, 136 et seq. (2d Ed., 110 et seq.).

Other objections are made to the regularity and validity of these proceedings, which I pretermit for the reason that the points already ruled on will doubtless reach all the cases pending, and any ruling upon others is unnecessary.

Since the argument, a case has come to my notice (Turner v. Smith, 18 Grat. 830) in which it is held that the provision of section 7 of the act of 1862, that "said commissioners shall be authorized at said sale to bid off the lands for the United States at a sum not exceeding two-thirds of the assessed value thereof," is mandatory, and that a sale of delinquent lands to a citizen for less than two-thirds of their appraised value is void. If this is a correct interpretation of the act, it would be an additional ground for avoiding the sale in this case. But, as the point was not argued, I forbear expressing any opinion on it. A decree will be entered for the complainant in the cross bill in conformity to this opinion.

NOTE. By order of the court at the April term, 1868 [Case No. 12,450], the property in controversy in this case was put into the hands of a receiver, with the usual directions. On the rendition of the decree at this term, which, among other things, required the receiver to turn over the possession of the property and the rents to Peay, the complainant in the cross bill, the defendants, Schenck and Bliss, prayed an appeal, which was allowed; and thereupon a supersedeas bond was filed and approved, in a penalty fixed by the court ($6,000) sufficient to cover costs and the rents of the property received by Bliss prior to the appointment of a receiver, and for which, by the terms of the decree, he was required to account. [The appeal was abandoned after the judgment of the supreme court in Bennett v. Hunter, 9 Wall. (76 U. S.) 326.]

On a subsequent day, the defendants, Schenck and Bliss, by their solicitors, moved for an order directing the receiver to turn over to them the possession of the property and the rents in his hands, on the ground that a party who appeals and files a supersedeas bond is thereby entitled to have delivered to him any money or property in the hands of a re-

ceiver, or in the custody or control of the court, if, as was the case here, that custody or possession had been taken from him, in the progress of the litigation, by an order appointing a receiver or otherwise.

By the Court: The motion is overruled. The supersedeas bond was only intended to cover the actual present liability of the defendants under the decree. Even if the bond was in a penalty equal to the value of all the rents, past, present, and prospective, it could not have any other effect than to stay the active operation of the decree, and would not entitle the defendants to the active interposition of the court in their behalf, and the revocation of orders existing at the date of the decree, and to the custody of property and money in the hands of the receiver in pursuance of such orders. See Smith v. Allen, 2 E. D. Smith, 259; Stafford v. Kirkland, 16 How. [57 U. S.] 135.

SCHENCK (POTTER v.). See Case No. 11,337.

SCHENECTADY & TROY R. CO. (WINANS v.). See Case No. 17,865.

Case No. 12,452.

In re SCHEPELER et al.

[3 Ben. 346; [1] 3 N. B. R. 170 (Quarto, 42).]

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

BANKRUPTCY—NOTICE TO CREDITORS—NEW WARRANT.

Where, on the return day of a warrant in involuntary bankruptcy, proof was made of the publication of notices to the creditors, but not of the service of such notices, and the bankrupts showed that they had not been able to prepare schedules, and asked for further time, which no one opposed, whereupon the register certified the facts to the court, and asked that a new warrant be issued: *Held*, that the register should have adjourned the meeting of creditors, under sections 42 and 12 of the bankruptcy act [of 1867 (14 Stat. 537, 522)], and directed a new notice to be served; but, as he had not done so, the proceedings had fallen through, and there must be a new warrant.

[Cited in Re Howes, Case No. 6,787.]

In this case, a warrant was issued, returnable July 20th, 1869, and was on that day returned, with proof of due publication of the notices required, but without any proof of service of notices, and the bankrupts [John F. Schepeler, John D. Schepeler, and Leon Rosenplaenter] appeared, and showed by affidavit that they had been unable to prepare the schedules, and moved for further time to prepare them, which no one opposed, whereupon the register certified the facts to the judge, and asked that a new warrant should be issued, returnable at a later day.

By EDGAR KETCHUM, Register:

[I, Edgar Ketchum, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit Mr. John W. Weed, who appeared for the bankrupt, and Mr. Edgar Logan, who appeared for the creditors of the said bankrupt, that is to say: The warrant was issued by the district judge, dated the 29th day of June, 1869, returnable the 20th day of July, at 12 o'clock, at noon, and was duly returned by the marshal with proof of due publication of the notices required thereby, but without any proof of notice served by mail or personally as therein required. On the return day, at the hour prescribed, the said attorneys appeared, and the attorney for the bankrupt made and filed an affidavit, showing that from the large number of creditors, and the necessary adjustment of numerous and difficult accounts between said bankrupts and creditors, home and foreign, they had been unable to prepare said schedules, and thereon he moved for further time, no one opposing the allowance thereof. Wherefore I respectfully certify these facts to the judge, and ask that a new warrant may be issued by the court, to be returnable in the early part of October next.][2]

BLATCHFORD, District Judge. The proper course, in this case, was for the register, under sections 42 and 12, to adjourn the meeting of creditors to a day certain, on the ground that the notice to the creditors had not been given as required in the warrant, and to direct the giving, for the adjourned day, of a new notice, in respect of the serving by mail or personally, but not in respect of the publication; but, as there has been no adjournment, the proceedings have fallen through, and there must be a new warrant.

[For a subsequent proceeding in this litigation, see Case No. 12,453.]

Case No. 12,453.

In re SCHEPELER et al.

[4 Ben. 68.] [1]

District Court, S. D. New York. Feb., 1870.

BANKRUPTCY — RESTRAINING FOREIGN SUIT—PARTIES.

The firm of Bunger, Burlage & Co., composed of partners resident here and one partner resident abroad, had proved a debt in bankruptcy against Schepeler & Co. After the dissolution of Bunger, Burlage & Co., the foreign partner took proceedings abroad, in the name of the firm, to collect the debt, by attaching a claim which Schepeler & Co. had against Lippman & Rosenthal, of Amsterdam, Holland. The assignee in the proceeding against Schepeler & Co. applied to the bankruptcy court, to restrain the foreign proceedings. *Held*, that Bunger, Burlage & Co. were parties to the bankruptcy proceedings, and that the members of the firm residing here should be restrained from prosecuting the proceedings abroad.

[Cited in Scott v. Ellery, 142 U. S. 381, 12 Sup. Ct. 234.]

[In the matter of John F. Schepeler, John D. Schepeler, and Leon Rosenplaenter, involuntary bankrupts.]

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

[2] [From 3 N. B. R. 170 (Quarto, 42).]

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

This was a motion on behalf of William von Sachs, assignee, to restrain certain creditors from prosecuting an action in Holland. The adjudication of bankruptcy was made in June, 1869, and among the debts proved against the estate was one by the firm of Bunger, Burlage & Co., which, on December 31st, 1869, was dissolved. Among the assets, which passed into the hands of the assignee, was a claim against the firm of Lippman & Rosenthal, of Amsterdam, in Holland, which was in litigation in the courts there, but on which judgment had not been recovered. Mr. Bunger, who resided at Cologne, in Prussia, after the dissolution of the firm here, took proceedings in Amsterdam, in the name of the firm, to recover the claim, and attached the claim against Lippman & Rosenthal. The assignee in bankruptcy, on a petition showing these facts, made a motion, on notice to the members of the firm of Bunger, Burlage & Co. who were here, that the firm be restrained from the further prosecution of their attachment proceedings, and be directed to relinquish them, so that the assignee could recover the claim against Lippman & Rosenthal, and that it might be distributed as part of the assets. The objection was taken, in opposition, that, the debt being located in Holland, and the proceedings pending there, this court had no jurisdiction to grant the relief asked, and that the effect of the dissolution of Bunger, Burlage & Co. was to vest in each of its members a specific share of the claim against the bankrupt's estate, and that Bunger, owning a separate share, was entitled to take measures to secure it, by attaching the Lippman claim, it being less than his share of the debt against the bankrupt's estate, which amounted to $50,000, gold, while the Lippman claim was only $12,000.

[For prior proceeding in this litigation, see Case No. 12,452.]

T. C. T. Buckley and J. K. Hill, for the assignee.

A. Mathews, for the creditors.

THE COURT (BLATCHFORD, District Judge) held that, as the firm of Bunger, Burlage & Co. had proved their debt in the bankruptcy case, they were thereby made parties to the proceedings, and, under section 21 of the act [of 1867 (14 Stat. 526)], the members resident here should be restrained from the further prosecution of their proceedings in Holland.

Case No. 12,454.

SCHERMEHORN v. L'ESPENASSE et al.

[2 Dall. 360.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1796.

INJUNCTION—PRACTICE—DISSOLUTION.

[1. An affidavit is not an indispensable prerequisite to the issuance of an injunction, and the court may accept other proofs showing the necessity for an injunction, in order to preserve complainant's rights.]

[Cited in Orr v. Littlefield, Case No. 10,590.]

[2. Mere delay in issuing subpœna after an injunction has been granted is not a sufficient ground for dissolving the injunction, where the same is necessary to prevent the subject of litigation from being removed beyond the jurisdiction, and where there is no evidence of willful procrastination.]

Bill in equity. This bill stated that on the 31st of December, 1790, the defendants, merchants of Amsterdam, had executed to the complainant (who resided at the same place) a power of attorney to receive to his own use, the interest due on 180,000 dollars of certificates of the United States bearing interest at 6 per cent., from the 1st Jan., 1788, to the 31st Dec., 1790, amounting to 32,400 dollars; but that, notwithstanding this assignment, the defendants on the 16th June, 1792, received certificates for the 32,400 dollars of interest, and agreeably to the act of congress, funded the amount at 3 per cent. in their own names. The bill then prayed relief, according to the equity of the case, and that an injunction might issue to prevent the defendants from transferring the stock, or receiving the principal or interest; and also to prevent the register and transfer clerk of the treasury, and the cashier of the Bank of the United States, from allowing a transfer, or paying the principal or interest of the stock, pending the suit. On filing the bill, Du Ponceau exhibited to the court the power of attorney duly authenticated, from the defendants to the complainants; and his own affidavit stating, that he had inspected the books of the treasury, where he saw that the identical stock in question was registered in the names of the defendants. Under these circumstances the injunction issued; but no subpœna was ever taken out, nor any further proceedings had in the suit till the present term, when Lewis moved for a rule to show cause, why the injunction should not be dissolved. Before the motion was argued, Du Ponceau filed another affidavit stating, that the delay in issuing process was by mistake and accident; and not from motives of malice and oppression; that he had heard Lewis was to make the present motion near a year ago; and that in expectation it would be made, he had suspended the proceedings on the part of the complainant, intending as soon as Lewis should appear in the cause to serve him with the process, as clerk in court. Lewis admitted that he had been applied to about a year ago, not on behalf of the defendants, but of Messrs. Pollocks, who claimed the stock (as he alleged) by virtue of a deposit from the complainant himself; but, he insisted, that he had postponed making his application to the court one term, at the instance of Du Ponceau. These facts being understood,

Lewis endeavored to support his motion on two grounds: 1st. That the injunction had

[1] [Reported by A. J. Dallas, Esq.]

issued irregularly, as there was no affidavit made of the truth of the allegations contained in the bill; and 2d. That the complainant had unreasonably delayed bringing the cause to a hearing and decision. On the first ground, he observed, that he did not object, because the injunction had issued before a subpœna was served, as there were various cases in which justice could not otherwise be attained; but in no case can an injunction be issued, or awarded, without a previous affidavit of the truth of the facts stated in the bill. 2 Har. Ch. Prac. 221–223, 232, 245, 259; 1 Brown, Ch. 452; 3 Brown, Ch. 12, 24, 463. The affidavit filed in this case, is not in support of the bill, but in proof of an extrinsic, immaterial, fact; and the power of attorney was not of itself sufficient. Such powers, given in a foreign country, do not always, on their face, explain the meaning of the parties; nor can they be deemed competent evidence of the right of property. It is true that Har. Ch. Prac. 221, and Hind, Prac. 583, mention that an injunction may issue on the exhibit of deeds, writings, or other evidence; but the former cites Vernon, where not a word is said on the subject, and the latter refers to no authority. On the second ground, it was urged, that the complainant's delaying his suit, is assigned in all the books of practice, as a good reason for dissolving an injunction. 2 Har. Ch. Prac. 259, 16, 17, 508. In this case there has never been even an attempt to serve a subpœna; and the property being within the jurisdiction of the court, the defendants (who are not, however, proved by affidavit to be resident abroad) might have been subpœnaed even in Amsterdam. If a subpœna is not served, the only excuse which can be allowed, and which must be proved, is that the party cannot be found;—but the attempt to find must be made.

Du Ponceau & Dallas, for complainant, premised that they were desirous in any mode to obtain a hearing and decision on the merits of the cause; and offered to meet the adverse counsel instanter, either on the claim of the defendants, or of the parties for whom he interposed, upon an answer to the present bill, upon a cross bill, or upon a bill of interpleader. If this overture was rejected, the inference must be conclusive in favor of the complainant, and the court will pay no regard to a motion made in behalf of persons, whose interests are not involved in the existing cause, and who preferring this insidious course, refuse to appear, for the purpose of enabling the complainant to contest their pretensions. But, in answer to the two grounds urged for dissolving the injunction, it was contended, 1st. That, although an affidavit of the truth of the facts contained in the bill, is a regular, and, perhaps, the most general foundation for an injunction, it is not the only foundation, on which it issues. Where the bill states an equity, depending on the discovery of the defendant; or a relief is prayed upon circumstances happening within the knowledge of the complainant, and several other analogous cases, the affidavit of the party is the best evidence of which the subject admits; but a court of equity will not, any more than a court of law, confine itself to one kind of proof, where there are various kinds of equal validity; much less will it adopt an inferior in exclusion of a higher kind. Suppose the fact depends on a record; the law says, that a record is the only regular proof of its own existence; and yet if the rule in chancery is as inflexible, as it is stated to be, the necessity for the affidavit of the interested party cannot be superseded by exhibiting the record itself. In the present case, would the complainant's affidavit be more satisfactory to prove the contents of the power of attorney, than the inspection of the instrument itself, as an exhibit in the cause? But, it is not on general principles alone, that the regularity of the proceeding is maintained: all the books of practice concur in stating, that an injunction may be obtained either upon matter confessed in the answer, or upon some matter of record, or on some deed, writing, or other evidence, produced in court. 2 Har. Ch. Prac. 221; Hind, Prac. 583. It issues upon payment of money into court; and it has been granted to a bankrupt, upon the bare production of his certificate, to stay proceedings at law. 2 Har. Ch. Prac. 222, 223. Besides, the present bill must, from the nature of the transaction, be filed by an attorney, as the complainant lives abroad; and it would have been fatal to wait for an affidavit, as the stock would certainly have been transferred on the first intimation of the suit, or intention to sue. It is conclusive, however, that by proof, independent of the allegations in the bill, to wit—the defendant's assignment of the property in question to the complainant's use, and Du Ponceau's affidavit of the defendant's having afterwards converted it to his own use; there is an apparent spoliation and fraud. The conscience of the court cannot be more satisfactorily informed upon the subject; and it is a strong additional circumstance, that notwithstanding the injunction has so long bound the property, the defendants have never attempted to release it. 2d. This naturally leads to the second consideration, wether the delay has been so unreasonable, as to warrant the court in dissolving the injunction; and, of course, putting it forever out of their power to do justice to the party really injured, as the stock will, doubtless, be instantaneously transferred. Neither of the grounds of the present motion at all relate to the merits; and, it may fairly be remarked, that the delay might more easily have been prevented by the defendants, than by the complainant. The delay, however, has not proceeded from any intention to oppress the defendants, nor to avoid a discussion; it is at most an error, or laches, of the solicitor, which the court will not allow to be converted into an instrument for the destruction of

a just claim. The defendants being abroad, it was doubtful how the complainant could proceed to bring the suit to a decision (Mitf. 30; 2 Har. Ch. Prac. 222), and where an injunction is granted on the merits, it will not be dissolved before a hearing. If, therefore, the merits are with the complainant, no advantage can flow from granting the present motion; as it is expressly laid down in the books, that where the equity appears evidently for the plaintiff, or his case is hard, an injunction dissolved for unreasonable delay, will, upon motion, be revived. Id. 224. The court will not dissolve the injunction merely to give an opportunity to carry the property (which ought in equity to be deemed the complainant's) out of its jurisdiction.

[Before WILSON, Circuit Justice, and PETERS, District Judge.]

PETERS, District Judge. If this were not a case, in which an irreparable injury might be done, by allowing the stock to be placed beyond the jurisdiction of the court, it would, perhaps, be proper to insist upon a more rigid practice than has been pursued. But the dissolution of the injunction would, probably, put the property out of the power of the court; and incapacitate us from doing justice hereafter to the parties, according to the real merits of their respective pretensions. It is proper, however, to observe, that I do not think an affidavit to the contents of a bill, is the only foundation for issuing an injunction. Harrison, on this point, is himself a respectable authority, though he cites no other book: but, independent of all written authorities, reason and the dictates of justice require, that other proof besides the party's oath should be allowed. Nor, under all the circumstances, can I decide, that the delay which has occurred is without a reasonable excuse. It will be proper, however, in continuing the injunction, to apprise the complainant, that, unless some good cause to the contrary is shewn, I shall be for dissolving it, at the next term.

WILSON, Circuit Justice. This motion is made on two grounds:—1st. That the injunction originally issued on an improper foundation; and 2d. That there has been an unreasonable delay in bringing the suit to a decision under it. It does not appear to me, however, that either of these grounds is sufficiently supported. The irregularity rests solely on the want of an affidavit; but this, though it is frequently, and, perhaps, generally, the mode of proceeding, is not, in my opinion, the only one. In the very case now before the court, the evidence of the power of attorney, operating effectually as a transfer of the property, is certainly stronger evidence, than an affidavit of the interested party. With respect to the delay, it is sworn to have happened through inadvertance and mistake; and no evidence of a wilful procrastination has appeared in the course of the discussion. On the contrary, an overture has been made to bring the merits to a hearing, as expeditiously as can be devised. It is to be considered likewise, that if the injunction is dissolved, the court put it out of their power to do effectual justice; but, if it is continued, justice can be done, eventually, to the injured party; whether the complainant, the defendant, or Messrs. Pollocks, shall establish a title to the property.

The motion refused.

Case No. 12,455.

In re SCHICK.

[2 Ben. 5;[1] 1 Bankr. Reg. Supp. 38; 1 N. B. R. 177; 6 Int. Rev. Rec. 183; 1 Am. Law T. Rep. Bankr. 28.]

District Court, S. D. New York. Nov. 1867.

BANKRUPTCY—ACT OF—FICTITIOUS JUDGMENT.

1. Where a debtor, before the passage of the bankruptcy act [of 1867 (14 Stat. 517)], procured a fictitious judgment to be entered in a state court against himself, to enable him to coerce creditors who were pressing him, and, after the passage of the act, took no steps to have it set aside, and in October, 1867, the debtor being then insolvent, execution was issued on it to a sheriff, who levied on what was substantially all the property of the debtor: *Held*, that the inaction of the debtor, in taking no steps to set aside the fictitious judgment, and to prevent execution being issued on it, was a procuring or suffering by him of his property to be taken on legal process.

[Cited in Re Dunkle, Case No. 4,160.]

2. The transaction was, in effect, within the provisions of section thirty-nine of the bankruptcy act, a transfer of the debtor's property, with intent to delay, hinder and defraud his creditors.

[Cited in Re Marter, Case No. 9,143; Re Pitts, 8 Fed. 264; Balfour v. Wheeler, 15 Fed. 234.]

3. The debtor, therefore, must be adjudicated a bankrupt; but there was nothing in the adjudication to preclude the judgment creditor from asserting his rights, and maintaining the integrity of the judgment, if he could.

[In the matter of Julius Schick, an involuntary bankrupt.]

BLATCHFORD, District Judge. The debtor, having denied the acts of bankruptcy set forth in the petition, evidence has been taken orally before the court, on the part of the petitioners and the debtor. The only act of bankruptcy set forth in the petition, which it is important to consider, is that arising out of the judgment obtained by Raphael I. Cowen against the debtor, on the 16th of February, 1867, for $2,005.51, in the supreme court of New York, for the city and county of New York. On that judgment an execution was issued, soon after the judgment was recovered, but it was almost immediately countermanded by Cowen, and nothing further was done in regard to the judgment until the 18th of October, 1867, when a second execution was issued upon it to the sheriff of the city and county of New York, under which

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

the sheriff has levied upon the stock of cloths and clothing contained in the debtor's store, in the Third avenue, in the city of New York, and now holds the same. The property so levied upon is substantially all the property which the debtor has. It is alleged, on the part of the petitioning creditors, that this judgment is wholly fictitious and fraudulent, and that the debtor did not owe Cowen anything, and that the judgment was procured by the debtor to be recovered for the purpose of covering up his property from liability to be seized by his creditors. The portions of section 39 of the bankruptcy act, under which it is sought to have the debtor adjudged a bankrupt in this case, are the provisions, that any person residing within the jurisdiction of the United States, and owing debts provable under the act, exceeding the amount of three hundred dollars, who, after the passage of the act, being insolvent, shall procure or suffer his property to be taken on legal process, with the intent, by such disposition of his property, to defeat or delay the operation of the act, and any such person who shall make any transfer of his property, with intent to delay, hinder, or defraud his creditors, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions thereinafter prescribed, shall be adjudged a bankrupt, on the petition of one or more of his creditors, the aggregate of whose debts provable under the act amount to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed.

I am satisfied, from the evidence, that the debtor was insolvent when the execution was issued, on the 18th of October, 1867, on the judgment recovered by Cowen, and when the property of the debtor was taken by the sheriff on such execution. All the minor conditions required by the provisions cited exist in regard to the debtor. The only disputed question is as to the bona fides of the judgment. In regard to that, I am compelled to come to the conclusion, that the judgment was wholly fictitious, and was a device set on foot by the debtor to enable him to coerce creditors of his, who were pressing him at the time, to make favorable arrangements with him and give him time, and that he did not owe Cowen anything at the time the judgment was recovered. Although the debtor and Cowen both of them swear to the bona fides of the debt to Cowen, and of the judgment, yet it is proved, by four separate and credible witnesses, that, on as many different occasions, the debtor declared to each of them, in substance, that the judgment was a fiction, and was procured to protect his property, and that he owed Cowen nothing. The debtor, although examined as a witness, did not deny having so stated to them, nor did he attempt to give any explanation in regard to such statements. Moreover, there are many surrounding and collateral circumstances in the evidence pointing in the same direction. Although the bankruptcy act had not been passed when the judgment was recovered, yet it was in force when the property of the debtor was taken on the execution, and the inaction or non-action of the debtor, in taking no steps to set aside the fictitious judgment, and prevent a second execution from being issued on it, must be held to have been, under the circumstances, a procuring or suffering by him of his property to be taken on legal process. The consequence of the taking of such property on the execution must be held to involve a probable defeat or delay of the operation of the bankruptcy act, and the debtor must be held to have intended such consequence, by procuring or suffering his property to be so taken. I think, also, that the transaction was, in substance and effect, within the provisions of section thirty-nine, a transfer of the property of the debtor, made by him, and so made with intent to delay, hinder and defraud his creditors.

It follows, that the debtor must be adjudged a bankrupt. This proceeding, however, is, so far, one merely between the petitioning creditors and the debtor. Cowen is no party to it, although examined as a witness for the debtor; and, in the further progress of the matter, if the assignee of the debtor, to be appointed, should institute proceedings to realize, for the benefit of the debtor's estate in bankruptcy, the property levied on by the sheriff under the execution, Cowen will have a full opportunity to assert his rights, and maintain, if he can, the integrity of the judgment; and there is nothing in this adjudication to preclude him from doing so.

Case No. 12,456.

SCHILLINGER v. GUNTHER.

[14 Blatchf. 152; 2 Ban. & A. 544; 11 O. G. 831; Merw. Pat. Inv. 165.] [1]

Circuit Court, S. D. New York. Feb. 26, 1877.

PATENTS—CONCRETE PAVEMENT—MAKING JOINTS—INFRINGEMENT—CONTEMPT OF COURT—AMOUNT OF FINE.

1. The invention set forth in reissued letters patent granted to John J. Schillinger, May 2d, 1871, for an improved concrete pavement, defined, and the claim construed.

[Cited in Kuhl v. Mueller, 21 Fed. 510; Schillinger v. Middleton, 31 Fed. 739; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 30; Hurlbut v. Schillinger, 130 U. S. 456, 9 Sup. Ct. 586.]

[Cited in Schillinger v. Cranford, 4 Mackay (D. C.) 452.]

2. The claim is not confined to the making of joints by the permanent interposition of some material between the blocks, but it embraces the making of joints by the temporary interposition of a cutting material while the pavement

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 165, contains only a partial report.]

is in process of formation, inasmuch as the latter method accomplishes the substantial results of the patentee's invention, in substantially the same way in which they are attained by the patentee.

[Cited in Schillinger v. Greenway Brewing Co., 17 Fed. 246; Shannon v. Bruner, 33 Fed. 290, 291; Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 135; California Artificial Stone-Pav. Co. v. Schalicke, 119 U. S 404, 7 Sup. Ct. 393.]

[Cited in Schillinger v. Cranford, 4 Mackay (D. C.) 478.]

3. Circumstances stated which govern the amount of the fine to be imposed for a contempt of court by violating an injunction issued restraining the infringement of a patent.

[Cited in Hendryx v. Fitzpatrick, 19 Fed. 811.]

[This was a bill in equity by John J. Schillinger against Hermann A. Gunther for the infringement of letters patent No. 105,599, granted to J. J. Schillinger, July 19, 1870; reissued May 2, 1871 (No. 4,364). Heard on motion for an attachment.]

Edward Fitch and John Van Santvoord, for plaintiff.

Arthur v. Briesen, for defendant.

SHIPMAN, District Judge. This is a motion for an attachment for contempt of court by reason of the alleged violation of an injunction order. Reissued letters patent, dated May 2d, 1871, were issued to the plaintiff for an improved concrete pavement. The specification, including the portions subsequently disclaimed, and which are enclosed in parentheses, states that the invention "relates to a concrete pavement, which is laid in sections, so that each section can be taken up and relaid without disturbing the adjoining section. With the joints of this sectional concrete pavement are combined strips of tar paper or equivalent material, arranged between the several blocks or sections in such a manner as to produce a suitable tight joint, and yet allow the blocks to be raised separately without affecting the blocks adjacent thereto." After describing the composition of the concrete, the specification continues: "While the mass is plastic, I lay or spread the same on the foundation or bed of the pavement, either in moulds or between movable joists of the proper thickness, so as to form the edges of the concrete blocks, a a, one block being formed after the other. When the first block has set, I remove the joists or partitions between it and the block next to be formed, and then I form the second block, and so on, each succeeding block being formed after the adjacent blocks have set; (and, since the concrete, in setting, shrinks, the second block, when set, does not adhere to the first, and so on;) and, when the pavement is completed, each block can be taken up independent of the adjoining blocks. Between the joints of the adjacent blocks are placed strips, b, of tar paper, or other suitable material, in the following manner: After completing one block, a, I place the tar paper, b, along the edge where the next block is to be formed, and I put the plastic composition for such next block up against the tar paper joint, and proceed with the formation of the new block until it is completed. In this manner, I proceed until the pavement is completed, interposing tar paper between the several joints, as described. The paper constitutes a tight water-proof joint, but it allows the several blocks to heave separately from the effects of frost, or to be raised or removed separately, whenever occasion may arise, without injury to the adjacent blocks. * * * (In such cases, however, where cheapness is an object, the tar paper may be omitted, and the blocks formed without interposing anything between their joints, as previously described. In this latter case the joints soon fill up with sand or dust, and the pavement is rendered sufficiently tight for many purposes, while the blocks are detached from each other, and can be taken up and relaid, each independent of the adjoining blocks.)" The claims are: "(1) A concrete pavement laid in detached blocks or sections, substantially in the manner shown and described; (2) the arrangement of tar paper, or its equivalent, between adjoining blocks of concrete, essentially as, and for the purpose, set forth." On February 2d, 1875, the plaintiff disclaimed the portions included in parentheses, and, in his disclaimer, also said: "Your petitioner hereby disclaims the forming of blocks from plastic material without interposing anything between the joints, while in the process of formation."

In April, 1875, the bill in equity of the plaintiff against the defendant, alleging an infringement of said letters patent, and praying for an injunction and an account, was heard upon the pleadings and proofs by this court. It was clearly proved that the defendant had made and laid the pavement described in the patent, except that he had substituted tin foil between the joints in lieu of tar paper. An attempt was made to show that the invention had been anticipated by other manufacturers of concrete pavement in this country, which attempt was unsuccessful. The American patent of Horace P. Russ, dated March 14th, 1848, and the English patent of John Little, dated April 29th, 1864, were also relied upon by the defendant, as anticipatory of the plaintiff's invention. Mr. Russ's invention consisted of a foundation pavement of concrete, which was afterwards to be covered with ordinary stone flagging. This sub-pavement of concrete was divided, in places where it covered a sewer or a drain, into panels, by bars of iron forming crosses, united by an eye-bolt, with a ring in the head of each bolt. When repairs were to be made upon the sewer the panel could be lifted, without injury

to the rest of the concrete, by suitable appliances attached to the ring. The Little patent was for a metallic frame work, filled in with concrete blocks. Neither device had substantial similarity to the pavement of the plaintiff. As the novelty of the plaintiff's invention was not disproved, and as the infringement was manifest, a decree was rendered directing an injunction and an accounting before a master.

The plaintiff has now filed a motion for attachment, claiming that the defendant is violating the injunction and the patent, by the construction of the pavement which is hereafter described. As the parties were at issue upon the manner in which the pavement was constructed, a reference was directed to a master to find the facts, who has reported as follows: "The ground was prepared by grading to four inches below the final and completed surface of such pavement. Upon the surface of the ground so graded were placed wooden frames or mould-boards, four inches in height or thickness. In such frames or mould-boards were first formed the one-half of the proposed diamond-shaped blocks. The said frames were then removed back, so that their points of separation rested against and accorded with the points of the half blocks of pavement already laid, thus making, by means of the sides of the two completed half blocks and the two sides of the frames or mould-boards, the shape for the diamond-shaped block to be made by the next operation. The materials used and the manner of using them were as follows: A lower course upon the ground as graded was laid, composed of one part of cement, three parts of sand and two parts of gravel or broken stone, (none of the particles of such gravel or broken stone exceeding two inches in diameter.) This lower course was laid to the depth of three inches and stamped down. Before the second block is thus laid in its lower course, the lower course of the first block is allowed to become 'well set.' After the lower layer has been thus laid to within one inch of the final surface, the upper layer is then put on, which upper layer consists of one part of cement and one part of fine sand, such upper layer being put upon the first-formed block first and shortly after such first block has been made with the bottom layer thereon. The top layer of cement and sand was then placed upon the bottom layer of the second block, up to and against the top layer of the first block, and the laying of the pavement was thus continued. After the laying of two adjoining blocks, and while the upper material for the second block was in a soft or plastic state, a trowel or other similar instrument was inserted between the top layers of the first and second block through the upper layer, for the purpose of making a separation or joint between them, thus making what is commonly known and designated as a 'block pavement.'" It is conceded that this description of the method in which the pavement is made is correct.

The question at issue between the parties is, whether a pavement constructed in the manner described is an infringement of the patent. That the defendant's pavement is constructed of separate layers of coarse and fine cement, I do not regard as material. The upper layer is divided into blocks by the insertion of a trowel after the separate sections have been made in the frame, and while the concrete of the second block is still plastic. The defendant thus makes a block pavement, which can be taken up, so far as the blocks into which the top layer is divided are concerned, without injury to the adjoining blocks. The pavement possesses the advantage of the plaintiff's invention. The plaintiff forms his joint by the permanent interposition of some material between the blocks, which material also serves, in some degree, to make a tight joint. The defendant forms a joint by the insertion of a cutting instrument between the blocks, and then removing the instrument, leaving the joint an open one for the time. The question between the parties becomes one of construction of the patent. Is the patent confined to the making of the joints by the permanent interposition of some material between the blocks, or does it embrace the making of the joints by the temporary interposition of a cutting material while the pavement is in process of formation? For the purpose of determining this question, it is necessary to ascertain the actual invention of the patentee.

It was manifest, upon the former hearing of this case, that the old method of laying cement or concrete pavement was in sections between joists or frames, without any attempt to divide the pavement into blocks. The pavement was a uniform surface of concrete, subject to contraction and expansion from natural causes, and, when it became cracked through the agency of frost, was not easily repaired. The improvement and the invention consisted in dividing the pavement into blocks, so that one block might be removed and repaired without injury to the rest of the pavement. Although this improvement, however effected, whether by the insertion of a trowel, or by the permanent interposition of some other means of separation between the blocks, now appears to have been a simple invention, yet it was one which the history of the art shows to have been previously unknown, and to have been of practical importance, and to have been received with much favor by the public. The plaintiff supposed that his invention included a block pavement in which the blocks were formed either with or without the interposition of something between the joints. He subsequently ascertained that he was mistaken, and that the pavement was not divided into blocks without the interposition of some material to form joints. The discovery of this fact led to his disclaimer, wherein he disclaimed the forming of blocks from plastic material without interposing anything between the joints. This disclaimer left the patent for a

pavement, wherein the blocks were formed by the interposition of some separating material between the joints, and, in the specification, he has described tar paper, or its equivalent.

A strict construction of the patent would limit the patented invention to the permanent interposition of the equivalent material, but such a construction would be a limitation of the actual invention. The method adopted by the defendant accomplishes the substantial results of the plaintiff's invention, in substantially the same way in which they are attained by the plaintiff. The difference in method is, that the material is not permanently interposed between the blocks, and this leads to the only difference in result, which is, that the defendant's method leaves an open joint, instead of the tight joint of the plaintiff, which is not the material part of the plaintiff's invention. The material part was to make a cement pavement separated into blocks by joints. This was the end to be accomplished by each party. Inasmuch, then, as the plaintiff's actual invention is substantially reproduced by the defendant and there is substantial identity in the means by which the material portion of the result was accomplished, I am of opinion that the mode of operation which the defendant has adopted, is within the proper limits of the patent, and is included within the first claim.

The well known and just principle of the courts of this country is, that a liberal construction is to be given to the language of all patents and specifications, ut res magis valeat quam pereat. In pursuance of that rule, "the technical claims in a patent are to be construed with reference to the state of the art, so as to limit the patentee to, and give him the full benefit of, the invention he has made." Estabrook v. Dunbar [Case No. 4,535].

It was well understood by both parties, upon the argument, that the object of the motion was not to mulct the defendant in damages, but to obtain a decision in regard to the extent to which the plaintiff was to be protected in the enjoyment of his patent, which had been decided to be valid and to have been infringed. I am of opinion, from all the circumstances which are disclosed in the affidavits and the testimony before the master, that there has been a studied attempt on the part of the defendant to obtain the benefit of the plaintiff's invention. But I am not disposed to impose a severe fine, in view of the fact which has been stated. The motion is granted, and a nominal fine of fifty dollars, in addition to a sum equal to the fees of the master upon this reference, is imposed upon the defendant, to be paid to the plaintiff as partial indemnity for his expenses.

[For other cases involving this patent, see Schillinger v. Gunther, Cases Nos. 12,457 and 12,458; Schillinger v. Greenway Brewing Co., 17 Fed. 244; Kuhl v. Mueller, 21 Fed. 510; California Artificial Stone Pav. Co. v. Molitor, 113 U. S. 609, 5 Sup. Ct. 618; California Artificial Stone Pav. Co. v. Perine, 8 Fed. 821; California Artificial Stone Pav. Co. v. Freeborn, 17 Fed. 735.]

Case No. 12,457.

SCHILLINGER v. GUNTHER.

[15 Blatchf. 303;[1] 3 Ban. & A. 491; 14 O. G. 713.]

Circuit Court, S. D. New York. Oct. 17, 1878.

PATENTS—TAKING ACCOUNT—VALUE OF PATENTED IMPROVEMENT—LICENSE FEE—PROFITS.

The claim of letters patent for an improvement in concrete pavements was, "The arrangement of tar paper, or its equivalent, between adjoining blocks of concrete, substantially as and for the purpose set forth." Under an interlocutory decree for an account of profits, the plaintiff did not prove before the master any license fee, as showing the value of the patented improvement, nor did he show such value otherwise. The reference and the master's report proceeded on the view that all the value in the infringing pavement was due to the patented improvement, and the master reported, as profits, the profits made by the defendant in laying the entire pavement: *Held*, that the master should have reported no profits.

[Cited in Star Salt Caster Co. v. Crossman, Case No. 13,320; Kuhl v. Mueller, 21 Fed. 510; Fischer v. Hayes, 22 Fed. 529; Shannon v. Bruner, 33 Fed. 872.]

[This was a bill in equity by John J. Schillinger against Hermann A. Gunther for the infringement of letters patent No. 105,599, granted to plaintiff July 19, 1870, reissued May 2, 1871 (No. 4,364). Heard on exceptions to master's report.]

John Van Santvoord and Edward Fitch, for plaintiff.

Arthur v. Briesen, for defendant.

BLATCHFORD, Circuit Judge. The plaintiff's patent is for an improvement in concrete pavements. Such pavements existed before the plaintiff's invention. The specification of the patent states that the invention "relates to a concrete pavement which is laid in sections, so that each section can be taken up and relaid without disturbing the adjoining sections." The invention relates merely to the laying of the pavement in sections, so as to "allow the blocks to be raised separately without affecting the blocks adjacent thereto," and so as to allow "the several blocks to heave separately from the effects of frost." There is nothing new in the composition of the pavement, as one formed of concrete made "by mixing cement with sand and gravel or other suitable material, to form a plastic compound." The point of the invention, as set forth in the specification, is, that, the pavement being made in sections, the joints between the sections have placed in them "strips of tar paper, or equivalent material, arranged between the several blocks or sections, in such a manner as to produce a suitable tight joint and yet allow the blocks to be raised separately without affecting the blocks adjacent thereto." It was not new to lay concrete pavements in sections. The

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plaintiff, after this suit was brought, filed a disclaimer disclaiming any claim merely to the laying of a concrete pavement in detached blocks or sections, without the interposition between the blocks or sections of the tar paper or its equivalent, and admitting that it was not new to lay a concrete pavement in sections. As the specification, before the disclaimer was filed, stated, the concrete, when laid in blocks without the interposition of the tar paper or its equivalent, in the joints between the blocks, would shrink in setting, so that the second-laid block would not adhere to the first-laid block, and the joints would "soon fill up with sand or dust," and the pavement would be "sufficiently tight for many purposes," while the blocks would be "detached from each other," and could be "taken up and relaid, each independent of the adjoining blocks." The disclaimer "disclaims the forming of blocks from plastic material without interposing anything between their joints while in the process of formation." By the "tight joint" produced by the interposition of the tar paper or equivalent material, the specification states, that the patentee means, that the tar paper "constitutes a tight water-proof joint." The specification sets forth, that, after one block or section is completed, the tar paper is placed along the edge where the next block is to be formed, and the plastic composition for the next block is put up against the tar paper; that the tar paper does not adhere to the block first formed, when placed against it, although it may adhere to the edges of the block formed after it is put in its place in the joints; and that, hence, the joints between the blocks are free, so that each block can be removed separately. The specification describes the mode of making the blocks to be, to spread the plastic mass on the bed of the pavement, "either in moulds or between movable joists of the proper thickness," so as to form the edges of the blocks, one block being formed after the other, the joists or partitions between the block first formed and the block next to be formed being removed after the block first formed has set, and the second block being next formed, "each succeeding block being formed after the adjacent blocks have set." Nothing is claimed as new in respect to this mode of forming blocks of concrete pavement. The sole claim of the patent, left after the disclaimer, is this: "The arrangement of tar paper, or its equivalent, between adjoining blocks of concrete, substantially as and for the purpose set forth." It was, therefore, open to the defendant to lay a concrete pavement in detached blocks or sections, by the use of moulds, or movable joists or partitions, in the manner described in the plaintiff's specification, each succeeding block being formed after the adjacent blocks have set, and, to avail himself of the fact affirmed in the plaintiff's specification, that, without the use of tar paper, or its equivalent, interposed in the joints, the concrete will, in setting, shrink, so that the second block, when set, will not adhere to the first, and the blocks, when completed, will be detached from each other, and thus to make a concrete pavement in sections, which can be taken up and relaid, each independent of the adjoining sections. It may be, that, without the use of something extraneous to make a joint, such as the permanent interposition of tar paper or equivalent material between the blocks, or the creation of a joint, by inserting a trowel or other cutting instrument between the blocks, and then removing the instrument, leaving the joint an open one for the time, the detachment of the blocks from each other will not be as effectual or complete as when a joint is formed by the interposed tar paper or trowel, and the blocks cannot be as easily or completely taken up and relaid, each independent of the adjoining blocks. The claim of the plaintiff's patent is for the interposition of the extraneous material to form the joint, whether the permanent tar paper or the temporary trowel or cutting instrument. It is for the artificial division of the pavement by the joint thus made, aside from, and in addition to, any division resulting from the shrinking, in setting, of the concrete in the second block, when placed against the completely set concrete in the first block. I do not understand that the plaintiff, by his disclaimer, affirms that anything stated in his specification is not true, or affirms that it is not true that if the sections are made without the interposition of anything, either permanently or temporarily, between the sections, the blocks will be "detached from each other, and can be taken up and relaid, each independent of the adjoining blocks." All that the disclaimer affirms is, that the plaintiff was not the first to invent what he disclaims, but that it was previously invented by some one else. It does not affirm that the plaintiff did not invent it at all, or that the effect set forth in the specification as resulting from laying the pavement with nothing interposed in the joint, either permanently or temporarily, will not result. A correction of a mistake as to the statement of the effect of laying the pavement in sections, without interposing anything in the joint, is the office of a reissue and not of a disclaimer.

There was an interlocutory decree for the plaintiff on the 22d of April, 1875, adjudging that the plaintiff's patent was valid, and that the defendant had infringed it, and referring it to a master, "to take and state and report to the court an account of all such concrete pavement or sidewalk made, or caused to be made, or used or sold, by the said defendant, since the 2d day of May, 1871, and also the gains and profits which the said defendant has received by or from the manufacture, use or sale of the said patented improvements; and that he also ascertain and report what, if any, damages the said complainant has suffered or sustained, by reason of the said infringement, over and above and be-

yond said gains and profits." Subsequently, an order was made setting forth, that "it appears to this court, that the defendant has made or laid sectional concrete pavements or sidewalks in different methods or modes of construction, all of which methods are claimed to be in violation of said patent," and ordering that the master proceed in said accounting, under the said decree of April 22d, 1875, "and take and state an account of all the sectional concrete pavements or sidewalks made or laid by the defendant, or under his authority, since the 2d day of May, 1871, specifying, as far as may be, the method or methods pursued by the defendant in making or laying the same, and the amount laid under each method, if more than one, to the end that, in the decree that shall be made upon the master's report, it shall be determined and decreed whether all of the methods of laying concrete pavement which have been practised and pursued by the defendant, are or are not within the patent which has been adjudged to be good and valid, and to have been infringed by the defendant, and whether the defendant is, therefore, liable to pay to the plaintiff damages for all or any portion of the concrete pavements which have been constructed by him, or under his authority."

The master has made his report. He states in it, that he directed the defendant to make out and produce before him "an account of all cement or concrete pavements or sidewalks made or laid by him since the 2d day of May, 1871, also the date when laid, the place where, the number of square feet, the price per foot and the total amount received;" that such accounts were produced and are submitted with the report; that "the defendant was also required to produce an account showing the cost or expense of laying such pavements and sidewalks, and the profits derived therefrom by the defendant;" that the defendant produced no detailed account showing such cost or expenses, but produced estimates of expenses, which are submitted with the report; "and that the cost or expense to the defendant of laying the cement pavements or sidewalks stated in his several accounts, is not exceeding 17 cents per square foot." The report states the defendant has laid, as appears from his accounts, 162,843½ square feet of sectional cement pavements, and received therefor the sum of $38,380 70; that the cost of the same, at the rate of 17 cents per square foot, was $27,683 39; that the sum of $10,697 31 is "the profits made by the defendant in the laying of the sectional pavements laid by him," and "is the damage sustained by the complainant if all of the pavements referred to were laid in the manner or according to the process described in the complainant's patent, or are such pavements as are claimed in said patent." The report also shows, that some of the pavement so laid by the defendant was laid with tar paper or its equivalent between the joints; that some of it was laid by leaving metal plates in the joints and afterwards withdrawing said plates and pouring melted pitch into the open joints; that some of it was made in the last named way, except that the joints were filled with cement; that some of it was made with the use of joists removed before the joint was formed, nothing being left between the blocks but a trowel, or other instrument, or metal strips were used to make a joint, or a separation into blocks, during the process of laying the pavement; and that some of it was laid by a method which this court has held, on attachment proceedings, to be an infringement.

The defendant has filed several exceptions to the report. The report states that the defendant's estimates of expenses are not accurate or reliable, but are greatly overstated as to quantity of materials used and the cost thereof; and that such estimates charge too much per barrel for cement and for too much cement. Exceptions 1, 2, 3 and 4 cover the above matters and are disallowed. Exception 5 excepts to the finding that the cost or expense to the defendant of laying the cement pavements stated in his several accounts, is not exceeding 17 cents per square foot, and is disallowed. As to exception 6, I think the evidence shows that the sum of $809, in respect of the pavements for Coburn and Birdsall, should have been deducted from the sum of $5,637 74 mentioned in paragraph 4 of the report. Exceptions 7, 10, 13, 16 and 18 and part of exception 17 relate to the 17 cents per square foot, as cost, and are disposed of by the ruling as to exception 5, and are disallowed. Exceptions 8 and 9 proceed upon the ground that it does not infringe the plaintiff's patent to lay sectional cement pavements by leaving metal plates in the joints and afterwards withdrawing said plates and pouring melted pitch into the open joints, and are disallowed. Exceptions 11 and 12 proceed upon the ground that it does not infringe the plaintiff's patents to lay sectional cement pavements by leaving metal plates in the joints and afterwards withdrawing said plates and filling the joints with cement, and are disallowed. Exceptions 14 and 15 proceed upon the ground that it is not true that a trowel or other instrument or metal strips were used to make a joint, or a separation into blocks, during the process of laying the pavement mentioned in the report as having been laid with the use of joists removed before the joint was formed, nothing being left between the blocks. I find the fact to be otherwise. There is nothing in the Russ patent or the Little patent like the method of procedure or pavement described in the part of the report to which exceptions 14 and 15 relate. They are disallowed. So much of exception 17 as relates to the sum of $8,709 80 is disallowed.

Exception 19 excepts to the finding of $10,697 31 as profits, and insists that the master should have found that the defendant made

no profits in laying sectional cement pavements in the various ways set forth in the report. Exception 20 is to the effect, that the master "has found that the manufacturer's profit of the defendant in laying the several cement pavements which are set forth in the report, is the measure of damage sustained by the complainant by the alleged infringement of his patent, whereas the said master should have found that the manufacturer's profits are not the true measure of damages in such cases." Exception 22 is to the effect, that the master "has failed to report that the complainant has not proved the value of his invention and the license fees, if any, which he actually received for the use of the invention, and that, therefore, the complainant has not shown himself to be entitled to any but nominal damages for the use of his said invention by this defendant."

The decree directed the master to report the profits received by the defendant from the manufacture, use or sale of the patented improvement. It is those profits alone which the plaintiff can recover. He cannot recover anything more, as profits. He cannot recover the profits of the manufacture, sale or use of anything but the patented improvement. He cannot recover the profits of the manufacture, use or sale of anything found in the pavement, or of any part of the pavement, except the patented improvement. Whatever distinctive profit belongs to the use of "the arrangement of tar paper, or its equivalent, between adjoining blocks of concrete, substantially as and for the purpose set forth" in the patent, is the profit to be recovered. Such distinctive profit must be shown affirmatively by the plaintiff. If he fails to show it, he can recover nothing, as profits. The plaintiff has proved no license fee, as showing the value of the patented improvement. Nor has he otherwise shown the value of the patented improvement. No evidence on that subject was given before the master. The reference proceeded on the principle that all the value or usefulness there was in the pavements laid by the defendant was due to the permanent or temporary interposition in the joint, during the process of laying, of something external, to make a separation into blocks or sections. This was clearly a mistake. The plaintiff's invention contributed but a small part of the usefulness of the pavement. As a concrete pavement, with all the advantages due to the smoothness and durability of such a pavement, it was a valuable pavement, without being in blocks or sections made by the use of the patented improvement. The advantage of being in blocks made by the use of the patented improvement was an advantage which does not give to the plaintiff the right to recover the profits of laying the entire pavement. These principles are well settled. Mowry v. Whitney, 14 Wall. [81 U. S.] 620, 649; Phelp v. Knock, 17 Wall. [84 U. S.] 460; Gould's Manuf'g Co. v. Cowing [Cases Nos. 5,642, 5,643]; Black v. Munson [Id. 1,463]; Buerk v. Imhaeuser [Id. 2,107]; Blake v. Robertson, 94 U. S. 728; Garretson v. Clark [Id. 5,248]. Exceptions 19, 20 and 22 are allowed, so far as they claim that the master should not have reported any sum as profits, under the interlocutory decree.

The master also reports, that "the complainant is entitled to recover from the defendant a further sum, as special damage, on account of the laying of the pavement for Andrew Dold, which pavement was laid in the same manner as the City Hall pavement, above referred to, the proofs showing that said pavement was contracted for and laid by the defendant in October, 1876, but is not included in any of the accounts rendered by him;" and that "it is shown that the complainant gave to Dold a bid or estimate for the said work, and that he was underbid by the defendant, and thus was damaged to the amount of $900." Exception 21 excepts to the report, because it finds "that the complainant is entitled to recover from the defendant special damages on account of the laying of a pavement for Andrew Dold, and that the proofs show that said pavement was laid in the same manner as the City Hall pavement." So much of exception 21 as excepts to the report of the $900 as special damage is allowed. Exception 22, before cited, is broad enough to be an exception to the report of the $900 as damages. The remarks before made as to the allowance of profits apply to this $900. If entitled, in any event, to any allowance of damages in respect of the Dold pavement, the plaintiff must show the value of the patented invention as distinct from the value of the rest of the Dold pavement, and can in no event recover as damages the entire $900. The rest of exception 21 is disallowed.

An order will be entered disposing of the exceptions in accordance with this decision.

[For other cases involving this patent, see note to Schillinger v. Gunther, Case No. 12,456.]

Case No. 12,458.

SCHILLINGER v. GUNTHER.

[17 Blatchf. 66; 16 O. G. 905; 4 Ban. & A. 479; Merw. Pat. Inv. 166.] [1]

Circuit Court, S. D. New York. Aug. 26, 1879.

PATENTS—CONCRETE PAVEMENT—ANTICIPATION—DISCLAIMER—RE-ISSUE—SPECIFICATIONS—COSTS.

1. A concrete pavement, made of cement, sand and gravel, made plastic by water and then laid in blocks, in a plastic state, at the place where it is to be used, and suffered to set or harden there, is not anticipated by a pavement made of blocks of cement made elsewhere, and then laid, like bricks or flags, at the place of use.

[Cited in Schillinger v. Greenway Brewing Co., 17 Fed. 246; Kuhl v. Mueller, 21 Fed.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 166, contains only a partial report.]

510; Shannon v. Bruner, 33 Fed. 290, 291; California Artificial Stone-Paving Co. v. Schalicke, 119 U. S. 405, 7 Sup. Ct. 393.]

2. Under sections 4917 and 4922 of the Revised Statutes, where a proper disclaimer is entered during the pendency of a suit on a patent, there may be a recovery for the plaintiff, in respect of what is not disclaimed, provided there has been no unreasonable neglect or delay to enter a disclaimer, but the recovery is to be without costs.

[Cited in Atwater Manuf'g Co. v. Beecher Manuf'g Co., 8 Fed. 610.]

3. There may be a disclaimer of something which was introduced into a re-issued specification and did not exist in the original specification.

[Cited in Yale Lock Manuf'g Co. v. Scovill Manuf'g Co., 3 Fed. 298; Tyler v. Galloway, 12 Fed. 569; Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 135, 136.]

4. In connection with a disclaimer of a claim or part of a claim, it is not improper to eliminate or withdraw, by the same writing, the parts of the body of the specification on which the disclaimed claim or part of a claim is founded.

[Cited in Schillinger v. Greenway Brewing Co., 17 Fed. 246; California Artificial Stone-Paving Co. v. Schalicke, 119 U. S. 405, 7 Sup. Ct. 393; Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 135, 136.]

5. The disclaimer in this case upheld, against the objection that the matter disclaimed was not introduced by mistake, but with the intent to defraud or mislead the public.

[This was a bill in equity by John J. Schillinger against Hermann A. Gunther for the infringement of re-issued letters patent No. 4,364, granted to plaintiff May 2, 1871, the original letters patent, No. 105,599, having been granted July 19, 1870.]

Edward Fitch and John Van Santvoord, for plaintiff.

Arthur v. Briesen, for defendant.

BLATCHFORD, Circuit Judge. The defendant contends, that the first claim of the plaintiff's re-issued patent is for a concrete pavement laid in detached blocks or sections, and that such claim is void, because blocks of cement had before been made, and carried to the place where they were to be used, and laid down side by side, thus forming a sectional cement pavement having all the advantages of the plaintiff's pavement. This view is not sound. The first claim of the re-issued patent claims "a concrete pavement, laid in detached blocks or sections, substantially in the manner shown and described." The concrete pavement referred to is shown by the specification to be a pavement made not of cement alone, but of cement, sand and gravel, made plastic by water, and then laid, in blocks, in a plastic state, at the place where it is to be used, and suffered to set or harden. This is a different thing from blocks of cement made elsewhere, and then laid, like bricks or flags, at the place of use.

Equally unsound is the view, urged by the defendant, that the disclaimer takes out of the patent the entire first claim of the reissue. It takes out of that claim only so much thereof as claims a concrete pavement made of plastic material laid in detached blocks or sections, without interposing anything between their joints in the process of formation. The first claim originally included a concrete pavement made of plastic material laid in detached blocks or sections, without interposing anything between their joints in the process of formation. The first claim, as amended by the disclaimer, claims a concrete pavement made of plastic material laid in detached blocks or sections, when free joints are made between the blocks, by interposing tar paper or its equivalent.

The alleged prior inventions of Russ and Little have been disposed of by the rulings of Judge Shipman in this case, and so has the question of the infringement by the use of a trowel or a knife.

By section 4917 of the Revised Statutes, which was in force when the disclaimer in this case was filed in the patent office, it is provided as follows: "Whenever, through inadvertence, accident or mistake, and without any fraudulent or deceptive intention, a patentee has claimed more than that of which he was the original or first inventor or discoverer, his patent shall be valid for all that part which is truly and justly his own, provided the same is a material or substantial part of the thing patented; and any such patentee, his heirs or assigns, whether of the whole or any sectional interest therein, may, on payment of the fee required by law, make disclaimer of such parts of the thing patented as he shall not choose to claim or to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent. Such disclaimer shall be in writing, attested by one or more witnesses, and recorded in the patent office; and it shall thereafter be considered as part of the original specification to the extent of the interest possessed by the claimant, and by those claiming under him, after the record thereof. But no such disclaimer shall affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing it." By section 4922 it is provided as follows: "Whenever, through inadvertence, accident or mistake, and without any wilful default or intent to defraud or mislead the public, a patentee has, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor or discoverer, every such patentee, his executors, administrators and assigns, whether of the whole or any sectional interest in the patent, may maintain a suit at law or in equity, for the infringement of any part thereof which was bona fide his own, if it is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right, notwithstanding the specifications may embrace more than that of

which the patentee was the first inventor or discoverer. But, in every such case in which a judgment or decree shall be rendered for the plaintiff, no costs shall be recovered, unless the proper disclaimer has been entered at the patent office before the commencement of the suit. But no patentee shall be entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer." The purport of these two sections, taken together, is, that, where a proper disclaimer is entered during the pendency of a suit on a patent, there may be a recovery for the plaintiff, in the suit, in respect of what is not disclaimed, provided there has been no unreasonable neglect or delay to enter a disclaimer, but the recovery is to be without costs. In the present case a proper disclaimer was entered after the suit was commenced. It disclaims certain words in the body of the specification, and it also disclaims a part of what was claimed in the first claim of the re-issued patent. What is disclaimed in the body is the foundation of so much of the first claim as is disclaimed. The plaintiff was neither the original nor the first inventor of so much of the first claim as is disclaimed. What is thus disclaimed is a material and substantial part of what is covered by the first claim. The part of such claim which is not disclaimed is truly and bona fide the plaintiff's. What is not disclaimed is definitely distinguishable from what he claimed without right. He did not choose to claim or to hold by virtue of the re-issued patent what he disclaimed. What he disclaimed was inserted by the re-issue. It did not exist in the original patent. But, for the purposes of a disclaimer, what is disclaimed stood, before it was disclaimed, as if there never had been but one patent, and that the re-issued patent. It was proper to correct, by a disclaimer, the unlawful claim introduced by the re-issue. It is true, that, strictly, section 4917 contemplates only a disclaimer of some claim, or part of a claim, but, in connection with a disclaimer of a claim, or of a part of a claim, it is not improper to eliminate or withdraw, by the same writing, the parts of the body of the specification on which the disclaimed claim, or part of a claim, is founded. The disclaimer is none the less a disclaimer of a claim or of a part of a claim because, in addition, it disclaims such parts of the body of the specification. The disclaimer being a proper one, in form and substance, it is, by the statute, to be, after its filing, "considered as part of the original specification." The re-issued specification is to be thereafter read as if the disclaimer were incorporated in it.

But, no disclaimer can be allowed to be operative unless the unlawful claim was made through inadvertence, accident or mistake, and without any fraudulent or deceptive intention, nor can a plaintiff recover on a patent which claims anything not bona fide the patentee's, unless the claim to the thing not bona fide his was made through inadvertence, accident or mistake, and without any wilful default or intent to defraud or mislead the public. It is set up in the amended answer, that the part of the thing patented which is disclaimed by the disclaimer, was not introduced into the re-issued patent "through inadvertence, accident or mistake, and without any wilful default or intent to defraud or mislead the public," but on the contrary, was introduced into it "deliberately and with the intent to defraud or mislead the public." I have arrived at the conclusion, on the evidence, that the disclaimed parts, both of the body of the re-issued specification, and of the first claim thereof, were introduced by reason of a mistaken idea on the part of the plaintiff, that the concrete, in setting, would shrink, so that the second block, when set, would not, though setting in contact with the first set block, adhere to such first set block, and that it was not necessary, in forming the blocks from the plastic material, to interpose anything between their joints, in the process of formation, in order to produce the detached blocks or sections described in the specification. I am also of opinion, on the evidence, that there was no wilful default, or fraudulent or deceptive intention, or intent to defraud or mislead the public, on the part of the plaintiff. The evidence shows, that the plaintiff believed, when he took the re-issue, that a sectional pavement could be made of plastic concrete, without interposing anything between the blocks. He may not have experimented as much as he ought to have done before arriving at that conclusion. He may have arrived at it on insufficient and inadequate grounds. Still, if he acted in good faith, it was a mistake. If he made experiments and drew a conclusion from them, not wholly baseless, it was not a wilful default, although other persons may, from other information, have been of a different opinion, and although other persons would have been slow to draw the same conclusion the plaintiff did from the premises before him. So, too, although the experiments and the conclusion were made and arrived at after the original patent was taken out, in such wise as to destroy the validity of the re-issue so far as such conclusion was concerned, it was proper to make the disclaimer in question, in order to avoid the effect of inserting in the re-issue matter which amounted, if true, to an invention made after the granting of the original patent. The plaintiff states, in his affidavit made November 22d, 1878, that he has never known any cement pavement constructed in sections formed on the ground for actual use in outdoor work, without the interposition of something while the material was in a plastic state, to form or complete the joints. There is nothing in this that is inconsistent with his statement in the same affidavit, that he believed, when he took his re-issue, that the concrete, in setting, would shrink, and that, after one section had been formed, another section might be formed of

the plastic material directly against and in contact with the one already formed, and the blocks, when completed, would be detached; nor anything inconsistent with the fair result of the evidence. The experiments on which he rested his belief were not pavements in sections formed on the ground for actual use in outdoor work. As to the conversations with the plaintiff, testified to by witnesses, they are too vague and unreliable to be satisfactory. The fact that the plaintiff, in the fall of 1874, laid, in Washington, from 2,000 to 3,000 square feet of concrete pavement in sections, without anything being interposed between the blocks, with the intention that it should be a pavement of detached blocks, such as his specification describes, shows that he had not, at that time, abandoned the idea that a pavement of detached blocks could be made in that way. It was not till January, 1875, that it clearly appeared that such pavement was a pavement of adhering blocks and not a pavement of detached blocks.

The foregoing observations serve to show that there was no unreasonable neglect or delay in not filing until March 1st, 1875, the disclaimer in question.

The remaining defence set up in the amended answer is founded on the first subdivision of section 4920 of the Revised Statutes, and is to the effect, that, for the purpose of deceiving the public, the description and specification filed by the patentee in the patent office, and which is contained in the re-issued patent, was made to contain less than the whole truth relative to his alleged invention or discovery, or more than is necessary to produce the desired effect, and that the patent is, therefore, void. This defence fails, because, as has been held, there was no purpose of deceiving the public; and, also, because the disclaimer being now a part of the specification, the specification is not open to the alleged objection.

The defences set up are overruled as not sustained by the evidence, and a decree to that effect will be entered.

[For other cases involving this patent, see note to Schillinger v. Gunther, Case No. 12,456.]

SCHILLINGER (UNITED STATES v.). See Case No. 16,228.

SCHIMER (UNITED STATES v.). See Case No. 16,229.

Case No. 12,459.

SCHLITZ v. SCHATZ.

[2 Biss. 248.] [1]

District Court, D. Wisconsin. Feb. 1870.

BANKRUPTCY—EXEMPT PROPERTY—MORTGAGE—PREFERENCE.

1. An assignee cannot recover property excepted by the 14th section of the bankrupt law [of 1867 (14 Stat. 522)].

2. Such property the debtor may lawfully mortgage or convey, and such a preference is not in violation of the act, nor a fraud on it.

3. The fact that soon after the conveyance, and before the petition was filed against him, the debtor left the country, does not place the assignee in a better position.

In bankruptcy. This was an action by Joseph Schlitz, assignee in bankruptcy of the estate of Henry Gretz, to recover the amount received by defendant in the sale of two horses which came to his possession from the bankrupt.

Mann & Cotzhausen, for plaintiff.
George B. Goodwin, for defendant.

MILLER, District Judge. It appeared in evidence at the trial that Gretz was a brewer, and, becoming pecuniarily embarrassed, he mortgaged to the defendant two horses as security for a debt previously contracted. And it also appears that those were the only horses Gretz owned at the date of the mortgage and thereafter until proceedings in bankruptcy were commenced against him. When Schatz received the mortgage and took possession of the horses he had reasonable cause to believe Gretz insolvent. He took possession of the horses a few days before the petition in bankruptcy was filed against Gretz. Gretz with his family left the country immediately after giving the chattel mortgage to Schatz, and is not known to be in this state.

By section 14 of the act to establish a uniform system of bankruptcy throughout the United States the estate real and personal of the debtor vests in the assignee by assignment, which relates back to the commencement of proceedings in bankruptcy; provided, that there should be excepted from the operation of the provisions of the section the several articles mentioned, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court, by the laws of the state in which the bankrupt has his domicil at the time of the commencement of proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year eighteen hundred and sixty-four.

By the law of this state in force in the year eighteen hundred and sixty-four, and since, a span of horses is exempt from levy and sale upon execution. By a span of horses is understood two horses worked together as a team, as these were. The horses mortgaged to Schatz being the only horses Gretz owned, were exempt from levy. Gretz by the mortgage appropriated this exempt property to the payment of a debt, prior to the proceedings in bankruptcy, at his domicil in this state. The said section fourteen further provides that the exception shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee, and in no case shall the except-

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

ed property pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of the act.

If Gretz had not made the mortgage, and had remained in his domicil, the assignee in bankruptcy would not be entitled to claim the horses. The fact of abandonment of his domicil by Gretz, after the mortgage of the horses to Schatz, and Schatz's possession under the mortgage before the commencement of proceedings in bankruptcy, cannot place the assignee in any better attitude as to this exempt property in the hands of Schatz. Gretz had a lawful right to mortgage or sell the horses, and having disposed of them, under the law of the state his creditors could not take them by legal process for debt from Schatz, neither can the assignee in bankruptcy recover of Schatz the proceeds of the sale of the horses.

The creditors of Gretz not having any right to the horses as assets, the preference given to Schatz was no violation of the bankruptcy act, nor was it a fraud on them.

The provision for exemptions under state laws may be supposed of doubtful constitutionality, for want of uniformity, but this court will not for this reason delay or embarrass proceedings in bankruptcy, preferring that the question be decided by the supreme court of the United States. Judgment for defendant.

A bankrupt by a mortgage waives the exemption as against the mortgagee, but not as against the assignee. In re Jones [Case No. 7,445].

SCHLOENER (STRINGHAM v.). See Case No. 13,536.

Case No. 12,460.

SCHMAIRE et. al. v. MAXWELL.

[3 Blatchf. 408.] [1]

Circuit Court, S. D. New York. Jan. 23, 1856.

CUSTOMS DUTIES—APPRAISEMENT—HOW TREATED—OBJECTIONS TO—HOW MADE—PROTEST—DEPUTY COLLECTOR—POWERS.

1. In an action to recover back duties, no exception can be taken to an appraisement of goods, which does not appear on the face of it, unless the exception is distinctly and specifically pointed out in a protest, as required by the act of February 26th, 1845 (5 Stat. 727).

2. A collector has power, with the sanction of the secretary of the treasury, to appoint as many deputies as may be necessary; and such deputies, unless restricted, are necessarily clothed with the power which their principal has.

3. Whenever an oath is required to be administered by a collector, a deputy collector may administer it.

4. Under the 8th section of the act of July 30th, 1846 (9 Stat. 43), an importer has a right to make, in his entry, an addition to the value of goods as contained in his invoice; but the additional duty or penalty of 20 per cent., imposed by that section, attaches, if the appraised value of the goods exceeds, by 10 per cent., the value in the entry, whether such addition has been made by the importer or not.

5. Under the 16th and 17th sections of the act of August 30th, 1842 (5 Stat. 563, 564), an appraisal of goods by the public appraisers is final and conclusive, unless the importer gives to the collector an absolute and unconditional notice of his dissatisfaction with such appraisal.

[Cited in Saxonville Mills v. Russell, 1 Fed. 124.]

6. Where the notice given to the importer was that the appraisement was not satisfactory, and that, "if desired," such evidence and statements would be produced to the collector as could be furnished, to satisfy him of the correctness of the invoice value: *Held*, that this was a conditional notice, and was either not an appeal from the appraisal, or was an abandonment of the appeal, and that the appraisal was final and conclusive.

7. If, on an appeal from an appraisal, a collector illegally refuses to order a re-appraisal, still the appraisal is not set aside by the appeal, and is conclusive till a re-appraisal is in fact made; and the only remedy of the importer is an action against the collector for his breach of duty.

This was an action against [Hugh Maxwell] the collector of the port of New York, to recover back an excess of duties, and penalties for undervaluation, paid by the plaintiffs [John Schmaire and others] upon two importations of goods from Liverpool, in the year 1852, one in the Washington and one in the Asia.

John S. McCulloh, for plaintiffs.

J. Prescott Hall, for defendant.

INGERSOLL, District Judge. The importation by the Washington was made on the 15th of May, 1852. An entry was made of the same at the custom-house, and the value as contained in the entry corresponded with the value set down in the invoice. The goods were obtained by the plaintiffs by purchase, and the purchase price was the price contained in the entry and invoice. The purchase was made about two months before the shipment. The appraisers appraised the value at more than 10 per cent. above the value contained in the entry. A re-appraisement was demanded by the plaintiffs, and the re-appraisers appraised the value at more than 10 per cent. above the value contained in the entry. Both the appraisal and re-appraisal were of the market value of the goods at the time they were shipped. Duties were exacted upon their value as found by the re-appraisal; and, also, a penalty for undervaluation. These payments were made under protest.

No cause of exception to the re-appraisal, which does not appear on the face of it, can be taken in this action, unless such exception is distinctly and specifically pointed out in the protest, as required by the protest act of February 26th, 1845 (5 Stat. 727). Bartlett v. Kane, 16 How. [57 U. S.] 263. Numerous cases to that effect have been decided by this court. The re-appraisal must stand as valid, unless a sufficient reason to make it invalid is particularly pointed out to the col-

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

lector in the protest, and unless that reason, so particularly and specifically pointed out, is sustained by proof. The protest in this case is very long and diffuse. It deals very much in generals—such as, that the appraisals were not made according to law; that they were not fairly, impartially and legally made, by persons unprejudiced and duly qualified; and that proper testimony was not received. There are only two particular exceptions to the re-appraisals and the imposition of the increased duty, pointed out. They are, first, that the re-appraisers were not sworn by the defendant, and that the re-appraisal was therefore void; second, that "20 per cent. penalty, under the 8th section of the tariff act of 1846, cannot be exacted, except where the importer has raised his invoice prices on entry."

As to the first exception. Was the re-appraisement void, because the re-appraisers were not sworn by the defendant? The protest does not state that the re-appraisers were not sworn by some one authorized to administer the oath; or that they were sworn by such a particular person, and no one else, and that such particular person had no power to administer the oath to them. The protest is: "The re-appraisers were not sworn by you." The defendant gives three answers to this exception. The first answer is, that it is not necessary that the re-appraisers should be sworn by any one. The second is, that they can be sworn, if there is a necessity for it, by an appraiser. See section 17 of the act of August 30th, 1842 (5 Stat. 564). The third is, that if there is a necessity for their being sworn, and they cannot be sworn by an appraiser, they can be sworn by a deputy collector. The view I take of the case renders it unnecessary to consider the two first answers to this exception. The collector has power, with the sanction of the secretary of the treasury, to appoint as many deputies as may be necessary. A deputy, unless restricted, is necessarily clothed with the power which his principal has. In U. S. v. Barton [Case No. 14,534], it was decided, that when an oath was required to be administered by a collector, a deputy collector could administer it. This exception, therefore, must be adjudged not to be sufficient.

As to the second exception. It is this:—"20 per cent. penalty, under the 8th section of the tariff act of 1846, cannot be exacted, except where the importer has raised his invoice prices on entry." No such construction as this can be put upon the section of the act referred to. By that section, the importer has a right to make, in the entry, an addition to the cost or value given in the invoice. But the additional duty of 20 per cent attaches, if the appraised value exceeds, by 10 per cent., the value declared in the entry, whether such addition has been made to the entry or not. This exception, therefore, must be adjudged to be insufficient.

The importation by the Asia was made on the 4th of June, 1852. An entry was made of the same at the custom-house, and the value as contained in the entry corresponded with the value as contained in the invoice. The goods were obtained by the plaintiffs about two weeks before they were shipped. The appraisers appraised their value at more than 10 per cent. above the value contained in the entry. Duties were exacted and paid upon their value as found in the appraisement, and a penalty of 20 per cent., by way of additional duty. These payments were made under protest.

This protest is very general, like the protest in the case of The Washington,[2] and the two particular exceptions set out in that protest are not set out in this. There was served, in this case, a notice as follows: "You should not refuse us the appointment of a merchant appraiser, under the acts of 1823, 1830, and 1832." The question is—did the collector refuse the appointment of such appraiser? The only evidence of such refusal is a letter from the plaintiffs to the defendant, dated June 16th, 1852, as follows: "We have been informed that the U. S. appraisers have raised the woollens imported by us about the 3d instant, per the steamer Asia from Liverpool, 7½ per cent. The appraisement which has been made is not satisfactory, and, if desired, such evidence and statements will be produced to you, as can be furnished, to satisfy you of the fairness of our invoice, and of the foreign market price." The 16th section of the tariff act of August 30th, 1842 (5 Stat. 563), provides for the appraisal of imported goods by appraisers; and the 17th section enacts, that the appraisal which they may make shall be final and conclusive, giving a right, however, to the importer, if he is dissatisfied with such appraisal, upon his compliance with certain requisitions, and upon his giving written notice of such dissatisfaction to the collector, to have an appraisal by merchants, as provided in the act. An absolute unconditional notice of dissatisfaction is an appeal; and, upon such appeal, the collector must take measures for a re-appraisal. But such appeal may be abandoned, and, when it is abandoned, the original appraisement is final and conclusive. Bartlett v. Kane, 16 How. [57 U. S.] 263. But a notice of dissatisfaction, accompanied by a condition which is not recognized by law, is no appeal, and the collector has no right to regard such a notice. The notice in this case was, that the plaintiffs were not satisfied with the appraisement made by the appraisers, accompanied by the offer, that if the collector desired it, but not without, they would produce evidence to show that the value in the invoice was correct. They had a right, if they wished it, without any desire of the collector, to go before the merchant appraisers and show this. The notice fairly indicates that they did not wish or intend to do this, unless the collector desired it. It was their duty to do this, in order to nullify the ap-

[2] [Case No. 17,222.]

praisement which had been made. That was final and conclusive, until a re-appraisement should be made. The notice was, in substance: "We do not wish to do that which it is necessary for us to do to set aside the appraisement which has been made, unless you, the collector, desire it. We do not intend to prosecute our appeal, unless desired by you, the collector." And, as the collector had no desire on the subject, the appeal was, in effect, abandoned—as much abandoned as was the appeal in the case of Bartlett v. Kane, already referred to.

But, even if the collector had refused to appoint a merchant appraiser, as claimed, still the appraisement upon which the duties were levied would be valid. That appraisement was final and conclusive, until a new appraisement should be made. An appraisement by the appraisers is not set aside by an appeal merely, as is shown by the case of Bartlett v. Kane. It becomes of no effect, only when there has been another appraisement, upon the appeal. And, if the collector had refused to do his duty, in taking measures to have the appraisement revised, the only remedy for the plaintiffs would be an action on the case, against the collector, for such breach of duty, by means of which they were damnified. The conclusion is, that neither of the protests will avail the plaintiffs in this action, and that there must be a judgment for the defendant.

Case No. 12,461.

Ex parte SCHMEID.

[1 Dill. 587;[1] 2 Chi. Leg. News, 186.]

Circuit Court, D. Iowa. 1871.

HABEAS CORPUS — ENLISTMENT INTO MILITARY SERVICE—FRAUDULENT REPRESENTATIONS BY RECRUITING OFFICER.

At law.

Mr. Nash, for relator.

Mr. Little, for the United States.

DILLON, Circuit Judge. I rule the following points:

1. The validity of the enlistment of a person into the military service of the United States may be inquired into on habeas corpus by a United States judge.

2. If the enlistment was procured by fraudulent representations on the part of the recruiting officer, and has never been ratified by the party; or if, in consequence of his want of acquaintance with the English language, a foreigner enlists, not knowing that he is actually entering the service, but supposing that he is simply taking the preparatory steps, in either case, he may, on prompt application, be discharged on habeas corpus.

3. If a party at the time of his enlistment, denies that he is a married man, and enlists as a single man, the fact that he has a wife and child does not entitle him to be discharged on habeas corpus, although it is provided in the army regulations that no married man shall be enlisted without special authority from the adjutant general's office.

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

Case No. 12,462.

SCHMEIDER et al. v. BARNEY.

[13 Blatchf. 37.][1]

Circuit Court, S. D. New York. June 25, 1875.

CUSTOMS DUTIES — ACT MARCH 3, 1857 — APPEAL TO SECRETARY OF TREASURY—RIGHT OF ACTION AGAINST COLLECTOR — ILLEGAL DUTIES PAID UNDER PROTEST — EVIDENCE OF DECISION BY SECRETARY—ERRORS AT TRIAL—EFFECT OF VERDICT—CIRCUIT COURT—CITIZENSHIP OF PARTIES.

1. Errors committed, on the trial of an action at law, against the party who obtains a verdict, are merged in the verdict.

2. Under section 5 of the act of March 3, 1857 (11 Stat. 195), which provides that, on the entry of any goods, the decision of the collector "as to their liability to duty or exemption therefrom, shall be final and conclusive," unless the owner shall, within ten days, specify in writing the grounds of his dissatisfaction, and shall, within thirty days, appeal to the secretary of the treasury, and that the decision of the secretary shall be final and conclusive, and the goods "shall be liable to duty, or exempted therefrom, accordingly," unless suit shall be brought within thirty days after his decision, such appeal is not a condition precedent to a right of action against a collector, to recover back duties illegally exacted by him, where the question is as to the rate or amount of duty, it being conceded that some duty is payable, but the statute applies only to a case where the question is whether the goods are liable to any duty or are wholly exempt from duty.

3. Whether, under said statute, a suit can be brought, where the secretary of the treasury unreasonably neglects to make and communicate a decision on an appeal, quere.

4. Under the act of February 26, 1845 (5 Stat. 727), a collector who demands and receives illegal duties, which are paid to him under protest, is liable in an action of assumpsit for the amounts thus collected by him.

5. Under the act of 1857, an appeal was taken to the secretary of the treasury from the decision of a collector as to the rate and amount of duties. On the trial of a suit against the collector to recover back the duties, the plaintiff gave evidence tending to show that he was justified in considering his appeal as having been decided against him, but the court directed a verdict for the defendant. *Held*, that the question as to whether there was evidence of a decision by the secretary upon the appeal, ought to have been submitted to the jury.

6. Where, in June, 1863, the same precise question had been decided by the secretary, on appeal, against the plaintiff, and the secretary had published a circular to that effect, and, in September and October, 1863, the plaintiff presented the same question to the secretary, on appeal, and, up to January, 1866, he had made no response, the plaintiff was justified in considering his appeal as having been decided against him.

7. An action against a collector of customs, to recover back money paid as duties, and alleged to have been illegally exacted, can be brought

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

in the circuit court, although the parties are residents of the same state.

[This was an action by Charles F. Schmeider and others against Hiram Barney, collector of the port of New York, to recover the amount of duties alleged to have been illegally exacted.]

Charles Tracy and Almon W. Griswold, for plaintiffs.

Henry E. Tremain, Asst. Dist. Atty., for defendant.

HUNT, Circuit Justice. This action was tried in May, 1872, at a circuit court held in the city of New York, and resulted in the finding of a verdict for the defendant, by the direction of the court. A motion for a new trial is now made by the plaintiffs upon the minutes of the court. The brief of the counsel for the defendant takes a larger scope than is justified upon this motion. The only questions now to be considered are those specifically presented upon the trial for the decision of the court, and which were ruled against the plaintiffs. The defendant having succeeded on the trial, is content with the result. He makes no motion, and the points presented by him on the trial, and ruled against him, are not now up for consideration. If any errors were committed against him, they are merged in the verdict in his favor.

The action was against Mr. Barney, as a former collector of the port of New York, and based upon the theory, that, as such collector, he did, in September and October, 1863, require and compel the payment by the plaintiffs of illegal duties upon certain goods imported by them in the steamers America and New York, in those months respectively. The action was to recover back the amount of duties thus paid. The plaintiffs proved the entry, invoice and protest of the shipments by the said steamers respectively; also, a certified copy of the appeal made to the secretary of the treasury from the decision of the collector. The details of these papers are not important to be stated. The objection of the plaintiffs to the demand of payment of duties, as made to the collector and as embodied in their appeal to the secretary, was, that they were "compelled to pay a duty at the rate of two cents per square yard, under section 9 of the tariff act of July 14, 1862 [12 Stat. 552], in addition to a duty of 30 per cent. ad valorem." The ad valorem duty I understand to have been conceded by the plaintiffs to be a duty to which the goods were liable. The objection was to the additional two cents per square yard. After proving the payment of the duties to the collector, both ad valorem and by the square yard, the plaintiffs offered evidence of the description of goods embraced in the entry, to show that the duties had been illegally exacted. To this evidence the defendant objected, for the reason that it did not appear that the appeal by the plaintiffs to the secretary of the treasury had ever been decided. The evidence, and the only evidence, on this point was as follows, viz.: On the 16th of May, 1863, the plaintiffs addressed a letter to the secretary of the treasury, informing him that the collector of the port of New York had compelled them to pay two cents per square yard, under section 9 of the tariff act of July 14, 1862, in addition to a duty of 30 per cent. ad valorem, on certain goods, of the same character and class as those now in question, that they had notified the collector of their dissatisfaction, and that they now appealed to him, claiming that the merchandise was liable to a duty of 30 per cent. ad valorem only. To this letter the secretary replied on the 3d of June, informing the plaintiffs that the decision of the collector was affirmed, for the reasons set forth in the decision of March 20th, 1863. The decision of March 20, 1863, was in the form of a letter addressed by the secretary of the treasury to the collector of the port of Boston, in which his reasons were given for holding the goods to be liable to the duty of two cents per square yard. Prefixed to it is this statement: "Treasury Department, March 20, 1863 The following decisions by the secretary of the treasury, of questions arising upon appeals by importers from the decisions of collectors, relating to the proper classification under the tariff acts of March 2, 1861 [12 Stat. 209], August 5, 1861 [12 Stat. 292], and July 14, 1862, of certain articles of foreign manufacture and production, entered at the ports of Boston, New York, etc., are published for the information of the officers of customs and others concerned. S. P. Chase, Secretary of the Treasury." Upon this evidence, and these offers, a verdict was directed for the defendant, to which the plaintiffs objected and excepted.

If an appeal to the secretary and his decision were required by the law as it stood in 1863, as a condition precedent to a right of action, and if the evidence offered would not justify a finding by the jury that a decision had been made in this case, the direction of the court was right. A concurrence on both points is necessary, to sustain the decision.

The plaintiffs insist, first, that the statute of March 3, 1857 (11 Stat. 192), in force at the time of this transaction, requiring an appeal and decision before suit can be brought, is not applicable to this case. The argument is, that the statute which makes the decision of the collector final, and permits a suit against him after an appeal to the secretary and his decision thereon, applies to a decision upon a question whether the goods are liable to any duty, or are wholly exempt and free of duty, and not to a case where the question is as to the rate or amount of duty, it being conceded that some duty is payable. This construction is sustained by a careful examination of the language of the statute. The first section provides, that, on and after the 1st day of July then following, ad valorem duties, "in lieu of those now imposed," shall be imposed upon the articles enumerated in Schedules A and B, to thirty per cent., and upon those in Sched-

ules C, D, E, F, G, H, and I, to certain other percentages, as specified. Section 2 distributes the various articles therein described into different schedules, thus subjecting them to different rates of duty. The marginal statement opposite section 1 is in these words: "Rates of duty on the different schedules;" that opposite section 2: "Transfer of certain articles from one schedule to another;" that opposite section 3: "Schedule of free goods." Section 3 enacts, "that, on and after the 1st day of July, 1857, the goods, wares and merchandise mentioned in Schedule I, made part hereof, shall be exempt from duty and entitled to free entry." Then follows Schedule I, embracing maps, charts, and numerous other articles, covering a page and a half of the statute book. Section 4 relates to goods in public stores on the 1st day of July, 1857, and then follows section 5. It is there enacted, "that, on the entry of any goods, * * * after July 1st, * * * the decision of the collector, * * * as to their liability to duty or exemption therefrom, shall be final and conclusive, * * * unless the owner * * * shall, within ten days," specify in writing the grounds of his dissatisfaction, and shall, within thirty days, appeal to the secretary, whose decision, it is declared, shall be final and conclusive, "and the said goods * * * shall be liable to duty, or exempted therefrom, accordingly, any act of congress to the contrary notwithstanding," unless suit shall be brought within thirty days after his decision. The act distinctly states upon what question the decision of the secretary shall be conclusive, to wit, whether the goods are "liable to duty or exempted therefrom." The point is, not whether they are to be included within one schedule or another, whether they shall pay thirty per cent. or fifteen per cent., but whether they are liable to duty, that is to any duty, and, as if to emphasize and point the distinction, the statute adds, "or exempted therefrom," that is, from any duty. That this is the construction of the statute is apparent from the language, not only, but from the subsequent acts of congress. When congress intends to embrace the case of rates and amounts within the same principle, it uses language admitting of no doubt. Thus, in the statute of June 30, 1864, § 14 (13 Stat. 214), it is enacted, that the decision of any collector "as to the rate and amount of duties to be paid * * * shall be final and conclusive," unless the importer shall appeal to the secretary, "whose decision on such appeal shall be final and conclusive, * * * and such * * * goods * * * shall be liable to duty accordingly." The marked difference in the language of these statutes, the first providing that the collector's decision shall be final "as to their liability to duty or exemption therefrom," the other that his decision shall be final "as to the rate and amount of duties to be paid," the first providing, that, after the secretary's decision is made, "the goods shall be liable to duty, or exempted therefrom, accordingly," the other, that, after such decision, "the goods shall be liable to duty accordingly," can only be explained upon the theory, that congress intended, in 1864, to alter the law, by making the decisions of the collector and the secretary applicable to decisions upon rates and amounts, as well as to questions of entire exemption. Section 2931 of the Revised Statutes re-enacts, in the same words, the provisions of the statute of 1864, above referred to, and that is now the law of the land. Being of the opinion that the objection under consideration was not well taken, for the reason that the provision does not apply to a case where the question was not as to an exemption from duties, but only as to the amount of duties, I do not think it worth while to examine the question whether a suit can be brought where the secretary unreasonably neglects to make and communicate a decision, in a case where the provision is applicable. Both the act of 1864 and the Revised Statutes provide, that the prohibition to sue ceases, where the decision of the secretary is delayed for more than ninety days, in the case of an entry at a port east of the Rocky Mountains, or more than five months at a port west of those mountains. The question suggested is, therefore, of no practical importance, in the future.

By the common law, a collector demanding and receiving illegal duties, which are paid to him under protest, is liable in an action of assumpsit for the amounts thus collected by him. Elliot v. Swartwout, 10 Pet. [35 U. S.] 137, 158; Bend v. Hoyt, 13 Pet. [38 U. S.] 267; Maxwell v. Griswold, 10 How. [51 U. S.] 242; In Cary v. Curtis, 3 How. [44 U. S.] 236, 246, 249, it was held, recognizing the general rule, that this right of action was taken away by the act of March 3, 1839 (5 Stat. 348), which required the collector immediately to pay over the money, Judges Story and McLean dissenting, and holding the collector to be liable notwithstanding the act. The right is, by the act of February 26, 1845 (5 Stat. 727), restored, and placed as it was before the passage of the act of 1839.

I am of the opinion, also, that there was error in refusing to submit the question to the jury, whether there was evidence of a decision by the secretary, upon the appeal to him. The payment of duties is absolutely necessary to the existence of the government, and it is the duty of the courts to enforce all the laws made for their collection. As the necessity is great, it is not unreasonable to say, that such laws must be rigidly enforced. This is the rule where duties are clearly payable, and where there is an evident attempt to evade their payment; where, however, a fair question is presented, whether there is a liability, there is no reason for the laying on of a heavy hand. The case should be disposed of as if it were between individuals, and like any other question of liability or non-liability. In Tacey v. Irwin, 18 Wall. [85 U. S.] 549, the supreme court of the United States held to this effect. The statute provided, that lands sold for taxes might be redeemed upon a com-

pliance with certain proceedings, of which payment of the amount of the tax to the commissioners within a specified time, was the most important. The commissioners, in the case before the court, announced and published, that they would in no case receive payment, unless tendered by the owner of the land in person. A relative of the party went to the office of the commissioners at the time appointed, to see about the payment of the tax, but, in fact, made no offer or tender of the amount. The court held, that the previous announcement of the commissioners was a waiver of the tender, or a refusal to accept the same, and that an actual tender of the money was unnecessary.

In the present case, the plaintiffs had already presented the precise question by appeal to the secretary of the treasury, to wit, on the 16th day of May, 1863. On the 3d of June following, the secretary decided the appeal against them, and published a circular to that effect, and, as he stated in it, "for the information of the officers of customs and others concerned." When, in September and October, 1863, the plaintiffs presented the same question to the secretary on appeal, and, up to January, 1866, he had made no response, if the case of Tacey v. Irwin [supra], is good law, the plaintiffs were justified in considering their appeal as having been decided against them.

I have no doubt of the power of the court to grant the amendment of the complaint allowed upon the trial, nor that an actionagainst the collector of customs of the port of New York, to recover back money paid as duties under the revenue laws of the United States, and which it is alleged were illegally exacted, can be brought in the circuit court, although the parties are residents of the same state.

Case No. 12,463.

SCHMIDT et al. v. The GEORGE NICHOLAUS.

[N. Y. Times, Feb. 12, 1855.]

District Court, S. D. New York. Feb. 9, 1855.

SHIPPING—REPAIRS—HYPOTHECATION BY MASTER.

[When necessary repairs can be made within a reasonable time. the master may hypothecate freight and cargo for that purpose, instead of transhipping.]

[This was a libel by John W. Schmidt and others against the bark George Nicholaus and her cargo upon a bottomry bond.]

Betts & Donohue, for libelants.

Mr. Lord, for claimants.

Before INGERSOLL, District Judge.

The libel in this case was filed to recover the amount of a bottomry bond, executed by the master of the bark George Nicholaus upon the bark, her freight and cargo. The bark, which was owned in Hamburg, was bound from a port in the Pacific Ocean, with a cargo of guano, owned by others than the owners of the bark, to Hampton Roads for orders, and thence to some other port of the United States to discharge. In March, 1852, she put into Rio Janeiro in distress, and a survey being held, the needed repairs and supplies to enable her to prosecute her voyage and deliver her cargo were ordered. The master of the bark had no funds to procure such repairs and supplies, and could not procure them either on his own credit, or on the personal credit of the owners of the bark. He therefore wished to raise money upon bottomry, and accordingly advertised for terms, but could only obtain the needed funds by a hypothecation of the bark, her freight and cargo, and at the rate of interest named in the bond. The funds were accordingly advanced by Messrs. Farrand & Wilmer, merchants at Rio, to the amount of $3,917.74, which was expended in the necessary repairs of the bark, and a bottomry bond duly executed to them by the master, purporting to bind the bark, her freight and cargo, for the payment, five days after the arrival of the bark at her port of discharge, of the said principal, and $940.26 premium,—amounting to $4,858. The bark afterwards pursued her voyage to Hampton Roads, and thence to the port of New-York to discharge. Upon her arrival here she was libeled for seamen's wages, and sold for an amount little more than enough to satisfy the seamen's claim. The present libel was filed by the libelants, who have become the assignees of the bottomry bond, against the bark, her freight and cargo, to recover the amount due. The balance of the proceeds of the bark and the freight are not sufficient to pay it, and the libelants are without adequate remedy unless they can resort to the cargo. The owners of the bark do not contest the right of the libelants to the proceeds of the bark and to her freight. But the owners of the cargo insist that the cargo is not holden for the libelant's claim; that no state of facts existed at Rio Janeiro which authorized the master of the bark to bind even the vessel by a bottomry bond; and that there was no necessity for his hypothecating the cargo, because there were several freighting vessels at Rio bound for the United States, in which case it was the master's duty to have transhipped the cargo, and therefore he had no right to hypothecate it.

HELD BY THE COURT: That on the finding of the facts as above set forth, there was an absolute necessity that the bark should have the repairs, and there was no way in which the master could procure them except by bottomry. The price which she (a foreign vessel) brought at a forced marshal's sale in this port would be very inadequate proof of her value at Rio, or that she was not worth repairing there, as claimed by the respondents. That a master of a vessel in a foreign port has the right, in case of necessity, to hypothecate his cargo as well as his ship and

freight, for repairs which are necessary in order to carry the cargo to its destination—a power given him by the law, without any express authority from the owners, and required by the necessities of navigation and commerce.

In an ordinary state of things, the master of a vessel is a stranger to the cargo, when it is owned by a freighter, except for the purposes of safe custody and conveyance. But in cases of unforseen necessity, the character of agent is thrown upon him, not by the appointment of the owner, but by the policy of the law. The necessities of navigation give power to a master in certain cases to control and dispose of the cargo of a general freighter, and give him power and authority over it, adequate to the purpose of discharging his duty of delivering it at its destination. In such cases of severe necessity the law makes him the agent of the owners, and as such he is authorized to do what it is presumed the owners would do. Hence, as is well settled, in case of necessity he may sell perishable articles; or he may sell part of the cargo to enable him to pursue his voyage and carry the balance to its destination; or he may destroy the cargo by throwing it overboard if necessary to save the ship. This power of selling a part or the whole of the cargo, or of destroying it, is not given him by the owners, but is thrown upon him by the law, and whatever he does by virtue of it is as binding upon the owners as if they had expressly authorized it. This power of the master has long been recognized by the courts of admiralty. His power to hypothecate the whole cargo instead of selling a part of it, to enable him to prosecute his voyage, was not recognized by the courts until a more recent period, but it had been the practice of shipmasters to do so some time before it had been expressly decided by any admiralty decision that they had the legal right to do so. No express decision legalizing the practice was had until the case of The Gratitudine, 3 C. Rob. Adm. 240, in which Sir William Scott decided that the master had such right. The law as laid down in that case has not been questioned in subsequent cases which have arisen. Judge Story, in the case of The Packet [Case No. 10,654], says: "The case of The Gratitudine has established upon the most satisfactory and conclusive grounds the right of the master in a case of necessity to hypothecate the cargo as well as the ship and freight."

But it is claimed by the respondents that although this is the law, yet where the master has an opportunity to tranship, it is his duty to do so, and that when he has such opportunity, and that is known to the bottomry lender, he cannot hypothecate the cargo for the repairs of the vessel. In certain cases, as, for instance, where a vessel is unseaworthy and unfit to be repaired, or where the master cannot raise funds to repair her, it may be his duty to tranship. But where the ship can be made seaworthy within a reasonable time, and the master can raise funds for that purpose by hypothecating the ship, freight and cargo, there is no law which so makes it the duty of the master to tranship that if he fails to do so he shall not have the power to hypothecate. That was expressly decided in the case of The Gratitudine, which is sustained by Judge Story in the case of The Packet [supra]. The master is not deprived of the power to hypothecate, because he can tranship, nor is the lender on bottomry deprived of his right to look to the cargo hypothecated, because he had good reason to believe that the master could tranship if he chose. If this were so, then the rule that the master may in case of necessity hypothecate his cargo for the repairs for his ship would be abrogated in this port and other large commercial ports, because he would at all times have it in his power to tranship his cargo on board another vessel. The decree therefore must be in favor of the libelants. The balance of the proceeds of the bark, remaining in the registry of the court, and the freight money, must be first applied to the payment of the libelants' demand, and the balance then remaining due must be paid by the cargo.

Case No. 12,464.

SCHMIDT v. The PENNSYLVANIA.

[7 Wkly. Notes. Cas. 98.]

District Court, E. D. Pennsylvania. Nov. 5, 1878.[1]

VENDOR AND PURCHASER — THROUGH BILLS OF LADING—STOPPAGE IN TRANSITU—LIABILITY OF MASTER TO SUBVENDEE.

1. A shipper of goods has no right to stop them, after a sale by his vendee to a third party.

2. The master's refusal to deliver to such subsequent vendee, though under the vendor's orders, is at the master's peril, and if loss occur, e. g. by reason of a falling market, he is responsible to such vendee.

This was a libel filed by Schmidt, the holder of a bill of lading for goatskins, which on arrival of the vessel, the steamship Pennsylvania, at Philadelphia, he presented to the ship's agent, and delivery of which was refused pursuant to a cable telegram from the shippers. The goods originally were shipped by one Bresch at Trieste on a through bill of lading, via Liverpool, signed by the respondents' agent at Trieste. The goods came into the respondent's possession, and were forwarded by them from Liverpool. The bill of lading was made out in the name of Bresch as shipper, deliverable to his order. Bresch indorsed the through bill of lading to Havemann & Poleman, at Paris, from whom Schmidt obtained the same, by indorsement, for value. Before arrival of the vessel at Philadelphia Bresch's agent at Liverpool telegraphed the

[1] [Affirmed in 4 Fed. 548.]

agents of the Pennsylvania to stop delivery of the goods as against the holder of the bill of lading. The vessel arrived at Philadelphia February 3, 1878, and commenced discharging cargo on the 7th. The libel was filed on the 12th of February 1878, claiming the value of the goods. On February 19, 1878, before the time for filing an answer had expired, the order to stop was withdrawn, and on the same day the vessel's agent notified Schmidt of the fact that they were prepared to deliver the skins. Schmidt refused to accept the same unless paid the sum of $1,090.51, for the damages which he had sustained by loss of a sale to one Keene. Subsequently, under an order of court, the skins were delivered to Schmidt, he reserving his right to claim damages for any loss which he had sustained by the refusal to deliver on arrival. The evidence of the sale of the goods to Keene consisted of an order for the importation of these skins, accepted by Keene, from Schmidt, dated at Philadelphia. This order stipulated that Keene should advance part of the price in two notes for $800 each, Keene to pay insurance and banker's commission, the goods to be shipped in December. Havemann & Poleman, at Paris had secured the goods in Trieste of Bresch for December shipment, and notified Schmidt of the price at which they had secured them, offering them at a smaller advance to Schmidt, who accepted, and placed them with Keene; Havemann & Poleman allowing Schmidt a commission in the transaction. The goods were shipped from Trieste in December.

The answer of the steamship company set forth the facts in relation to the shipment, the notice by the shipper to stop in transit, and the subsequent withdrawal of the order, and the offer to deliver to Schmidt, and further averred as follows: "And that, in acting in accordance with the same, the respondents fulfilled their duties as carriers under the engagement with the shipper contained in the bill of lading, and that no liability exists on the part of the respondents for any loss which the libelant may have sustained by reason of the exercise by the vendor of the right of stoppage while in their hands as carriers."

E. G. Platt and S. Dickson, for Schmidt, libelant.

The whole transaction, as disclosed by the correspondence and testimony, shows that Schmidt became the purchaser of these skins from Havemann & Poleman, and subsequently sold them to Keene. He had paid for the goods, and therefore was a bona fide holder for value of this bill of lading. That being so, the right of stoppage in transitu did not exist. This has been settled ever since the leading case of Lickbarrow v. Mason [2 Term R. 63]. If the owner of a vessel, under such circumstances, takes upon himself the responsibility of refusing delivery of the goods, he does it at his peril. He runs the risk of the title of the holder being good as against the shipper, and in that case he is liable to him. Abb. Shipp. 337, 338. The only safe course, when the bill of lading is outstanding in the hands of a third party, is to demand indemnity from the shipper when he gives notice and attempts to exercise the right of stoppage in transitu.

CADWALADER, District Judge. Is an instrument like the one in question a regular bill of lading? And will a transferee for value be invested with the rights of a bona fide holder for value of a regular bill of lading? This paper was issued in Trieste, and is signed by the agent of the steamship company. Bills of lading are signed by the master of the vessel.

This is what is known as a through bill of lading. It may be true that a sailing vessel's bills of lading should be signed by the master. This is a steamship company, and the validity of these through bills of lading has become a well-recognized fact in the commercial world. By them goods are shipped from California to Russia, from China via United States to Europe, in fact from almost any one part of the globe to another. The distinction between the two classes is well settled. Schmidt, then, being the holder of the bill of lading, was entitled to the possession of the goods on arrival. On account of his inability to obtain possession, he lost the opportunity of carrying out the sale to Keene, and they were thrown back on his hands. The measure of damages, therefore, is the difference between what Keene would have paid him and what the goods were worth when actually delivered to him. This was not until March 4, 1878. The loss is, therefore, as appears by the testimony, about $2,000.

CADWALADER, District Judge. I think that the market value at the time the respondents offered to return them should be taken as February 19, 1878.

No, because they refused at that time to give them up unless we should waive all claim to damages. There was really no absolute offer to give them up until the time when the order of the court was made, viz. March 4th. We insist that that time, therefore, is to be taken for fixing the value of the skins.

M. P. Henry, for the steamship, contended that Schmidt acted only as agent for Keene, and that there was no loss of any sale by Schmidt, as the goods were Keene's. The libel should have been brought by Keene. As to the liability of the ship for obeying the orders of the shipper. The master is not bound to decide whether the right to stop has been lost by endorsement of the bill of lading for value or otherwise. The Tigress, Brown. & L. 44, denied the right of the master to demand evidence that the vendee had not parted with the bill of lading. The master had a right to compel Bresch and Schmidt

to interplead, and they would have applied to the court to take the goods in their custody, and determine the right of the respective parties to them. Abb. Shipp. 540; 2 Story, Eq. Jur. § 518; 3 Madd. Ch. Prac. tit. "Interpleader." This course was prevented by Bresch, the shipper, withdrawing the stoppage. It is the case of the holder of a fund claimed by two persons. The bailment of a transporter does not impose on the master the duty of determining whether the right of stoppage has been lost by the shipper. The master is the shipper's agent, and must obey his orders. Right of stoppage is not necessarily lost by indorsement to order. Feise v. Wray, 3 East, 93; Thompson v. Trail, 6 Barn. & C. 36; Litt v. Cowley, 7 Taunt. 169. If the master had undertaken to return the goods to the shipper, he would have incurred responsibility to the holder of the bill of lading, and vice versa; but while he held subject to the conflicting claims, he is not responsible.

November 23, 1878. THE COURT (CADWALADER, District Judge). The detention of the skins by the defendants was wrongful. There could be no rightful stoppage in transitu by reason of the former owner's insolvency. Through this wrongful detention and the consequent inability to deliver the goods to the purchaser in Philadelphia, the benefit of the sale to him was lost. He rejected the goods, as he had a right to do, and the market had fallen so that a loss, which is the measure of damages, had been suffered.

Decree accordingly.

[On appeal to the circuit court, the decree of this court was affirmed. 4 Fed. 548.]

Case No. 12,465.

SCHMIDT v. The PENNSYLVANIA.

[See 4 Fed. 548.]

SCHMIDT (POILLON v.). See Case No. 11,241.

Case No. 12,466.

SCHMIDT et al. v. SMITH.

[7 Ben. 361.] [1]

District Court, S. D. New York. June, 1874.

CHARTER PARTY—NET MEASUREMENT OF STEAMER—CARGO SPACE OCCUPIED BY COAL.

1. The owners of a steamer chartered her in London to S., for a voyage from New York to the United Kingdom or Europe, by a charter party which described the vessel as "of the net measurement of 537 tons, or thereabouts." On the arrival of the vessel in New York, the agent of S. made a written agreement with S. & D., whereby he chartered the vessel to them for a voyage from New York to Europe, for £1,500, for a full and complete cargo of lawful merchandise, the difference between the £1,500 and the amount of freight on the bills of lading to be settled before sailing. The agreement, after specifying certain conditions as to the loading of the vessel, added: "All other conditions as per charter party, dated London, &c." This charter party was known to S. & D. when they made the agreement with the agent of S. When the vessel came to be loaded, it appeared that she had on board, in a part of the space which was properly for cargo, a quantity of coal weighing 200 tons, and occupying as much space as would be occupied by 150 tons in measurement of such general cargo as S. & D. put on board the vessel; and, when S. & D. had put on board cargo till the vessel was so deep that the master refused to take any more, there still remained space for 50 tons more. She sailed with a cargo of 468 tons in measurement; and, but for the carrying of the coal above spoken of, she could have carried 668 tons. A vessel can generally carry 25 per cent. of tons by measurement more than what is stated in her register as her "net measurement," which, for this vessel, would have made 671 tons. S. & D. filed a libel against S., to recover damages for breach of the agreement made between them, claiming to recover, as such damages, the difference between the freight earned on the goods actually received on board, and that which the vessel would have earned but for her having that cargo space filled with coal. *Held*, That the agreement between S. & D. and S. was a charter of the vessel.

2. Under this contract, S. & D. were entitled to have, for their £1,500, the space of a net measurement of 537 tons for cargo; and unless they were allowed to have it, S. did not perform his covenant, that they should be allowed to carry a full and complete cargo, notwithstanding a clause in the charter, that the cargo should not exceed what the vessel "can reasonably stow and carry over and above her tackle, apparel, provisions and furniture."

3. S. & D., therefore, were entitled to recover the difference between the freight actually earned, and that which would have been earned if such covenant had been fully performed.

[This was a libel by Jacob W. Schmidt and Herman Dill against Alexander Smith, to recover freight money.]

W. R. Beebe, for libellants.

E. H. Owen, for respondent.

BLATCHFORD, District Judge. On the 19th of December, 1872, at London, the Glasgow & Cape Breton Coal & Railway Company entered into a written charter party with the respondent, in respect to the British steamship Dione. The charter party described the vessel as "the steamship called the Dione, of the net measurement of 537 tons, or thereabouts." The charter party contained an agreement, that the vessel should proceed to New York, and there load a cargo of lawful merchandise, in bulk, "not exceeding what she can reasonably stow and carry, over and above her tackle, apparel, provisions and furniture," and therewith proceed to a safe port in the United Kingdom, or a safe port on the continent of Europe, between Havre and Hamburg, both inclusive, calling for orders at Queenstown, Falmouth or Plymouth, at master's option. The rate of freight for the cargo was prescribed by the charter party.

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

The respondent, by his agent, at New York, on the 11th of January, 1873, entered into a written agreement with the libellants, in these words: "I, George Pendreigh, agent for Alexander Smith, Esq., charterer of the screw steamer Dione, do hereby charter said steamer Dione to Jacob W. Schmidt & Co., for a voyage from New York to one safe direct port on the continent, between Havre and Hamburg, both included, port to be named on signing bills of lading, for the sum of fifteen hundred pounds British sterling, in full for a full and complete cargo of lawful merchandise. Any difference between said fifteen hundred pounds sterling and bills of lading to be settled before sailing, if in favor of George Pendreigh, in cash at current rate of exchange, less insurance; if in favor of Jacob W. Schmidt & Co., by captain's draft on consignee, at port of discharge, payable ten days after arrival. Steamer in ballast and to haul to a pier on East river not above pier 40. Lay days not to commence until steamer is in berth and ready for cargo. All other conditions as per charter party, dated London, December 19, 1872. Steamer to employ J. W. Schmidt & Co.'s stevedore at customary rates."

The instrument of the 11th of January, 1873, is manifestly a charter of the vessel by the respondent to the libellants, for the voyage named in it. It so expressly states. The price to be paid was £1,500, "for a full and complete cargo." By this instrument, construed in view of the charter party, the vessel was to give bills of lading for the cargo to be laden, and to collect the freight thereon. If such freight fell short of the £1,500, the libellants were to pay the difference in cash to the respondent, before the vessel should sail. If such freight exceeded the £1,500, the excess was to be paid by the respondent to the libellants, by a draft of the master of the vessel on her consignee, payable ten days after the arrival of the vessel on the other side. By the expression, "all other conditions as per charter party," the respondent assumed to carry out towards the libellants the covenants therein contained on the part of the parties who chartered the vessel to him. It appears by the evidence, that the libellants, before executing the instrument of January 11, 1873, learned, from a copy of the charter party referred to in it, what that charter party stated as to the net measurement of the vessel, namely, that she was "of the net measurement of 537 tons, or thereabouts," and that they computed, on the basis of that measurement, as a measurement of the space free for cargo, as to whether they could afford to pay the sum of £1,500 for the hire of the vessel. The evidence shows that the words "net measurement," in reference to a British vessel, mean the statement in the register of the vessel as to her net measurement, and that, in such register, the spaces not set apart for the use of the vessel are put down by items, by measurement tons, and the total is her net measurement tonnage, and represents, and is understood, in commercial signification, to mean, the space free for the carrying of cargo. I am of opinion, that, under this contract, on the evidence, the libellants were entitled to have, for their £1,500, the space of a measurement of 537 tons for the carrying of cargo, and that, unless they were allowed to have that space, the respondent did not perform his covenant, that they should be allowed to carry a full and complete cargo. It is true, that the charter party provides that the cargo shall not exceed what the vessel "can reasonably stow and carry, over and above her tackle, apparel, provisions and furniture;" but the evidence shows that the allowance for the measurement for the tackle, apparel, provisions and furniture of the vessel is not set down among the spaces which make up the net measurement tonnage.

The evidence shows that the vessel had on board, in a part of the space which was properly space for the carrying of cargo, a quantity of coal. This coal occupied a space into which the libellants could have put 150 tons, by measurement, of such general cargo as they put on board of the vessel. The coal belonged to the vessel. It was not taken out. It amounted, in weight, to 200 tons. When the libellants had put on board a certain quantity of cargo, the vessel was down so deep that the master and the stevedores refused to take on board any more cargo. At that time, there was empty cargo space into which 50 tons, by measurement, of such general cargo as the libellants put on board of the vessel could have been stowed. The weight of the 200 tons of coal was such, that, if the space occupied by it had been filled by the 150 measurement tons of cargo, and the empty cargo space had been filled by the 50 measurement tons of cargo, the vessel would have been no deeper than she was. The libellants had engaged cargo sufficient to supply such additional 200 measurement tons of cargo. The cargo put on board and the cargo engaged was an average general cargo as to weight, and not an over heavy cargo in weight for the space it occupied. The vessel left, on her voyage, with 468 measurement tons of cargo. She could have taken, as before shown, if the 200 tons weight of coal had been out of her, 200 measurement tons more of cargo, making 668 measurement tons in all. The evidence shows, that a vessel will generally carry a cargo greater in number of measurement tons by 25 per cent., than the number of tons stated in her register as her net measurement tonnage. For this vessel, that would make 671 measurement tons. A measurement ton is 40 cubic feet, and is called equal to a ton of 2,240 pounds.

The libellants claim, in their libel, that the freight money on a full cargo would have been £1,898.3.6 and that they are entitled to recover from the respondent £398.3.6. The

libel is substantially framed to recover for the freight money which would have been earned by the vessel on cargo which her master refused to carry, and which could have been safely stowed in space which properly formed part of the space composing the 537 tons net measurement. The libellants were entitled to such space for cargo, and the respondent and his agents wrongfully withheld it.

There must be a decree that the libellants are entitled to recover such freight money. An account of the entire freight money must be stated, on a reference to a commissioner, on the basis of adding to the actual freight money on the cargo carried, the freight money which would have been received on 200 measurement tons more of cargo, at the rate of 40 cubic feet per ton, at the average rate of freight for the cargo carried by the vessel, and credit must be given to the respondent, in such account, for the sum of £1,500 sterling.

Case No. 12,467.

SCHMIDT v. The SUPERB.

[N. Y. Times, May 25, 1852.]

District Court, S. D. New York. May, 1852.

MARITIME LIENS—PETITION—ORDER OF FILING—CLAIMS—PRIORITY.

[On September 6, 1850, W. attached a vessel in the state court, but took no further proceedings therein. On the 15th of same month, S. filed his libel in the district court. At the time there were other actions pending. In October the vessel was sold under decree of district court, and the proceeds paid into court. On November 23d, W. filed his petition praying that his debt might be paid out of proceeds. Subsequently the court made an order that the claims of like character be paid, in the order of filing, to all holding maritime liens. *Held*, that S.'s claim takes priority over W.'s.]

The bark Superb was seized upon process issuing in various actions, and sold under an order of this court, made October, 1850, and the proceeds paid into court. The libelants, Schmidt & Balchen, filed therein libel for advances and supplies made to the vessel on the 15th of September, 1850, and on the 10th of May, 1852, obtained a decree in their favor. On the 6th of September, 1850, James Wilkie seized the said vessel, under an attachment issued by the supreme court of this state, but took no further proceedings thereon, and on the 23rd of November, 1850, filed his petition in this court, praying that his debt be paid out of the proceeds of said vessel in court. On the 28th day of April, 1851, this court entered a decree to the effect that the various suitors in court claiming compensation out of said proceeds, and having maritime liens therefor, should be paid out of said fund, in the order of bringing their suits, respectively, when the demands are of like character.

HELD BY THE COURT, that the petition of James Wilkie does not bar or affect the right of the libelants to the satisfaction of the decree rendered in their favor, no suit or proceeding having been instituted in this court by said Wilkie until after the commencement of the action by the libelants, and it not appearing that he has any fixed lien or privilege upon said vessel or her proceeds for his debt, or that he has been declared, by any competent court of law, to have a lien or privilege of payment in respect thereto; nor is it represented by his petition that his demand has any privilege or lien, other than that which accrues to him in a maritime court, because of supplies and advances made to a foreign vessel.

Case No. 12,468.

SCHMITT et al. v. TROWBRIDGE.

[24 Int. Rev. Rec. 381; 3 Cin. Law Bul. 1029.]

District Court, E. D. Michigan. 1878.

INTERNAL REVENUE—TAX ON MATCHES—ACTION TO RECOVER BACK—VALIDITY OF ASSESSMENT—BURDEN OF PROOF.

[1. The payment of a tax, assessed upon manufactured articles by the commissioner of internal revenue, under protest is not a voluntary payment, and if the owner of the goods appeals to the commissioner, as provided by law, and he decides against him, an action may then be brought to recover back the amount of the tax.]

[2. It is the duty of a manufacturer of matches to see that no box contains more matches than the number indicated by the internal revenue stamp placed thereon, and if some of them do overrun, the commissioner may assess an additional tax thereon, notwithstanding that other boxes of the same lot fall short, so that in the aggregate there is no excess.]

[3. An assessment by the commissioner of internal revenue is prima facie valid, and where he has assessed a certain lot of matches in boxes on the ground that the boxes contain an excessive number of matches, and it appears that some of the boxes did overrun, it will be presumed that all the boxes overran, and the burden is upon the complaining taxpayer to show what boxes did not overrun.]

At law.

BROWN, District Judge (charging jury). This is an action against the collector of internal revenue of this district, and in fact against the government through him as defendant, to recover certain taxes said to have been illegally assessed and collected upon 243 boxes of matches made by the plaintiffs. The law provides that, in all cases where the assessment is disputed, the amount of the tax shall be paid, and upon protest being made and an appeal taken to the commissioner of internal revenue, in case his decision sustains the validity of the tax, a suit may be brought against the collector, and the case submitted to a jury. That is the only way which the law provides for the rehearing of assessments, so that in the end the validity of these assessments may always be submitted to a jury. And I charge you, as requested by plaintiff in his first request, that the payment of the assessment in this case, and under the circumstances proved, is not to be

considered a voluntary one. All that this request means is that where the assessment is illegally exacted under protest, and the appeal properly taken, the plaintiff may sue to recover it back.

The law provides that an appeal shall be taken from these assessments to the commissioner of internal revenue. An appeal was taken in this case from the assessment, and I charge you upon that point that it is sufficient to enable the party to bring this action without the necessity of a further appeal from the collection of the tax.

I may say one word here with regard to the relative position of the parties. It is the plaintiff on the one hand, a manufacturer of matches, and the government upon the other. In cases of this kind, where the government sues or is sued with relation to the validity of a tax, it is almost a matter of course for the government to be represented in an unfavorable light. Now, gentlemen, it is hardly necessary for me to say that that is an erroneous view to take of the relations between a government like this and its citizens. In former times, when taxes were imposed by arbitrary power, and tax collectors were sent from the seat of the government to extort them from the people, complaints of that kind were very frequently and justly made; but in this case you must bear in mind that these taxes are laid by you, through your representatives in Washington, and are collected by your fellow citizens, and it is a matter as much between you and the taxpayers as between the government and the taxpayers. You are here representing the government as much as I am, and you are also representing the people of this government. The people having imposed these taxes, they have also delegated certain agents to collect them, and you, as a portion of the people, are to decide whether the act of these officers was correct or not. It is as much a matter of interest for you, as it is for these gentlemen, that a tax honestly due the government should be honestly collected and honestly paid. It is a matter in which these officers of the government have not the slightest personal interest, no more than any two of you gentlemen, sitting on the jury, and they are entitled as much to your protection as are the two plaintiffs in this case. It is a mere question of fact, were these taxes illegally collected or not?

It appears that the government officers were informed in Louisville, by certain rivals in business of the plaintiffs, that the plaintiffs' boxes containing matches were overrunning, —that the boxes contained more than three hundred matches. The law provides that, if the box shall contain one hundred or less, there shall be a stamp put upon it of one cent; if it contains two hundred or less, a stamp of two cents shall be put upon the box; and for each hundred in excess of two hundred, or for each fraction of one hundred, an additional stamp of one cent shall be imposed; so that it was the business of these plaintiffs to see that none of their boxes contained over three hundred matches, as the stamps they put upon them were stamps appropriate to that amount.

I feel compelled, gentlemen, in the discharge of my duty in this case, to disagree with plaintiffs' counsel in their construction of the law. It was urged that if some of the boxes fell short and some overran, that the jury might strike an average, and say that if the boxes in the different cases did not average over three hundred in the box, there had been no offence committed, and this tax had been illegally laid. I charge you otherwise. It was the duty of the plaintiffs to see that none of these boxes contained over three hundred matches, and for every box that contained over three hundred the commissioner of internal revenue was authorized to impose the extra cent, notwithstanding there were other boxes that fell short of three hundred. The plaintiffs were at liberty to lump them; to fill each box, we will say, without counting them. The government does not require they shall be counted, but it does require there shall not be over three hundred in a box, so the safer way in that case was to do as Mr. Richardson did,—see that the boxes did not contain over three hundred. If they chose to lump them, they should have made sure that the contents of the boxes ran from say 290 to 300 or 295; that is, if there were any chances to be taken, the chances should not be taken against the government.

In determining these tax cases, the government is entitled to certain presumptions. It is a matter of necessity that it should be so. For instance, I charge you that, where the commissioner of internal revenue makes an assessment of this kind, the presumption is that the assessment is correctly made. You may say that where a government officer imposes a tax upon one hundred thousand boxes of matches, for instance, that it is his duty to see that the tax is properly imposed upon each of these hundred thousand boxes. As between man and man, that would seem to be so, but the necessities of the case require a different rule. It would never do to say that, in order to sustain this assessment, it was necessary for the government to prove that each one of these hundred thousand boxes contained more than three hundred matches, because that would necessitate the counting of the entire number of matches in each one of these boxes, which would be entirely impossible. So then it is a fundamental principle of the law in this connection that the commissioner shall lay the tax as he believes it to be just, and that the assessment, when made by him, shall be regarded as prima facie legal, and the burden is thrown upon the plaintiff to show that it is illegal. There is another reason for it. The government cannot know the contents of each one of these boxes, because the most of them have been sold, and are scattered all

over the country. The proofs are lost. The government would not be able, in the nature of things, to prove that each one of those boxes contained over three hundred matches, even if the law required that a count should be made; whereas, on the other hand, the proof is in the hands of the plaintiff to show through his workmen the course of business, and the care he took in packing those boxes and in counting the matches. The facts in relation to these things are all in the hands of the plaintiffs, and for that reason, among others, the law imposes upon them the duty of showing that the assessment was illegally made. It is the duty of the plaintiffs to show that in fact there were not over three hundred matches in these boxes, and it is for the plaintiffs to show how many of these boxes did not overrun. The government has shown that some of the boxes did overrun. They have not shown that all of them did. Now, then, how far does this proof go in that regard? As I said before, it is impossible for the government to count the matches in these boxes; but, where we find one or two or a few boxes in a case overrunning, it is a fair presumption that all the boxes in the case overrun; and, where you find boxes in one case overrunning, it is fair to be presumed that all the boxes in that class overrun; but it would not follow that if other matches were made of a different class, or if they were boxed differently, as if the boxes were differently shaped, or of different sizes, they would all overrun; but here there were one hundred thousand boxes of a certain size, the matches being all of a size, and of a certain quality of timber. And you find, in that number of boxes, that twenty of fifty boxes, indifferently chosen, overran, and none of them underran. It would be a fair presumption that the entire one hundred thousand would overrun, and the commissioner would fairly exercise his discretion in imposing the tax on the whole one hundred thousand. But that evidence may be contradicted by showing that an equal number did not overrun; so, after all, it is a fact for you to say, how much of the tax was illegally collected, and for that amount the plaintiffs are entitled to judgment.

It is claimed here that there were one hundred smaller boxes made first that did not overrun, and that there is no evidence here one way or the other upon that point; that the count related only to the larger class of boxes.

With regard to that, I have this to say: that there is no evidence one way or the other with regard to these overrunning, and in that connection you are entitled to consider on whom lies the burden of proof. The government has assessed these boxes as overrunning. The assessment is prima facie evidence of its own legality,—that is, it is prima facie correct,—and it imposes upon the plaintiffs the burden of showing that the matches in these one hundred boxes did not overrun. There is no evidence on that point one way or the other, except that some of these were not assessed, and I think it is a question proper to be submitted to the jury, whether these hundred smaller boxes did overrun or not.

The course of business of the factory seems to have been about this: They did not count each box, but once a day each packer was required to count one or two boxes, and that the superintendent went through and examined, every day, the boxes, to see whether they overran or not. It seems that the plaintiffs became aware, in the fall of 1876, that they did overrun, but whether they overran in the smaller boxes or not the testimony leaves us in a very painful state of uncertainty. The government can only rely in that case upon the prima facie validity of the assessment. It is upon the plaintiffs to show that it was illegal. If you shall find here, under all the circumstances of the case, that the boxes contained in these hundred packages did not overrun, then for that amount the plaintiffs would be entitled to a judgment. The same is the fact with regard to the one hundred and twenty-six cases of round matches. It is insisted here by the plaintiffs that they did not overrun; that the round matches were not of the same size as the square matches; and that there is no evidence here that they overran. To that the government replies again that this assessment is prima facie legal, and that the burden is upon the plaintiffs to show it.

Mr. McGrath. I would remind your honor that five out of the seven boxes at Toledo were round matches, and that the five counted there did not overrun; and there is further evidence that the collector examined these eighteen cases at Buffalo, and informed the dealer there to go and sell them; that they were all right; those were round matches.

THE COURT. Those facts are proper for you to consider, gentlemen, in this connection, bearing in mind, however,—and that may become material in your deliberations,—that the burden of proof in these matters rests upon the plaintiffs. It seems that, on the attention of the government officers in Detroit being called to the fact that these matches overran, they visited the factory; that a visit was made by Gen. Trowbridge and Capt. Gavett, the internal revenue agent; and that they there requested Mr. Schmittdiel to make a statement. The manner in which this was done has been criticised by the plaintiffs' counsel, and it is proper for me to comment upon it here. On the one hand, Mr. Schmittdiel says that the statements he made were dictated by Capt. Gavett, although he admits himself that Gen. Trowbridge, the collector, told him to be cautious, and not make the statements if they were not true, and he says that, in

reply to that caution, he said, "I do know," or, "We do know they overran." On the other hand, both Capt. Gavett and Gen. Trowbridge deny that any dictation was used, and assert that the statements made were entirely voluntary on the part of Mr. Schmittdiel. The statements are here, in the handwriting of and signed and sworn to by Mr. Schmittdiel, and they are certainly presumed to be voluntary, the burden being upon the plaintiffs to show that they were involuntary. Now, if you believe Gen. Trowbridge and Capt. Gavett's testimony in this regard, I think that you will find their conduct was entirely correct. I see no opportunity to criticise the way this business was done. On their attention being called to this alleged overrunning, it was entirely proper for them to go to these parties, and ask them to make a statement. There seems to have been no compulsion exercised, their establishment was not seized, and there has been no attempt to impose a penalty upon these parties,—simply an attempt to collect the tax honestly due. Now, if you believe their version of this affair, I charge you their conduct was entirely justifiable and correct, and I see nothing whatever to criticise in that regard. If there was an attempt made at using the power of the government to dictate to this party what he should write down, that would be unjustifiable; but Mr. Schmittdiel says in that connection that Gen. Trowbridge urged him to be cautious in making this statement, and both Gen. Trowbridge and Capt. Gavett deny that any dictation was used whatever, but that the statements were entirely voluntary on the part of Mr. Schmittdiel. As I said before, the burden of proof is upon the plaintiffs to convince you of this fact.

On the 29th day of June, Mr. Schmittdiel made this statement: "Sir: We have manufactured of the kind of matches which we denominate 'No. 7,' and being the same as the 13 cases we shipped to H. Wedekind & Co., Louisville, Ky., in all only 279 cases, containing 144 boxes in each case, and each box containing 300 matches; and that we never represented the said boxes to contain more than 300 matches each, and that we never received or demanded pay for them as containing more than 300 matches each; that we were aware that some of the boxes overran, but that we expected some would fall short. We have sold this class of matches (No. 7) to the following parties: H. Wedekind, Louisville, Ky.; Granger & Co., Buffalo, N. Y.; W. J. Benedict, Milwaukee, Wis.; Kummel & Norris, Milwaukee, Wis.; Jacob Wellaur, Milwaukee, Wis.; and Matthews, Schaunsenbach & Co., Toledo, Ohio; and we have only nine cases of said matches left. We commenced the manufacture of matches about the year 1871, and in 1872 our establishment was destroyed by fire, and in 1873 we resumed operations. There is no other brand of our matches except No. 7, which we are aware of, that the boxes contain, or have contained, more matches than was represented by our stencil and by the amount of revenue stamps thereon."

It seems that on the same day, thinking that his statement was not exactly correct, he made another statement, in which he says: "Sir: We have manufactured matches as follows: Since March 12, 1877, that being the date on which we resumed manufacturing, 3,325 cases No. 9 matches, 3 gross each," etc. And he adds, Detroit, June 30th, the following day: "We were aware that some of these boxes overran. We were also aware that many fell short of the number represented by the stamps on the boxes, and we felt confident that there were no more matches in the entire cases than the stamps indicated." In other words, they seek to justify themselves by saying that the average was no greater than 300 in the box. On consulting counsel, they made another statement, on the 2d day of July, in which they say: "These matches were manufactured during the year 1876, some of them early in the year, and others in the fall. It was our custom at times to ourselves count a box of a particular lot, to ascertain how they are running, and in the fall of last year we made the discovery that a particular batch of these matches did overrun, and we immediately gave instructions to our packers to put a less number in the boxes. It is impossible to count each box of matches, for if we did so the counting would cost several times more than the total price received for the matches." That is entirely true, gentlemen, that the counting of each one of these boxes would undoubtedly make them cost more than they would realize upon each box; at the same time, it is their duty, if they do not count each box, to see that the boxes do not overrun, and if there is any loss it should be a loss to them, and not a loss to the government in their overrunning.

I believe I have covered all the material points in this case, and all the requests to charge, except as I have given the plaintiffs' requests. I decline to give them.

Case No. 12,469.

SCHNEIDER v. JACKSON.[1]

Circuit Court, D. Connecticut. Jan. 19, 1878.

PATENTS—LAMP SHADE—ANTICIPATION.

[The Votti invention of a combination of a transparent shade holder and shade, constructed substantially as described, by which the two perform the functions of a chimney in inducing the draft which supplies the air requisite to combustion, and dispenses with the necessity for a chimney, was not anticipated by either the Chinnock, Fravis, or Fullager devices.]

[This was a bill in equity by Bennett B. Schneider against Franklin D. Jackson for an injunction and accounting. The bill

[1] [Not previously reported.]

charged the infringement of reissued letters patent No. 7,511, granted to Carl Votti, February 13, 1877, the original letters patent, No. 182,973, having been granted October 3, 1876.]

William B. Wooster, for plaintiff.
Samuel B. Gardner, for defendant.

SHIPMAN, District Judge. This is a bill in equity based upon the alleged infringement of reissued letters patent, dated February 13, 1877, and granted to the plaintiff as assignee of Carl Votti, for an improvement in shade holders for lamps. The original patent to Votti was dated October 3, 1876. The bill prays for an injunction and an account. The answer alleges that the reissue is not for the same invention which was described in the original patent, and that Votti's invention had been anticipated, and had been described in sundry patents which will be hereafter particularly mentioned. The first defense was abandoned. The question of novelty is the only one which is practically in dispute, for if the plaintiff's patent is valid, infringement is not denied.

The specification of the reissued patent states, in substance, that the invention consists of a transparent or translucent shade holder and a shade, so arranged, with respect to each other and to the burner, that an ordinary lamp burner can be used without a chimney. The principal advantage of the invention is that the annoyance of broken chimneys is avoided. The burner is also cleaned, and the wick is trimmed, without difficulty.

The device is constructed as follows: An ordinary lamp burner is provided with a circumferential flange for the support of the cone, and which ordinarily also serves to support the chimney. This flange is provided with suitable perforations through which air is admitted within and without the cone. Instead of using the flange for the support of the ordinary chimney, the shade holder is placed directly upon the flange. The shade holder is provided with a tubular extension or socket which fits over the cone, leaving an air space between the inner surface and the outer surface of the cone. The socket extends and widens out into a broad dish-shaped flange provided with a rim which serves to support and hold the shade. This flange is perfectly closed, so that no air will pass to the flame, except that which is admitted through the perforation in the burner flange, and by these means a bright flame is produced without the use of an ordinary chimney. The first and principal claim is: "In a lamp having a burner, the combination of a shade holder made of material that will admit of the passage of light, and a shade or globe arranged and constructed substantially as described, whereby the burner performs the required functions without the use of a chimney, as set forth."

The Votti device seems to have been speedily received with favor by the public. Before it was put upon the market, no similar lamps had been manufactured. After its introduction, others than the owners of the Votti patent commenced to manufacture and sell articles which are substantially like the Votti device, and which are claimed to be protected by reissued patents to other inventors. The defendant's lamp was made under reissued letters patent to George Chinnock, dated December 26, 1876. The original patent was dated April 28, 1868. The defendant also claims that the Votti invention was anticipated by the patent of Ebenezer Blackman, dated February 6, 1872, and reissued to said Blackman and A. Homer Byington on December 5, 1876, numbered 7,417, and by the patent to James S. Fravis, dated May 18, 1869, and by the patent to William Fullager, dated June 7, 1870, reissued to the plaintiff, January 2, 1877, and by the patent to J. S. and T. B. Atterbury, dated December 16, 1873, and by the design patent to the same persons, dated October 5, 1875.

The object of the Chinnock invention was to provide a more free transmission of light, through a transparent rim at the base of the burner, than had been previously attained when the base of the burner was nontransparent. The free transmission of light was also effected by a glass shell or deflector, which served the purpose of a deflector and at the same time did not interfere with the radiation of light. An annular rim or plate of glass was placed upon the ordinary radial arms of sheet metal which were attached to the perforated bottom plate of the burner, and which served to retain the ordinary chimney in position. Seated upon or connected with the glass rim was a translucent shell of somewhat tapering form. The rim or shell surrounded the wick tube and cone. The lamp chimney was then placed upon the rim or upon the flange of the shell, and was held in position by the radial arms.

Under the reissued patent, the device which is shown in the Votti patent was manufactured. It is not necessary to consider whether this device is or is not embraced within the claims of the Chinnock reissue, or whether this reissue is or is not an improper enlargement of the original patent. It is sufficient to state the obvious fact that a lamp without a chimney, or a shade holder to serve the double purpose of holder and chimney, in combination with a shade, was not within the scope of Chinnock's invention or original patent. His invention did not accomplish, and did not seek to accomplish, this result.

The Blackman invention was said, in the original patent, to consist in a novel construction of a mica lamp chimney, and its combination with a glass base. Two sheets of mica were united at their vertical edges by a strip of sheet metal. The manner of uniting and securing the sheets of mica was particularly described. The bottom of the

chimney was made to fit over the top of the glass base. The upper portion of the base was made of suitable size and form to fit the chimney, and the lower portion was made to fit the lamp. Between the upper and lower portions the base was contracted by an external groove, while the upper portion "flared" or inclined outward. The claims were (1) for the mica chimney, and (2) for the glass base. The patent was reissued in two parts, one for the chimney and the other for the glass base. Neither the original nor the reissued Blackman patent, properly construed, covered his glass base without any chimney. The base can be used without a mica chimney, but the specifications and drawings, both of the original and of the reissued patent, show that the base was to be used in connection with what is ordinarily meant by a lamp chimney. It may have been the intention of the patentees to enlarge their patent, so as to claim a base supporting a shade without a chimney, but such is not the construction which should be given to the reissue in view of the state of the art.

The Fravis patent was for a translucent disk applied to the bottom of the shade of a gas burner, and having a central opening to permit the shade to be passed over the burner. The object was to obtain a softer and more mellowed light than is reflected from the sides of the ordinary shade. The ordinary chimney was used. The Fullager patent was an improvement upon the Fravis device, and consisted, in substance, of a porcelain bottom shade having a downward-projecting flange which rested on the brackets attached to the burner. A chimney was used, and could not be dispensed with unless the device was modified so as to have a longer socket and to elevate the shade holder from the burner, and thus to supply a current of heated air sufficient to support combustion.

Neither the Atterbury patent for a combined lamp shade and drip cup, nor the Atterbury design patent for lamp shade and chimney, contain features of importance to the present discussion.

The defect in the defendant's case is contained in the assumption, that the main result of Votti's invention was the reflection of the light downward through the transparent dish-shaped disk, and that his invention consisted in turning the rays downward through the shade holder, and thus mollifying the brightness of the light. This was the object of the Chinnock, Fravis, and Fullager devices, but the important feature of the Votti patent was the combination of transparent shade holder and shade, constructed substantially as described, by which the two perform the functions of a chimney in inducing the draft which supplies the air requisite to combustion. The distance between flame and glass is increased, so as to diminish materially the liability to breakage resulting from the unequal expansion of the glass by the heat of the flame.

Let there be a decree for an injunction and an account.

[For other cases involving this patent, see Cases Nos. 12,470a and 12,470b, 10 Fed. 666, and 21 Fed. 399.]

Case No. 12,470.

SCHNEIDER v. LAWRENCE.

[3 Blatchf. 115.] [1]

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

CUSTOMS DUTIES—ACT 1842—ROCOA—ANNATTO—NON-ENUMERATED ARTICLES.

1. Rocoa and annatto being articles derived from the seed of a vegetable, rocoa being the product of the seed in a crushed state, and annatto being an article made from the seed and mixed with other substances, and the articles being known in commerce by distinct names, and devoted to different uses, except that annatto, though chiefly used for culinary purposes, is occasionally employed in dyeing, while that is the only use to which rocoa is put, *held*, that rocoa cannot properly be subjected to duties as annatto, under article 4, § 8, of the tariff act of August 30, 1842 (5 Stat. 559), because it had acquired in commerce the name of rocoa, and was bought and sold in trade under that name alone, before the act of 1842.

2. Under that act, rocoa is not free from duty, under that name, nor as being a berry or vegetable "used principally in dyeing or composing dyes," under article 6, § 9, of said act (5 Stat. 561), exemption applying to the berries or vegetables in their native state, and not after they are transmuted, by manufacture, into a substance which takes a different denomination in commerce.

3. Under that act, rocoa is a non-enumerated article, and is subject to a duty of 20 per cent., under section 10.

This was an action brought in the supreme court of New York, to recover back duties imposed by [Cornelius W. Lawrence] the collector of the port of New York on an importation of rocoa. The case was removed into this court by certiorari. The facts were these: On the 27th of December, 1845, the plaintiff [Charles W. Schneider] entered at the custom-house twenty-nine casks of rocoa, imported from Bordeaux, and claimed the right to enter it free of duty, under article 6, § 9, of the tariff act of August 30, 1842 (5 Stat. 561), as falling within the denomination of "berries, nuts, and vegetables, used principally in dyeing or composing dyes." The defendant caused a duty of 20 per cent. to be imposed on it, under article 4, § 8, of the same act (5 Stat. 559), at being "annatto," The proofs showed, that both articles were derived from the seed of a vegetable grown in South America, rocoa being the product of the seed in a crushed state, and annatto being an article made from the seed in some manner known only to the natives, and mixed with other substances, and that the articles were known in trade and commerce by distinct names, and were devoted to different uses, except that annatto, though

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

chiefly used for culinary purposes, was occasionally employed in dyeing, while that was the only use to which rocoa was put.

THE COURT held: 1. That the article was improperly rated as annatto at the custom-house, and subjected to duties under that name, because it had acquired in commerce the name of rocoa, and was bought and sold in trade under that name alone, before the passage of the act of 1842.

2. That the plaintiff was not entitled to enter the article as free, under the name of rocoa, nor as being a berry or vegetable "used principally in dyeing or composing dyes," that exemption applying to the berries or vegetables in their native state, and not after they are transmuted, by manufacture, into a substance which takes a different denomination in trade and commerce.

3. That rocoa was a non-enumerated article in the tariff act of 1842, and was subject to duty under section 10, and that, that duty being 20 per cent., the same that was charged upon the article, the plaintiff could not maintain this action—no more than the legal duty having been exacted by the defendant.

Judgment for defendant.

Case No. 12,470a.

SCHNEIDER v. THILL

[5 Ban. & A. 565.] [1]

Circuit Court, E. D. New York. July, 1880.

PATENTS—LAMP SHADES—SPECIFICATIONS—PUBLIC USE.

1. The claim of the patent being, "In a lamp having a burner, the combination of a shade holder made of material that will admit of the passage of light, and a shade or globe, arranged and constructed substantially as described, whereby the burner performs the required functions without the use of a chimney, as set forth," and no description whatever of the shade to be used being given, either in the claim or the specification, and it appearing that one well-known form of lamp shade would not, if used in the combination, produce the result claimed, and that the state of the art limited the complainant's patent to the method shown by him of combining certain forms of shade, shade holder, and burner, in such a manner as to enable the chimney to be dispensed with, *held*, that the patent did not describe the invention in the full, clear, and exact terms required by the statute, and was therefore void.

2. Eight years before applying for a patent, the inventor voluntarily, and for a consideration, made and sold, without reserve, a device embodying his invention to a third party; intending the same to be publicly used by him, and it was so used. *Held*, that these facts show a public use which invalidates the patent.

[This was a bill in equity by Bennett B. Schneider against Francis Thill, for the infringement of certain letters patent.]

George Gifford and C. H. Watson, for complainant.

Edwin H. Brown, for defendant.

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

BENEDICT, District Judge. This action is brought to recover damages for the infringement of four several patents owned by the plaintiff. One of these patents is re-issue No. 7,511, granted February 13, 1877, to the plaintiff, as assignee of Carl Votti, for an improvement in shade holders in lamps. The invention sought to be secured by this patent is described by the plaintiff's expert to be "a novel arrangement of shade and shade holder, which, combined as shown in the drawing, operate to produce, when placed upon a burner, the draft necessary to supply air to the flame issuing from the burner." The first claim of the patent, which is the only claim here involved, is as follows: "In a lamp having a burner, the combination of a shade holder made of material that will admit of the passage of light, and a shade or globe, arranged and constructed substantially as described, whereby the burner performs the required functions without the use of a chimney, as set forth." This claim is for a combination composed of three elements, a lamp burner, a shade holder, and a shade. The claim contains a partial description of the shade holder, but, by the words, "arranged and constructed substantially as described," refers to the specification and drawing for the form of the other elements, and a complete description of the form of the shade holder, as well as for the method in which the shade, shade holder, and lamp burner are to be arranged to produce the desired result. In the specification, the lamp burner is described as "an ordinary lamp burner, provided with a circumferential flange for the support of the cone, and which ordinarily also serves to support the chimney or cylinder. This flange is provided with suitable perforations, through which air is admitted both inside and outside the cone." The lamp burner thus described is not claimed to be new. The specification also describes the shade holder as made of glass or other suitable transparent material, or of material that will allow of the passage of light, and which is provided with a tubular extension or socket which fits over the cone, leaving an air space between its inner surface and the outer surface of the cone. From said socket extends a broad disk-shaped flange, which is provided with a rim, which serves to support and retain the shade. The flange is perfectly closed, so that no air will pass to the flame except what is admitted through the perforations in the burner flange. No description whatever of the shade is given, either in the claim or in the specification. It is not pretended that Votti was the first to employ a lamp shade or a lamp burner, and the evidence shows that shade holders constructed as described were not original with him. Indeed, the testimony of the plaintiff's expert is to the effect that novelty in the form of the shade holder used forms no part of the invention secured by the patent, and that the patent is for the combination described, and not for any of the elements that go to form that

combination. The patentable feature of this invention must, therefore, be in the method of arranging the lamp burner, shade holder, and shade. The only arrangement of these parts that can be gathered from the claim, specification, and drawing is, that the shade holder is to be placed on the flange of the burner, which ordinarily serves to support the chimney or cylinder, and the shade upon the broad disk-shaped flange of the shade holder. In this mode of arranging a shade, shade holder, and lamp burner, it certainly is not easy to discover any novelty of invention sufficient to support a patent. Such an arrangement of the parts of a lamp referred to would seem to be nothing more than the ordinary and well-known method of arranging those parts of a lamp.

But, it is said, before Votti, these parts of a lamp were always used in connection with a tall cylinder surrounding the frame, ordinarily termed, when speaking of lamps, the chimney. Votti was the first to discover and announce that the chimney could be omitted, and still sufficient air furnished to the flame issuing from the burner to produce the required light, and, having put this discovery to a practical test, he became entitled to the exclusive right to the combination employed by him to accomplish the result indicated. Assuming the correctness of this contention, as to which no opinion need be expressed at this time, it is evident that, if Votti discovered anything of value, it was the method of combining certain forms of shade, shade holder, and burner in such a manner as to enable the chimney to be dispensed with. Votti did not discover that a shade, shade holder, and burner could be combined in a lamp. That was known before him. Nor did he discover that a lamp burner such as he describes, combined with a shade holder such as he describes, and a shade of any form or description, could be so arranged as to dispense with the use of the chimney; for such is not the fact. Lamp shades vary in form and in description. A not uncommon form has perpendicular sides, and is wholly uncovered at the top. Such a shade, combined with the shade holder and lamp burner described in the Votti patent, in the manner there described, will not produce the draft necessary to supply sufficient air to the flame issuing from the burner. Such a combination would, in all respects, comply with the description given in the Votti patent, and yet would utterly fail to accomplish the result claimed for the Votti invention. The statement of the patent, that "it will be seen that, with the shade and shade holder arranged as shown and described, the ordinary burner will perform the required functions without the use of a chimney," is therefore incorrect. That result will not be seen unless a shade having certain peculiarities of form be used. What those peculiarities are the patent omits to disclose, and the omission is fatal to its validity. If it were the fact that the result claimed to have been first attained by Votti could be secured by using any form of shade in combination with the burner and shade holder that he describes, the difficulty indicated would not exist. But, as is obvious, in order to produce the desired result, it is necessary to know the form of the shade; and yet the patent, instead of stating that the form of the shade is important, and giving information as to the form and description of the shade that is to be used, states nothing in regard to the shade, and leaves it to be inferred that a shade of any form or description may be employed. It is impossible to say, of such a patent for such an invention, that it contains a description of the invention in such full, clear, and exact terms as to enable any person skilled in the art to which it appertains to make and use the same. It would doubtless occur, to any one skilled in the art of constructing lamps who should undertake to employ the combination described in the Votti patent, that the burner would not perform the required functions unless some attention was paid to the character of the shade, the location and size of its aperture, and the relation in size between the aperture in the shade and the aperture below the flame; but, in all these particulars, experiment, not to say invention, would be necessary before he could arrange a shade, shade holder, and lamp burner that would enable the burner to perform its functions without the use of a chimney.

If it be said that the claim and also the specification use the words "shade or globe," and thereby indicate that the shade must be globular in form, the answer is that, when the patent says that a "shade or globe" may be used, the natural meaning is that a globe or any other form of shade may be used. Nor will it do to say that the word "globe," as used in this re-issue, has the effect to limit the word "shade," to shades of a globular form, because, in the original patent, the word "globe" nowhere appears, and there is no language therein that can serve to indicate the form of shade necessary to be employed in order to accomplish the desired result, or to suggest that the form of the shade is of any importance; so that, if the word "globe," inserted in the re-issue, were to be considered as limiting the word "shade" to shades of a globular form, the re-issue would become subject to the objection that it covers a combination not described or attempted to be described in the original patent, and consequently is void. I conclude, therefore, that the Votti patent is invalid, because it does not contain that full, clear, and exact description of the invention which the law requires.

This view of the Votti patent renders it unnecessary to consider the various objections to the plaintiff's claim, based on that patent, that have been pressed upon my attention by the defendant, and I pass to consider that part of the plaintiff's claim which is based upon the patents Nos. 191,102, 191,103 and 191,224. These patents were granted to the

plaintiff as assignee of Homer Brooke. Patent No. 191,102 is for a compound mold for the manufacture of lamp shades. Patent 191,103 is for a compound mold for the manufacture of lamp shades. Patent No. 191,224 is for an improvement in the process of manufacturing shades. The first two of these patents are for machines intended to be used when employing the process described in the last-mentioned patent.

To these patents the defense has been interposed that the inventions described therein were in public use and on sale for two years and more prior to the application of Brooke for a patent. This defense I find sustained by the testimony. It appears in evidence that, in the fall of 1869, Brooke, the inventor, made a mold which, he says, embodies the invention described in his mold patents Nos. 191,102 and 191,103, and was intended to be used in making shades according to the process described in patent No. 191,224. This mold Brooke, the inventor, made for a Mr. T. T. Nichols, the agent of the Boston & Sandwich Glass Company. Nichols ordered the machine of Brooke, paid Brooke for it when delivered, and now owns the same. This mold was sent by Brooke to Nichols, at Sandwich, Mass., and it was there publicly used in a well-known factory, in the summer of 1869, in manufacturing shades according to the process described in the patent No. 191,224. There is no evidence tending to show that any limit was put upon the use of this machine by Brooke, when he sold it or thereafter. He gave Nichols a bill of sale which contained nothing to indicate that the transaction was not what it appeared upon its face to have been, viz. an absolute sale of the machine, without any reservation whatever, with the intention that it should be used by the buyer. So far as appears, Brooke paid no further attention to the mold or the process referred to until the fall of 1876, when he made a similar mold for B. B. Schneider, the plaintiff in this suit, and, in January, 1877, made application for a patent. Brooke now says that he sent the machine to Sandwich for trial; but he is not confirmed in this statement by Nichols, who ordered the machine, nor are any facts attending the sale or use of the machine proved that correspond with his present statement. Upon the evidence as it stands, it is impossible to say that Brooke was simply testing his invention during the long period that elapsed between the time of the alleged invention in 1869 and the application for a patent in 1877. On the contrary, it must be held that, nearly eight years before applying for a patent, the inventor voluntarily, and for a consideration, made a mold embodying the inventions described in patents Nos. 191,102 and 191,103, intending the same to be publicly used in making shades according to the process described in patent No. 191,224, and that he sold the same, without reserve, to a third party, who bought it for use, and actually made public use of it according to the process described in patent No. 191,224, some eight years before any application for a patent was made. My conclusion, therefore, must be that the plaintiff's action, so far as based on the patents Nos. 191,102, 191,103 and 191,224, has failed, because the inventions described in those patents were in public use and on sale more than two years prior to the applications for patents therefor, and the patents are for this reason void.

The bill, accordingly, dismissed, with costs.

[NOTE. An action between the same parties, brought to establish the validity of re-issued letters patent No. 7,511, and also of letters patent No. 191,224, will be found reported in 3 Fed. 95. For other cases involving this patent, see note to Case No. 12,469.]

Case No. 12,470b.

SCHNEIDER v. THILL.

[5 Ban. & A. 595.] [1]

Circuit Court, E. D. New York. Aug., 1880.

EQUITY—PRACTICE—REHEARING—PLEADING—AMENDMENT.

It appearing doubtful whether, under the allegations of the answer, a decree adverse to one of the complainant's patents could probably be passed, upon the ground on which the court had held the said patent to be void, a rehearing of the case was ordered, so far as it related to the said patent, with liberty to the defendant to apply for leave to amend the answer.

[This was a bill in equity by Bennett V. Schneider against Francis Thill, for the infringement of reissued letters patent No. 7,511, granted to Carl Votti February 13, 1877, the original letters patent, No. 182,973, having been granted October 3, 1876.]

George Gifford, A. J. Todd, and C. H. Watson, for complainant.

Edwin H. Brown, John J. Allen, and Robert Payne, for defendant.

BENEDICT, District Judge. My attention having been directed by this motion to the averments of the answer, it appears doubtful, to say the least, whether, in the present state of the pleadings, a decree adverse to the Votti patent could properly be passed upon the ground stated in the opinion filed herein. Schneider v. Thill [Case No. 12,470a]. It will be advisable, therefore, and perhaps avoid the necessity of an examination of the other grounds of defense, to direct a rehearing of the case so far as it relates to the Votti patent, with liberty to the defendant to apply for leave to amend the answer. I see no reason for a further hearing in regard to the mold patents. An order may, therefore, be entered directing a rehearing of the cause upon the issues raised in regard to the Votti

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

patent, with leave to the defendant to apply for permission to amend the answer.

[For other cases involving this patent, see note to Case No. 12,469.]

Case No. 12,471.

In re SCHNEPF.

[2 Ben. 72; Bankr. Reg. Supp. 41; 1 N. B. R. 190; 7 Am. Law Reg. (N. S.) 204; 6 Int. Rev. Rec. 214; 1 Am. Law T. Rep. Bankr. 46.] [1]

District Court, E. D. New York. Dec., 1867.

BANKRUPTCY—JUDGMENT OF STATE COURT—FRAUD—LIEN—POWER OF THE COURT.

1. Where a suit was commenced in a state court against the bankrupt, and the judgment was entered and execution issued, and a levy made by the sheriff before the petition in bankruptcy was filed, *held*, that on the facts the judgment was not fraudulent.

2. Therefore the judgment creditors, by their levy, acquired a security for their debt in the property, which is not invalidated by the bankruptcy act.

[Cited in Re Dey, Case No. 3,870.]

[Cited in McCabe v. Goodwine, 65 Ind. 295.]

3. As it appeared that the property levied on would bring more money if sold by the assignee in bankruptcy at private sale than if sold by the sheriff under the execution, and as no objection was made by the creditors to the taking of such a course, the assignee must take the property and sell it, with leave to the judgment creditors to apply for an order directing payment of their judgment out of the proceeds.

[Cited in Sutherland v. Lake Superior Ship Canal, Railroad & Iron Co., Case No. 13,643; Re Ulrich, Id. 14,328; Re Hufnagel, Id. 6,837.]

4. Whether the court has power to direct an assignee to take property out of the hands of a sheriff who holds it under such a levy, except by consent, quere.

[Cited in Re Carow, Case No. 2,426; Re Mallory, Id. 8,991; Re Brinkman, Id. 1,884; Thames v. Miller, Id. 13,860.]

This was an application to set aside an injunction heretofore granted. The bankrupt [Francis Schnepf] filed his papers on the 9th of October, 1867, and was declared a bankrupt, and procured an injunction prohibiting creditors named Cammeyer & Mason from enforcing a levy, which the sheriff had made upon Schnepf's property under a judgment against him which they had obtained in a state court. They now moved to set aside that injunction. The affidavits on behalf of the bankrupt showed that he had prepared his papers to take the benefit of the act in September, 1867; that the summons in the suit of Cammeyer & Mason was served on him on September 17th; that after that service he sent to them showing them the state of his affairs, and offering them a compromise of their debt at forty cents on the dollar, telling them that he should go into bankruptcy if they did not take it; that on the 8th of October he sent again to them, and they requested till the next day to consider it, and gave him to understand that they would not proceed in their suit in the mean time; but on that afternoon they entered judgment against him by default, and issued execution, on which the sheriff made the levy that night, and Schnepf filed his petition in bankruptcy the next morning.

Mr. Daly, for motion.
Knowlton & Baker, contra.

BENEDICT, District Judge. This is a motion in behalf of judgment creditors of a bankrupt to dissolve an injunction heretofore issued by this court, restraining them from proceeding to sell under an execution certain personal property, levied upon prior to the filing of the petition in bankruptcy. The motion is opposed by the bankrupt, on the ground that the judgment under which the judgment creditors seek to proceed, was obtained in fraud of the bankruptcy act, and by the assignee in bankruptcy, on the ground that the title of the property in question is vested in him as an officer of the court, and no person can be permitted to dispose of or interfere with it, except under the order of the bankrupt court, to which the property has been transferred by operation of law. The facts attending the judgment are so fully spread out in the papers before me, and are so simple in their character, that I can without injustice dispose of the question as to the validity of the judgment on the affidavits alone. Upon that question I should gladly hold in favor of the bankrupt if I could do so, as I by no means approve of the manner in which the judgment was obtained; but I do not see how the judgment can be held fraudulent upon the facts. It was obtained in the regular course of judicial proceedings, instituted adversely to the debtor and without collusion. It was entered for an amount admitted to be justly due, and the entry was made as it was, not with the assent of the debtor, but in spite of him. It is in law a valid judgment obtained without fraud or collusion, and can in no proper sense be said to have been procured by the bankrupt with a view to give a preference. This being so, the judgment creditors, by their levy made prior to the filing of the bankrupt's petition, acquired a security for their debt in the property levied on.

The next question arising is whether such a security is invalidated by the provisions of the bankruptcy act, and upon this question I have heretofore had occasion to express an opinion which I see no reason to modify. It seems to me that such a security is preserved and entitled to be protected, upon general principles of law, and that the general scope of the bankruptcy act indicates that such was the intention of the framers of the act. Parker v. Muggridge [Case No. 10,743].

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 1 Am. Law T. Rep. Bankr. 46, contains only a partial report.]

The remaining question, then, is as to the manner in which this right of the judgment creditors shall be protected. Two methods are open, by either of which the debt will be secured. One is to allow the creditors to proceed to sell the property at sheriff's sale, in which case, as the affidavits show, there will be little or no surplus for the other creditors. The other is to direct the assignee in bankruptcy to take possession of and sell the property at private sale, in which case, as also appears by the affidavits, a sum can be realized not only sufficient to pay the judgment, but to leave a considerable sum for the other creditors. As between these two methods upon such a state of facts, it cannot be doubted that it is the duty of the bankrupt court, charged as it is with the interests of all the creditors, to prevent the sacrifice of his property by a sheriff's sale, and direct a sale by the assignee, provided the power to do so has been conferred by the act. A discussion of the question of the power of the court in the premises is rendered unnecessary in this case, inasmuch as the power is conceded to exist by the judgment creditors, and no objection is made to a disposal of the property by the assignee instead of the sheriff. I postpone, therefore, the discussion of that point until a case shall arise where it is raised, with the remark that such a power seems necessary to a proper administration of the bankrupt law, and that it would seem to be fairly included in the power conferred by the act to collect all the assets of the bankrupt, to ascertain and liquidate all liens or other specific claims thereon, to adjust priorities and marshal and dispose of the different funds and assets so as to secure the rights of all persons and the due distribution of the assets among all the creditors. The motion to dissolve the injunction will therefore be denied, and an order entered directing the assignee to take possession of the property levied upon and sell the same, without delay, and to the best advantage, with liberty to the judgment creditors, immediately upon such sale, to apply for an order directing the payment of their judgment out of the proceeds of such sale.

Case No. 12,472.

SCHNERTZEL v. PURCELL.

[1 Cranch, C. C. 246.] [1]

Circuit Court, District of Columbia. July Term, 1805.

CONTINUANCE — NATURE OF ACTION CHANGED BY AMENDMENT—PLEADING—ISSUE.

1. If by an amendment, the nature of the action be changed, it is to be considered as a new cause, and may be continued, although at the fifth term after its commencement.

2. A cause is not regularly for trial, unless it has been put at issue at a preceding term.

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

This was the sixth term since the action was instituted. The plaintiff, at last term, had leave to amend, by changing his action from debt to case, and laid a rule on the defendant to plead by the plea-day.

Mr. Key, for defendant, now pleads non assumpsit, and moves for a continuance, the cause not having been at issue at the last term.

THE COURT. If a cause has not been put to issue at a preceding term, it is not regularly for trial, unless it be the fifth court since its commencement, in which case it must, by act of assembly, be disposed of, and cannot be continued. But in this case of a material amendment by the plaintiff, it must be considered as a new cause at the last term, and the issue not being made up, the defendant is entitled to a continuance.

SCHNUGG (MORAN v.). See Case No. 9,786.

Case No. 12,473.

In re SCHOENENBERGER.

[15 N. B. R. 305.] [1]

District Court, S. D. Ohio. Feb. 19, 1877.

BANKRUPTCY — PREFERENCE — LIMIT OF TIME IN MAKING—KNOWLEDGE OF INSOLVENCY—SURRENDER OF PREFERENCE.

1. The limitation within which a preference may be set aside is four months in voluntary and two months in involuntary cases.

2. A party who receives a preference with knowledge of his debtor's insolvency and that a fraud on the act is intended, can prove but a moiety of his debt in either class of cases.

3. But where he voluntarily restores to the assignee the preference which he has received, and there is no actual but only a constructive fraud, he will be allowed to share pro rata with the other creditors.

By FLAMEN BALL, Register:

On the 26th of June, 1876, Joseph M. Schoenenberger filed two proofs of claims against the estate of his father, the bankrupt. One claiming the sum of eight thousand eight hundred and sixty-four dollars, for a balance due on a promissory note for nine thousand five hundred dollars given as alleged for money loaned by him to the bankrupt, and the other claiming the sum of six hundred and seventy-eight dollars and forty-three cents, for the amount due on a promissory note of the bankrupt, given for premiums on life insurance in the Union Central Life Insurance Company, and by it assigned to the said Joseph M. Schoenenberger. On the 9th of November, 1876, the assignee filed his petition for the re-examination of both of said claims on the following grounds, as to the claim for eight thousand eight hundred and sixty-four dollars, namely: First, that no such sum of money was loaned to the bankrupt; second,

[1] [Reprinted by permission.]

that as assignee of Weil & Co., the said Joseph M. Schoenenberger received assets of great value, which he has not accounted for to the bankrupt; third, that on the 1st of April, 1876, the said Joseph M. Schoenenberger knowingly received of his father a preference in money of two thousand and twenty-five dollars with a view to prevent the same from being distributed under the bankrupt act [of 1867 (14 Stat. 517)]; fourth, that in like manner he received various other sums to the assignee unknown; and, fifth, for various other reasons. As to his claim for six hundred and seventy-eight dollars and forty-three cents, the assignee alleges: First, that said note was taken up by money furnished by the bankrupt, and should be cancelled; and, second, that the note was given to pay premium of life insurance on the life of the said Joseph M. Schoenenberger, as well as on that of his father, and that —— dollars thereof is due to the bankrupt's estate. The prayer of both petitions is that the claims be expunged or diminished. Both petitions were heard at the same time by the consent of the parties.

A thorough and complete examination of the claimant and of his father, the bankrupt, has been had, and the testimony of ten witnesses called by the parties has been taken and reduced to writing, which is filed herewith, together with the exhibit produced on the hearing; and the cause has been argued by Mr. L. Kramer, for the plaintiff, and Mr. J. H. Perkins, for the assignee. It was agreed by counsel that in considering the above-named claims of Joseph M. Schoenenberger, that his other claim for twenty-two dollars and forty-seven cents, also proved and filed, and the claim of his father, the bankrupt, as to his right to be paid five hundred dollars as an exemption in lieu of a homestead, should also be considered and passed upon by the court.

It was claimed in argument by counsel for the assignee: First, that it being shown by the evidence that the sum of one hundred and fifty dollars for one month's wages was erroneously included in the note of the bankrupt on file for nine thousand five hundred dollars, should be credited with the sum of twenty-two dollars and forty-seven cents, the amount of the claimant's third claim, and that the residue, amounting to one hundred and twenty-seven dollars and fifty-three cents, should be deducted from that note, which was not dissented to by Mr. Kramer, and it will be so ordered; second, that five thousand dollars was the money of the claimant's wife, and that the proof filed for eight thousand eight hundred and sixty-four dollars is not a bona fide claim; third, that the payment of two thousand dollars, received by the claimant on April 1, 1876, was a fraudulent preference, within the meaning of section 5128 of the Revised Statutes of the United States; fourth, that the note for six hundred and seventy-eight dollars and forty-three cents purchased by the claimant from the Union Central Life Insurance Company became void after due, that it was given partly for a debt of the claimant; fifth, that the bankrupt is not entitled to the exemption of five hundred dollars in lieu of a homestead; and, sixth, that the claimant having received a fraudulent preference, his claim must be reduced one-half, as provided for by section 12 of the amendatory act of June 22, 1874 [18 Stat. 180]. The converse of all these propositions except the first was argued by Mr. Kramer, who appeared both for the claimant and the bankrupt.

The testimony shows the following dates, which have bearing more or less direct on the transaction had between the parties. The claimant was born November 9, 1847. The indorsement of the bankrupt to the German American Bank on the Skates note, for two thousand one hundred and sixteen dollars and twenty-two cents, became due March 22, 1876. The sum of two thousand dollars was paid by the bankrupt to claimant April 1, 1876. The deed of assignment by the bankrupt to Mr. Long was dated April 6, 1876. The voluntary petition of the bankrupt was filed in bankruptcy June 3, 1876. Also, that for a period of more than seven years prior to the filing of his petition, the bankrupt had been engaged as a merchant and trader in the city of Cincinnati, in the business of selling hardware and bar iron. That from 1869 to the date of the assignment to Mr. Long (with the exception of a short voyage to Europe), the claimant occupied the position of clerk to his father, and for the last four years he was the bookkeeper, and for the last two years of said period he received a salary of eighteen hundred dollars per year, besides house rent, the use of a horse and buggy, etc. That in October, 1869, the claimant received from his wife three thousand dollars in cash and invested it in a loan to his father, and that in February, 1870, he received from her the further sum of two thousand dollars which he also invested in a loan to his father. These sums Mrs. Schoenenberger received from the estate of her deceased father, Francis Schnebeien, late of Dahmm, in the province of Alsatia, France, in two payments in gold, one of fifteen thousand and the other of thirteen thousand francs. For the purposes of this case he reduced to his possession five thousand dollars of these funds and loaned them to his father, which, with accrued interest, formed part of the consideration of the note for nine thousand five hundred dollars, filed by the claimant with his proof of claim. The residue of the consideration was made up by his savings while acting as clerk or bookkeeper for his father. For the years 1874 and 1875 his salary amounted to three thousand six hundred dollars (or eighteen hundred dollars per year) besides perquisites, and it is possible that during a period of seven years he might have laid up with the accruing interest enough to

make up the balance of the consideration. It is true that for the last two years he enjoyed an enormous salary for the services rendered, but the testimony before me does not warrant me in impeaching the consideration of the note.

It is claimed by counsel for the assignee in bankruptcy that the payment of two thousand dollars, received by the claimant of his father on the 1st of April, 1876, and indorsed as a credit on the note for nine thousand five hundred dollars, was a fraudulent preference within the meaning of section 5128 of the Revised Statutes. That section is as follows:

"Sec. 5128. If any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment or conveyance is made in fraud of the provisions of this title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited."

By an act amendatory of said section, approved June 22, 1874, the foregoing section was amended, so far as it may relate to involuntary and compulsory bankruptcies, as follows:

"Sec. 10. That in cases of involuntary or compulsory bankruptcy, the period of four months mentioned in section 35 (section 5128), of the act to which this is an amendment, is hereby changed to two months; but this provision shall not take effect until two months after the passage of this act. And in the cases aforesaid, the period of six months mentioned in said section 35 is hereby changed to three months; but this provision shall not take effect until three months after the passage of this act.

"Sec. 11. That section 35 of said act be and the same is hereby amended as follows: First. After the word 'and' in line eleven, insert the word 'knowing.' Second. After the word 'attachment' in the same line, insert the words 'sequestration, seizure.' Third. After the word 'and' in line twenty, insert the word 'knowing'; and nothing in said section 35 shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of the making of such loan."

As the law now stands, the limitation within which a preference may be set aside is four months in cases of voluntary and two months in cases of compulsory bankruptcy; and the question arising in this case is, "Was the bankrupt insolvent on the 1st day of April, 1876? If yea, did his son, the claimant, have reasonable cause to believe him to be insolvent, and did he receive the money knowing it to be in fraud of the provisions of the bankrupt law?" The term "insolvency" has been defined by the supreme court of the United States (Toof v. Martin, 13 Wall. [80 U. S.] 40), to mean, in the case of a trader or merchant, an inability to pay his debts as they mature in the ordinary course of his business. What are the facts as established by the evidence?

Neave testifies that the books show that the bankrupt was in a failing condition, and had been for several years. The claimant, who was the bookkeeper, testifies that on January 1, 1876, when he balanced the books, "father was in debt to the concern thirteen thousand three hundred and sixty-six dollars and ten cents." He was then insolvent, and to keep up his credit was borrowing heavily from the banks with whom he dealt, and from every person who would lend him money or their paper. Again, the Skates note for two thousand one hundred and sixteen dollars and twenty-two cents, which the bankrupt had had discounted by the German American Bank, fell due March 22, 1876, and was not paid by Skates, nor was it paid by the bankrupt, who was its indorser, and has never been paid. To protect himself against the charge of insolvency, the bankrupt should have paid it the next day, but it was not paid then nor since. The bankrupt gave the bank a chattel-mortgage and a policy on the life of Skates as security, which it still holds. He testifies he made "no agreement with the bank to extend it. I thought it was going to be paid every day, and so I did not make any agreement." He had borrowed the money of the bank, and, so far as the bank was concerned, it was the commercial paper of the bankrupt as well as of Skates. Again, the fact of his father's insolvency and of the claimant's knowledge of it, is testified to by Mr. Neave, who states that "he (the claimant) acknowledged that for some years past he had been aware of his father's failing condition, but he still hoped that something would turn up and that he would get out of it, and that his father's assignment and failure had taken a great weight off of his mind." I deem it proper here to say that the claimant contradicts this statement of the witness Neave. Without reverting to any other of the facts and circumstances of the case established by the evidence, it is impossible for me to resist the conclusion that the claimant knew the insolvent condition of his father on the 1st day of April, 1876, and that he knew he was then obtaining an unlawful, and therefore fraudulent, preference when he received the sum of two thousand dollars which he has credited on his note.

In regard to the note for six hundred and seventy-eight dollars and forty-three cents assigned to the claimant by the Union Central Life Insurance Company, I find from the evidence that two hundred and twelve dollars of that amount was for premium on the life policy issued to the claimant, and that the residue was for premium on the policy issued to the bankrupt; that the claimant gave to his father two hundred and twelve dollars in money, which he kept and used, and settled with the company by giving his note for the whole, which note was afterwards taken up by the claimant and proved by him as a claim against his father's estate.

In regard to the exemption of five hundred dollars, allowed to the bankrupt in lieu of a homestead, I find that there is no testimony impeaching his right to receive the same from the assignee, and he will accordingly be directed to pay the same.

In regard to the right of the claimant to prove his whole debt, the following is the provision of the amendatory act of June 22, 1874:

"Sec. 12. Provided, that the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended, and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt, and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy."

I have already found from the evidence that when he received the payment of two thousand dollars, the claimant had reasonable cause to believe that his father was insolvent, and knew that a fraud on this act was intended; the conclusion necessarily follows that he can be permitted to prove but a moiety of his debt. Having proved for the whole, the proof must be diminished so as to comply with the law. Unless he shall voluntarily return his preference to the assignee, his claim will stand as follows:

Amount of note	$9,500 00
Amount of his third claim	22 47
Total	$9,522 47
Deduct for error	150 00
Total	$9,372 47

Of which a moiety is four thousand six hundred and eighty-six dollars and twenty-three and one-half cents, to which extent his claim will be diminished. The claim for six hundred and seventy-eight dollars and forty-three cents on the insurance note is valued for its face, and the petition for its re-examination will be dismissed. The claim of the bankrupt for five hundred dollars, as an exemption in lieu of a homestead, will be ordered paid by the assignee.

NOTE. On the 27th of February, 1877, and before the expiration of the time limited by general order 34, for forming an issue to be certified to the court for determination, the claimant filed a petition expressing his acquiescence in the foregoing opinion, and voluntarily offering to restore to the assignee the preference which he had received. Whereupon, there being no actual but only a constructive fraud, I directed the assignee to receive the same, with interest from April 1, 1876, and that the penalty imposed upon the claimant be remitted, and that he be allowed to share in common with the other general creditors in all dividends declared or to be declared. Flamen Ball, Register.

SCHOFIELD (DENSMORE v.). See Case No. 3,809.

Case No. 12,474.

SCHOLFIELD v. FITZHUGH.

[1 Cranch, C. C. 108.] [1]

Circuit Court, District of Columbia. Dec. Term, 1802.

PLEADING AT LAW—AMENDMENT—CHANGE OF ACTION.

The court will not give leave to amend by changing the action from case to covenant.

Motion to amend by changing the writ from case to covenant.

No declaration nor cause of action was filed at the time of issuing the writ, which was ordered, by the plaintiff's counsel, to be in case.

THE COURT refused leave so to amend, because it was changing the question, and not simply bringing its merits fairly before the court.

KILTY, Chief Judge, contra.

The same point was also decided in the case of Nicholls v. Harrison [Case No. 10,229], at the same term.

SCHOLFIELD (ROUNSAVEL v.). See Case No. 12,085.

SCHOLFIELD (SWANN v.). See Case No. 13,676.

SCHOLFIELD (TAYLOR v.). See Case No. 13,804.

Case No. 12,475.

SCHOLFIELD et al. v. UNION BANK.

[2 Cranch, C. C. 115.] [1]

Circuit Court, District of Columbia. Nov. Term, 1815.

BANKS—STOCKHOLDERS—ELECTION OF DIRECTORS—WHO MAY VOTE.

A stockholder of a bank, who has pledged his stock to the bank as collateral security for the payment of his notes not yet due, has a right to vote as a stockholder at an election of directors.

[Cited in Clarke v. Central Railroad & Banking Co., 50 Fed. 343.]

[Cited in Hoppin v. Buffum, 9 R. I. 515.]

An injunction had been granted to stay the election of directors of the Union Bank of Alexandria, upon the refusal of the committee of election to permit those stockholders to vote

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

whose stock was pledged to the bank as collateral security for notes not yet payable.

THE COURT confirmed the principle upon which the injunction was granted.

SCHOLFIELD (UNITED STATES v.). See Cases Nos. 16,230 and 16,231.

Case No. 12,475a.

SCHOLLENBERGER v. FORTY-FIVE FOREIGN INSURANCE COMPANIES.

[5 Wkly. Notes Cas. 405.]

Circuit Court, E. D. Pennsylvania. April 13, 1878.

COURTS — FEDERAL — FOREIGN CORPORATIONS — PROPER DISTRICT—WRITS—JURISDICTION—MANDAMUS.

1. The language of the act of congress of March 3, 1875 (18 Stat. 470), re-enacted from the judiciary act of 1789 (1 Stat. 79, § 11), that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings," etc., is complied with where the defendant is a foreign corporation doing business within the state in which the United States district is situated, and process has been served upon it through its local agent in said district, appointed under a state statute requiring the foreign corporation defendant to have such resident local agent before doing business in the state, on whom service of process for the company may be had.

2. A foreign corporation, for the purpose of service of original process upon it, may be "found within" the limits of another sovereignty than that in which it was incorporated.

3. A foreign corporation is "found within" another state when it transacts its ordinary business within the latter state, and has there a local agent on whom, by the state law, original process may be served.

4. Although state legislation cannot confer jurisdiction upon United States courts, and consent of parties cannot, yet both combined may. Thus, where a foreign corporation consents to the condition of a state law, viz. to be found within the state for the service of process, the fact that it is so found gives the jurisdiction. The proviso in the act of congress prescribing where a defendant may be sued is not one affecting the general jurisdiction of the federal courts. It is rather in the nature of a personal exemption in favor of a defendant which, if the citizenship of the parties is sufficient, he may waive.

5. A state law of Pennsylvania prescribed that foreign corporations doing business therein should submit themselves to service of process issuing out of "any court of this commonwealth having jurisdiction of the subject-matter." *Held*, that the circuit court of the United States in Pennsylvania, having jurisdiction of the subject-matter, was within the purview of the act.

6. Mandamus is the proper remedy where the United States circuit court refuses to entertain jurisdiction by quashing the service of the original process.

7. Semble, that, on a rule for a mandamus, the United States supreme court will only look at the petition and return, and not at the record of the cases in the lower court referred to in the petition. La Fayette Ins. Co. v. French, 18 How. [59 U. S.] 407, and Railroad Co. v. Harris, 12 Wall. [79 U. S.] 81, approved and followed.

These were 45 actions of debt on policies of fire insurance, brought by William Schollenberger & Son, citizens of Pennsylvania, against the defendants, who were, respectively, corporations incorporated either by the parliament of Great Britain or by states other than Pennsylvania. Writs of summons, issued in this court, returnable to the first Monday of April, 1878, were duly served by the United States marshal for this district upon the person who, for the time then being, was, in each case, the agent of the respective defendant, and who had been, and was then, appointed by the said defendant as its agent, resident in Pennsylvania, under the acts of assembly of April 11, 1868, § 2 (P. L. 1868, p. 83; Purd. Dig. 796, pl. 29), and of April 4, 1873 (P. L. 1873, p. 27). Declarations were at the same time filed, in which the plaintiffs were described as citizens of the state of Pennsylvania, and each defendant as "a body corporate, created under the laws of [the proper state], and having its principal place of business in said state, and being a body corporate exercising, within the state of Pennsylvania, under a license granted by said state, their corporate rights, powers, and privileges, in the making of contracts of insurance, such as that on which this action is brought." The declarations showed that the contracts of insurance sued upon were in each case made in this district, insuring property situated here, between the plaintiffs and the respective defendants, acting by their local agents, who in each case were served. An appearance de bene esse was in each case entered for the agent, as an individual, upon whom service had been made, but not for the defendant corporation. Motions were thereupon made to quash the service of the writs in all the cases. The motion in one of the cases was, for special reasons, overruled. Schollenberger v. Phœnix Ins. Co. [Case No. 12,476].

James H. Heverin and R. P. White, for the motions. (Their argument is fully stated in the opinion of McKENNAN, Circuit Judge, by whom it was substantially adopted.)

A. Sydney Biddle and Mr. McMurtrie, contra.

It is a general rule of jurisprudence that the defendant must be within the territorial jurisdiction of the sovereign from whose court the original process issues, in order that service may be made upon him. The defendant must have his day in court, and unless he has this, the judgment is void, except so far as the proceeding was in rem, and it is then good only to the extent of the res brought under the control of the judgment of the court by the original proceeding. Pennoyer v. Neff, 95 U. S. 714. If, then, a court entertains jurisdiction of a suit in personam where the defendant has

never been served, or has not voluntarily submitted to the jurisdiction, the judgment of the court is void, and will not be recognized by the court of another nation or state. Now, in the passage of the judiciary act of 1789, congress contemplated for each district a mode of service such as was then in use in the courts of the state in which the districts were respectively situated. But, in several of those states, consisting of more than one district, original process ran throughout the whole state. Moreover, as the United States was a nation, forming a single sovereignty, with national federal courts, process might, if congress had so willed it, run from one federal court throughout the national territory; and a defendant might be served in Massachusetts by a writ issuing from a United States court in California. The injustice of this was so obvious that it was deemed necessary to limit the otherwise existing jurisdiction, and confine the service of original process within the limits of the district from the court of which it issued. For this reason, it was declared, in that act, and the proviso has occurred in the succeeding acts, that "no civil suit should be brought before either of said courts against any person by original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings." 18 Stat. 470.

It is clear that this proviso was never intended to introduce a new condition essential to the jurisdiction of the United States courts, but that it was introduced in order to lessen the extent of the territory within which original process might, without the restriction, have run. The question, therefore, is whether a corporation can be an inhabitant of, or be found within, any other district than one of the state by which it was incorporated, for the purpose of being served with original process. The decisions in the state courts are applicable, inasmuch as no valid judgment in personam can be rendered unless the defendant was actually, or constructively by an agent, within the court's jurisdiction. Pennoyer v. Neff, supra. This was decided in La Fayette Ins. Co. v. French, 18 How. [59 U. S.] 407, in which it was held that jurisdiction was rightfully entertained by a United States court of a suit to enforce a judgment which had been obtained in a state court of Ohio against an Indiana insurance corporation doing business in Ohio by a local agent, as here. The service there was upon the local agent. The circuit court examined the question as to whether the state court had jurisdiction, and decided in the affirmative; and this, as we have seen, could not have been unless the defendant had been "found within" the jurisdiction. Harris v. Railroad Co., 12 Wall. [79 U. S.] 65, approved in Railroad Co. v. Whitton, 13 Wall. [80 U. S.] 285, and Knott v. Southern Life Ins. Co. [Case No. 7,894], are to the same effect. The same principle, i. e. that a foreign corporation could be "found within" another country for the purpose of being served, was reached in Newby v. Colt's Patent Fire Arms Manuf'g Co., L. R. 7 Q. B. 293.

To the effect that the residence of a corporation for the service of process is not confined to the place of its principal office, see Cromwell v. Charleston Ins. & Trust Co., 2 Rich. 512; Baldwin v. Mississippi & M. R. Co., 5 Clarke (Iowa) 518; Richardson v. Burlington & M. R. Co., 8 Clarke (Iowa) 262; Bristol v. Chicago & A. R. Co., 15 Ill. 436; Libbey v. Hodgdon, 9 N. H. 394.

The circuit court of the United States for the Eastern district of Pennsylvania is a "court of this commonwealth," under the language of the act of assembly of April 4, 1873, supra. Newhall v. Atlantic F. & M. Ins. Co. [8 Phila. 106]; Com. v. Pittsburg & C. R. Co., 8 P. F. Smith [58 Pa. St.] 26.

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

McKENNAN, Circuit Judge (orally). This question is one of considerable importance, and although it had already been decided in this court, yet, as we were not at that time aware of the decision of Judge Woods, in Knott v. Southern Life Ins. Co. [supra], who took an opposite view, we have allowed the matter to be argued. Corporations can have no existence outside of the limits of the sovereignty by which they were incorporated. They cannot migrate or pass beyond its boundaries. They can have no residence elsewhere, and hence can not inhabit or "be found within" the territory of another sovereignty. Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 588; Wheeler v. Railroad Co., 1 Black [66 U. S.] 287. Now, these corporations are all inhabitants of the states which created them. No corporation can, therefore, inhabit the territories of two different sovereignties at once. A corporation, for the purpose of suing and being sued, is no longer considered as being identical with its individual corporators or stockholders, inasmuch as it is now held that there is a presumption of law that the corporation is for those purposes a citizen of the state by which it was incorporated, even though a majority of the stockholders are citizens of another state. Railroad Co. v. Letson, 2 How. [43 U. S.] 497; Marshal v. Railroad Co., 16 How. [57 U. S.] 329; Railroad Co. v. Wheeler, 1 Black [66 U. S.] 297. Now, it is expressly required by the act of March 3, 1875 (18 Stat. 470), that the defendant of the United States court shall be an inhabitant of, or found within, the district in which he is sued at the time of serving the original process in the suit. How can this condition, essential to the jurisdiction, be said to have been complied with in the case of a foreign insurance corporation, if, as we have seen, it cannot exist outside of the territory of the state by which it was incorporated? These views are those which have been entertained in a number of similar cases cited by counsel, in which this very point has been raised. Pom-

croy v. New York & N. H. R. Co. [Case No. 11,261]; Leonard v. Lycoming Fire Ins. Co. [Id. 8,258], decided at Cleveland in the United States circuit court of Ohio; Day v. Newark India Rubber Manuf'g Co. [Id. 3,685]; Southern & A. Tel. Co. v. New Orleans, M. & T. R. Co. [Id. 13,185]; Abb. Prac. (3d Ed.) 34; and several cases cited in these. There is but one exception to this line of decisions. That is, Knott v. Southern Life Ins. Co. [supra]. But, on looking at that case, it appears to us clearly that the judge has been misled by misreading the case of Harris v. Railroad Co., supra, upon which the counsel for the plaintiffs chiefly relied. I confess, on first looking at that case, that I was somewhat staggered by it; but, on examining it more carefully, it does not appear to be in conflict with the views expressed by the circuit courts in a majority of the cases. That decision was expressly based upon a statute which was said to be local to the District of Columbia. No such statute exists, generally applicable to the United States circuit courts, whereby their jurisdiction has been enlarged, and this case is, therefore, a strong argument against the contention here made. The restriction as to inhabitancy, existing in the general statute, was removed by that local act, as regarded the District of Columbia. The English case cited is not applicable, inasmuch as the jurisdiction of the United States courts depends upon a statute requiring the condition to exist of the defendant's inhabitancy, or of his being found within the district, and not upon the principles of the common law, as does that of the English courts. The motions to quash are, therefore, granted. Orders accordingly.

Subsequently, on April 15, 1878, counsel for the plaintiffs presented in the supreme court of the United States, at Washington, a petition for a mandamus, setting forth the facts of the above case. Whereupon the said court awarded a rule, directed to the said judges of the Third circuit, commanding them to show cause why a writ of mandamus should not issue to them, directing them to proceed with the said causes, to reverse their orders quashing the service of the said writs, and to make such orders as ought to have been made if the service of the said writs had not been quashed (No. 7, original; October term, 1877).

The respondents filed the following return and note appended thereto: "Whereas, it was, on the 15th day of April, 1878, ordered by the said supreme court that the judges of the said circuit court show cause, etc.: Now, the judges of the said circuit court, in return to the said order, submitting to the supreme court the question whether the case is a proper one for the remedy by writ of mandamus, answer as follows: The facts in the said petition alleged are truly stated therein. The respondents have declined to hear and determine the said suits, because, in their opinion, the said circuit court has no competent jurisdiction thereof, the several and respective defendants not having appeared therein, or in anywise, submitted to the jurisdiction of the court, and not having been, at the commencement of the respective suits, or at any time, 'inhabitants of or found in,' the said district, within the meaning of the act of congress of March 3, 1875; re-enacting a like provision of the 11th section of the act of September 24, 1789. The question under this enactment being one of jurisdiction, and not of mere procedure, the legislation of Pennsylvania, mentioned in the said petition, was, in the opinion of the respondents, inapplicable. The service of the process in the said suits was, therefore, set aside, as unauthorized. The reasons of the respondents are, in some respects more fully stated in a note hereto appended. Respectfully submitted."

Note.

Normally, the seat of justice, when proceedings are in invitum, is the home of the defendant, or the place he may be served personally with process. "Actio sequitur reum." The exercise of original compulsory jurisdiction elsewhere, by local arrest of his property, or by what is called "substituted service" on his local agent, is, when allowed, an exceptional privilege of the creditor. But such a privilege may reasonably be allowed, in certain cases, in the exercise of internal jurisdiction, by the ordinary tribunals of a nation or state. Thus, the process of foreign attachment, limited to the property of nonresidents, which is actually within the territorial limits of the state or country, is not generally considered objectionable. It seems that, in England, the process in a suit against a foreign corporation, upon its contract made by its general local agent, may now be served on such agent. Laws of several of the states of our Union, including the act of Pennsylvania mentioned in the petition, authorize foreign corporations of certain kinds to transact business within the respective states on the condition of maintaining a local agency in such manner that process against the corporation may be served on the agent. The supreme court of the United States has considered such a condition reasonable and proper. La Fayette Ins. Co. v. French, 18 How. [59 U. S.] 404. On the same principle, congress, in legislating as to judicial proceedings in the District of Columbia, enacted, in 1867, that, in actions against foreign corporations doing business in that District, all process may be so served. 14 Stat. 404. This is one of the acts of congress which are called by the supreme court of the United States "local to the District." Railroad Co. v. Harris, 12 Wall. [79 U. S.] 65, on page 86. They do not constitute any part of what may properly be called the judicial system of the United States. Considerations, in many respects different, apply to questions of original jurisdiction, under the judicial system of the United States. As the system has been organized, original juris-

diction is apportioned according to a territorial division into districts, not one of which is composed of two states, or of parts of any two states. But the purposes of this territorial division do not require that as extended a system of internal jurisprudence, in all respects, shall be organized under the federal government within the limits of each state, as may exist under laws of the state.

Where the federal jurisdiction is exercisable, acts of congress indeed adopt, for the federal courts, the forms and modes of procedure in use in the several states. But these acts do not enlarge or define the original jurisdiction of the federal courts, or assimilate it to that of the state courts. The acts merely regulate the exercise of jurisdiction where it is already competent, as originally defined. In a case in which it was decided that state legislation could not limit or restrain the exercise of the judicial power of the United States under authority given by congress, the supreme court stated also, conversely, the proposition that "state legislation cannot confer jurisdiction upon the federal courts." Insurance Co. v. Morse, 20 Wall. [87 U. S.] 453.

The present question is wholly one of original jurisdiction. In organizing the judicial system under this head, congress has thought it necessary to exclude expressly any sanction, which might otherwise have been implied, of laws or usages of England, or of any state of the Union, enabling a plaintiff to transfer jurisdiction from the normal seat of justice to any other place where a defendant's property or a defendant's agent might happen to be. This was the purpose of the provision of the eleventh section of the act of 1789, that "no civil suit should be brought against any inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." In the absence of such precautionary express conclusion, it might have been material to inquire whether the acts of congress which adopt the laws of the several states, and the practice of the state courts, would apply to a case like the present, so as to sustain the jurisdiction. Wnat was said in Picquet v. Swan [Case No. 11,134], and in Toland v. Sprague, 12 Pet. [37 U. S.] 300, 328, would then have required careful consideration. These cases, and Richmond v. Dreyfous [Case No. 11,799], apply to foreign attachments.

There are authorities more directly in point, which render the inquiry unnecessary. In Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 588, and in other cases, it is established that a corporation, although it may have power to make contracts and incur obligations in a foreign state, can have no legal existence out of the boundaries of the sovereignty by which it is created. "It must dwell in the place of its creation, and cannot migrate to another sovereignty." Therefore, a corporation created by one of the states of our Union cannot be "inhabitant" of another state in which it transacts its business, though under an established and recognizable agency. Day v. Newark India Rubber Manuf'g Co. [supra], was the case of a foreign attachment against a corporation of another state. Nelson, J., said that, "in order to give jurisdiction to the circuit courts, the party defendant must be an inhabitant of the district in which the suit is brought, or he must be found within it at the time of the service of the original process; and this whether the suit be commenced by writ, summons, or attachment, or whatever may be the nature or character of the process used." Nelson, J., said, further, that, according to the true construction of the eleventh section of the act of 1789, the court would have no jurisdiction in suits instituted against foreign corporations, even in cases where the state practice, if adopted, would authorize the institution of such suits by the attachment of their goods, found within the jurisdiction.

Pomeroy v. New York & N. H. R. Co. [supra], cannot be distinguished from the present case. A law of New York, which gave certain privileges to a Connecticut corporation transacting business in New York, declared the corporation suable in the same manner as corporations created by the laws of New York, and that the process might be served on an officer or agent of the corporation. The corporation availed itself of the privileges, and submitted to the conditions. There was no doubt that it was suable in the courts of the state of New York. But it was decided that the circuit court of the United States for the Southern district of New York had no jurisdiction of a suit against the corporation in which the process had been served in the manner thus authorized by the act. There was a decision of like effect in Southern & A. Tel. Co. v. New Orleans, M. & T. R. Co. [supra], in the circuit court of the United States for the Southern district of Mississippi.

The re-enactment of the provision in question, in the same words, by the act of 1875 is not unimportant, because the decisions which have been cited had rendered the question familiar. It was a subject for the practical application of the rule that the construction of a statute forms a part of the statute. If there was any doubt of the correctness of the past interpretation, the form of the re-enactment would have been changed. This observation was made, since the re-enactment, by Judge Dillon, in a case decided by him in the same manner. Stillwell v. Empire Fire Ins. Co. [Case No. 13,449]. The strong leaning of that judge's mind was in a contrary direction, but he said that his decision was according to the view of the law generally accepted and acted upon, and that this was the third case, in seven years, in which it had been attempted in his circuit, by the service of original process on the agents of foreign corporations to acquire jurisdiction over the corporations themselves. In a note to the last-mentioned case the reporter cites a similar opinion of the circuit court for the Western

district of Missouri, in Dallmeyer v. Farmers', Merchants' & Manufacturers' Fire Ins. Co. [Id. 3,546]. The same point had been similarly decided by this court in an unreported case; and other cases to the same effect are noted in the briefs of counsel.

The only decision to the contrary which has been mentioned is that of Knott v. Southern Life Ins. Co. [supra]. The case appears to have been ruled upon a misconception of the decision in Railroad Co. v. Harris, 12 Wall. [79 U. S.] 65, already cited. By "an act concerning the District of Columbia" (passed on February 27, 1801), § 6, it was provided that no action should be brought before the circuit court of that District by any original process against any person who should not be an inhabitant of or found within said district at the time of serving the writ. 2 Stat. 106. This local enactment was in the same words as the provision of the eleventh section of the general judiciary act of 1789, which is now in question. So far as the local enactment could in any wise have been material to any present question, the provision was repealed by the local enactment of 1867 already cited. This enactment was, that in actions against foreign corporations doing business in the District of Columbia, all process may be served on the agent of such corporation, or person conducting its business aforesaid, or, in case he is absent and cannot be found, by leaving a copy thereof at the principal place of business in the District, and such service shall be effectual to bring the corporation before the court. 14 Stat. 404. That this was a repeal pro tanto there can be no doubt. But repeal pro tanto of what? Not of the provision of the eleventh section of the general judiciary act of 1789, which never was applicable to the District of Columbia at all, but of the similar provision of the local act of 1801. The supreme court said, expressly, that the jurisdiction of the court below was not governed by the eleventh section of the judiciary act of 1789, but by the acts of congress local to the District. This case, in 12 Wall. therefore, on which the present plaintiff chiefly relied, does not in any wise concern the present question favorably to his contention.

But the opinion of the court refers to the case of Bank of Augusta v. Earle in a manner unfavorable to the contention, as we understand the subject.

The case was heard in the supreme court April 30, 1878.

A. Sydney Biddle and Mr. McMurtrie, for the rule, presented the same arguments as before. They also argued that mandamus was the proper remedy, and not a writ of error, citing Toland v. Sprague, 12 Pet. [37 U. S.] 300, 331; Ex parte Russell, 13 Wall. [80 U. S.] 670; Railroad Co. v. Wiswall, 23 Wall. [90 U. S.] 507; Ex parte Smith, 94 U. S. 455. The judges of the circuit court, in distinguishing Railroad Co. v. Harris, supra, have evidently supposed that that case was decided on the local statute of 1867, printed in the report. But that act was not passed when that suit was brought, as appears by the report (pages 69, 74, 77).

Messrs. Heverin and White, contra, in addition to the arguments presented in the court below, argued that mandamus was not the proper remedy, citing High, Extr. Rem. § 173; Ex parte Flippin, 94 U. S. 350; Goheen v. Myers, 18 B. Mon. 427. The returns of the writs were defective, and would have been quashed in the state court.

FIELD, Circuit Justice. We cannot look at the records of these cases. Does not the petition aver that "the said writs were duly served" upon the proper parties? And does not the return state that "the said facts in the said petition alleged are truly stated therein"?

State legislation cannot confer jurisdiction upon the federal courts. Toland v. Sprague, 12 Pet. [37 U. S.] 323; Levy v. Fitzpatrick, 15 Pet. [40 U. S.] 171; Nazro v. Cragin [Case No. 10,062]; Main v. Second Nat. Bank [Id. 8,976]; Chittenden v. Darden [Id. 2,688]; Minot v. Philadelphia, W. & B. R. Co. [Id. 9,645]; Home Ins. Co. v. Morse, 20 Wall. [87 U. S.] 445.

May 10, 1878. [The writ of mandamus was granted, as prayed for. 96 U. S. 369.]

Case No. 12,476.

SCHOLLENBERGER v. PHOENIX INS. CO.

[5 Wkly. Notes Cas. 366; 7 Ins. Law J. 697; 6 Reporter, 43.]

Circuit Court, E. D. Pennsylvania. May 2, 1878.

FIRE INSURANCE—POLICY—COVENANT NOT TO SUE TILL AWARD MADE NOT A CONDITION PRECEDENT—ARBITRATION CLAUSE AS TO AMOUNT ONLY NOT AN OUSTER OF COURT'S JURISDICTION, AND GOOD.

1. A clause in a policy, that the amount of the loss shall, on request, be ascertained by arbitrators, but all other defenses shall be reserved, coupled with an agreement that no suit shall be brought until after award made, is not a bar to a suit on the policy for the loss, even though an arbitration is pending.

[Cited in Crossley v. Connecticut Fire Ins. Co., 27 Fed. 32; Kahnweiler v. Phœnix Ins. Co., 57 Fed. 564.]

2. There is a distinction between a covenant to pay such a sum as an arbitrator shall award, and a covenant to refer the amount of liability to arbitration. Though a reference as to amount is still pending, a cause of action in the latter case may be enforced in a court of law.

Motions for judgment non obstante veredicto, on point reserved, and for new trial.

Debt on a policy of fire insurance. The contract was made between the plaintiff and the company, acting by their local agents in Philadelphia, covering property in Philadelphia. After the service of the writ upon the local agents, a general appearance of the company's counsel was entered, and subsequently leave was asked by the defendants to withdraw their

counsel's appearance. A rule was also taken to quash the service of the writ, on the ground that original process could not issue, under the judiciary act of March 3, 1875 (18 Stat. 1874–75, p. 470), against a foreign corporation, under the proviso in the act providing that no cause shall be brought before the said court unless the defendant be an inhabitant of or found within the district at the time of the service of the writ. Service of process in a number of similar cases, where no general appearance had been entered, was quashed on the above ground, but in this case the court held that, as the defendants had entered a general appearance, they had thereby submitted themselves to the jurisdiction of the court, and ordered a special venire for the trial of the case.

A plea in abatement was thereupon filed, to the effect that the plaintiff could not recover in this action inasmuch as the policy contained conditions precedent not yet performed. The material language of the policy was as follows: "In consideration of —— dollars to them paid by the insured, hereinafter named, the Phœnix Insurance Company of Brooklyn do insure [the plaintiffs] against loss or damage by fire to the amount of $2,500 [on certain specified property], and the said Phœnix Insurance Company hereby agrees to make good unto the said insured * * * all such loss or damage * * * as shall happen by fire to the property so specified, * * * the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after the proofs of the same, required by the company, shall be made by the insured, and received at the office in New York, and the loss shall have been ascertained and proved in accordance with the terms and provisions of this policy. * * * (9) In case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liabilities of the company under this policy; and, further, that it shall be optional with the company to repair, etc. * * * (12) It is further hereby expressly provided and mutually agreed, that no suit or action against this company for the recovery of any claims by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced in twelve months next after the loss shall occur, and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

This plea in abatement was formally insufficient, not having been sworn to, and the plaintiff's counsel signed judgment against the defendants on the said plea. The cause was ordered for trial, the defendants pleading issuably; and the plaintiff having made out a prima facie case, the defendants asked for a nonsuit on the ground of variance, the declaration having omitted to state the conditions of the policy hereinbefore cited, arguing that it was a condition precedent to recovery that a reference should be had, and an award made, fixing the amount of the claim. The nonsuit was refused.

The defendants then offered evidence to show that an agreement of reference, but not upon the written request of either party, had been entered into between the parties prior to the beginning of this suit, in which it was agreed that all matters in dispute connected with the amount of the loss should be referred to the arbitration of two arbitrators, therein named, with power to them to choose a third in case of difference, and that the award of said arbitrators, or a majority of them, should be final, binding, and conclusive upon both parties, as to the value of the property destroyed, but should not decide the liability of the company on the risk. They also showed that an arbitration had been begun, and much testimony taken under the above agreement, and that it was still pending at the time that this action was brought, at which time no award had been made, and the case had not been concluded before the arbitrators. The defendants offered no further evidence.

Whereupon CADWALADER, District Judge, who tried the case, reserving the point whether or not the plaintiff could recover without showing an award, or that said award had been prevented by the defendant's default, left the case to the jury.

A verdict was rendered for the plaintiff for the full amount claimed, whereupon the defendants entered this motion for a new trial, and to enter judgment in defendants' favor upon the point reserved.

James H. Heverin and R. P. White, for the motions.

The condition of the policy requiring an award was a condition precedent, upon compliance with which only the defendants became liable. As admittedly no award had been made, the judgment must be entered for the defendants. Scott v. Avery, 5 H. L. Cas. 811; Milner v. Field, 5 Exch. 829; Leebrick v. Lyter, 3 Watts & S. 365; Herdic v. Bilger, 11 Wright [60 Pa. St.] 60; Quigley v. De Haas, 1 Norris [82 Pa. St.] 274; Liverpool, L. & G. Ins. Co. v. Creighton, 51 Ga. 95. The contract here is not to pay the value of the property, with a collateral covenant to submit, but to pay what shall be determined by a specific tribunal to be due the plaintiffs. It is similar to the case of U. S. v. Robertson, 9 Pet. [34 U. S.] 326. The exact point has been decided in Yeomans v. Girard F. & M. Ins. Co. [Case

No. 18,136], by Nixon, J., of the United States circuit court of New Jersey. The fact that judgment on the plea in abatement was entered against the defendant, for an informality in the plea, is not decisive of the case, inasmuch as the point can be raised on motion for a nonsuit on the ground of variance between the contract alleged and that proved. The reference to the arbitrators was irrevocable. Monongahela Co. v. Fenelon, 4 Watts & S. 205; McGheehen v. Duffield, 5 Barr [5 Pa. St.] 499; Paist v. Caldwell, 25 P. F. Smith [75 Pa. St.] 161; Abbot v. Shepherd, 4 Phila. 90; Flaherty v. Germania Ins. Co., 1 Wkly. Notes Cas. 352.

A. S. Biddle and R. C. McMurtrie, contra.

The condition in this case, to refer to arbitrators, is not a condition precedent, but a collateral covenant, for breach of which the plaintiff may, possibly, be sued by the defendant in a cross action, but which cannot prevent an action by him in a court of law. The rule is that an agreement to oust the jurisdiction of the court is void, as against public policy. No person is allowed to bind himself by a stipulation which may injure not only himself but the public. See the remarks of Lord Chancellor Cranworth in Scott v. Avery, supra. See, also, as to the absurdity of refusing to entertain jurisdiction because of a pending arbitration, which may end in nothing, Scott v. Corporation of Liverpool, 3 De Gex & J. 368. It is perfectly true that, where the liability only arises in respect to a sum stated by a third person, no recourse can be had to the court before his finding of the amount, unless such finding be excused. But that is not the case here. The agreement is to insure against loss by fire in a certain amount, in consideration of which both parties agree, upon the written request of the other, to submit the amount to arbitration in case of difference. The requirement that the submission is to be made in case of difference, and upon a written request, shows conclusively that the reference and award are not conditions precedent in every case. Here there has been no written request. The case of Yeomans v. Girard F. & M. Ins. Co., supra, is opposed to all the authority. The point in this case has been decided by the case of Horton v. Sayer, 4 Hurl. & N. 643, and Mentz v. Armenia Fire Ins. Co., 29 P. F. Smith [79 Pa. St.] 478. There it was held by the supreme court of Pennsylvania that such a condition was void, and the judgment of the lower court granting a nonsuit was reversed. That case was decided before this contract was entered into, and hence formed one of the terms of the contract which was made in Pennsylvania.

CADWALADER, District Judge. Perhaps the only remedy which the defendants could have would be to ask, in a court of equity, that execution should be restrained until a reasonable time had elapsed in order to enable the arbitrators to make an award.

Mr. White in reply.

The contract is not to be governed by the Pennsylvania decision, which is opposed to the authorities. This court will not be bound by state decisions on questions of general law. Southern & A. Tel. Co. v. N. O., M. & T. R. Co. [Case No. 13,185]; Sanford v. Portsmouth [Id. 12,315]. This case differs from Mentz v. Armenia Fire Ins. Co., supra, inasmuch as here the parties entered into the arbitration, expressly excluding, by the terms of the agreement, all questions except that of amount. The written agreement of reference is equivalent to a waiver of requirement for the written request.

CADWALADER, District Judge, having asked the plaintiff's counsel whether they would object to an allowance of a moderate amount of time, to enable the arbitrators, if possible, to make an award, with the understanding that the verdict should be reduced to their award, if below the verdict; otherwise, to stand as found by the jury,—counsel answered that such an agreement would be perfectly satisfactory.

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

CADWALADER, District Judge. We have no hesitation in saying that the conditions, to refer and that no suit shall be brought until award made, do not suspend the plaintiff's right of action. This has been decided in the case of Mentz v. Armenia Fire Ins. Co., supra. The plaintiff, on the evidence, is therefore entitled to judgment, the covenant being a collateral one, and not a condition precedent. We think, however, that this court may regard the matter from an equitable light, and that it would be proper, as both parties have submitted to the arbitration, that if an award can be made within a reasonable time they should be bound by it. As the plaintiff's counsel have stated that they have no objection to this course, we suspend the entry of judgment in the plaintiff's favor for 60 days, within which time, if an award is made, its amount is to take the place of the verdict; otherwise, the jury's assessment is to stand. The motions for a new trial, and to enter judgment in the defendant's favor on the point reserved, are refused

Case No. 12,477.

In re SCHONBERG.

[7 Ben. 211.] [1]

District Court, S. D. New York. March, 1874.

BANKRUPTCY—EXAMINATION OF BANKRUPT'S WIFE—COUNSEL—WITHHOLDING DOCUMENTARY EVIDENCE.

A bankrupt's wife, summoned as a witness before the register, and required to produce a letter from her half-brother accompanying a gift of money with which a house contracted for by her husband was partly paid for, refused, by advice of the bankrupt's counsel, to produce it. *Held*, that the witness was not entitled to

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

have counsel, nor had the bankrupt's counsel a right to advise her to withhold such documentary evidence bearing on the subject of her examination; that the witness must produce the document; and that the assignee might examine her as to all the facts to which it related.

[In the matter of J., A., and E. Schonberg, bankrupts.]

BY THE REGISTER. The wife of one of the bankrupts had received at various times gifts of money from her half-brother, amounting to $25,000; and part of the purchase money of a house contracted for by her husband was furnished from these gifts, and the deed of the house was taken in the wife's name. She was summoned as a witness in the bankruptcy proceedings, and was, at first, willing to produce the letter of her half-brother which accompanied the first gift; but, by advice of the bankrupt's counsel, who claimed also to be her counsel, she refused to produce it.

The register, upon request, certified his conclusions upon the questions raised, as follows: (1) The witness is not entitled to counsel on her examination. (2) The counsel for the bankrupt has not the right to advise the witness to withhold the letter. (3) The witness should be directed to produce the letter, as her only reason for not so doing is the advice of counsel. (4) The assignees should be allowed to go into all the facts and circumstances of the transaction of the purchase of the house for which one of the bankrupts contracted, but the title of which was taken in his wife's name, and which house was partly paid for by the money alleged to have been given her by her half-brother. (5) The assignees should be allowed to examine the witness fully as to the alleged gifts, and as to what was done with the money, so far as it is connected in any way with the bankrupts or their estate.

BLATCHFORD, District Judge. I concur in the conclusions of the register.

SCHOOL DIST. (CHAPMAN v.). See Cases Nos. 2,607 and 2,608.

Case No. 12,478.

SCHOOL DISTRICT TP. v. LOMBARD.

[2 Dill. 493.] [1]

Circuit Court, D. Iowa. 1873.

MUNICIPAL CORPORATIONS — SCHOOL WARRANTS — FRAUDULENT JUDGMENT THEREON SET ASIDE ON TERMS.

1. The holders of municipal warrants, though they gave value therefor, are subject to all defences which would have been available had the action been by the payee or party to whom they were originally issued.

[Cited in Shirk v. Pulaski Co., Case No. 12,794.]

[Cited in Board of Sup'rs v. Catlett's Ex'rs (Va.) 9 S. E. 1001.]

2. In this respect, such warrants are different from authorized negotiable bonds or securities issued by public or municipal corporations.

[Cited in Shirk v. Pulaski Co., Case No. 12,794.]

3. A judgment rendered in favor of the holder of school district warrants which were fraudulently issued, and where the school officers connived at the rendition of such judgment, was, upon a bill in equity filed for that purpose, set aside; but the court directed an inquiry to be made by a master as to the consideration actually received by the district for the warrants, and subsequently rendered a decree against the district for the amount in value of such consideration.

This is a bill in equity to set aside a judgment heretofore obtained in this court against the complainant, the district township of Newton, in Carroll county by the defendant [James Lombard], on account of the fraud of the officers of the township in issuing the warrants, and suffering judgment to be rendered thereon. Knowledge of these frauds is charged upon the agent of the defendant, who purchased the warrants and procured the judgment. Testimony was taken, and the cause heretofore submitted to Mr. Justice Miller, who found that the allegations of the bill were true, and ordered a decree to the effect that the complainant was entitled to have the judgment set aside because of the frauds of the township officers in issuing the warrants and in conniving at the recovery of the judgment thereon; but as to each warrant embraced in the said judgment he directed an inquiry to be made, whether it was fraudulent, and what consideration was actually received therefor by the district. The master has made that inquiry, and reports that of the warrants in the defendant's judgment, $3,286.41 "were fraudulently issued, and for which no consideration whatever has been received by the complainant;" that certain others of said warrants were fraudulently issued, but the complainant has received a partial consideration therefor, to-wit: $407.65, and that $1,600 of the said warrants were not shown to be either fraudulent or without consideration. The defendant excepts to the report of the master, and it is on these exceptions that the cause is now before the court.

Hubbard & Cook, for complainant.
Grant & Smith, for defendant.

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

DILLON, Circuit Judge. The defendant obtained judgment by default against the complainant on the 20th day of October, 1869, for $7,882.28. This judgment was rendered upon what is known as school district warrants, mostly issued in the years 1868 and 1869. The complainant township is situate in one of the newer counties of the state; and as late as 1870 there were in this township, between the ages of five and twenty-one, only one hundred and sixty-six children. The evidence shows that this district township was out of debt, or nearly so, in 1867, but that in 1868 school

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

officers were elected who systematically set to work to issue to themselves and their confederates and friends school warrants without any consideration, or but a nominal or colorable consideration. It is shown, during these two years, that warrants were issued by these officers to an amount exceeding $30,000, on account of the erection and purchase of school houses, while the actual value of the school houses on account of which these warrants were issued did not reach $2,000. Indeed it is plain, upon the evidence, that during those years the officers only made use of their power to erect and furnish school houses for the fraudulent purpose of obtaining a pretext for the issue of warrants.

A few examples will show the character of the transactions. For school house No. 1, worth about $1,000, warrants for $5,000 were issued; school house No. 2, worth about $500, cost in warrants $2,540; for the two school houses in sub-district No. 3, worth $500, there were issued warrants for over $18,000; for school house No. 4, worth $400, there were $1,200 of warrants issued. School house No. 5 was professedly let to the president to be built by contract for $2,000. He bought, or pretended to buy, a dwelling house of one Atterbury, actually worth $500 to $800, and turned it over to the district for $1,750 in warrants, Atterbury continuing to occupy it, and the school being kept in the garret. The district never obtained title to the house or the ground on which it stands. On account of this house there were warrants issued to the amount of $2,983. To one Elwood were issued $1,483 in warrants for fencing, trees, etc., for school house No. 1; the actual value of the fence which he built was $40, and the trees $5. Other examples may be stated: $600 of warrants were issued to Gilley for a fence which he never built; $600 were issued to another man for building a fence worth only $40, and $215 of warrants were issued for banking up school houses, the actual service rendered being worth not to exceed $5; and many warrants were issued for alleged services which were never rendered. These frauds were known to the community, but until 1870 those interested in perpetrating them outnumbered the few honest citizens, who felt themselves unable to resist or prevent their commission. The records of this court show that frauds of a similar character have been practiced for years in many of the new counties in the northwestern portion of the state, and it seems strange that the legislature of the state, or its officers, have been so tardy or remiss in suppressing them.

It is settled law that warrants of this character have not the quality of negotiable paper, which prevents an inquiry into its fraudulent character or its consideration when in the hands of innocent holders for value before due. Clark v. Des Moines, 19 Iowa, 199; Clark v. Polk Co., Id. 248; Shepherd v. District Tp., 22 Iowa, 595; Taylor v. District Tp., 25 Iowa, 447. In this respect such warrants are unlike authorized negotiable bonds issued by public or municipal corporations. The holders of these warrants are in no better situation than the payee, and are open to all defences which might have been made against the party to whom they were originally issued. Shepherd v. District Tp., supra.

In this case it was shown that the agent of the defendant, who purchased for him these warrants for fifty cents on the dollar, or thereabouts, knew, or had good reason to know, that they were fraudulent, or without consideration, and that the school officers connived at the rendition of judgment upon them. Accordingly Mr. Justice Miller was of opinion that the district township was entitled to have the judgment set aside and the warrants upon which it was based canceled, except so far as it might appear that some of the warrants were valid, and a consideration therefor was actually received by the district.

On the many exceptions which have been made to the master's report I have examined all the evidence, and find his report sufficiently favorable to the defendant except in one respect. The master rejected the $1,100 of warrants in the defendant's judgment, issued to one Bowers, for building a school house which he never erected. But the only evidence taken on this subject does not establish any fraud nor any default on the part of Bowers. If Bowers did not have title to the lot on which the building was to have been erected (which is the material question), the complainant ought to have more satisfactorily shown it.

The master's action in rejecting the $600 of warrants issued to Hampton in part payment for the Atterbury school house in No. 5 is excepted to; but, both by reason of fraud and want of consideration, these warrants are not binding upon the district. The whole scheme for the purchase of this dwelling house originated in fraud, and warrants issued in pursuance of this scheme, to the fraudulent officer and contractor, cannot be enforced in a court of justice. If the district had title to the property, or were actually in possession of it, there might arise an equity on the part of the innocent holders of these fraudulent warrants to compel the district to pay to the extent of consideration actually received. But such is not the case. On the contrary, the record presents a case of fraud wholly novel in its character and which well illustrates the mode of discharging public trusts there practised. The evidence shows that after the sale Atterbury occupied the house, and it tends to show that the only school kept was one in the garret; that Atterbury's daughter was the teacher, and his children the only scholars.

The exceptions to the report of the master are overruled, and his report confirmed except as to the above $1,100, and a decree will be entered to the effect that there are justly due to the defendant, on account of the warrants in suit, the aforesaid sums reported by the master, viz.: $407.65 and $1,600, and the said $1,100—making in all, $3,107.65; and that the

same be enforced by execution, and, if necessary, by mandamus, in the usual manner; each party to pay his own costs in this suit.

Decree accordingly.

SCHOONER.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the vessels; e. g. "The Schooner Jacob E. Ridgway. See Jacob E. Ridgway."]

SCHOONMAKER (WING v.). See Case No. 17,870.

Case No. 12,479.

SCHOTT et ux. v. BENSON.

[1 Blatchf. 564;[1] 8 N. Y. Leg. Obs. 294.]

Circuit Court, S. D. New York. Oct. Term, 1850.

CONTINUANCE—COSTS OF TERM—WITNESS FEES.

1. Where, at the opening of the term, both parties in a case were ready for trial, and their witnesses were in attendance, but the court was adjourned over for several weeks, and, at the adjourned day, the plaintiffs' witnesses were in attendance, but, the defendant not being ready for trial, the case, on his motion, went off for the term on payment of costs, on grounds which did not exist at the opening of the term, *held*, that the fees of the plaintiff's witnesses for actual attendance, as well at the opening of the term as at the adjourned day, were chargeable as part of the costs of the term.

[Cited in Spill v. Celluloid Manuf'g Co., 28 Fed. 870.]

2. Witnesses from a distance are entitled to fees for attendance on Sunday when they are detained over that day.

[Cited in Rowe v. Shaw, 56 Me. 307.]

This was an appeal from the clerk's taxation of costs under the following circumstances: At the opening of the term both parties in the case were ready for trial, and their witnesses were in attendance, but the court was adjourned over for several weeks. At the adjourned day the plaintiffs' witnesses were in attendance, but, the defendant [Neal Benson] not being ready for trial, the case on his motion went off for the term, on payment of costs, on grounds which did not exist at the opening of the term. The points on the appeal were, whether the plaintiffs [James Schott, Jr., and wife] were entitled to attendance fees for their witnesses at the opening of the term, and whether their witnesses from a distance were entitled to fees for attendance on Sunday when detained over that day.

Archibald C. Niven, for plaintiffs.

Ambrose L. Jordan, for defendant.

THE COURT held that the fees of the witnesses for actual attendance, as well at the opening of the term as at the adjourned day, were chargeable as part of the costs of the term; and that the fees for attendance on Sunday were allowable.

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

SCHOTT (MASSEY v.). See Case No. 9,262.

SCHOYER (UNITED STATES v.). See Cases Nos. 16,232 and 16,232a.

Case No. 12,480.

SCHRENKEISEN v. MILLER.

[9 Ben. 55.][1]

District Court, S. D. New York. March, 1877.

BANKRUPTCY—ILLEGAL TRANSFER OF PROPERTY—ORDINARY COURSE OF BUSINESS.

1. S., who was a manufacturer of chairs, bought of H. a quantity of black walnut logs, to be used in his business, and gave H. his note for them for $2,242.59, dated November 17, 1875, payable in three months. On December 4, 1875, S. failed to pay a note due that day. On December 9, 1875, S. sent a message to M. that there were some logs for sale. M. went to S. and bought of him 67 of the logs which S. had bought of H., agreeing to pay for them $1,057.17 in four months. On the 16th of December S. was adjudged a bankrupt on his own petition, and an assignee was appointed. On December 10th M. took from H. a transfer of the note of S. for $2,242.59, without recourse to H., and he afterwards filed a proof of debt in the bankruptcy proceedings for the amount of that note, less the $1,057.17 which he had agreed to pay for the logs, and was paid a dividend on it. The assignee filed a bill in equity against M. to set aside the transfer of the logs from S. to M. as void, alleging that S. was insolvent when it was made, and that M., when he bought the logs, had reasonable cause to believe that S. was insolvent, or acting in contemplation of insolvency, and that the sale was made by S. with a view to prevent his property from coming to his assignee in bankruptcy, and to prevent it from being distributed under the bankruptcy statute, and so defeat the object of, and impair, hinder, impede and delay the operation and effect of, such statute; and that the sale was not made in the usual and ordinary course of the business of S., and was void and a fraud on the bankruptcy act [of 1867 (14 Stat. 517)]. The answer of M. denied that he knew that S. was insolvent or in contemplation of insolvency. The case was heard on pleadings and proofs. *Held*, that the sale to M. was not one in the usual and ordinary course of the business of S., as that was known to M.; that the burden, therefore, was thrown on M., of showing that there was no violation of section 5129 of the Revised Statutes; and that he had not done this.

2. The plaintiff had made out a case falling within the decision in Walbrun v. Babbitt, 16 Wall. [83 U. S.] 577.

3. S. intended a fraud, in the sense of section 5130 of the Revised Statutes, in the sale to M.

4. There was enough in the facts to put M. on inquiry to ascertain the condition of the affairs of S.

5. The point, that the plaintiff should have proceeded by a suit at law and not by bill in equity, had not been taken in the answer and was, therefore, waived; but, if it had been

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

taken, it could not have prevailed, for, when a transfer of property is held void under the provisions of the bankruptcy act, as against the assignee in bankruptcy, the transferee is properly to be regarded as a trustee for the assignee, and to be held to account as such.

6. The plaintiff was entitled to a decree that the sale to M. was void and that M. account for the property.

[This was a bill by Martin Schrenkeisen, assignee in bankruptcy of Alexander Stein, against John Miller.]

Daily & Machin, for plaintiff.
Castner & Love, for defendant.

BLATCHFORD, District Judge. Alexander Stein filed his petition in voluntary bankruptcy, in this court, on the 16th of December, 1875, and was adjudicated a bankrupt, and the plaintiff was appointed his assignee. Stein was a manufacturer of chairs and was in the habit of purchasing logs of black walnut wood, and using them in his business, by cutting them up and making them into chairs. In November, 1875, he purchased 99 of such logs from one Hoyt, and gave to Hoyt, for the purchase price thereof, his promissory note, dated November 17, 1875, payable three months after date to the order of Hoyt, for $2,242.59. On the 9th of December, 1875, Stein had on hand sixty-seven of such logs, and on that day contracted to sell those sixty-seven logs to the defendant, Miller, for $1,057.17. Miller was to pay Stein for the logs in four months. The logs were delivered to Miller. On the 10th of December, 1875, Miller took from Hoyt a transfer in writing, to him, Miller, of all the right, title and interest of Hoyt in the note for $2,242.59, expressed to be without recourse to Hoyt, and written on the back of the note. The note and the transfer were on the same day delivered to Miller. Miller did not pay Stein for the logs or give him a note; but, after the adjudication in bankruptcy, he filed a proof of debt against the estate of Stein, founded on the note for $2,242.59, as owned by him, Miller, for the amount of that note less the $1,057.17 he owed for the 67 logs. It also appears that he has been paid a dividend from the estate on the amount proved.

The bill in this case alleges, that, on and from the 9th of December, 1875, Stein was insolvent; that Miller, when he purchased the logs, had reasonable cause to believe that Stein was insolvent, or was acting in contemplation of insolvency, and knew that the sale was made by Stein with a view to prevent his property from coming to his assignee in bankruptcy, and to prevent it from being distributed under the bankruptcy statute, and to defeat the object of, and impair, hinder, impede and delay the operation and effect of, such statute; that said sale was not made in the usual and ordinary course of the business of Stein; that Stein sold the logs at much less than their regular market price; that Hoyt and Miller, with the intent to enable Hoyt to obtain a preference over the general body of the creditors of Stein, agreed that the note for $2,242.59 should be assigned by Hoyt to Miller, and that Miller should offset the amount he agreed to pay Stein for the logs, and prove the claim for the balance of the note; and that, by reason of the premises, the transfer of the logs by Stein to Miller was and is void, and was and is a fraud on the bankruptcy statute and on the general body of the creditors of Stein. The bill prays for a decree that Miller restore to the plaintiff the 67 logs, the value of which is alleged to be $1,409.58, or so many of the same as he still has, and pay to the plaintiff the value of those which he no longer has.

The answer denies that Miller was advised of or knew that Stein was insolvent or in contemplation of insolvency, and alleges that he had the assurances of Stein and one representing himself to be the agent of Stein, that Stein was in a sound financial condition.

Stein had been a manufacturer of chairs at the same place for twenty-four years. His property consisted of real estate, machinery, lumber, cut up lumber and logs. He had purchased the 99 logs from Hoyt with a view to cut them up and use them in his business, and not with a view to sell them again in the shape of logs. He agreed to pay $55 per one thousand feet for the logs. They were delivered to him from time to time for a month after he contracted for them and gave the note for $2,242.59 to Hoyt for the purchase price of them. Stein testifies, that he became insolvent and unable to pay his debts in the ordinary course, as they matured, on the 4th of December, 1875, and on that day failed to pay a promissory note which became due on that day. On the 9th of December the defendant received a message from Stein that there were some logs for sale. Miller, on going to Stein's place of business in response to such message, saw one Zimmer there, before seeing Stein, and saw that Zimmer was assuming to be in charge of the place. Zimmer kept a drinking saloon, and Miller knew that fact. Miller had previously sold logs to Stein, and had never bought logs of Stein. He knew what Stein's business was.

As to what transpired between Stein and Miller, Stein testifies, that he told Miller that he could not pay his debts, and that the logs had to be moved from the street, and that he was unable to manufacture at present. Miller testifies, that Stein did not tell him he could not pay his debts; that he had no conversation with Stein about his solvency; and that, at the time he purchased the logs, he had not heard that Stein had failed to meet any of his payments. One Jones was in the room with Stein and Miller, when Miller had the conversation with Stein. He was invited by Miller to go with him to Stein's place, and says he thinks that Miller told him, when so inviting him, that Stein had sent to him, Miller, to buy some logs. Jones testifies, that he did not hear Stein say to Miller that he, Stein, could not pay his debts and that he was unable to manufacture at present and that that was the reason why he wanted to sell the logs.

The price which Miller was to pay for the

logs was $45 per 1,000 feet. There is testimony as to whether this was as high as the market value at the time, and there is also testimony that Stein had been notified by the police to have the logs removed from the street. In the view I take of the case it is unnecessary to discuss this evidence.

It is quite clear, on the testimony, that the sale to Miller was not made in the usual and ordinary course of business of Stein, as such course was known to Miller. This fact is, therefore, prima facie evidence of fraud, and throws on Miller the burden of showing that there was no violation of section 5129 of the Revised Statutes. This he has not shown. On the contrary, a case is made out by the plaintiff which falls within the decision in Walbrun v. Babbitt, 16 Wall. [83 U. S.] 577. In that case, a stock of merchandise was sold by the bankrupt, Mendelson, to one Summerfield, and by the latter to the defendants. The assignee in bankruptcy sued the defendants to recover the value of the property. The bankrupt, who was a retail merchant, wrote to Summerfield to bring some money and buy him out. Summerfield went with the money. The bankrupt told him he wished to sell his stock, because he could not succeed in the business in which he was engaged and wished to deal in other kinds of goods. A sale was made at a reduction of 25 per cent. from cost, and Summerfield paid the money to the bankrupt. Summerfield then resold the stock of goods, at a slight advance, to the defendants, who received them from the possession of the bankrupt and paid Summerfield the agreed price for them. The money which the bankrupt received from Summerfield did not reach his creditors and it was alleged by him that he had lost it. The court held, that the plaintiff was entitled to recover; that the transaction of the bankrupt with Summerfield was out of the ordinary mode of transacting the business of the bankrupt, and was prima facie evidence of fraud, and threw the burden of proof on the purchaser, to sustain the validity of his purchase; that the legal presumption that the bankrupt intended to commit a fraud on his creditors was not overthrown by showing that Summerfield paid full value for the goods, in ignorance of the condition of the bankrupt's affairs; that Summerfield, in purchasing in the way and under the circumstances he did, was told by the law that a fraud of some kind was intended by the bankrupt, and was put on inquiry to ascertain the true condition of the bankrupt's business; that he did not do that, nor make any attempt in that direction; that he contented himself with limiting his inquiries to the object the bankrupt had in selling out and to his future purposes; that something more was required than that information, to repel the presumption of fraud which the law raised, in the mere fact of a retail merchant selling out his entire stock of goods; that the presumption of fraud, arising from the unusual nature of the case, could only be overcome by proof on the part of the buyer that he took the proper steps to find out the pecuniary condition of the seller; that all reasonable means, pursued in good faith, must be used for such purposes; that, if Summerfield had employed any means at all, directed to that end, he would have discovered the actual insolvency of the bankrupt; and that, in choosing to remain ignorant of what the necessities of his case required him to know, he took the risk of the impeachment of the transaction by the assignee in bankruptcy, in case the bankrupt should, within the time limited in the statute, be declared a bankrupt. The court further held, that the defendants were in no better condition than Summerfield would have been if he had not transferred the stock to them, because they, on the evidence, took his title with full knowledge of its infirmity.

In the present case, Stein was insolvent and knew that he was insolvent. He had past due debts that were unpaid, and knew that, by the sale to Miller, he was placing the logs where his creditors could not reach them. He received no money for them and contracted to receive nothing but the personal credit of Miller. It was unusual for him to sell logs as logs, except a single one occasionally for a special object. He owed debts not yet due, as shown by the outstanding note to Hoyt, and, by selling the logs on credit, he was putting it in the power of Miller, by becoming the assignee of the Hoyt note, to practically secure the payment in full of so much of that note as should be equal to the sale price of the logs, to the prejudice of other creditors. It must, therefore, be held, that, in the sense of section 5130, Stein intended "fraud," that is, intended to prevent the property which he sold to Miller from remaining in a position where, in case he should go into bankruptcy, it would come to the hands of his assignee in bankruptcy.

As to Miller, there was sufficient to put him on inquiry, to ascertain the condition of the affairs of Stein, when Stein, a buyer of logs and a chair-maker, was sending to him, Miller, to come and see him, and was offering to sell him a quantity of logs which, so far as appears, were all the logs Stein had, and which Miller could easily have ascertained to have been only recently purchased by Stein. Miller himself testifies, that Stein sent word by somebody, that he wished to see him "in connection with the logs." Miller is pressed by the importance of giving a reason why Stein should be selling logs, and states that Stein told him that the logs were for sale and that he had been notified by the authorities to remove them, the logs being in the street in front of the factory. But, Miller assigns no reason why the logs need have been sold, or why they could not have been removed to Stein's premises, and does not state that he made any inquiry on that point, or as to how Stein could expect to continue

his business without black walnut logs. Miller says that he was to remove the logs immediately and that he did remove them the next morning; that nothing was said as to how he was to pay for them, but he supposed it was to be in the usual time, four months; and that Stein told him that the logs cost more than he, Miller, had offered for them. In view of these undisputed facts, testified to by Miller, which raise the presumption of fraud, because of the unusual nature of the sale, Miller is bound to give proof that he took steps to find out the pecuniary condition of Stein. He gives no such proof. He chose to remain ignorant of what the necessities of the case required him to ascertain, and what he had the ready means of ascertaining. All this arises from the testimony of Miller himself, irrespective of the testimony of Stein.

Miller removed the logs on the 10th. On that same day he took an assignment of the Hoyt note. He did that under very extraordinary circumstances, according to his own testimony. When the note was first shown to him, on his examination as a witness, he stated that he got it from William G. Shand, as a business transaction; and that he simply bought it the same as he bought other paper. He was then asked what was the consideration for the assignment of the note to him, and, on the advice of his counsel, he declined to answer the question. The court having ruled that there was nothing to justify him in such refusal, he answered, "Nothing." The transfer of the note was signed by Shand as attorney for Hoyt, and Miller's transaction was with Shand acting for Hoyt. Miller testifies: "I don't remember the place where the transfer took place. It took place in New York, but where I am not sure. I don't remember whether in a house or on a street. Mr. Shand delivered me the note. I don't remember whether I had any conversation with him or not, nor do I remember how I came to meet Mr. Shand." Subsequently to giving that testimony, he says, that he had an agreement with Shand, that they should meet at some time in the future and settle the terms respecting the consideration for the assignment of the note. Then followed this evidence by Miller: "Q. What was said at that interview? A. The exact words I do not remember. The understanding was, that at some future time I was to pay. Q. Shand had the note with him at the time? A. I believe he had; I won't be positive. Q. Had you had a talk previously to this interview with Shand, about the assignment of this note? A. I don't remember. Q. Can you remember a single word that was said between you and Shand at the time of this interview when the note was assigned? A. I could not swear to any particular word that I uttered; we were talking about the note and that business. Q. Have you since met Mr. Hoyt or any person for him and arranged the terms of the transfer of this note? A. I have not. Q. Have you had any conversation with Mr. Hoyt or any person for him, relative to the terms of the transfer or consideration of said note, since the interview spoken of? A. Not that I recollect. Q. The terms have never been agreed upon, then, between you and Mr. Hoyt, as to the consideration for the assignment? A. I have had nothing to do with Mr. Hoyt. Q. Or any one representing him? A. No, sir. Q. Do you wish to be understood that the matter of the consideration for the assignment of the note still remains open between you and Hoyt? A. It is still open between Shand and I."

Shand, who had charge of Hoyt's business, testifies, that he wrote the assignment on the note on the 10th of December; that he sought Miller in regard to the transfer of the note; and that Miller paid nothing as the consideration for its transfer. Then he testifies thus: "Q. Did you or not have an understanding with the defendant that the consideration for the assignment of said note could be paid from the proceeds of the logs in question, or any other agreement of that character? A. Yes, sir." Then he says that the transfer of the note took place in the street, he and Miller meeting in the street, and the assignment being then on the back of the note. Then he gives this testimony: "Q. What agreement or understanding did you have with Miller as to the consideration for the assignment of the note? A. The agreement was that he, Miller, was to purchase the note, and on a future occasion we would meet and arrange terms." Subsequently he says: "At the time of the meeting with Miller, when I delivered the note, the note was endorsed by me, but it did not have the assignment on it. Mr. Miller said, you had better put the assignment on it, and I took the note and wrote the assignment, and afterwards on that day gave it to Miller."

This is a very strange proceeding. Miller buys of Stein 67 logs, for $1,057.19, which he is to pay for in four months, and the next day receives the logs, and immediately becomes the purchaser from Hoyt of a note made by Stein for $2,242.59, without anything being said as to what he was to pay to Hoyt for the note, except that the terms were to be arranged at a future day. Then Miller proves a claim against the estate of Stein for the difference between the $2,242.59 and the $1,057.19, and thus gets the logs without paying anything for them, and gets a claim besides against Stein's estate, for such difference, namely $1,185.40, without paying anything for it, and without being under any legal obligation to pay anything for it. This is his own story. If this is the result it is not unreasonable to infer that this result was intended by Miller from the beginning, and thus his transaction with Hoyt through Shand throws light on his transaction with Stein.

On the hearing, it was argued that the defendant had a defence to the plaintiff's claim, in the fact that, under section 5073 of the Revised Statutes, the defendant, being the owner of the note for $2,242.59 made by Stein, by the purchase of it before the petition in bankruptcy was filed, had a right to have his debt of $1,057.19 to the estate paid by deducting it from the $2,242.59. But, the difficulty in this view is, that the plaintiff makes no claim for the $1,057.19. He does not claim to recover the purchase price of the logs. He does not affirm the sale of the logs made by Stein but seeks to avoid it. He asks that the sale be held void, and that Miller account for the balance of the property. There must be a decree to that effect.

The point is not taken in the answer, that the plaintiff should have proceeded by a suit at law and not in equity, and it is, therefore, waived. But, if had been taken, it would not have prevailed. Where a transfer of property is made, which is held void under the provisions of the bankruptcy act, as against the assignee in bankruptcy, the transferee, is properly to be regarded as a trustee for the plaintiff, and to be held to account as such, especially where, as in this case, it appears that some, if not all, of the property, has passed away from the transferee. Matters of trust are of equitable cognizance. The case of Traders' Bank v. Campbell, 14 Wall. [81 U. S.] 87, is analogous to the present case, in that respect. See, also, Verselius v. Verselius [Case No. 16,925].

The fact that Miller has proved a claim for the $1,185.40, and has received a dividend on it, is of no importance. This suit is not brought to set aside the transfer of the note for $2,242.59 to Miller, nor could the plaintiff set aside such transfer, nor, if he could, could he do so without making Hoyt a party to a suit for that purpose. The proof of debt made by Miller is made on the note, though not for its full amount, and Miller is the legal holder of the note.

Let a decree be entered for the plaintiff, with costs.

[For a subsequent proceeding in this litigation, see Case No. 13,352.]

Case No. 12,481.

SCHRIEFER et al. v. WOOD.

[5 Blatchf. 215.] [1]

Circuit Court, S. D. New York. May 10, 1864.

INTERNAL REVENUE—MANUFACTURERS OF BONE—BONE BLACK—CHARCOAL.

1. Animal charcoal or bone black, produced by the process of burning bone, or exposing it to the action of fire, in the same manner that wood is exposed to the action of fire, to produce vegetable charcoal, and bone dust, produced by the process of pulverizing or grinding bones or pieces of bone, whereby they are reduced to small fragments of no regular or uniform shape or size, are "manufactures of bone," within the description of an internal revenue act taxing "manufactures of bone."

[Followed in Peters v. Robertson, 20 Fed. 819; Cited in Harrison v. Merritt, 23 Fed. 654; Erhardt v. Hahn, 5 C. C. A. 99, 55 Fed. 275.]

[Cited in Attorney General v. Belle Isle Ice Co., 59 Mich. 164, 26 N. W. 313; Carlin v. Western Assur. Co., 57 Md. 526.]

2. The exemption of "charcoal," by such an act, from taxation, does not exempt animal charcoal or bone black, produced in the manner above stated.

[3. Cited in Equitable Life Ins. Co. v. Gleason, 56 Iowa, 49, 8 N. W. 791, to the point that, in the interpretation of statutes, words of common use are to be taken in their natural, plain, and ordinary signification.]

This was an action [by Richard B. Schriefer and others] against the defendant [Alfred M. Wood], as a collector of internal revenue, to recover back taxes paid to him, under protest, on an article called animal charcoal or bone black, and on an article called bone dust. The bone black was produced by the plaintiffs by the process of burning bone, or exposing it to the action of fire, in the same manner that wood is exposed to the action of fire to produce vegetable charcoal. The bone dust was produced by the process of pulverizing or grinding bones or pieces of bone, whereby they were reduced to small fragments of no regular or uniform shape or size.

Charles A. Nichols, for plaintiffs.

E. Delafield Smith, Dist. Atty., for defendant.

HALL, District Judge. It is insisted by the defendant, that animal charcoal and bone dust are manufactures of bone, and, as such, are chargeable with taxes. The plaintiffs insist that they are not manufactures of bone; and that, if animal charcoal is a manufacture of bone, it is, nevertheless, exempt from taxation, because charcoal is specially exempted from taxation, by the internal revenue act [12 Stat. 713].

In regard to the first question, it is argued, in behalf of the plaintiffs, that there is an obvious distinction between a mere natural process and a manufacture; that the latter involves the idea of a series of natural processes, and of the results of the art and ingenuity of man; that this distinction is recognized by all the lexicographers, in their definition of the word "manufacture," and, also, in the popular use of the terms "manufacture" and "manufacturer"; and that we do not call a wood-sawer, or a miller, who merely grinds corn into meal, without bolting it, a manufacturer. It is true, that we do not ordinarily call a wood-sawer a manufacturer, and that we do not usually term a miller, who simply grinds corn in his mill, a manufacturer: but this is probably because the exact character of their business is more clearly expressed by the terms "wood-sawer" and "miller," than by the more indefinite terms

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

"manufacturer of wood," and "manufacturer of corn meal," and because their operations are usually quite limited. We do not ordinarily apply the term "manufacturer" to one whose operations are as limited as those of a wood-sawer; but, when great quantities of saleable articles are produced, even by a single operation of a very simple machine, we frequently, if not ordinarily, speak of the operation as a manufacture. When large quantities of kindling wood are made by splitting blocks of wood by machinery adapted to that special purpose, we do not hesitate to speak of it as a manufacture of kindling wood; and an establishment where very large quantities of bone dust are produced by grinding by machinery, would, by many, in ordinary conversation, be termed a manufactory of bone dust. We speak of the manufacture of salt, when it is produced by the simple operation of boiling, or by solar evaporation; and, when any article of manufacture, having a distinct name in the trade and commerce of the country, is produced by machinery, or by a chemical process, from any material or materials having a different commercial name from the article produced, we may generally speak of the operation by which it is produced as a manufacture.

If we look to the definitions of the term manufacture, both as a noun and as a verb, given in our standard dictionaries, it will be seen, that the definitions are broad enough to include the manufacture of bone dust and bone black, when produced in the modes adopted by the plaintiffs. Among the definitions given by Webster, are: (1) "The operation of reducing raw materials of any kind into a form suitable for use, by hand, by art, or by machinery;" (2) "Anything made from raw materials by the hand, by art, or by machinery;" (3) "To make or fabricate from raw materials by the hand, by art, or by machinery, and work into forms convenient for use;" (4) "To work raw materials into suitable forms for use." Worcester has the same definitions, in substance; and similar definitions are found in other dictionaries. "Bone dust" and "bone black," with the proper definitions, are found in both Webster and Worcester, and in other modern dictionaries, and they are known in trade by these distinctive appellations.

Whether we look to the popular use of the term "manufacture," or to its definition as given by our best lexicographers, as the proper guide to the intention of the act of congress, it is clear that the plaintiffs were properly charged with taxes on the bone dust and on the bone black, as manufactures of bone.

The exception of "charcoal," on which the plaintiffs rely, to excuse them from the payment of taxes on the bone black or animal charcoal, is also some evidence that the production of charcoal from wood, and of other articles of merchandize, by a single and simple process, was deemed a manufacture; for, if charcoal would not have been chargeable with duty if no such exception had been made, there was no necessity for such an exception. Tinkham v. Tapscott, 17 N. Y. 141.

The exception of "charcoal," in the internal revenue act, is not an exception of bone black. In defining charcoal, both Webster and Worcester refer to only that produced from wood; and animal charcoal is not referred to in their definitions of charcoal, nor is animal charcoal found in the lists of words defined. In commercial contracts and in legal phraseology, the simple term "charcoal," without the word "animal" before it, would not be held to include bone black or animal charcoal; and, if we look to the ordinary and popular use of the term "charcoal," it clearly would not include bone black. This popular use of the word should doubtless be most influential in determining the interpretation of the language of the statute exception, for, in the interpretation or construction of statutes, words of common use are to be taken in their natural, plain, obvious and ordinary signification and import. 1 Kent, Comm. 462; Martin v. Hunter's Lessee, 1 Wheat. [14 U. S.] 304, 326; Rex v. Inhabitants of Turvey, 2 Barn. & Ald. 522. As the statute stands, I think it entirely clear that bone black is not exempted from taxes because of the exemption of charcoal.

On the whole case, the defendant is entitled to judgment on the verdict.

SCHROEDER (SMITH v.). See Case No. 13,103.

SCHROEDER (UNITED STATES v.). See Case No. 16,233.

SCHROEDER (WRIGHT v.). See Case No. 18,091.

Case No. 12,482.

SCHUBERTH et al. v. SHAW.

[19 Am. Law Reg. (N. S.) 248.]

Circuit Court, E. D. Pennsylvania. 1879.

COPYRIGHT—MUSIC—NEW ADAPTATION.

[Labor bestowed on the production of another is enough to constitute a claim to copyright, and it is not necessary that complainant be the sole creator of the work for which protection is claimed.]

[The French composer, Waldteufel, in about 1872, published the "Manola Suite de Valses pour Piano." About three years after this the complainants, Edward Schuberth & Co. employed J. M. Lauder, a musical composer, to make a new arrangement of the piece. This Mr. Lauder did, altering and simplifying the harmony, and in some cases altering the melody. He abridged the length of the introduction of the waltz and also the coda. This new arrangement was copyrighted and published by the complainants as "Manola Waltz, Arranged by J. M. Lauder." The defendant, W. F. Shaw, employed Mr. A'Becket, a musician, who made an arrangement of the Waldteufel music which was very similar to the complainants' arrangement. This was

published by the defendant as "Manola Waltz, as Performed by J. M. Lauder."

[The complainants filed a bill asking for an injunction on the ground that the defendant's publication was an infringement of their copyright. The answer denied the complainants' claim to musical authorship, and alleged that the changes in the original music made by Mr. Lauder were trifling, and involved no especial "skill, knowledge, or experience, beyond what is possessed by any one who can play the waltzes on the piano." After all the testimony had been taken, a preliminary order was made by the court, appointing two musicians as experts to report "whether the Manola waltz, published by complainants, was musically different from the Waldteufel composition, in what the difference consisted, and whether complainants' publication is an original musical composition representing any musical authorship." They reported that, "while we do not consider the publication an original composition, with the exception of the harmony in the last three bars of the introduction, we regard it as an original arrangement, and the work of a practical harmonist and musician.]

David M. Sellers, for complainants.
Joseph R. Sypher, for defendant.

BUTLER, District Judge. Under the construction given to section 4952 of the Revised Statutes, relating to copyrights, the plaintiffs' claim must be regarded as valid. To entitle one to a copyright it is unnecessary that he be the sole creator of the work for which protection is claimed. Labor bestowed on the production of another will often constitute a valid claim. The maker of an abridgement, translation, dramatization, digest, index or concordance of a work of which he is not the author, may obtain a copyright for the product of his labor, thought and skill. So also one making material changes, additions, corrections, improvements, notes, comments, etc., in the unprotected work of another. A photograph, chromo or engraving is often but a copy of a work of art, in whose production the photographer or engraver had no part. Wood v. Boosey, L. R. 3 Q. B. 232. In all such cases, the test of originality is applied to that which represents the labor or skill of the person claiming the copyright. Drone, Copyright, 200. In music, not only new compositions, but any substantially new adaptation of an old piece, as an arrangement for the piano of a quadrille waltz, &c., constitutes a valid claim. Atwill v. Ferrett [Case No. 640]; Jollie v. Jaques [Id. 7,437].

The report of the commissioners (Messrs. Thunder & Hasler), leaves me in no doubt respecting the validity of the plaintiffs' copyright. Nor can I doubt that the defendant's publication is a substantial copy of the plaintiffs'. His artist, Mr. A'Becket, understanding what was wanted, sought to do materially what the plaintiffs had done. The defendant's design was to procure a similar work. The evidence shows this quite distinctly. Mr. A'Becket had not, as he says, the plaintiffs' work before him; but he was familiar with it, and was, I think, mainly guided in what he did by his recollection of it. The imitations, in some instances extending even to errors, seem too remarkable to be accidental. The slight, unimportant differences may well be ascribed to a desire to avoid the charge of copying. It is, I repeat, quite plain that the defendant started out with the design to publish and offer for sale a work similar to the plaintiffs', and this similarity is carried even into the title-page, which is made so like the plaintiffs' that any one purchasing might well suppose he was getting the plaintiffs' work. The answer, indeed, admits that the defendant's publication "is substantially the same as the complainants." Let a decree be entered for the plaintiff.

Case No. 12,483.

In re SCHUCHARDT et al.

[8 Ben. 585; [1] 15 N. B. R. 161.]

District Court, S. D. New York. Dec., 1876.

BANKRUPTCY—STRIKING OUT CLAIM—INDIVIDUAL ESTATE—REPRESENTATIONS BY PARTNER AS TO SOLVENCY OF FIRM—DAMAGES FOR TORT.

1. S. & Co., having been adjudged bankrupts, a claim was proved by A. against the individual estate of S., which estate was sufficient for the payment of individual liabilities. The claim was for the amount of a note made by S. & Co.. It was insisted by A., that, about two months before the failure of the firm of S. & Co., he was told by S. that the firm of S. & Co. were doing a safe and legitimate business and were easy, financially, and abundantly able to meet all their obligations, and that, on the strength of those representations, he discounted the note in question. On a re-examination of the claim, it appeared that the conversation between S. and A. (of which S. testified that he had no memory whatever) was on a casual meeting of the two in an omnibus; that, after the conversation, A. sent to B. & Co., note-brokers, to whom he had previously said that he would not buy any more of S.'s paper, to know if they had any of S.'s paper; that B. & Co. said they would get some, and they went to S. & Co. and bought from them the note in question, and sold it on the same day to A. *Held*, that A. could have no claim against S., individually, except a claim for deceit.

2. There was no allegation in the proof of debt, and no proof in the evidence, of an intention on the part of S. to deceive A., or that he did not believe that what he said to A. was true.

3. Moreover, the claim set up was a claim for damages for a tort, and was not provable in bankruptcy, though, if it had been put in judgment against S., that judgment might have been proved.

[Cited in Re Lachemeyer, Case No. 7,966; Re Boston & F. Iron-Works, 23 Fed. 881; 29 Fed. 784.]

4. The proof of debt, therefore, must be expunged.

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

[In the matter of Frederick Schuchardt and Lawrence Wells, bankrupts.]

F. E. Brown, for creditors.
Carter & Eaton, for assignee.

BLATCHFORD, District Judge. On the 27th of May, 1876, John T. Agnew, one of the firm of William Agnew & Sons, made oath to and filed, on behalf of said firm a proof, of debt against the individual estate of Frederick Schuchardt, one of the bankrupts, for the sum of $25,000, with interest from November 9, 1875. The proof states that the indebtedness is upon a promissory note made by the bankrupts, Frederick Schuchardt and Lawrence Wells and one Edward L. Wells, in their firm name of Frederick Schuchardt & Sons, dated New York, July 6, 1875, for the sum of $25,000, payable four months after date to the order of themselves. It is not stated, nor does it appear by the proceedings, that the note was endorsed by Frederick Schuchardt & Sons, but it will be assumed that it was. It is not claimed that the note was endorsed by Frederick Schuchardt individually, but the proof of debt contains the following statement, as making out the claim that Frederick Schuchardt individually is indebted to William Agnew & Sons, upon said note, in the amount thereof, with interest from its maturity: "And this deponent further says, that he has known for many years last past said Frederick Schuchardt, one of said bankrupts, who was, during the summer of 1875, engaged in business at No. 40, Exchange Place, in the city of New York, with his co-partners, the bankrupt Lawrence Wells and one Edward L. Wells, under the firm name of Frederick Schuchardt & Sons; that, on or about the 17th day of July, 1875, this deponent met the said Frederick Schuchardt and had a conversation with him in reference to the business of his said firm of Frederick Schuchardt & Sons; that, in reply to deponent's inquiries, the said Frederick Schuchardt stated and represented to this deponent that his firm was doing but little business, and that on a very cautious, careful basis; that, he, Schuchardt, was going to the Profile House, White Mountains, where he intended to remain until the 1st of September, 1875; that deponent is unable to give the exact language of the said conversation, but the substance of it was, that Mr. Schuchardt represented that his said firm of Frederick Schuchardt & Sons were doing a careful business and were easy, financially, and abundantly able to meet all their obligations, and that they had a large capital and were doing a safe and legitimate business; that, on the strength of said statements, and relying upon said representations to be true, and not otherwise, this deponent thereupon, and on behalf of his said firm, discounted for cash, at the rate of five per cent per annum, said promissory note of $25,000 made by said firm of Frederick Schuchardt Sons; and this deponent charges that, at the time said representations were made, and at the time said promissory note was made, and for a long time prior thereto, said bankrupts and said firm were hopelessly insolvent and unable to pay their debts; that, long before the maturity of said note and on or about the 11th day of September, 1875, said bankrupts and the said firm failed in business, and the said note has never been paid, nor any part thereof; that said note was discounted on the good faith of said representations, and on the personal credit of said Schuchardt; and this deponent and his said firm insist that his claim and demand be declared to be a charge against the individual estate of said bankrupt, Frederick Schuchardt." The assignee in bankruptcy, on the 7th of June, 1876, petitioned for a re-examination of said proof of debt, alleging, in his petition, that "Frederick Schuchardt is not individually liable for the payment of said note, as regards his individual estate in bankruptcy, but that said note is an indebtedness of the firm of Frederick Schuchardt & Sons, bankrupts, and that the estate of said firm is liable for its payment, and that the individual estate of said Frederick Schuchardt is not liable." Thereupon an order was made for the re-examination of said claim, and testimony was taken thereon, and the question now to be determined by the court is whether such proof of debt shall stand.

Mr. Agnew has been examined as a witness in the matter. He testifies that the conversation which he had with Mr. Schuchardt occurred in an omnibus, while they were riding up Broadway, in the city of New York, and sitting side by side. He does not remember the date of the conversation. All he will say, is that it was before the 17th of July, 1875, which was the day he bought the note. He does not remember where he entered the omnibus. At first he says that Mr. Schuchardt entered the omnibus after he did, and then he says he does not remember which one of them entered it first. The meeting was accidental. He does not remember which one of them left the omnibus first. He does not remember whether he has met Mr. Schuchardt in an omnibus since then. He cannot remember having ever spoken to Mr. Schuchardt before about the financial strength of his firm. As a reason for his having interrogated Mr. Schuchardt on that occasion on the subject of his financial strength, he testifies that he had heard that some of the paper that had been made by Schuchardt & Sons was paper made and put on the street to sell, and his firm had had a note which became due and was paid on the 18th of June, 1875, and he had concluded that he would not take any more of the paper. He states the conversation thus: "I asked him what he thought of the times. He said that they were rather critical. I asked him how they were getting on. He said, very conservative;

that they were not doing much business, and they had reduced their obligations; that they were financially comfortable and he was going to the White Mountains, to the Profile House, to spend the month of August." He says that the only question he asked Mr. Schuchardt about the business of his firm was the question as to how they were getting along; that he did not say anything to him about the rumor that he was putting his paper on the street for sale; that he did not give him any reason for asking him about his firm; and that Mr. Schuchardt said nothing about their capital or about their speculations.

It appears, by the evidence, that at one time Mr. Agnew had stated to the firm of O. M. Bogart & Co., note-brokers, that he was not going to buy any more of Schuchardt's paper. After the conversation in the omnibus, Mr. Agnew sent to O. M. Bogart & Co., to know if they had any of Schuchardt's paper. Bogart & Co. replied that they would go and get some, and they went to Schuchardt & Sons, and purchased for themselves, directly from Schuchardt & Sons, the note in question, on the 17th of July, 1875, and sold it on the same day to Mr. Agnew.

Mr. Schuchardt has been examined as a witness in the matter. He testifies, that he left New York on the 2d of July, 1875, for the Profile House, and was absent from New York continuously until the 18th of August, 1875; that he did not know of the insolvency of his firm before he so left New York; that, at the time he so left New York, he was himself a creditor of his firm and held its promissory notes to the amount of $65,000, purchased by him as an investment of his individual funds, directly from the firm, in March, 1875, and May, 1875, at the rate of six per cent per annum, and the earliest of which would mature on the 11th of September, 1875; and that he had no idea of any trouble in his firm until the 17th of August, 1875. He says that he has no recollection of any conversation with Mr. Agnew, prior to his leaving for the White Mountains, or of meeting him in an omnibus in June or July, 1875, or of seeing him in 1875, except meeting him in the street in May or June, 1875, and bowing to him and receiving a bow in return, without any conversation passing; that the failure of his firm took place on the 11th of September, 1875; that he has no recollection of having had any conversation with Mr. Agnew, or with any other person, regarding the finances of his firm, prior to his so leaving New York on the 2d of July, or of having had any inquiries made of him regarding the finances of his firm, or its business prospects, or its soundness; that people had not been in the habit of interrogating him about the financial soundness of his firm; that, to his recollection, no one had done so; that he would have considered it an offence up to the time he went to the Profile House in July; and that he considered himself a rich man. It is claimed that the evidence shows that the firm was not solvent in May and June, 1875. On that subject Mr. Schuchardt testifies that the firm may not then have been able to pay everything on demand without realizing its assets, but that, at the time of its suspension on the 11th of September, he considered it able to pay one hundred cents on the dollar, if proper time were given; that, from his present knowledge of the assets and liabilities of the firm in July, 1875, he thinks it was solvent and able to pay its debts on the 1st of July, 1875; and that, down to the time he left New York in July, his firm met its liabilities as they matured and he then considered it solvent.

The liabilities of the firm when it suspended amounted to about $2,000,000. Its assets are not sufficient to pay its liabilities. Up to the time of their failure the bankrupts were bankers in the city of New York. The individual assets of Frederick Schuchardt are more than sufficient to pay his individual liabilities.

It is not alleged in the proof of debt that Mr. Schuchardt did not, at the time he made the alleged statements to Mr. Agnew, believe them to be true, or that he knew or believed them or any of them to be untrue, or that he made them for the purpose of misleading or deceiving Mr. Agnew. It is not alleged that he knew why Mr. Agnew sought the information; or that he knew Mr. Agnew had heard rumors about the firm's making paper to sell; or that he knew there were such rumors; or that, in fact, the firm had made any paper to sell; or that he knew Mr. Agnew had previously resolved not to buy any more of the Schuchardt paper; or that he knew Mr. Agnew was inquiring with any view to determining whether such resolve should be altered. In the proof of debt, Mr. Agnew states that Mr. Schuchardt said that the firm had a large capital, but in his testimony he does not say that Mr. Schuchardt made that statement. It is not shown that the firm were not at the time of the conversation doing a careful business, or that it was not true that they were then not doing much business, or that they were not conservative, or that they had not at that time reduced their obligations, or that they were not then abundantly able to meet all their obligations which were then outstanding, or that they were not then financially comfortable, or that they did not then have a large capital, or that they were not then doing a safe and legitimate business. It is not shown that at that time they were insolvent or unable to pay their debts. They went on, so far as appears, transacting their usual business and meeting all their obligations punctually, until the 11th of September following, and it is not shown that there was any suspicion of embarrassment until the 17th of August.

Assuming that the conversation occurred as stated by Mr. Agnew, it is established by the evidence that it occurred before the 2d of July. After that, Mr. Agnew buys this note, one not made before that time, but one made after the conversation. He does not buy it from Schuchardt & Sons, nor does he deal with them at all or pay them any money. He buys it from Bogart & Co., who owned it.

On the facts alleged in the proof of debt no cause of action for deceit arises in favor of Agnew & Sons against Mr. Schuchardt. The cause of action which will give them a claim against Mr. Schuchardt individually must be one for deceit, or else none at all. The gist of an action for deceit must be that Mr. Schuchardt intended to deceive Mr. Agnew in what he said, and intended to commit a fraud, and did not believe that what he said was true. No such thing is alleged in the proof of debt or proved in the evidence. Mr. Schuchardt was not dealing with Mr. Agnew at the time, the relation of debtor and creditor did not exist at the time, nor did either contemplate at the time the future creation of such relation, much less did Mr. Agnew disclose to Mr. Schuchardt at the time that such a relation in the future was in the contemplation of Mr. Agnew. Nor did the parties afterwards deal with each other, either directly or through agents. The case is not like one of a banker dealing with his customer face to face, over his counter, and taking his customer's money, when the banker conceals his known real condition, and the circumstances show such bad faith that the law implies fraud. Nor is the case like one of a party purchasing property under such circumstances as show an intention not to pay for it.

Independently of this, the claim set up is a claim for damages for a tort, and is not a claim provable in bankruptcy. If it had been put in judgment against Mr. Schuchardt, individually, before the adjudication, the judgment might have been proved. The claim is not one made provable by sections 5067 to 5071 of the Revised Statutes. It is not a claim created by contract and, therefore, is not a debt within section 5067. Nor is it, within that section, a demand for or on account of goods or chattels wrongfully taken, converted or withheld. Nor is it a claim for unliquidated damages arising out of a contract or promise, or on account of goods or chattels wrongfully taken, converted or withheld. Nor is it a contingent debt or a contingent liability, within section 5068. Nor can it be proved under any one of the other three sections above named. No contract can be implied between Agnew & Sons and Mr. Schuchardt, as might be the case if Mr. Schuchardt had received from Agnew & Sons money which ex æquo et bono ought to be refunded. The parties held no such relations as raise the implication, in law, of a contract. Agnew & Sons paid no money to Mr. Schuchardt or to Schuchardt & Sons or to any agent of either. Therefore no action for money had and received could lie against Mr. Schuchardt. The action would be for deceit, for a tort, and would sound in damages, and they would not be damages arising out of a contract or promise. The claim, therefore, is not a provable one.

The proof of debt must be expunged.

SCHUCHARDT (ALLEN v.). See Case No. 236.

Case No. 12,483a.

SCHUCHARDT v. The ANGELEQUE.

[22 Betts, D. C. MS. 44.]

District Court, S. D. New York. Nov. Term, 1853.[1]

MARITIME LIENS—PRIOR MORTGAGE—PROCEEDS OF SALE—EQUITABLE LIENS—PRIORITIES.

[1. In a case where several libels have been filed by material men, seamen, and others against a vessel upon which there is an earlier mortgage lien, the court has no authority to compel the mortgagees to submit their interest to the order of the court, or to discharge the mortgage lien upon payment to the holders thereof of less than their full mortgage debt.]

[2. Where the holders of a prior mortgage lien on a vessel decline to appear as claimants in a suit against the vessel by material men, seamen, and others, and the vessel is sold in satisfaction of the libelants' claim, the mortgagees appearing at the sale and giving notice to the bidders of their lien, *held*, that the lien of the mortgage is not affected by the sale, the mortgagees not having submitted their interest to the jurisdiction of the court.

[Disapproved in The Hendrik Hudson, Case No. 6,358.]

[3. *Held*, further, that, had such submission been made, the court has no power to compel the parties to relinquish any part of their demand.]

[4. The mortgage holders, by a subsequent libel, are not entitled to arrest the proceeds of the sale in satisfaction of their lien, nor are they entitled to share in the distribution of the same.]

[5. Courts of admiralty have no jurisdiction to prefer claims clothed with a mere equitable character over maritime liens, nor to marshal assets for the purpose of putting equitable liens on the same footing as maritime liens.]

[6. As a general rule, maritime liens take precedence in the order of the arrest of the res, and not pro rata, or in the order of debts incurred.]

The libelants [Frederick Schuchardt and Frederick C. Gebhard] sold the ship Angelique May 7, 1853, and, in part payment of the purchase money, took from the purchaser his promissory note for $5,000, payable in six months, with a mortgage of the same date, on the moiety of the ship, to secure the payment of the note. The purchaser put up the ship for a voyage to Australia, and incurred large liabilities for materials and supplies furnished

[1] [Affirmed by circuit court. Case No. 12,483c. Decree of circuit court affirmed by supreme court, in 19 How. (60 U. S.) 239.]

her in this port, and also to seamen engaged for the voyage, to freighters for cargo laden on board, and to passengers who had engaged passage on board her and made advances of money in payment thereof. On the 29th of July, 1853, a libel was filed against the ship, on a maritime contract for labor and materials supplied her in this port, upon which an attachment issued, and the cause proceeded to a decree in favor of the libelants, and condemnation of the ship to satisfy the demand and costs, upon which execution was issued. Numerous other actions were almost simultaneously prosecuted against the ship, some of which were carried forward to final decrees and to execution, and others were suspended by the fact of the sale of the vessel. On the 31st of August the marshal of this district, under the first mentioned execution, in due course of law disposed of the ship at public auction for the sum of $6,900, the highest sum bid therefor, and paid the proceeds of sale into court. At the time of the sale, and before the ship was bid off, the libelants gave notice to the marshal of their mortgage incumbrance, and that the ship still remained subject to it, which notice was also made known to the bidders and purchaser at the sale. After that sale, and before the note secured by the mortgage became due, the libelants instituted this action against the proceeds of sale now in court, praying that the one-half thereof be retained by the court to satisfy said note and mortgage, when the same should become due, if then unpaid. On the 10th of November the note was protested for nonpayment, and upon the ground that the mortgage debt yet remains unpaid and the incumbrance in force, the suit was brought on for hearing immediately thereafter.

Various creditors interposed their answers to the libel, denying that the libelants had any incumbrance upon or right to any part of the fund in court, and demanding payment of their decrees and liens, according to their legal priority, out of the fund. Other creditors having liens, and who had commenced actions by filing libels in this court against the ship, and had sued out attachments, but had not intervened in this cause, and others who had done no more than file libels, have petitioned the court to be paid out of the fund, according to their legal rights.

[An opinion was previously delivered by the court, covering in part the subjects discussed below. See Case No. 12,483a.]

Messrs. Wells and Ogden, for plaintiffs.
E. C. Benedict, for defendant.

THE COURT (BETTS, District Judge) held: First. That this court, proceeding on the instance side, in actions by material men, freighters, and passengers against the ship, had no authority to compel the mortgagees to submit their mortgage interest to the order of the court, or to take satisfaction therefor, even at its full amount; much less to order the discharge of its lien on the ship on payment to the mortgagees of less than the mortgage debt.

Second. That the mortgagees never submitted themselves, or their mortgage lien or debt, to the jurisdiction of this court, but, on the contrary, appeared at the place and time of the marshal's sale, and gave notice of the subsistence of their legal incumbrance and right against the ship.

Third. That, had such submission been made, the court of admiralty possesses no power over the creditors or their debts adequate to coerce the parties to an involuntary relinquishment or adjustment of their rights, or enabling it to fix a scale of equities between these numerous suitors, prosecuting distinct interests, or to compel any of them to forego their entire legal rights and remedies.

Fourth. That the libelants establish no right of action against the fund in court, as the res chargeable with their debts, and that they are not entitled to arrest them, or partake in their distribution as remnants or proceeds of the ship on which they held an incumbrance, because the court has never displaced that incumbrance from the ship, and because these proceeds are more than absorbed by decrees in court directly against the ship, and they do not, therefore, continue in court, nor are they at the disposal of the court as remnants, so that the court can take cognizance of the equities thereto as between the owner of the ship and his creditors.

Fifth. That courts of admiralty have not inherently the faculty to use chancery powers or processes to compel creditors to yield legal rights, and give place to claims clothed with no more than an equitable character, nor, as a general principle, to act upon parties or interests not before it by regular course of suit, nor to coerce suitors pursuing by course of law the remedies appropriate to the jurisdiction of the court, nor others, not parties before the court, to submit to a marshaling of assets within the control of the court, for the purpose of putting equitable claims thereto on the same footing with maritime liens in suit, or legal rights.

Sixth. That, as a general principle, debts resting on a maritime privilege alone become incumbrances, and bind the res under lien, when the same is attached thereon, and not before. Accordingly, suitors in admiralty take priority of satisfaction of lien debts, in the order of the arrest of the property, subject thereto, and not pro rata, nor in the order in which the debts were incurred, nor with reference to the time of indebtment, except in the case of express hypothecation.

It is therefore ordered by the court that the libel filed in this cause by the mortgagees be dismissed, with costs. And the court, adhering to the spirit of the order in suits against the ship Angelique, entered in October term last, directs that the lien creditors,

other than the libelants, be paid out of the fund in court in the order in which their attachments were levied, respectively, and when no attachment was served in suits under prosecution, then in the order in which the actions were instituted. Should there be in court remnants of the proceeds of the said ship after satisfaction of the suits aforesaid, the court has competent authority, upon the applications before it, to direct a distribution of such remnants equitably among creditors having liens on the ship, or maritime demands against her, as against the claim or right of the owner of the ship to such fund; and, on proper motion, reference will be made to a commissioner to marshal the assets in court to that end.

[NOTE. From the decree entered dismissing the libel, an appeal was taken by the libelants to the circuit court, where the decree was affirmed, but upon a different ground, viz. that the mortgage lien had no priority over the subsequent maritime liens. The opinion of the district court upon the priorities among the several maritime liens was affirmed. Case No. 12,483c. A fee of $250 was allowed counsel for the lienholders by the district court. Id. 12,705. The decree dismissing the libel was affirmed, upon appeal to the supreme court, upon a still different ground, viz. that the libel was in effect a suit to foreclose a mortgage, and, as such, not within the admiralty jurisdiction. The court expressed no opinion upon the conflicting points in the opinions of the district and circuit courts. 19 How. (60 U. S.) 239. The Ocean Mutual Association Company, who claimed to be subrogated to the rights of Schuchardt and Gebhard, filed a petition in the circuit court, after the decision of the supreme court, seeking a review of the district court decrees for the purpose of appearing as claimants in the original actions. The court held that the holders of the several maritime liens had priority over the mortgage by the maritime law, and that such a petition, seeking to establish the mortgage against their liens, could not be allowed. Case No. 12,483d. This last decision pointedly overrules the opinion of Judge Betts upon this point, in this case and in Case No. 12,483b.]

Case No. 12,483b.

SCHUCHARDT v. The ANGELIQUE.

[22 Betts, D. C. MS. 2.]

District Court, S. D. New York. Oct. Term, 1853.

MARITIME LIENS — PRIORITIES — LIEN BY STATE STATUTE—MORTGAGE.

[1. In admiralty, as a general rule, there is no exclusive priority among maritime liens one over another, on account of either the subject-matter or the time of contracting the lien debt.]

[2. The exceptions to this rule are bottomry bonds and sailors' wages.]

[3. Where a state statute gives a lien for supplies furnished by material men in the home port, and makes that lien paramount to all others except sailors' wages, the federal admiralty courts will enforce the lien, although it be not otherwise than by the statute within their admiralty jurisdiction, but will refuse to recognize the exclusive priority of the lien over other maritime liens.]

[4. A mortgage regularly recorded has priority over all maritime liens subsequently created, except bottomry bonds and sailors' wages.]

[See, contra, Schuchardt v. The Angelique, Cases Nos. 12,483c and 12,483d.]

In admiralty.

The ship was first attached, by process sued out of this court by material men, on the 27th day of July last, and was sold by decree of the court on the 31st day of August, 1853. The proceeds have been deposited in court to await the disposal of the numerous actions pending against them of the ship. The suitors stand before the court representing various classes of demands, each of which it is urged, is entitled to a grade of priority over some of the other creditors. Over 70 actions have been instituted, and have been in part matured to decrees, and are in part in progress. In addition to those suits, several petitions have been filed, praying satisfaction, out of the proceeds of the ship, of other debts chargeable against her. Pleadings have been interposed, putting in contestation some of the demands in toto, and in other instances their amounts, and the privilege is reserved to parties to file further answers litigating the justness of other claims, should the court pronounce them entitled to a priority of any kind.

Application was made to the court by motion, upon this state of the proceedings, to declare the order in which the various classes of demands should be ranked for satisfaction out of the fund in court. The claims brought before the court on this motion were by passengers for a return of passage money advanced for the voyage, and for damages because of breaches of the contract; by material men for repairs put upon the ship, and supplies and necessaries furnished her; by freighters for damages, because of the non-performance of the contract of affreightment; by the sheriff of the city and county of New York, for the amount of a demand on which the ship was arrested under process in his hands issued by a state court; and by mortgagees, claiming the entire moiety of the proceeds under a mortgage upon the ship, executed to them antecedent to the accruing of any of the other demands.

The claims to priority in these several cases were supported by E. C. Benedict, F. R. Sherman, J. B. Scoles, C. Donohue, and Mr. Hoxie.

Wells & Ogden, in opposition.

BETTS, District Judge. The ship Angelique was in a course of preparation, and was put up in July, for a voyage from this port to Australia, and advertised to receive on board freight and passengers for the voyage. The vessel was arrested at the suit of creditors, and the voyage was broken up after the ship had taken freight on board and had received, in advance, passage money from a large number of passengers. To save the accumulation of expenses, many suitors, pro-

ceeding against the ship, now apply to the court, by motion, to declare the legal effect of their demands, and the order of priority to be observed in their payment, it being found that the debts chargeable upon the ship and her proceeds greatly exceed in amount the fund in court.

It is conceded that the demands of seamen for their wages must be first satisfied, but, in respect to the residue of the fund, it is contended on the part of material men that their claims, being founded upon a statute of this state, are, by the provisions of that act, entitled to an absolute preference over every other description of demands than seamen's wages. The amount of this class of claims, with the attendant costs, will go towards absorbing the entire fund.

Undertakings to supply materials to a vessel, or perform labor in her repair, are maritime contracts, and suable in rem in admiralty when the services are rendered to a foreign vessel, or to one in the ports of a state to which she does not belong. But, as to repairs or necessaries in the state to which the ship belongs, the right of privilege is dependent upon the local law of the state, and no lien is implied unless recognized by that law. If the local law allows a lien for that description of debts, it may be enforced in admiralty, The General Smith, 4 Wheat. [17 U. S.] 438; Peyroux v. Howard, 7 Pet. [32 U. S.] 324; The Robert Fulton [Case No. 11,890]; The Marion [Id. 9,087]. The objection to the priority claimed by the material men in these cases is that the admiralty, having jurisdiction of the subject-matter, will enforce the remedy according to its own course of proceedings, and cannot be controlled by the law of the state. The gist of the remedy, unquestionably, is that of giving the libelants the benefit of their liens upon the ship; but, whether it is to be a maritime lien alone, or the statutory one which carries a higher privilege, is the question in issue between the parties.

A contract for repairs in a home port, being of a maritime character, is within the jurisdiction of the admiralty courts, as to the person. [The General Smith] 4 Wheat. [17 U. S.] 438. But no lien upon the thing can be implied from it, so as to give those courts jurisdiction in rem. The Orleans, 11 Pet. [36 U. S.] 181. When the local law attaches to the contract a right of lien, such lien may then be enforced according to the mode of administering relief in admiralty. Id. 184; Weaver v. The S. G. Owens [Case No. 17,310]. The same case settles the further principle that the local law has no effect to create or confer jurisdiction in the particular case against the vessel in kind. The admiralty court employs its own method of procedure to enforce a local lien, because its powers are independent of state legislation. They can neither be enlarged nor curtailed by it. The lien, therefore, carries with it no higher properties in a nautical tribunal than if it was one under the general law, nor does it necessarily acquire all the force it possesses in the local forums. The qualifications result from the rule that the privilege or lien is an incident of the maritime contract, in relation to jurisdiction and remedy, but is so solely to the extent that the local law creates and establishes the privilege. When, therefore, it ceases to be one under that law, it ceases to have the effect of one in the federal courts.

But whether the rights of material men are to be measured in admiralty by the provisions of the local law, is a question of a different character. Judge Conkling, in his Practice, says: "The state law furnishes the rule to ascertain the rights of the parties." 1 Conk. Adm. 57. But this inference is not authenticated by any adjudged cases, and there seems no principle of the common law or law maritime to uphold it. A state legislature would thus prescribe the law to the national judicatories, and might displace the best-established powers of those tribunals. This might give to domestic creditors incumbrances upon vessels which should override all other rights presented in the federal courts. The same power which permits them to raise the debts of material men to a priority over all other claims than those of seamen for wages, would likewise enable them to postpone the latter also, and disarm the admiralty courts of all efficient jurisdiction, on maritime contracts or torts, over domestic vessels.

The United States judiciary, having disclaimed the authority to take cognizance of liens on domestic vessels as incidents of maritime contracts, when the contract itself is within their jurisdiction, will look to the local law no further than to ascertain whether it ascribes a lien to the contract, and if there be one, will enforce it only to the same extent as if the contract carried the lien as an attribute under the maritime law. Accordingly, every condition or qualification to the accruing or attaching of the lien prescribed by the local law will be observed in admiralty, because those particulars are essential elements to its existence. If the vessel leaves the state, or goes out of the port of refitment, 12 days before the lien is pursued, the statute of this state does not act upon the matter, and admiralty must pronounce the vessel not subject to arrest for the debts through its jurisdiction.

In my opinion, in respect to the cases before the court, the material men have the same, and no other, privilege as if the vessel were a foreign one, and that, accordingly, they can claim no special prerogative or lien by favor of the local law. In my judgment there are but two descriptions of tacit liens which, under the maritime law, have title to a priority exclusive of others, and those are bottomry bonds and sailors' wages. This court has, in former causes, developed its views on this subject, and they are, I believe, in entire concurrence with the deci-

sions of the circuit court of this circuit, and the supreme court and court of chancery of this state; but, as opposing opinions on this subject have been pronounced in the district court of the Northern district of this state, and the parties here claim that as the sounder rule of law, I am quite willing to review the subject with the aid of a full argument, in any of these causes which shall be put to issue and be of sufficient magnitude to warrant the delay and expense attendant upon its more solemn consideration and determination.

The suits by passengers to recover back passage money advanced, and those by freighters on their shipping contracts, rest upon liens of the like character and effect with those of material men, and as classes stand before the court on the same footing of privilege.

In respect to the rank and character of the claim of the mortgagees, I hold, as a general principle, that the mortgage, being an incumbrance or positive hypothecation of the vessel, is paramount in privilege to the liens acquired subsequently and now before me. There may be modifications of that rule, no doubt, where the fund comes to be administered in an admiralty court, for there the rights of bottomry holders and seamen, accruing bona fide afterwards for the navigation and preservation of the vessel, will supersede a mortgage charge or other hypothecation. No definite opinion will, however, be pronounced establishing the validity of this mortgage or the rank of its lien, until the question of its validity has been tried upon issues to the libel filed by the mortgagees; and the antagonists to the demand have an opportunity to show that the mortgagees, as against this fund, are not protected by the general principle of priority, and that they, in legal effect, have no higher privilege than that of part owners.

Upon the motions made in these various and numerous cases, I therefore decide:

First. That the material men, as a class, have no legal priority of lien over other creditors, who, by the maritime law, are entitled to a lien or privilege against the ship, for their debts.

Second. That freighters who shipped merchandise in this ship have not, by virtue of their bills of lading or other ordinary shipping contracts, a priority of lien on the vessel.

Third. That persons who contracted for a passage on this ship for the voyage mentioned, and who paid the agreed passage prices in advance, have a maritime lien on the ship for the fulfillment of their contracts, but have no special priority of privilege over other maritime liens.

Fourth. That the mortgagees, if holding a bona fide mortgage, and acting in that character alone, are entitled to a priority lien over all the other creditors in court, except seamen, upon a moiety of the ship, unless it be shown that the priority has been waived or lost by their acts or their relationship to the ownership of the vessel.

Fifth. The doctrine of the court as to creditors of equal rank or privilege is that those who first enforce their liens acquire a priority in payment, but that rule will not be adhered to in this instance without allowing parties affected by it to bring up the point for the reconsideration of the court.

[NOTE. Judge Betts delivered a later opinion, in which he held that the libel of Schuchardt and Gebhard must be dismissed, upon the ground that their mortgage was not affected by the marshal's sale, and for this reason they could not be entitled to any part of the proceeds of the sale. Case No. 12,483a. From the decree entered dismissing the libel, an appeal was taken by the libelants to the circuit court, where the decree was affirmed, but upon a different ground, viz. that the mortgage lien had no priority over the subsequent maritime liens. The opinion of the district court upon the priorities among the several maritime liens was affirmed. Id. 12,483c. A fee of $250 was allowed counsel for the lienholders by the district court. Id. 12,705. The decree dismissing the libel was affirmed, upon appeal to the supreme court, upon a still different ground, viz. that the libel was in effect a suit to foreclose a mortgage, and as such not within the admiralty jurisdiction. The court expressed no opinion upon the conflicting points in the opinions of the district and circuit courts. 19 How. (60 U. S.) 239. The Ocean Mutual Association Company, who claimed to be subrogated to the rights of Schuchardt and Gebhard, filed a petition in the circuit court, after the decision of the supreme court, seeking a review of the district court decrees for the purpose of appearing as claimants in the original actions. The court held that the holders of the several maritime liens had priority over the mortgage by the maritime law, and that such a petition, seeking to establish the mortgage against their liens, could not be allowed. Id. 12,843d. This last decision pointedly overrules, upon this point, the opinion of Judge Betts in this case and in Case No. 12,483a.]

Case No. 12,483c.

SCHUCHARDT v. The ANGELIQUE.

[N. Y. Times, Oct. 3, 1855.]

Circuit Court, S. D. New York. Sept. 28, 1855.[1]

MARITIME LIENS—PRIORITY—MORTGAGES.

[1. Mortgage liens in admiralty have no superiority over subsequently created maritime liens.]

[2. Maritime liens are to be satisfied, as a general rule, in the order of the commencement of the suits in admiralty.]

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

[This was a libel by Frederick W. Schuchardt and others against the proceeds of the ship Angelique. From a decree of the district court dismissing the libel (Case No. 12,483a), libelants appealed.]

In admiralty.

[1] [Affirming Case No. 12,483a. Decree of circuit court affirmed by supreme court, in 19 How. (60 U. S.) 239.]

This case, as will be recollected, was a suit brought by the libelants, as mortgagees of one-half of the ship, to obtain an attachment upon one-half of the proceeds of the ship, which had been sold at marshal's sale in suits brought by material men, passengers, etc. Judge Betts, in the court below, gave a decree dismissing the libel, with costs. [Case No. 12,483a.] The questions in the case were interesting in themselves, and were rendered yet more so by a subsequent decision rendered by Judge Hall, in the Northern district of this state, in which the question of the rights of mortgagees upon vessels came up, and in which Judge Hall expressed different views from those held by Judge Betts on the subject.

Mr. Cutting, for appellants.

E. C. Benedict, for the appellees.

Before he had finished his argument, however, NELSON, Circuit Justice, said that the principles involved in the case were very important, and rendered it desirable that it should be brought before the supreme court at Washington; that he had no hesitation in saying, without, however, intending to bind himself to these views if the case should be brought up before the supreme court, that his impression was that he should, if he were to decide the case, hold, with Judge Hall, that a mortgage interest could have no superiority over other subsequent liens, but, with Judge Betts, that liens created either by the maritime law or a state statute, must be treated by the courts of admiralty, whenever they come before it as maritime liens, and were to be satisfied and paid off in the order of the commencement of the suits; that, if it was deemed desirable to carry the case to Washington, he would now affirm the decree of the court below, from which the libelants could appeal to the supreme court. This course seemed best to all concerned, and a decree was entered affirming the decree of the district court, dismissing the libel, with costs. An order was also made directing that the fund in question, being one-half of the proceeds of the ship, be brought up from the district court, and invested by the clerk of the circuit court in the United States Trust Company.

[On appeal to the supreme court, the decree of this court was affirmed. 19 How. (60 U. S.) 239. See note to Case No. 12,483b.]

Case No. 12,483d.

SCHUCHARDT v. The ANGELIQUE.

[N. Y. Times, May 14, 1857.]

Circuit Court, S. D. New York. May 13, 1857.

MARITIME LIENS—PRIORITY—LIEN BY STATE LAW—REVIEW OF DECREE OF DISTRIBUTION.

[1. In admiralty, maritime liens, although subsequently created, have priority over a mortgage duly recorded.]

[2. No difference will be made in the enforcement of maritime liens between those created by state statute and those given by the general maritime law.]

[3. The circuit court will not review, upon petition, a decree of the district court distributing the proceeds from the sale of a vessel under decrees for sale procured by holders of maritime liens, when the purpose of the petition is to set up a priority over these liens, by one who declined to appear as claimant in the original suits.]

In this matter, as will be recollected, some fifty or sixty libels were filed by material men, passengers, and others against the vessel, and decrees entered in many of them against her. The vessel was sold, and the proceeds brought into court. A libel was then filed by Schuchardt and Gebhard against one-half of the proceeds, claiming to be entitled to the same as mortgagees of one-half of the vessel, in preference to all others. Their claim was carried to the supreme court at Washington, and the decrees of the district and circuit courts, dismissing the libel of Schuchardt and Gebhard with costs [Cases No. 12,483a and 12,483c] was there affirmed [19 How. (60 U. S.) 239], that court holding that the only way they could have come in was by opening the decrees in the district court, or by petition. The Ocean Material Association Company thereupon filed a petition in this court, claiming to be subrogated to the rights of Schuchardt and Gebhard, and asking that the court proceed to examine the matter, and decree that they were entitled to one-half of the proceeds in court.

Mr. Hamilton, for petitioners.

Benedict, Burr & Benedict, in opposition.

The matter coming up before the court this morning, NELSON, Circuit Justice, said that argument of the petition was unnecessary, as he should hold the law to be that a maritime lien which attached to the rem was entitled to a preference over a mortgage, although the mortgage had been duly recorded; that no difference would be made between a lien given by a maritime law and one given by the local law of the state, if the latter was one of which a court of admiralty would take cognizance; that the lien creditors having obtained decrees in the circuit court, this court would not review the decree upon a petition filed in the circuit court; that this would dispose of the petition, and accordingly the application of the petitioners must be dismissed.

Case No. 12,484.

SCHUCHARDT et al. v. LAWRENCE.

[3 Blatchf. 397.] [1]

Circuit Court, S. D. New York. Jan. 23, 1856.

CUSTOMS DUTIES—LIQUORS—LEAKAGE—PROTEST.

1. Where, on several importations of gin, the quantity which arrived was, through leakage, less than the quantity stated in the invoice, and the collector exacted duties on the quantity stated in the invoice, which were paid under the following protests, written on the

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

face of the entries: "The actual gauge and 2 per cent. claimed for leakage;" "the actual gauge and 2 per cent. claimed for wantage and leakage;" "the actual gauge and 2 per cent. for leakage claimed on this entry,"—*held*, that these protests were sufficient, under the act of February 26, 1845 (5 Stat. 727).

2. The duty on brandies and other liquors is, under the decision in Lawrence v. Caswell, 13 How. [54 U. S.] 488, to be assessed on the actual quantity which arrives in the United States, and no duty is to be paid on what leaks out during the voyage.

[Cited in Balfour v. Sullivan, 17 Fed. 232.]

This was an action [by Frederick Schuchardt and another] against [Cornelius W. Lawrence] the collector of the port of New York, to recover back an excess of duties paid by the plaintiffs on sundry importations of gin.

John S. McCulloh, for plaintiffs.
Benjamin F. Dunning, for defendant.

INGERSOLL, District Judge. In the case of Lawrence v. Caswell, 13 How. [54 U. S.] 488, the supreme court decided, that the duty of 100 per cent. ad valorem on brandies and other liquors, was to be assessed on the actual quantity which arrived in the United States, and not on the quantity stated in the invoices; in other words, that there should be no duty paid on that which had leaked out of the casks during the voyage.

From May 1, 1847, to September 21, 1850, the plaintiffs imported into New York, on five different occasions, a certain number of pipes of gin. On each importation, there was a leakage of the gin. The duties charged and paid were on the quantity as stated in the invoice, and not on the actual quantity which arrived in the United States. The excess of duties can be recovered back, provided there was a protest at the time of each payment. On two importations by the Angelique, one May 5, 1847, and the other September 13, 1847, the excess of duties was paid under the following protest, written on the face of the entry: "The actual gauge and 2 per cent. claimed for leakage. Schuchardt & Gebhard." On two other importations by the same ship, one May 28, 1848, and the other September 28, 1848, the excess of duties was paid under the following protest, written on the face of the entry: "The actual gauge and 2 per cent. claimed for wantage and leakage. Schuchardt & Gebhard." On an importation by the same ship, February 5, 1849, the excess of duties was paid under the following protest, written on the face of the entry: "The actual gauge and 2 per cent. for leakage claimed on this entry. Schuchardt & Gebhard."

The question is upon the sufficiency of these five several protests. The act of February 26, 1845 (5 Stat. 727), provides, that no action shall be maintained against any collector, to recover back duties paid, unless, at or before the payment of the duties, there was a protest in writing, signed by the claimant, setting forth distinctly and specifically the grounds of objection to the payment. The above protests are short. They are in writing, and signed by the claimants. They were presented to the collector at or before the payment of the duties. They claim that the collector should not collect duties on any quantity above the actual gauge. From them the collector would understand that they distinctly and specifically set forth, as a ground of objection to the payment of the duties, that they were assessed, not only on the quantity which arrived in the United States, but on a greater quantity. The protests are, therefore, sufficient.

Judgment must be rendered for the plaintiffs for the excess of duties, with interest from the time of payment.

Case No. 12,485.

SCHUESSLER v. DAVIS.

[13 O. G. 1011.]

Circuit Court, N. D. New York. May 11, 1878.

PATENTS—REISSUE—OBJECT OF—BUCKLE FASTENINGS.

1. The original patent being unnecessarily restricted, it was the object and the proper office of the reissue to correct this omission, so as to protect the patentee to the full extent of the invention.

[Cited in Loercher v. Crandal, 11 Fed. 879.]

2. It is the peculiarities of the case itself, and not of the method of fastening it to the strap, which is the valuable feature of the improvement, reissue No. 7,129.

[Cited in Loercher v. Crandal, 11 Fed. 879.]

This suit was brought [by Charles Schuessler against Charles H. Davis] for infringement of reissued patent No. 7,129, originally granted to R. Meyer, for "improved buckle fastenings," January 19, 1867, and assigned to complainant. [The original letters patent, No. 61,628, were granted January 29, 1867.] The defendant claims to manufacture under patent originally granted him September 21, 1869, and reissued March 7, 1876, No. 6,974.

A. V. Briesen, for complainant.
J. C. Hunt, for defendant.

WALLACE, District Judge. The description, as well as the drawings and model accompanying the original patent, clearly point out the invention claimed in the reissue. The improvement consists in a compact device embodying a loop, bottom plate, and buckle to be attached to a strap by rivets or an equivalent fastening. In my view, the valuable feature of the improvement does not consist in the method by which the case is fastened to the strap, but in the case itself, as forming a loop and buckle combined, and its adaptability to being fastened by various methods to the strap. In the original patent the claim did not cover the combination of the buckle with the case, or, speaking more accurately, with the bottom plate of the shell of the case, but was limited to a combination of the pins or rivets with the case. It was the object and the proper office of the

reissue to correct this omission so as to protect the patentee to the full extent of his invention. It is urged that there is want of novelty in the arrangement by which the buckle is fastened upon the bottom plate of the shell. The evidence in support of this theory is unsatisfactory, and cannot prevail against the testimony of dealers introduced by the complainant and against the presumption afforded by the complainant's patent. I am not satisfied that the means described in complainant's patent for fastening the shell to the strap are an essential feature of his device, although evidently regarded as such by the patentee. If they are, there is reason to believe that the defendant has so far improved upon this feature in his device as to have made a patentable improvement instead of employing an equivalent. In either case the complainant must rely upon the second claim for the purposes of this action. As defendant has appropriated the combination covered by that claim, there will be a decree declaring that claim infringed, and for an injunction and accounting accordingly, with costs.

[For other cases involving this patent, see Loercher v. Crandal, 11 Fed. 872; Metal Stamping Co. v. Crandall, 18 O. G. 1531.]

Case No. 12,486.

SCHULENBURG et al. v. HARRIMAN.

[2 Dill. 398.] [1]

Circuit Court, D. Minnesota. 1872. [2]

GRANT — CONSTRUCTION — RAILROAD AID — LEGAL TITLE TO THE LANDS—REVERTER—REPLEVIN — MINGLING LOGS IN BOOM — MEASURE OF DAMAGES.

1. Land grant to the state of Wisconsin to aid in the building of railroads (11 Stat. 20), construed.

2. The legal title to said lands is in the state in trust for the building of the railroads named.

3. Such lands do not, ipso facto, revert to the United States, by mere failure to build the road within the period prescribed in the act of congress. To effect the forfeiture, some act on the part of the general government evincing an intention to take advantage of such failure is essential.

4. The state has power to protect such lands from trespass, and may maintain replevin or trover for logs cut thereon by trespassers.

5. Under the legislation of Minnesota (Rev. St. Minn. p. 250), it is not necessary, to enable the state to maintain replevin where the adverse party has indistinguishably mingled logs cut upon such railroad lands with others bearing the same mark, and especially where he refuses, upon demand made to recognize the right of the state, that the state shall trace, and identify each log, for which it asks a verdict, to have been cut upon the said railroad lands.

6. Measure of damages under the statute in such cases stated.

7. Stipulation, in replevin, construed.

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

[2] [Affirmed in 21 Wall. (88 U. S.) 44.]

This was replevin for a large quantity of saw-logs, and is one of many similar cases pending in the court. The plaintiffs [Frederick Schulenburg, Adolf Boeckeler and Louis Hospes] cut the logs upon odd sections of the lands granted by congress "to the state of Wisconsin to aid in the construction of railroads in said state," by act approved June 3, 1856 (11 Stat. 20). This act provided "that the land hereby granted shall be exclusively applied in the construction of the railroad for which it is granted and selected, and shall be disposed of only as the work progresses, and shall be applied to no other purpose whatsoever." "That the said lands hereby granted to the state shall be subject to the disposal of the legislature thereof for the purposes aforesaid, and no other;" and "shall be disposed of by said state only in the manner following—that is to say, a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of road, may be sold; and when the governor of said state shall certify to the secretary of the interior that any twenty continuous miles of said road are completed, then another like quantity of land hereby granted may be sold; and so, from time to time until said road is completed; and if said road is not completed within ten years, no further sales shall be made, and the land unsold shall revert to the United States." On the 5th day of May, 1864, congress "extended" the above act of June 3, 1856, "to a period of five years from and after the passage of this act," May 5, 1864 (13 Stat. 66). On the 10th day of March, 1869, the legislature of the state of Wisconsin passed an act of which the nineteenth section is as follows: "For the purpose of aiding in the construction of the railway hereby incorporated, the state of Wisconsin hereby grants and transfers unto the said company all the rights, title, interest, and estate, legal or equitable, now owned by the state in and to the lands heretofore conditionally granted to the Saint Croix & Lake Superior Railroad Company for the construction of a railroad and branches; and the said state of Wisconsin does further grant, transfer, and convey unto the said railway company hereby incorporated the possession, right, title, interest, and estate, which the said state of Wisconsin may now have or shall hereafter acquire of, in, or to any lands through gift, grant, or transfer from the United States, or by any act of the congress of the United States amending 'An act granting a portion of the public lands to the state of Wisconsin to aid in the construction of a railroad, approved June 3, 1856,' and the act or acts amendatory thereof, or by any future acts of the congress of the United States granting lands to the state of Wisconsin, so far as the same may apply to and in the construction of a railroad from Bayfield, in the county of Bayfield, in a southwesterly

direction, to the intersection of the main line of the Northern Wisconsin Railway, from the lake or river Saint Croix to Superior, to have and to hold such lands, and the use, possession, and fee in the same, upon the express condition to construct the herein described railway within the several terms and spaces of time set forth and specified in the next preceding section of this act; and upon the construction and completion of every twenty miles of said railway, the said company shall acquire the fee simple absolute in and to all that portion of the lands granted to this state, in any of the ways hereinbefore described, by the congress of the United States, appertaining to that portion of the railway so constructed and completed." Laws Wis. 1869, p. 972. The said railroad, nor any part thereof, has not been constructed by the said railway company; and congress has passed no act since May 5, 1864, above-mentioned, extending the time for building the road beyond May 5, 1869; nor has it passed an act declaring a forfeiture of the rights of the state under the said acts of June 3, 1856, and May 5, 1864, or declaring that the lands had reverted to the United States by reason of the failure to complete the railroad by the 5th day of May, 1869. The legislature of Wisconsin passed an act to protect these lands from trespassers. The defendant, Samuel Harriman, is the agent of the state of Wisconsin, duly appointed and commissioned, and as such seized logs which had been cut by the plaintiff in 1870 upon said railroad lands; and thereupon the plaintiff brought this action of replevin. The defendant claimed that the legal title to the logs was in the state of Wisconsin. The plaintiffs claimed: (1) That the state of Wisconsin had no title to the logs, because the title to the lands from which they came had, before the logs were cut, reverted to the United States; and (2) if the lands had not thus reverted, that the title thereto was in the said railroad company by virtue of the above-mentioned act of the state legislature of the 10th day of March, 1869.

Brisbin & McCleur, for plaintiffs.

C. K. Davis and Mr. Spooner, for defendant.

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

PER CURIAM. 1. We hold that the legal title to the lands granted by the act of June 3, 1856, is, by virtue of that act, in the state of Wisconsin, in trust for the building of the railroad.

2. That the lands had not reverted to the United States, there having been no judicial proceeding, no act of congress, and no other act of the general government, to take advantage of the failure to build the railroad or to declare the forfeiture.

3. That the title to the lands could be disposed of by the state only in the manner provided in the last section of the aforesaid act of congress of June 3, 1856, and that the state could not, before the building of the road, divest itself of the legal title to the lands, and that the act of the state legislature of the 10th day of March, 1869, should not be construed as intended to have that effect.

4. That as the legal title to the lands where the logs were cut was in the state of Wisconsin, it had authority to protect them from trespassers, and it would be the owner of logs cut thereon by third persons without authority.

After the testimony was concluded, the presiding justice charged the jury as follows:

MILLER, Circuit Justice. This is an action of replevin. It is admitted by counsel that the plaintiffs obtained possession of the logs under a writ of replevin. It has been stipulated by the parties that plaintiffs were in the quiet and peaceable possession of the logs before defendant seized them, and that defendant's seizure thereof, as to the manner of making it, was valid and legal.

The stipulation as to the plaintiffs' "quiet and peaceable possession of the logs" is not an admission by the defendant that the plaintiffs' possession was rightful, or that the plaintiffs were the owners. These questions were left open by the stipulation, and are to be decided by the jury under the instructions of the court.

The presumption arising on the stipulation entered into between the parties is, that the logs were the plaintiffs' property; it makes out a prima facie case for the plaintiffs. That is its only effect. It throws the burden of proof on the defendant, to show title or right of possession in himself. The defendant, as the duly commissioned agent of the state of Wisconsin, claims that the logs in dispute were cut on the railroad lands granted by congress to the state of Wisconsin, by act of congress of June 3, 1856 (11 Stat. 20).

The legal title to these lands, and the logs cut thereon without authority, is in the state of Wisconsin. Evidence has been offered by the defendant with a view to show that the plaintiffs cut logs on said lands, and that they were mingled with a large quantity of other logs having the same marks, belonging to the plaintiffs, and were in this condition while in the boom at Stillwater and when seized by the defendant.

The plaintiffs insist that the defendant cannot recover except so far as he traces and identifies each log for which he asks a verdict, to have been cut upon the said railroad lands. However it might be at common law, we instruct you that under the legislation of this state—where the logs were seized by the defendant and replevied by the plaintiffs (Rev. St. Minn. p. 250)—and the decisions of the courts in the lumber regions applicable to such controversies, that it is not necessary that the defendant should trace and identify each log; that is, if you are satisfied from the evidence

that the plaintiffs cut logs on the said railroad lands, without authority from the state, and that these logs, thus cut, were driven by the plaintiffs down the river into the boom at Stillwater, in this state, and mingled with other logs belonging to them, bearing the same marks, so that the two classes of logs could not be distinguished, then the defendant had at least a right, especially after demand of the plaintiffs, to get from that boom a quantity of said logs equal to those which he shows were cut by the plaintiffs on said railroad lands.

If you find for the defendant, the measure of his damages (under the statute of the state relating to replevin) will be the value of the logs thus traced by the defendant from the railroad lands to the boom at Stillwater, and of which defendant was in possession (as stipulated) when the suit in replevin was commenced.

NOTE. Verdict for defendant for $16,809.97, upon which judgment was entered, and a writ of error taken. [The supreme court affirmed the judgment of this court. 21 Wall. (88 U. S.) 44.] The other cases, by stipulation, abided the result of this. By the statute of Minnesota, mentioned in the charge, it is provided:

"Sec. 39. In all cases of wrongful or unlawful taking, detention and conversion of logs or timber, and intermingling the same with other logs and timber so they cannot be identified and separated therefrom by the owner, the rule of the common law applicable to the case of a wrongful and fraudulent confusion of goods, shall govern in determining the right of property in respect to said logs and timber."

"Sec. 40. In cases where logs or timber bearing the same mark, but belonging to different owners in severalty, have, without fault of any of them, become so intermingled that the particular or identical logs or timber belonging to each cannot be designated, each of such owners may, upon the failure of any one of them having the possession, to make a just division thereof after demand, bring and maintain against such one in possession an action to recover his proportionate share of said logs or timber, and in such action he may claim and have the immediate delivery of such quantity of said mark of logs or timber as shall equal his said share, in like manner and with like force and effect as though such quantity embraced his identical logs and timber, and no other." Rev. St. Minn. c. 32, p. 250.

Before settling the foregoing charge, the state decisions in Michigan, Wisconsin, and Minnesota, in respect to mingling logs or suffering them to become mingled with others, were examined. Stearns v. Raymond, 26 Wis. 74. Construction of congressional land grant in favor of the Union Pacific Railroad Company, see Union Pac. R. Co. v. Watts [Case No. 14,385].

Case No. 12,487.

SCHULENBURG v. KABURECK et al.

[2 Dill. 132.] [1]

Circuit Court, E. D. Missouri. 1873.

BANKRUPTCY—FRAUDULENT SALE—DUTY OF PURCHASER TO MAKE INQUIRY.

1. Where a joint purchase of property is made by two persons, in contravention of the bankrupt act [of 1867 (14 Stat. 517)], the recovery by the assignee in bankruptcy may be against both for the full value of all the property, though the purchasers may have been interested in different proportions.

2. What circumstances will put the purchaser upon inquiry as to the bona fides of a proposed sale, and the degree of inquiry that is requisite, considered.

Writ of error to the district court of the United States for the Eastern district of Missouri.

The action was one by the assignee [Rudolph Schulenburg], under section 35 of the bankrupt act, to recover the value of property alleged to have been fraudulently sold by the bankrupt to the defendants, Conrad Kehler and George Kabureck. In their answer, the defendants admit "that on, etc., they purchased from the said William Hartman (the bankrupt), in satisfaction of a debt owing by said Hartman to the defendant Kabureck, of $700, and of another debt owing by Hartman to the defendant Kehler, of $300, the property mentioned in the petition;" but they deny the fraud, etc., imputed to them. All of the evidence is in the record, and it shows that Hartman, the bankrupt, was the lessee and proprietor of a boarding house, and saloon connected with it, in St. Louis; that he was indebted to various persons, and among others, to the defendants; that the defendants purchased all the property of the bankrupt in the boarding house and saloon for $1,000, which was paid for by their debts against him, unless it may be that Kehler paid $300 in money; that this was all the property that Hartman had, except money on his person; that he absconded, and that the defendants had both admitted that they made the purchase "to save themselves." The defendants, one of whom was a butcher, and the other a grocer, did business near Hartman and supplied him, the one with meat, and the other with groceries and liquors. On the trial the defendants excepted to the instructions given by the court to the jury, and a verdict and judgment having been rendered against them, [case unreported,] they bring the case into this court by writ of error.

F. & L. Gottschalk, for plaintiffs in error.

Slayback & Haussler, for defendant in error, the assignee.

DILLON, Circuit Judge. That the defendants' purchase is one which cannot stand, under the bankrupt act, as against the assignee. is very clear upon the admitted facts and undisputed testimony. The judgment should not, therefore, be reversed except for errors of law, occurring on the trial, prejudicial to the defendants. On the argument two such errors are urged, which will briefly be noticed:

1. One of the defendants paid $300 and the other $700 of the purchase money. The $700 was confessedly paid by a debt owing to the purchaser by the bankrupt, and the answer admits the same as respects the $300 paid by the other defendant, and he is concluded on this point by the admission in the pleadings.

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

The answer, the testimony, and the bill of sale, show a joint purchase by the defendants of Hartman's property. The court charged the jury "That if these two defendants purchased the property together, the consequences resulting to the one are the same as to the other." It is urged that the court erred in this, and that the jury ought to have been allowed to find separate verdicts or amounts against the defendants, proportioned to the sums which they respectively paid for the property. But as they bought the whole property together, as a joint purchase, the instruction of the court is manifestly correct.

2. The court, in substance, also instructed the jury that the fact that the sale by the bankrupt to the defendants was out of the usual course of business, was prima facie evidence of fraud, and that the law devolved upon the defendants the burden of proof to show that the sale was fair, and that they had made diligent inquiries as to the solvency of Hartman before purchasing. The objection made to this charge is to that portion which requires that they should have made diligent inquiries.

The degree of inquiry which devolves as a duty upon a person who proposes to make a purchase out of the usual course of the business of the seller depends upon the circumstances of the particular transaction. Such a person must, in all cases, make a reasonable inquiry as to the right of the seller to make the proposed sale. In the case before us there were other circumstances showing that the defendants' purpose was to obtain a preference, and the charge of the court must be looked at in the light of the case before it. And we think the case was such as to justify the court in saying that it was the defendants' duty to make diligent inquiry as to the right of the bankrupt to make the proposed sale. At all events, upon the facts known to the defendants, the proposed sale was in contravention of the bankrupt law, and the defendants were not prejudiced by the instruction.

The judgment is affirmed.

Affirmed.

As to degree of diligence on the part of a purchaser out of the usual course of business, see opinion of the supreme court of the United States in Walbrun v. Babbitt [16 Wall. (83 U. S.) 577] December term, 1872, affirming judgment of the circuit court [Case No. 694].

SCHULER (UNITED STATES v.). See Case No. 16,234.

SCHULTZ (BALDWIN v.). See Case No. 804.

Case No. 12,488.

SCHULTZ v. BOSMAN.

[5 Hughes, 97.]

District Court, D. Maryland. Nov. 1, 1879.

ADMIRALTY— JURISDICTION — LIBEL IN PERSONAM — SHIPPING — AUTHORITY OF MASTER — VESSEL IN HOME PORT.

[1. A court of admiralty has jurisdiction to enforce the liability of the owner of a vessel for materials and supplies, by libel in personam, without regard to the existence of a lien on the vessel for such materials and supplies.]

[2. The master of a vessel has authority to bind the owner for repairs and supplies, not unusual in amount and necessary for the vessel, even when she is in her home port, if the owner does not reside at such port, and is not within easy access of it.]

[3. The master of the schooner C., a vessel registered in the district of Maryland, while she was lying at Baltimore, purchased, on the credit of the owner, a pair of side lights and a fog bell, which were necessary for the navigation of the schooner. The owner resided in Crisfield, Md., a place not easy of access from Baltimore. *Held*, that the master had authority to bind the owner.]

[This was a libel by Alexander H. Schultz against Edward Bosman, owner of a domestic vessel, for supplies purchased by the master.]

MORRIS, District Judge. This is a libel in personam against the owner of the schooner Clara, of Crisfield, Md., to recover for supplies furnished the schooner by direction of the master while she was lying in the port of Baltimore; the owner being a resident of Somerset county, Maryland. The sale and delivery of the articles for the payment of which this action was brought was fully proved; they were principally a pair of side lights and a fog bell furnished the schooner Clara, and were articles necessary for her navigation, indeed without those just mentioned she would have been liable to serious penalties under the United States Revised Statutes. They were purchased by the master upon the credit of the owner; and this suit is resisted upon the ground that the schooner being a vessel registered in Maryland was, when lying at Baltimore, in a home port, and that the master had not therefore authority to bind the owner for repairs or supplies.

It certainly has been held that the master has not usually authority to pledge the credit of the owner for necessary repairs made at the home port where the owner resides and can be consulted and can personally interfere, unless the owner has held out the master as having such authority or has ratified his contracts. The reason of this is, that the foundation and nature of the authority of the master arises from the requirements of the peculiar and responsible duties of his position, and his authority must be commensurate with those duties; when the reason for his authority disappears, then his authority ceases. Therefore the authority of the master to bind the owners of the vessel is more extensive abroad than in a home port. In foreign ports (and ports of states other than those where the vessel belongs are for that purpose considered foreign ports) it is uniformly held that the master has authority to contract on the credit of the owner for such supplies and repairs as are reasonably fit and proper for the ship and the voyage. This authority arises from the necessity of procuring the supplies, the absence of the owner, and the presumption that if he had been consulted he would as a prudent man have pro-

cured them, and would not have allowed the voyage to be broken up or the ship to suffer for want of them.

It is only so far and just to the extent that the reason and necessity for such authority ceases in a home port that the authority of the master is restricted. It is no inflexible rule arising from statutory legislation or any question of jurisdiction, and the restriction should not be pushed further than the reasons of it require. When therefore, although the port where materials or supplies are furnished may be in one sense a home port, if it is not the port where the owner resides and if he is not within easy access of it, and the repairs or supplies are not unusual in amount and are such as a reasonable and prudent owner would have sanctioned if present, I think the master must be held to have power to bind the owner. Of course the supplies and repairs which are reasonably fit and proper under such circumstances for the master to contract for upon the credit of the owner without consulting him are much more restricted as to kind and amounts than would be the case in a foreign port, and greater caution and inquiry in giving the credit should be exercised by the material man before furnishing them.

In the case under consideration the owner lived at Crisfield, a place not of easy access from Baltimore, and the supplies were such as were indispensable to the navigation of the vessel, and they were furnished on the credit of the owner, the master having no credit. They were not provisions to be consumed by the crew, but articles which went to the equipment of the vessel, and the owner presumably got the benefit of them.

It was suggested by the respondent that he should not be held liable as owner of the vessel because he had agreed with his brother, who was master, to sell the vessel to him; but it is conceded that he continued to be the registered owner and that his brother not being able to pay for the vessel, the agreement of sale was subsequently rescinded between them, no change having been made in the registry. Having held himself out to the public as owner, and having put in his brother as master and suffered him to remain without notice of any change, no such private understanding between them which they could set up or rescind at pleasure and without notice to anyone, can affect the rights of the libellant.

In the argument of this case a question has been raised as to the jurisdiction of this court to entertain an action in personam for such a cause of action where there is no privilege or lien in rem on the vessel. It was argued with great earnestness and with many references to authorities, and as the question is an important one, applying to many cases pending in this court, I have considered it with care, although I never supposed there could be doubt with regard to it at this day. It was asserted that by decisions with regard to jurisdiction of admiralty courts and particularly by Dr. Lushington, the doctrine had been established that no suit could ever be maintained against the ship if the owners were not personally liable, and vice versa that in no case where the ship was not liable could the owners be held in personam; and that this doctrine had been recognized by the supreme court in the changes they have from time to time made in the twelfth admiralty rule, and by the opinion delivered by Mr. Justice Johnson in Ramsey v. Allegre, 12 Wheat. [25 U. S.] 613.

I do not find this proposition supported by the weight of authority in this country. Mr. Justice Story, delivering the decision of the supreme court in The General Smith, 4 Wheat. [17 U. S.] 438, says: "No doubt is entertained by this court that the admiralty rightfully possesses a general jurisdiction in cases of material men, and if this suit had been a suit in personam there would not have been any hesitation in sustaining the jurisdiction of the court." And he then proceeds to dismiss the libel in rem, because being a domestic vessel the material man had no lien upon the ship. In the opinion delivered in 1827 by Mr. Justice Johnson in Ramsey v. Allegre [supra], speaking for himself, but not for the court, they having put their decision upon a different ground, he repudiates the doctrine just above quoted from the opinion of Mr. Justice Story, and in a most learned and lengthy discussion endeavors to establish the doctrine contended for by counsel in this case, but I do not find that his views have ever been sanctioned or approved by the court in any subsequent case; on the contrary, it is apparent that they have constantly taken for granted that such was not the law governing admiralty practice and jurisdiction in this country. Chief Justice Taney, thirty-four years later, delivering the opinion of the supreme court in the year 1861, in the case of The St. Lawrence, 1 Black [66 U. S.] 529, said: "In the case of a foreign vessel the repairs and supplies are presumed to be furnished on the credit of the vessel, but in the case of a domestic vessel the supplies are presumed to be furnished on the personal credit of the master or owner, and where the local law gives the party no lien he must seek his remedy against the person and not against the vessel. In either case the contract is equally within the jurisdiction of a court of admiralty." In 1874, in the case of The Lottawanna, 21 Wall. [88 U. S.] 559, Mr. Justice Clifford in his dissenting opinion says: "Contracts or claims for services or damage purely maritime and concerning rights and duties appertaining to commerce and navigation are properly cognizable in admiralty, and this without regard to whether by the maritime law a privilege or lien is given upon the ship or not, and it is beyond dispute that a contract for necessary repairs or supplies is a maritime contract whether the vessel was at home or abroad when the repairs or supplies were made."

I think it is clear that the action in personam is the general remedy in admiralty of

the material man in all cases, he having also in certain cases and subject to certain limitations a further and more effective remedy by virtue of a lien on the ship. 1 Conk. Adm. 76. The ground of the action is in the liability of one person to respond to another and the court may enforce it against the person or against a particular portion of his property or against his property generally as the law may have provided the right. Ben. Adm. § 304. See, also, sections 269 and 270.

One very great reason for denying the maritime lien or privilege on the ship in case of domestic repairs and supplies (unless given by the local law which usually requires notice to be given by recording) is that it is a secret lien and that the rights of persons who invest their money in the purchase or loan money on mortgages of such ships are put in jeopardy, but there is no such objection to a right of action against the owner in personam. The very ground upon which a lien or privilege upon the ship is given in a foreign port is that the master was not able to procure the supplies upon the credit of the owner. If the claimant of a ship libelled by a material man can show that the master could have obtained the supplies and repairs on the credit of the owner and that the material man knew such to be the fact then the libel in rem cannot be maintained, but a libel in personam against the owner could be.

So far as I can find, although from time to time the attempt has been made to fasten such a doctrine upon the admiralty courts of this country, at no time has it ever been held that their jurisdiction is restricted to cases in which there is a right to proceed in rem. The quotations I have made from decisions of the supreme court show that whatever may have been at times the individual views of dissenting justices the court has always upheld the contrary doctrine. It is an error I think to suppose that the twelfth admiralty rule gives it recognition. In the rule of 1844, the proceeding in rem was allowed in cases of domestic ships where by the local law a lien is given. The rule is silent as to the action in personam, but the action in personam was not forbidden. It was in fact constantly used. By the rule of 1859 the proceeding in rem was disallowed and that is the whole effect of the alteration. The rule of 1872, is general in its terms, giving to all material men, whether against foreign or domestic ships, their option to proceed either in rem or in personam. But of course only where under the law in admiralty they have the right. The changes in the rule never proposed to give or to take away any right, but merely to declare that if the material man under the state law had a lien on the ship he might proceed or that he should not proceed to enforce it in admiralty.

The doctrine in this point declared by Dr. Lushington to be the law of the English admiralty courts as well as the other question to be decided in this case are fully discussed by Judge Shipman, in the case of Fox v. Holt [Case No. 5,012]. He says: "Some of the articles charged for are of a character pertaining to what may be called the furniture and implements for necessary and permanent use on board the vessel." They were articles required for immediate use and though furnished at a home port it was at a place 20 miles distant from the residence of the principal owner. Such articles immediately needed for current use I think the master could in the absence of funds in his hands obtain even in a home port at this distance from the owner upon the credit of the owner.

It is laid down by Dr. Lushington in the case of The Druid, 1 W. Rob. Adm. 391, that no suit could be maintained against the ship if the owners were not liable, and that if the ship is not liable the owners are not, and vice versa. It is clear that the master can create no lien on the ship for repairs in the home port where her owners reside unless it is recognized by the law of that state; but can he not bind the owners personally? The authorities are not uniform or consistent but they undoubtedly imply exceptions to the rule laid down by Dr. Lushington, and their general tendency is to support the doctrine that the owners are personally responsible for such repairs and supplies ordered by the master, as are reasonably fit and proper and apparently necessary to enable the vessel to navigate the sea and perform her voyage in safety, though obtained in a home port, and especially in one at some distance from that at which the owners reside.

I will sign a decree in favor of the libellant for the amount claimed and costs.

SCHULTZE (PECK v.). See Case No. 10,895.

SCHULTZ, The P. C. See Case No. 10,865.

Case No. 12,489.

SCHULZE v. BOLTING.

[8 Biss. 174;[1] 17 N. B. R. 167.]

District Court, W. D. Wisconsin. Feb. 13, 1878.

BANKRUPTCY—MORTGAGE TO SECURE FUTURE ADVANCES—CORRECTION OF MISTAKE.

1. A mortgage to secure future advances is good as against the assignee in bankruptcy for the amount of advances actually made thereon.

2. A mistake in the description of the premises in such mortgage may be corrected as against the assignee to the same extent as would have been allowed against the mortgagor.

In bankruptcy.

T. L. Kennan, for plaintiff.
Cox & Rogers, for defendant.

BUNN, District Judge. On the 24th of November, 1876, Henry Bolting filed his peti-

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

tion to be declared a bankrupt, and on the same day was declared a bankrupt by this court, and the plaintiff, F. W. Schulze, on the 5th of December thereafter was appointed assignee, and the estate of the bankrupt duly assigned to him. Afterwards, on the 15th day of February, 1877, Francis Bolting, the defendant in this suit, commenced an action in the state court, to correct a mistake in the description of premises contained in a mortgage upon real estate in Portage City, Wis., executed by Henry Bolting and wife, to him, September 27, 1875, for the sum of $4,000.

This action is brought to set aside that mortgage on the ground that it was obtained and given to hinder and delay creditors, and was without consideration. The evidence fails entirely to show any fraud or want of consideration in the giving of the mortgage. On the contrary, it is proven that at the time the mortgage was given Henry Bolting was indebted to Francis in the sum of $779.14 for goods theretofore sold by Francis to him. The mortgage was given to secure the balance of indebtedness and also future advances of goods to be made by Francis to Henry. On September 30, three days after the mortgage was given, Francis Bolting sold and advanced to Henry on the strength of this mortgage goods to the amount of $959.81, making an indebtedness of $1,738.95, for which the mortgage is a valid security.

The mistake in the description of a portion of the property mortgaged is clearly proven, but it is insisted that this mistake cannot be corrected as against the assignee of Henry Bolting. This is a mistaken view. The assignee is not in the situation of a purchaser for value without notice. He simply succeeds to the rights of Henry Bolting and his creditors, and takes the actual interest which Henry Bolting and his creditors had in the property at the time of the filing of the petition, subject to all legal and equitable claims of other persons. He is in no better position than they would be to defend against an equity like this. And it is clear law that as against Henry Bolting, his heirs or personal representatives, and as against his creditors, even judgment creditors whose judgments are a lien on the land, such an equity must prevail. Such a special equity and charge upon the land will prevail as against the general lien of the judgment. 1 Story, Eq. Jur. § 165; Ontario Bank v. Mumford, 2 Barb. Ch. 596; Cook v. Tullis, 18 Wall. [85 U. S.] 332; Mitchell v. Winslow [Case No. 9,673]; Kelly v. Scott, 49 N. Y. 595; Spackman v. Ott, 65 Pa. St. 131; Rhoades v. Blackiston, 106 Mass. 334; Winsor v. Kendall [Case No. 17,886]; Donaldson v. Farwell [93 U. S. 631]; Coggeshall v. Potter [Case No. 2,955]; Hayes v. Dickinson [9 Hun, 277].

As the mistake is set out in the answer and clearly proven, although no affirmative relief is sought by the defendant, I see no objection to his amending his answer or filing a cross bill praying for such relief, and taking a decree for the reformation of the mortgage. This course may save the expense of another action for that purpose. There must also be a decree for a perpetual injunction restraining the further prosecution of the action brought in the state court. If such actions were allowed to be prosecuted in the state court, it would lead to endless delay and complication in the settlement of the estate in this court. The defendant proved up his claim in this court in the bankruptcy proceedings, and all the difference between the situation of his case and the unsecured creditors is, that he will be entitled to preference of payment out of the funds realized from the sale of the mortgaged property. And if any action to foreclose the mortgage becomes necessary, that action should be prosecuted in this court by leave of the court first obtained, but probably no such action will be necessary. Phelps v. Sellick [Case No. 11,079]; Whitman v. Butler [Id. 17,579]; Markson v. Haney [47 Ind. 31]; Clifton v. Foster, 103 Mass. 233.

Decree to be entered in accordance with this opinion.

Case No. 12,490.

SCHUMACHER v. MANHATTAN LIFE INS. CO.

[3 Ins. Law J. 455.] [1]

Circuit Court, E. D. Missouri. 1874.

INSURANCE — LIFE — FAILURE TO PAY PREMIUMS — RIGHT TO DEMAND PAID-UP POLICY — RE-EXAMINATION.

A ten-premium life policy for $2,000 contained the conditions that after two annual payments were made the insured could have a paid-up policy for an amount equal to as many tenths of the original policy as he had paid premiums. Failure to pay any of the annual premiums when due worked a forfeiture. It was the custom of the defendant to restore forfeited policies within thirty days on the presentation of a certificate of good health, and within six months on satisfactory medical examination. On November 3, 1871, the insured made a tender of premium due May 16th, which was refused unless he would make a new application and pass a new medical examination, which he failed to do. Insured died December, 1871. Plaintiff claimed a paid-up policy of $1,000,—five annual premiums having been paid,—or the whole amount she was entitled to, as might appear from the facts on trial. *Held*, that she was not entitled to recover, because (1) there never was any demand for a paid-up policy, or offer to surrender the old one; (2) because the insured failed to present a certificate of good health up to the time of his death; (3) because he failed to pass a satisfactory new medical examination.

The plaintiff [Elizabeth F. Schumacher] in the above cause sued upon a policy of insurance for the sum of $2,000, issued by defendant May 13, 1866, upon the life of her hus-

[1] [Reprinted by permission.]

band, who died in December, 1871. The policy was upon what is known as the "ten-year plan," and the insured had the right at any time after the payment of two annual premiums upon his policy, and upon surrendering the same (no default having been made in the payment of premiums), to demand a paid-up policy for an amount which should bear the same proportion to $2,000 as the number of premiums paid bore to ten premiums. The policy also provided that failure to pay any annual premium when due should work a forfeiture. Plaintiff asked judgment in her petition for either the amount of a paid-up policy for $1,000, or for the whole amount of the policy sued on, as it might appear from the facts she was entitled to. Upon the trial it appeared: That the insured died in December, 1871, having paid five annual premiums on his policy, the first four having been paid on or before the days when they fell due, respectively, and the last having been paid August 17, 1870, and about three months after it fell due. That it was the custom of the defendant in the prosecution of its business to receive premiums on its policies at any time within thirty days after the time for payment had passed, and the policies were restored upon presentation of a health certificate, and at any time within six months after forfeiture upon a medical examination. That before defendant received the fifth annual premium from deceased, it had required of him, and he had given, the usual health certificate, and that at no time had the deceased demanded a paid-up policy, or offered to surrender his, the original one. It further appeared that on November 3, 1871, the deceased, through a friend, made a tender to defendant of the premium due May 16, 1871, but that he did not at that time, or any time before his death, tender a health certificate; and it also appeared that about the middle of the month of November, previous to the death of the insured, defendant offered to renew his policy on condition that he would make a new application, pass a satisfactory medical examination, and pay his premium, all of which he failed to do.

Geo. P. Strong, for plaintiff.

Hitchcock, Leibke & Player, for the company.

Upon these facts THE COURT (DILLON, Circuit Judge) instructed the jury that the plaintiff was not entitled to recover: (1) Because there never was any demand for a paid-up policy, or offer to surrender the policy sued; (2) because, after the premium was due, May 16, 1871, and when on November 3, 1871, payment was tendered, no health certificate was tendered, nor was any such certificate tendered at any time previous to the death of the assured; and (3) because when, subsequent to said November 3d, a proposition was made to renew on condition that the assured should make a new application and pass a satisfactory medical examination and pay said premium, he failed to comply with any of said conditions.

Upon the giving of this instruction the plaintiff submitted to a nonsuit.

SCHUMAN v. FLECKENSTEIN. See Case No. 12,826.

SCHUMANN (UNITED STATES v.). See Case No. 16,235.

SCHUMENANT (UNITED STATES v.). See Case No. 16,236.

Case No. 12,491.

In re SCHUMPERT.

[8 N. B. R. 415.] [1]

District Court, N. D. Mississippi. 1873.

BANKRUPTCY — FAILURE TO KEEP BOOKS —GROWING CROPS—FIFTY PER CENT. CLAUSE.

1. Where a bankrupt, after March, 1867, fails to keep proper books of account, such books as will enable an ordinary bookkeeper to determine his true financial condition,—his discharge will be refused.

[Cited in Re Archenbrown, Case No. 505.]

[Cited in brief in Re Howard, 59 Vt. 595, 10 Atl. 719.]

2. Growing crops unmatured should be entered by the bankrupt on his schedule of personal property.

3. For a debt contracted in 1863, a note was given at twelve months, and each year thereafter until 1870—the old note was taken up and a new note given, the last note given in 1870. *Held*, this was not a debt contracted prior to January 1, 1869, but comes under the fifty per cent. clause.

In bankruptcy.

HILL, District Judge. This cause is submitted upon the exceptions and specifications filed by T. L. Schumpert, a creditor who has proved his debt, against the discharge of said bankrupt, answer and proofs. The specifications number from one to nineteen. The answer denies each and every allegation contained in these specifications, the only question being whether or not the bankrupt is entitled to his discharge. If any one of the specifications, being sufficient to refuse the discharge, is sustained by the proof, the consideration of the remaining specifications will become unnecessary, and only such will be considered as may be thought necessary as affording rules in similar cases. Therefore, as most easy of a satisfactory solution of the question for decision, the sixth specification and proof thereon will first be considered. This specification is in the following words: "Because said bankrupt, being a merchant and tradesman, has not, subsequently to the passage of this act, kept proper books of account, in this: that he has not kept an invoice book; that he has not kept a cash book, a blotter, a day book, journal, ledger, or any other books of account, show-

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ing the condition of his business, at any time since the 2d of March, 1867." The bankrupt has, in obedience to the order of the court, filed three books, which he admits are all the books kept by him; these books show that he carried on the business of a merchant and tradesman from a period before the 2d of March, 1867, to the 1st of January, 1870. These books are more memorandums than books of account, and were kept in such a manner that neither the bankrupt nor anyone else can from them make any correct estimate of the condition of the business at any time during this period.

The bankrupt act wisely provides that merchants and tradesmen who purchase and sell upon credit, and who may become applicants for the beneficent provisions of the law, shall keep proper books of account, so as at any time to exhibit to those dealing with them and giving them credit, the condition of their pecuniary affairs, and upon a failure so to do, as a penalty for such neglect withholds from them the discharge to which they would otherwise be entitled. This being in the nature of a penalty only applies to transactions after the passage of the law [of 1867 (14 Stat. 517)]. This requirement is important for another reason, and that is, to enable the assignee to understand from the books the condition of the estate, and to properly settle it up. The question of a fraudulent intent in omitting to keep the proper books, is not involved; it is simply the omission to do that which is required and for the reasons stated. This is evident, from this provision of the act itself, without reference to the judicial construction placed upon it; were, however, such construction necessary, to maintain this position, it will be found in the decisions referred to by Mr. Bump, in his treatise on the bankrupt law and proceedings under it (pages 428 and 429). It is unimportant in what particular form the books are kept, or in what kind of books, if they are sufficient to exhibit the true financial condition of the merchant or tradesmen. Ordinarily there is an invoice book showing the purchases, a day book showing the daily sales, a cash book showing the cash received and cash paid out, a ledger and journal; but these different accounts, if the business is small, may be kept in the same book, but the accounts, whether kept in one or more books, must exhibit the financial condition of the merchant or tradesman. The books in this case failing to make such exhibit, for this reason, if there were no others, I am not at liberty to grant the discharge.

The first specification raises a question on which I am asked by counsel to decide, and whilst I had supposed there was no doubt upon the subject, and have adopted rules regulating proceedings in relation to it, as it is the first time it has been judicially raised, and as it is one which may be of importance in similar cases, will be considered. And that is, did the growing or ungathered crop of corn, cotton and potatoes, pass to the assignee under the assignment, and should they be placed upon the schedules as personal property? The first specification avers that the bankrupt did have in his possession, and own, and hold, as his own property, a crop of corn, cotton and potatoes raised on his farm, and most of which was ungathered when he filed his petition praying to be declared a bankrupt on the 26th day of September, 1870, which he failed to place on his schedules, and afterwards gathered and appropriated to his own use, and that in his affidavit to his petition and schedules he testified that they contained a true statement of all his estate, real and personal, which he then knew to be false. There is no question but that he owned the crops, and that he failed to include them in his schedules; but it is insisted by the bankrupt's counsel that these crops, which were then ungathered, constituted a part of the realty, and did not pass to the assignee as personal property, and should not have been embraced in the schedules. All the authorities hold growing crops, which are annually produced by the cultivator, to be emblements, and upon the death of the owner of the fee, and before their severance from the soil, they go to the personal representative, and not to the party taking the land as heirs at law; they also go to the personal representative of the tenant for life, if planted or sown before the death of the tenant. It is true, that when the owner sows or plants the crop, and before it is gathered devises the land, or sells and conveys it, and dies before the crop is gathered, the crop goes to the devisee or vendee; but this is upon the presumption that the testator or vendor so intended it, and not that it constituted a part of the realty. Such is the common law doctrine. Has this rule been changed by the statutes of this state? In the Revised Code of 1857, at page 389, and continued in the present Code, it is provided that in the trial of an action of ejectment, when the jury shall find for the plaintiff, and the defendant shall have a growing crop upon the land, the jury shall assess a reasonable rent for such time as may be necessary to make and gather the crop, and upon its being secured or paid the writ of possession shall not issue until the crop is made and gathered. Again, on page 448, it is provided that if an executor or administrator should deem it proper that the crop growing at the death of the testator or intestate be disposed of, the probate court upon application may decree a sale thereof at public or private sale, or if the court shall deem it best may direct the crop to be completed and gathered by the executor or administrator, and sold, and the proceeds, less expenses, to become personal assets. The supreme court of this state in the case of McCormick v. McCormick, 40 Miss. 760, whilst holding (the crop having only been planted at the death of the intestate, and cultivated and gathered by the heir at law) the administrator was not entitled thereto, intimate

in a proper proceeding he would be entitled to recover the value of the crop at the time the heir took possession of it, or that the administrator might have applied for a sale of the crop as it stood at the death of the intestate. The ruling of the court in this case clearly treats the crop, although only then planted, as personal and not real estate, and which is doubtlessly the correct rule. The crop in this case had been fully cultivated, and mainly matured before the filing of the petition, and should have been scheduled and accounted for according to the rules adopted on this subject. Having determined that on other grounds the bankrupt is not entitled to his discharge, it is not necessary to further consider the questions raised by this specification.

A question of more difficulty is raised by specification eleven, which alleges that the exceptor's demand is a judgment obtained on the 9th of June, 1870, and that the assets which have come to the hands of the assignee are insufficient to pay fifty per cent. of the amount due thereon. The bankrupt act as amended requires that unless the assets are equal to fifty per centum on the debts proved, in which the bankrupt is the principal debtor, contracted since the 1st of January, 1869, he shall not obtain his discharge unless a majority in number and value of those to whom he has become the principal debtor since that time, and who shall have proved their claims, shall file their assent in writing thereto. This provision alludes to the time the contract was made, and not to the date of payment. The proof shows that the note upon which the judgment was rendered was executed after the 1st of January, 1869. The original indebtedness was for money received belonging to the excepting creditor in 1863, for which he gave his note, which subsequently was renewed, the last renewal being the note upon which the judgment was rendered, at which time the former note was surrendered, and, so far as the proof shows, all the former notes were surrendered at and before the giving of the last note. The question for solution is, was the renewal of the note a contract within the meaning of this provision of the bankrupt law, or does it refer to the original indebtedness? The object of the law was to give to all those who had become involved to a greater amount than they had means to pay, an opportunity to be relieved from their liabilities upon a surrender of their property and assets of every kind, but, as a check upon future indebtedness and embarrassment, provided the application must be made within one year after the passage of the act, or, if not, that the assets should equal fifty per centum of the debts proved against the estate, or a majority in number and amount of those who proved their debts should agree thereto. The time was afterwards extended to the 1st of January, 1869, and this provision again amended by granting the discharge as to all debts contracted prior to the 1st of January, 1869, and to all debts subsequently contracted in which the bankrupt was not the principal debtor, and to all cases in which the assets equal fifty per centum upon the debts proven in which the bankrupt is the principal debtor, and a majority in number and amount shall file their written assent thereto. Had the bankrupt in this case not seen proper to renew the note, and there had been no other obstacle in the way, he would have been entitled to his discharge, but he voluntarily entered into a renewal of his engagement after the 1st of January, 1869. It is, however, true, that at the time the last amendment had not been passed, and so far as it then appeared he had nothing to lose by the renewal, but I am inclined to the opinion that it was a new contract, though based upon the former consideration; in other words, that it was a payment and discharge of the old indebtedness by the execution of the new note. It is a well settled rule that the acceptance of a note for a pre-existing debt does not discharge the original debt unless it is paid or transferred, or there is such laches upon the part of the holder that will discharge the debtor, or unless it is agreed between the parties that it shall operate as a discharge of the pre-existing debt. Some of the authorities hold that an express agreement must be proven, others, that it must be expressed, if not implied from the conduct and acts of the parties. I am satisfied that this agreement may, like almost every other fact, be established by circumstantial testimony, and that when a new note is executed, and the old one surrendered to the maker, the presumption arises that the new note was accepted in payment and discharge of the old note, unless sufficient proof is adduced to rebut this presumption, which has not been done in this case. Had the old note not been given up and surrendered this presumption would not have arisen, but it would still have left a difficult question of solution, as to whether or not the renewal of the note was not, under this provision of the bankrupt law, a new contract so as to subject the bankrupt to the fifty per centum clause. It is not like a case in which the consideration is the point to be determined. In such a case you may go back to the original consideration if insufficient, but it is more like the application of the statute of limitation, the bar of which is prevented by the execution of a new note or other acknowledgment of indebtedness, or the giving of a new promise for the payment of a debt discharged under proceedings in bankruptcy, which, it has been held, will bind the promisor. The question being, so far as I am informed, an entirely new one, I have examined it with all the lights available and have come to the conclusion that had there been no other difficulty in the way the bankrupt could not be discharged from this debt.

Case No. 12,492.

SCHURTZ v. The NEW YORK.

[N. Y. Times, June 1, 1855.]

Circuit Court, S. D. New York. May 31, 1855.

TOWAGE—LOSS OF BARGE—NEGLIGENCE.

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

In admiralty.

Owen, Betts & Vose, for libellant.

Platt, Gerard & Buckley, for appellee.

NELSON, Circuit Justice. This libel was filed by the owner of the barge Hero, which was sunk in a storm on the North river on the night of the 2d of August, 1854, near Yonkers, while in the tow of the tug New York. She was loaded with 213 tons of coal, and was stationed in the middle of the front tier of the tow on the larboard side of the tug, which consisted of three boats. Several grounds are taken upon the proofs, which are voluminous, in the case, in order to establish gross negligence on the part of the master of the tug, under the circumstances of the violence of the storm in which the boat was lost,—such as that its position in the tow was an improper one; that the tug was moving at too great speed at the time; that she should have come to an anchor or detached the boat from the tug, so as to have prevented it from being drawn under and sunk.

We have looked into this case with a view of these several grounds of complaint against the conduct of the tug, and agree with the court below that neither of them is sustained by the proofs. On the contrary, the clear weight of the evidence is that the sinking of the barge is attributable either to the effect of the storm that prevailed without the fault of the tug, or to the negligence of the master in not properly securing the forecastle hatch, in consequence of which it was forced open by the breaking of the water over, and letting it into her hold. This hatch, as described in the testimony, was covered with a box on combings rising from the deck, fitting tight, without any other fastening. The other two hatches were secured with hooks and staples, as this one should have been, or with bars properly fastened, which is better, and has since been adopted. The master of the barge, also, is not altogether free from blame, after the storm had arisen and danger apprehended, as he neglected to watch this ill-secured hatch after his attention had been called to it by some of the hands on the tug. We think the decree below, dismissing the libel, right, and affirm the decree.

SCHURZ, The CARL. See Case No. 2,414.

SCHUTTE v. FLORIDA CENT. R. CO. See Cases Nos. 17,433 and 17,434.

Case No. 12,492a.

SCHUTTE v. JACKSONVILLE, P. & M. R. CO.

[See Case No. 17,434.]

Case No. 12,493.

SCHUTZ et al. v. The NANCY.

[Bee, 139.][1]

District Court, D. South Carolina. March, 1799.

SALVAGE — COMPENSATION — AGREEMENT MADE WHILE IN DISTRESS.

Salvage must always be a reasonable allowance, to be fixed by the court upon consideration of the circumstances. All agreements, therefore, entered into in situations of distress at sea, are contrary to law, and will be set aside.

The Nancy, on her passage from Martinique to St. Kitt's sprung a leak, which being considerable, and one of the pumps being rendered useless, the crew agreed to stand for the first port. Four days after this, they threw overboard part of the cargo; in ten days more, made the land, and sent on shore for a pilot. The next day, the ship struck on a bank off Cape Romain, and at four in the evening fell in with a Danish ship, the mate of which was sent on board to ascertain her situation. The Danish captain also boarded her, and agreed, at the request of the captain of the Nancy, to stay by her that night, and, on the following day, to put his chief mate on board, who should take the command of the vessel and conduct her into port. It was further agreed between the two captains that, for these services, the Danish captain should receive such a sum as arbitrators might allow. The pump of the Nancy was repaired by the captain and crew of the other vessel; and she was towed by them till three o'clock the next day, when a pilot boarded her. The Danes then cast the ship off, and she was brought safely over the bar of Charleston.

THE COURT, in this case, said that salvage was unquestionably due, but must be reasonable; and that agreements entered into at sea, by persons in distress, were void in law: as in cases of duress on land. This was done in the case of Cowell v. The Brothers [Case No. 3,294], decided here. The judge also compared the circumstances of The Nancy with those of The Canada [Id. 219] and L'Esperanza [Id. 1,647], which had also been argued here; and after a full view of the case ordered that the sum of one thousand dollars should be allowed to the libellants by way of compensation.

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

Case No. 12,494.

In re SCHUYLER.

[3 Ben. 200;[1] 2 N. B. R. 549 (Quarto, 169); 16 Pittsb. Leg. J. 94; 2 Am. Law T. Rep. Bankr. 85.]

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

BANKRUPTCY — DISCHARGE — VOLUNTARY ASSIGNMENT—ESTOPPEL OF CREDITOR.

Where creditors opposed the discharge of a bankrupt on the ground that he had made a voluntary assignment of his property for the benefit of his creditors, contrary to the provisions of the bankruptcy act [of 1867 (14 Stat. 517)] and it appeared that, after the assignee had taken possession of the property under the assignment, an instrument in writing was executed by certain of the creditors, among whom were the opposing creditors, consenting that the assignee might transfer the assigned property to one R., and requesting said R. to "accept such transfer, take possession of said estate, dispose of the same, and distribute the nett avails thereof among all the creditors, according to the terms of said assignment," and thereupon the property was transferred to R. by the assignee: *Held*, that, on this state of facts, the opposing creditors were estopped from setting up the assignment in opposition to the discharge, and that a discharge would be granted when a certificate of conformity was furnished by the register.

[Cited in Re Sawyer, Case No. 12,394; Re Williams, Id. 17,706; Judson v. Courier Co., 8 Fed. 426.]

[Cited in Greene v. Sprague Manuf'g Co., 52 Conn. 372.]

In this case, the discharge of the bankrupt [Spencer D. Schuyler] was opposed on the ground that he, on the 7th of December, 1867, made a voluntary assignment of all his property, for the benefit of all his creditors, to Joseph Wescott; that he was insolvent at the time; and that he made such assignment with a view to prevent such property from coming to his assignee in bankruptcy, and from being distributed under the bankruptcy act, and to defeat the object of that act, and impair, hinder, impede, and delay its operation and effect, and evade its provisions. The voluntary petition of the bankrupt was filed on the 17th of December, 1867. The opposition to the discharge was made by Hunt, Tillinghast & Co., and by Mott, Brothers & Co., creditors of the bankrupt. The voluntary assignee, Wescott, accepted the assignment, and entered on the execution of the trust under it, and took possession of the assigned property. Immediately on doing so, he found it would be impossible for him, in view of his other business employment, to attend to the execution of the trust, and thereupon a paper was prepared, bearing date December 10th, 1867, and was signed by many of the creditors of the bankrupt, and among others by Hunt, Tillinghast & Co., and Mott, Brothers & Co., which recited the fact of the assignment to Wescott, and that it was "a general assignment of all his property, in trust for the payment of all his creditors, without partiality or preference," and that Wescott was willing to surrender the trust, and that Charles Raymond was familiar with the affairs and business of the bankrupt, and then proceeded: "Therefore we, the undersigned, creditors of the said Schuyler, hereby consent, that the said Wescott may transfer the estate, property, and effects, which came to him under said assignment, and we consent to and request of said Raymond, that he accept such transfer, take possession of said estate, dispose of the same, and distribute the nett avails thereof among all the creditors of said Schuyler, according to the terms of said assignment." In pursuance of such request and consent, Wescott, by an instrument in writing, dated January 2d, 1868, transferred to Raymond all the property which passed by the assignment from the bankrupt to Wescott, to convert it into money, and pay the debts of the bankrupt, in the manner specified by the assignment from the bankrupt to Wescott.

D. W. C. Brown, for bankrupt.
C. H. Smith, for creditors.

BLATCHFORD, District Judge. On the above state of facts, it is insisted on the part of the bankrupt, that however obnoxious the assignment by the bankrupt to Wescott may be to the provisions of the bankruptcy act, the creditors who take these objections are estopped from questioning the assignment, or urging the objections, by reason of the fact that those creditors, while enjoying the free election of ratifying or repudiating the assignment, have chosen to ratify it. I think this point is well taken. On the general principles of equity jurisprudence, it is very clear that these objecting creditors would never be allowed, under these circumstances, to come into a court of equity, and impeach the voluntary assignment, either by a direct proceeding to set it aside or in any other way. They stand in the same light towards that assignment as if they had been parties to it on its face. If they themselves had been the voluntary assignees, executing the instrument of assignment, as Wescott did, they would not be allowed, as creditors, to attack it as fraudulent and void as against the bankruptcy act. "Ex turpi causa non oritur actio." Yet their position is no different from what it would have been if they had been assignees under the assignment as well as creditors. They became parties to it by the paper they signed, and the effect of their signature to that paper, followed by the transfer from Wescott to Raymond, was the same, as regarded their relations to the assignment, as if their consent to the original execution of the assignment had been written thereon simultaneously with such execution. "Omnis ratihabitio retrotrahitur et mandato aequiparatur." They would not have been allowed,

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

after that, to urge the making of the assignment to Wescott as a ground for declaring the assignor an involuntary bankrupt. Perry v. Langley [Case No. 11,006] U. S. Dist. Ct. S. D. Ohio.

There is nothing in the fact that the creditors in question are opposing the discharge of the bankrupt on the grounds urged, which should induce the court to refrain from applying the principle of equity law to which I have referred. The question of withholding a discharge for any of the reasons specified in section 29, when the bankrupt has taken the oath required by that section, and it appears that he has conformed to the modal requirements of the act, is one wherein the creditors are the attacking party. If they enter no appearance and file no specifications, as required by general order No. 24, setting up, as required by form No. 53, some one or more of the causes specified in section 29 of the act as grounds for not granting a discharge, they are regarded as not opposing the discharge, and as assenting to it, and the grounds for refusing a discharge, specified in section 29, are regarded as not existing in respect to the particular bankrupt. So, also, the provision of section 34, that a creditor, in order to attack a discharge after it is granted, by showing that it ought to be avoided for some ground specified in section 29, must show, in addition, that he had no knowledge, until after the granting of the discharge, of the existence of the avoiding act or fact, clearly expresses the view of the law to be, that the creditor who has knowledge, before the discharge, of the existence of an act or fact which would prevent a discharge, may waive his right to enforce such act or fact, simply by his silence, when he might have spoken. If so, certainly, a fortiori, he may waive such right by affirmative acquiescence and ratification, such as these creditors have deliberately manifested in this case. The provisions of the 1st and 2d sections of the act and its whole scope show that the proceedings under it, in the bankrupt case proper, are regarded as proceedings in equity, and are to be governed by the rules and analogies of equity jurisprudence. It follows, that these objecting creditors are estopped from urging these objections, and, as no other objection is seriously urged by them and no other creditor opposes, a discharge will be granted, when a certificate of conformity is furnished by the register.

Case No. 12,495.

SCHUYLER v. The CORSICA.

[37 How. Prac. 262.]

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

COLLISION BETWEEN STEAMERS IN THE NORTH RIVER—CROSSING COURSES.

[A steamer descending the Hudson river, and colliding with a steamer crossing from New York to Jersey City, *held* in fault, because, instead of keeping her course, as required by articles 14 and 18 of the rules of 1864, in the case of a steamer approaching, on crossing courses, the starboard side of another, she attempted to avoid the crossing steamer by sheering to the east, and thus striking her after the latter had stopped and reversed.]

[1][This was an action [by Samuel Schuyler] brought to recover $41,000, being the damages arising out of collision which happened in this port on the 9th of November, 1865, between the steamer America and the steamer Corsica. The Corsica was, at the time, proceeding down the North river, bound to sea. The America was below her and proceeding across the river from off the Battery to her pier at the foot of Sussex street, Jersey City. The America was struck on the starboard side, some 40 feet from the stern, the Corsica sweeping aft without injuring the hull of the America, but staving off her starboard guard from the gangway aft to the wheel, staving the wheel and bringing up with great force upon the shaft, which was split in the inboard journal, and shoved aft against the after wheel-beam.]

Mr. Van Santvoord, for libelant.

Mr. Lord, for claimant.

BENEDICT, District Judge. This case has been argued with earnestness on both sides, and the voluminous evidence presented before me has received my careful attention. The argument on the part of the Corsica is ingenious, but it has failed to convince me of the correctness of the management of that vessel upon the occasion in question, and I must hold the libelant entitled to recover. The two vessels were crossing each other's courses, the America having the Corsica upon her starboard side. They were in plain sight of each other in an open river at midday, in clear weather, and no other vessels were moving near them to affect in any way their action. It is, therefore, no special case, but one manifestly within the provisions of articles 14 and 18 of the rules of 1864. Under these rules, it was the duty of the Corsica to keep on her course, and the duty of the America to avoid her. The America accordingly stopped before she reached the course of the Corsica, and backed, and I am satisfied would have avoided her, had not the latter vessel disregarded the rule and, instead of keeping on her course down the river, undertaken to avoid the America by sheering to the east. This action on the part of the Corsica, which I do not find justified by any circumstances proved in the case, was the cause of the collision which ensued, and renders her responsible for the damage caused thereby.

As to the defense that the Corsica was under the direction of a licensed pilot, and therefore not responsible for a collision caused by his improper order, it is sufficient to

[1] [From the records of the court.]

say that this defense has been overruled by the circuit court of this circuit in the case of Walsh v. The China. [Case No. 17,114.] The decree must accordingly be for the libelant, with an order of reference to ascertain the amount of the loss.

SCHUYLER (ROBERTS v.). See Case No. 11,915.

Case No. 12,496.

SCHUYLER STEAM TOWBOAT LINE v. NEWTON.

[9 Reporter, 233;[1] 21 Alb. Law J. 82.]

Circuit Court, S. D. New York. Dec., 1879.

INJUNCTION — GOVERNMENT OFFICER — INTERNAL IMPROVEMENT.

Where a general plan of an improvement of a river is laid before congress, and appropriations are made afterwards, and a specific contract has been approved by the secretary of war, an injunction will not be granted to prevent the completion of the work.

Motion for injunction.

[The defendant, General Newton, is a colonel of engineers in the United States army, and has been detailed by the secretary of war to improve the navigation of the Hudson river. The complainant's bill charges that General Newton proposes to build a dike across the east channel of the Hudson river, between Barren Island and New Baltimore, a portion of the river about fourteen miles below Albany, to the great and irreparable injury of the navigation of the river at that point. In answer to these allegations, General Newton averred that he was engaged under the direction of the secretary of war in improving the navigation of the Hudson river by a system of parallel dikes, and that the proposed dike complained of would, when built, throw the ebb and flood tides through the west channel and over the vast shoal known as "Willow Island Middle Ground," thereby clearing such shoal away, and leaving a broad, deep and permanent channel, over 900 feet wide, as he has already done at a point just above on the river, known as "Coeyman's Middle Channel."][2]

BLATCHFORD, Circuit Judge. I think on the whole case before me the plaintiff has not succeeded in establishing its right to a preliminary injunction. The general plan of the improvement which the defendant is carrying out in respect to the dike across the existing eastern channel was laid before congress, and it therefore made the appropriations it made by the acts of 1878–1879 [20 Stat. 159,363], "for improving the Hudson river," the money "to be expended under the direction of the secretary of war," and a specific contract for constructing the dike is shown to have been approved by the secretary of war. The weight of the evidence is, that what is sought to be done will, when completed, be an improvement of the navigation of the river and that the means adopted to that end are not improper. The experience of the past contributes largely to the belief that what is now sought to be done will improve the navigation. On the present state of affairs no injunction ought to be granted, and the temporary injunction must be dissolved.

Motion denied.

[1] [Reprinted from 8 Reporter, 233, by permission.]

[2] [From 21 Alb. Law J. 82.]

SCHUYLKILL BANK (KNEASS v.). See Cases Nos. 7,875 and 7,876.

Case No. 12,497.

SCHUYLKILL NAV. CO. v. ELLIOTT.

[32 Leg. Int. 362;[1] 21 Int. Rev. Rec. 342; 1 N. Y. Wkly. Dig. 282; 8 Chi. Leg. News, 26.]

Circuit Court, W. D. Pennsylvania. Oct. 4, 1875.

INTERNAL REVENUE — BONDED INDEBTEDNESS OF CORPORATION—IMPOSITION OF NEW TAX.

1. The act of congress of July 14, 1870 [16 Stat. 256], re-enacts the sections of the act of 1864 [13 Stat. 223], in reference to the tax of 5 per cent. on the amount of interest upon a corporation's bonded indebtedness.

2. Congress has the right to impose a tax by a new statute, although the measure of the tax is governed by the income of the past year.

At law.

Wm. M. Tilghman and R. C. McMurtrie, for plaintiff.

John K. Valentine and Wm. McMichael, for defendant.

McKENNAN, Circuit Judge. On the 10th and 16th of September, 1870, the plaintiff returned to the internal revenue assessor the amount of interest upon its bonded indebtedness, payable on and between the 1st days of January and July, 1870, upon which a tax of 5 per cent. was assessed by the assessor and paid by the plaintiff under protest to the defendant, as collector; and the question to be determined is, whether this interest was subject to taxation. If the 120th, 121st, 122d, and 123d sections of the internal revenue act of June 30, 1864, and its amendments in 1866 [14 Stat. 98] and 1867 [14 Stat. 471], did not expire by limitation with the year 1869, except as to the income tax properly so considered, as was held by the circuit court for the First circuit, in the Concord R. Co. v. Topliff [Case No. 3,093], there can be no doubt of the liability of the plaintiff for the tax imposed. And, indeed, it is very difficult to gainsay the conclusion of the court in that case, supported, as it is, by very cogent reasons.

But whether this be so or not, the act of

[1] [Reprinted from 32 Leg. Int. 362, by permission.]

July 14, 1870 (16 Stat. 261), is decisive of the plaintiff's liability. Notwithstanding the peculiarity of its phraseology, the supreme court holds in the case of Stockdale v. Atlantic Ins. Co., 20 Wall. 323 [87 U. S.], that the seventeenth section of that act re-enacts sections 122 and 123 of the act of 1864, as modified by subsequent statutes, and subjects to the tax imposed by them the earnings of corporations which accrued before its passage. Mr. Justice Miller, delivering the opinion of the court, says: "The right of congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted, that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. * * * The paragraph we have been considering was not, in its essence, an attempt to construe a statute differently from what the courts had construed it, for no construction on this subject had been given by any court. Nor was it an attempt, by construing a statute, to interfere with or invade personal rights, which were beyond the constitutional power of congress. But it was a legitimate exercise of the taxing power, by which a tax, which might be supposed to have expired, was levied and continued in existence for two years longer. It was, therefore, valid for that purpose, and the tax must be upheld."

Although the contested assessment in that case was upon corporate earnings, the principle of the decision is equally applicable to a tax levied upon the interest payable on corporate bonds, because the tax upon both is imposed by the same sections of the acts of 1864, 1866, and 1867, which the court declare are continued in force by the act of 1870. As the tax in question was assessed after the passage of that act, it must be held to have been legally demandable; and judgment will, therefore, be entered on the special verdict for the defendant.

SCHUYLKILL NAV. CO. (LAWRENCE v.). See Case No. 8,143.

Case No. 12,498.

In re SCHWAB.

[3 Ben. 231;[1] 2 N. B. R. 488 (Quarto, 155); 3 Bolt. Law Trans. No. 9; 1 Pittsb. Leg. J. 123.]

District Court, E. D. New York. April, 1869.

BANKRUPTCY—INVOLUNTARY—EXPENSES OF CREDITORS—REFERENCE.

1. Where several suits had been commenced in a state court against S., in which attachments had been issued and levied upon his property, and thereupon another creditor filed a petition in the bankruptcy court, procured a warrant to the marshal, and procured injunctions staying proceedings in the state court suits, and thereupon S. was adjudged a bankrupt without opposition, and the property was secured by the assignee, *held*, that the reasonable expenses of the creditors for such proceedings ought to be paid out of the fund, and that authority for the court to direct such payment was to be found in the 1st section of the bankruptcy act.

[Cited in Re Mitteldorfer, Case No. 9,675; Re New York Mail Steamship Co., Id. 10,208; Re Mead, Id. 9,364; Re Nounnan, 7 N. B. R. 22.]

2. A reference would ordinarily be ordered to ascertain the proper amount of such expenses.

[In the matter of Julius Schwab, a bankrupt.]

This was an application on the part of the petitioning creditors, in a case of involuntary bankruptcy, for an order directing the assignee to pay to them out of the assets the amount of their reasonable expenses incurred in procuring the adjudication of bankruptcy, and preventing the disposition of the property by proceedings in the state tribunals before the appointment of an assignee in bankruptcy. The petitioners filed their petition and procured a warrant to the marshal, and prior to the adjudication and to the appointment of the assignee, procured injunctions staying the proceedings in six actions brought against the bankrupt in the state courts, in which attachments had been issued, and levied upon the property of the bankrupt. The result of this action on the part of the petitioners was an adjudication of bankruptcy without opposition, and the securing for equal distribution of property valued at some thousands of dollars, which the assignee reduced to possession, and was about to distribute. The petitioning creditors now asked to be paid out of the assets their reasonable expenses of the proceedings taken by them.

BENEDICT, District Judge. As to the justice of this application there can be no question. The action of the petitioners was necessary to be taken by some one to recover for all the creditors the property which is now about to be distributed. The fund is the fruit of their diligence, and there can be no justice in compelling them to bear alone the expenses which were incurred for the benefit of all. The only question in my mind is, therefore, whether there exists any power in the court to direct the assignee to pay these expenses—and upon consideration I am satisfied that authority for the exercise of such a power is to be found in the first section of the bankruptcy act.

The due distribution of the assets of the bankrupt, for which the first section provides, cannot be made without the exercise of this power, for the petitioning creditors cannot be said to share equally with the other creditors if they must pay the expenses of the proceedings out of their dividend and a distribution of the fund without providing for expenses like those in question, would work injustice.

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

These and other obvious considerations, which are referred to in the opinions of Judge Lowell, in Ex parte Jaffray [Case No. 7,170], and of Judge Bryan, in Re Williams [Id. 17,704], seem to me abundantly to justify the construction of the bankrupt act which was given by these judges, and is now contended for by the petitioners.

In regard to the effect of the fee-bill of 1853, I may add to the cases cited in the opinions referred to, that I recollect a case in admiralty where Judge Betts, since the passage of that act, allowed a counsel fee, out of the proceeds of a vessel, for an argument made for the common benefit of various parties, who had filed libels against the vessel, as against the claim of a mortgagee who was proceeding against the fund. Shannon v. The Angelique [Case No. 12,705].

The motion is accordingly granted. A reference would, ordinarily, be directed to ascertain the proper amount, but that is unnecessary in the present case, as the amount asked for is small, and the papers show fully the proceedings. Motion granted.

Case No. 12,499.

In re SCHWAB et al.

[8 Ben. 353.] [1]

District Court, S. D. New York. Feb., 1876.

BANKRUPTCY — EXAMINATION OF BANKRUPT — SECURED CREDITOR — JUDGMENT.

A first meeting in composition of creditors of bankrupts being held, a debt was proven by S. & Co., upon a judgment rendered in a state court, in favor of S. & Co., against the bankrupts, on which execution had been issued and which was still unsatisfied. The proof of debt alleged that no manner of satisfaction or security had been received for the debt, except the judgment, execution and lien thereunder, if any, and any right or title which the creditors might have under an assignment for the benefit of creditors, claimed to have been made by the bankrupts before the commencement of the bankruptcy proceedings. S. & Co. requested an examination of the debtors. On behalf of the debtors and of other creditors, it was objected that these creditors were not entitled to any examination of the debtors, as their claim was, by the proof, alleged to be secured. *Held*, that S. & Co. were entitled to proceed with the examination of the debtors.

[In the matter of Jacob Schwab and Daniel Deutsch, bankrupts.]

The register in this case certified to the court as follows: Pursuant to notice duly given to the creditors of the debtors, a first meeting on composition was held before the register, at his office, on the 24th January instant. Among the debts proven, was one by J. N. Stearns & Co., for the sum of $878.32, made in the form of a deposition for proof of debt without security, and setting forth that said claim was founded on a judgment for damages and costs rendered in favor of the creditors against the debtors, in the supreme court of the state of New York on the 7th January, 1876, the original consideration of the debt being goods and merchandise sold and delivered; and said proof further set forth, that an execution upon said judgment was thereafter issued to the sheriff of the city and county of New York, and that said judgment still remained uncancelled and unsatisfied; and it further set forth, that no manner of satisfaction or security had been received for said debt, whatsoever, "except the said judgment, execution and lien thereunder, if any, and any right or title which said creditors may have under an alleged assignment claimed to have been made prior to the proceedings, by the said debtors, for the benefit of their creditors, to one Adolph Kahn, but the said liens or claims, if any exist, are not security for the full amount of the said debt, but the amount or value thereof is unknown to this deponent." Thereupon Mr. James P. Stearns, the counsel for said creditors requested an examination of the debtors on oath, to which Mr. Blumenstiel as counsel for 14 other creditors, and Mr. Jacob, of counsel for the alleged bankrupts, objected, upon the ground that the claim of J. N. Stearns & Co. was alleged to be secured and secured creditors were not entitled to any examination of the debtors.

The register expressed the opinion that the creditors, J. N. Stearns & Co., had the right to proceed with their examination of the debtors, as claimed by them.

BLATCHFORD, District Judge. I concur in the opinion of the register.

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

Case No. 12,500.

SCHWAB v. HOLLOWELL.

[Cited in Schoolfield, Hananer & Co. v. Johnson, 11 Fed. 297. Nowhere reported; opinion not now accessible.]

SCHWAB (HUDSON v.). See Case No. 6,835.

Case No. 12,501.

SCHWABACKER v. REILLY.

[2 Dill. 127.] [1]

Circuit Court, E. D. Missouri. June 1, 1872.

WRITS — ORIGINAL PROCESS — BY WHOM SERVED — SERVICE BY PRIVATE PERSON.

1. Since the act of June 1, 1872 (17 Stat. 196), as well as before, original process directed to the marshal must be served by that officer or his deputy, and cannot be served by a private person, although such mode of service as respects process in the state courts, may be authorized.

[Cited in Republican Val. R. Co. v. Sayre, 13 Neb. 282, 13 N. W. 404.]

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

2. Subpœnas and notices directed to a witness or party need not, necessarily, be served by the marshal.

At law.

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

DILLON, Circuit Judge. This is a civil action at law commenced in this court. Summons issued, in the usual form, in the name of the president, tested in the name of the chief justice, under the seal of the court, signed by the clerk, commanding the marshal to summon the defendant to appear in this court at the term named in the writ to answer the petition of the plaintiff filed herein. At this term the plaintiff moved for a default, for want of an answer, and on looking at the summons, we find no return of service by the marshal, or by any deputy of his, but only an affidavit of a private person, that "he executed the writ by delivering a copy to the defendant, at," etc.

We cannot grant the default. The marshal is the executive officer of the court, and he or his deputy must serve the process directed to him. It is the marshal who is commanded by the writ to serve it, and no other officer or person is authorized to perform this duty. Among the duties of the marshal as prescribed by the judiciary act (1 Stat. 73, § 27), is this: "To execute throughout the district all lawful precepts directed to him, and issued under the authority of the United States." By the twenty-eighth section of this act, it is further provided that when the marshal or his deputy shall be a party, the process in the suit shall be directed to a disinterested person, appointed by the court, or any judge thereof, and such person is authorized to execute and return such process.

In some of the states there are provisions authorizing original process to be served by private persons, and to make proof of such service by affidavit. In Missouri the original writ is a summons directed to the officer who is to execute it. If there is any authority in the laws of the state giving to private persons the right to make service of a writ of summons, this would not apply, under the special legislation above mentioned, to actions in this court. Nor would it apply by reason of the provisions of the act of June 1, 1872 (17 Stat. 196, § 5).

True, this act provides that "the practice, pleadings, and forms and modes of proceedings in other than equity and admiralty causes" in the federal courts "shall conform, as near as may be, to the practice, pleadings, forms and modes of proceedings" in the state courts, "any rule of court to the contrary notwithstanding." This general provision, of which the main object was to secure uniformity of practice in the two classes of courts, as far as practicable, cannot impliedly repeal special provisions of the acts of congress directing the modes of procedure and of service of process in the federal courts. A subpœna directed to a witness, or a notice directed to a party, stands on different ground, and in ordinary civil actions service of these may be made in conformity with the statute provisions of the state, and not, necessarily by the marshal.

Motion denied.

NOTE. Service of process is a "mode of proceeding" within the meaning of the act of June 1, 1872, and being so, the mode of service (not the officer by whom made) prescribed by the state law must be followed, and the power of the federal court to prescribe or substitute any other mode is necessarily abrogated. So held by the United States circuit court, for the Eastern district of Wisconsin, by Mr. Justice Davis and Mr. District Judge Hopkins. Perkins v. Watertown [Case No. 10,991.]

Construction of above act as respects service by publication. Bronson v. Keokuk [Case No. 1,928].

Case No. 12,502.

In re SCHWARTZ.

[14 Blatchf 196;[1] 15 N. B. R. 330; 52 How. Prac. 513; 15 Alb. Law J. 350.]

Circuit Court, S. D. New York. April 9, 1877.

BANKRUPTCY—RIGHT OF CREDITOR TO PROSECUTE CLAIM—DISCHARGE—PROVABLE DEBT.

1. Section 5106 of the Revised Statutes, which enacts that no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit therefor against the bankrupt, until the question of his discharge shall have been determined, applies to all provable debts, as well to those which, under section 5117, would not be discharged, as to others.

[Cited in Re Cohen, Case No. 2,961; Re Van Buren, Id. 16,833; Re Alsberg, Id. 261; Re Schwarz, 14 Fed. 788.]

[Cited in Brooks v. Bates (Colo. Sup.) 4 Pac. 1,072.]

2. A claim arising out of a contract for the purchase and sale of merchandise is a provable debt, within § 5106, although the sale was made because of a false representation by the debtor as to his pecuniary affairs, and the prosecution of such claim may be enjoined, under § 5106, if it be prosecuted in an action sounding in damages.

[Cited in Re Pitts, Case No. 11,190; Re Van Buren, Id. 16,833.]

[In review of the action of the district court of the United States for the Southern district of New York.

[In the matter of Henry Schwartz, a bankrupt.]

Anthony R. Dyett, for creditors.

Alexander Blumenstiel, for bankrupt.

JOHNSON, Circuit Judge. On the 4th of March, 1876, the district court denied an application made by the petitioners to vacate a stay of proceedings in a suit in a state court against the bankrupt, brought by them, and which had been stayed by an ex parte order of the district court, on the 14th of February, 1876. The petitioners now apply to have this order of March 4, 1876, reversed, upon

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

review, in this court. The question involves the construction of section 5106 of the Revised Statutes. This section enacts, that "no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined." It is contended, on the part of the petitioners, that, notwithstanding the generality of the language employed, which embraces every provable debt, it ought to be construed not to include any debt which, under the provisions of section 5117 of the Revised Statutes, would not be discharged even though the bankrupt should obtain the statutory discharge. Debts of this class are designated, in that section, as those created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character. They further insist, that the demand upon which their suit is brought against the bankrupt is not a provable debt. This latter proposition cannot, in my judgment, be maintained. Their statement of their own case shows that the claim originated in what, in form, at least, was a contract for the purchase by the bankrupt, and the sale by them to him, of merchandise in the line of his business. The fact that he is charged with having fraudulently induced the petitioners to make the sale, by false representations of his pecuniary affairs, does not exclude the claim from the class of provable debts. It is still the price that is claimed, under the name of damages for the fraud. Even if their complaint in the state court is so framed that they cannot recover unless they prove the fraud, according to the laws of the state, it does not cease to be, in the language of the bankrupt act [of 1867 (14 Stat. 517)], a debt created by the fraud of the bankrupt. Had the action of the petitioners taken the form of an action for the recovery of the specific merchandise sold, founded upon a complete rescission of the contract, a different question would have been presented. Where a claim originates in contract, although fraudulently induced, and is prosecuted in an action sounding in damages, it continues to constitute a provable debt, even though the fraud must be proved to entitle the plaintiff to a recovery.

The question to be determined in this case is, therefore, the general one, whether, the debt being provable, the creditor is at liberty to proceed, upon the ground that debts which cannot be discharged are impliedly excepted from the purview of section 5106. This question has been fully discussed in several cases, in the district courts. In re Rosenberg [Case No. 12,054]; In re Ghirardelli [Id. 5,376]. I concur entirely in the views presented by Judge Blatchford, in the opinion in the first of the cases cited. The bankrupt is entitled, until the question of his discharge is settled, to be protected by the court in bankruptcy, except in the cases specified in the bankrupt law. That the creditors have not proved their claim in the bankruptcy does not affect the question. The section relates to debts provable, which, of course, includes those which have not been proved.

As the application of the petitioners to vacate the stay of proceedings followed so closely the granting of the stay, there cannot have been at that time any unreasonable delay, on the part of the bankrupt, in endeavoring to obtain his discharge. The adjudication of the defendant to be a bankrupt, on his voluntary application, was in December, 1875, his assignee was appointed February 10, 1876, and the application for a stay of proceedings immediately followed, as before stated. On this review, the decision must have relation to the facts upon which the district court acted.

The order under review must be affirmed, and the clerk will certify to the district court that the order of that court in this matter, made March 4, 1876, refusing the application of the petitioners to vacate the stay of proceedings and injunction granted on the 14th of February, 1876, is affirmed.

Case No. 12,503.

In re SCHWARTZ.

[4 N. B. R. 588 (Quarto, 189).] [1]

District Court, D. Kansas. 1871.

BANKRUPTCY—EXEMPTIONS—KANSAS.

A merchant doing business and residing in Kansas is not entitled to the special exemption allowed mechanics, miners, or other persons for the purpose of carrying on their trade or business. Such exemption made by an assignee in bankruptcy will be disallowed.

By HIRAM GRISWOLD, Register:

It is admitted and agreed that at the time of the filing of the petition in bankruptcy, M. F. Schwartz, the bankrupt, was a citizen of the state of Kansas, and was and had been domiciled in Kansas for more than one year previous thereto. That he was the head of a family. That he was a retail merchant of dry goods, clothing, hats, caps, boots, and shoes in Wyandotte, Wyandotte county, in said state. That the amount of merchandise, consisting of miscellaneous articles, was selected and set apart by the assignee to the bankrupt from his stock, under and by virtue of the provisions of the eighth subdivision of section 11, pp. 549, 550, Comp. Laws Kan. 1862, and only by virtue of said provisions, and does not exceed four hundred dollars, as appears by the bill and appraisal or report on file herein. That the report of the assignee of the articles set off to the bankrupt by him was made to the court within twenty days after receiving the deed of assignment, with the estimate value of each article.

[1] [Reprinted by permission.]

At Leavenworth, in said district, on the 29th day of March, 1871, the register, to whom the matter of the exceptions to the statement of the assignee of the said M. F. Schwartz set apart by him to the bankrupt, as property excepted from the operation of the bankrupt act, to report to the court the facts and the conclusions of law thereon, reports: That he sat at his office in Leavenworth on the 27th day of March, 1871, to hear the matter aforesaid, when Mr. Clough appeared in behalf of the excepting creditors, and W. Hale in behalf of the assignee.

The parties submitted an agreed statement of the facts, which is hereto attached and made part of this report. From this statement of facts it appears that the bankrupt at the time of the filing of the petition in bankruptcy, was a retail merchant, and the property set apart and assigned to him was goods and merchandise, a part of his stock of goods, which up to that time he had been engaged in selling in Wyandotte, in the state of Kansas. This property was set apart to the bankrupt as "stock in trade," and was so set apart under the provisions of the eighth subdivision of section 11 of the exemption statute of the state of Kansas (Comp. Laws 1862). The question, therefore, is fairly raised, whether under the exemption laws of the state in force in the year 1864, and they are the same now, a merchant, in addition to the specific exemptions prescribed by those laws, was entitled to have exempted from execution, etc., stock in trade not exceeding four hundred dollars in value. I am not aware that this provision of the statute of the state of Kansas has ever received a construction from the supreme court of the state, but it has been decided by the district court of the county of Leavenworth that merchants are not of the class of persons specified in the eighth clause of the statute. The district court, in so deciding, has followed the decision of the supreme court of the state of Minnesota on this precise point, made by it in the case of Grimes v. Bryne, 2 Minn. (Gil. 72). That decision was made in December, 1858. The clause in question in the Kansas statute is literally copied from the Minnesota statute. Hence that clause had received a construction in the highest court of the state in whose statutes the provision is first found before its incorporation into the laws of this state. And the legislature of this state is supposed to have made that provision a part of our statute with a knowledge of the construction given to it in its native state, and to have also adopted that construction of the act. But were this an open question, now first presented, I should put the same construction upon the statute. I think it the correct one, and one in harmony with the spirit of the act. In opposition to this view, it is objected that the legislature of Kansas has given a construction to the words "stock in trade," and that by legislative enactment they are to be "construed to mean the same as the words goods and chattels." The legislature did, by an act amendatory of the act to establish a code of civil procedure, on February 25, 1860, declare, that whenever the words should occur in that act in the Code of Civil Procedure, they should be construed to mean the same as the words goods and chattels. I think that cannot be held to be an authoritative interpretation of those words when used in another statute, enacted at another time, and having reference wholly to another subject-matter. But if wrong in this, if these words, "stock in trade," should be held to mean "goods and chattels," the objection made to the claim of the assignee, that these goods were rightfully set apart to the bankrupt, is not removed. The provision would then be, that the class of persons in that clause specified should have set off to them, exempt from seizure on execution, etc., goods and chattels not exceeding four hundred dollars in value. But the question, who are the persons composing this class, and are therefore entitled to this exemption? is still to be met and answered. If language is to be used in its ordinary sense and have any force and meaning, the persons meant are they who "keep and use tools and instruments" ("implements" probably being intended) "for the purpose of carrying on their trade or business." Hence, as was held in the case before cited,—Grimes v. Bryne,—the clause should be construed as though it read thus: The tools and instruments (implements) of every mechanic, miner, or other person to the exercise of whose trade or business tools and implements are necessary, used and kept for the purpose of carrying on his trade or business, etc. If this is a correct construction of the act, as I think it clearly is, then, among the persons intended to be provided for by the provision of the statute in question, there is no place for a merchant. The only exemptions to which he is entitled are those provided for in other sections, concerning which nothing more can be here said. Hence I report to the court, as a conclusion of law from the agreed statement of facts, that the setting apart of the goods in question to the bankrupt, as excepted from the operation of the bankrupt act, was improperly done, and that the same should be inventoried by the assignee as a part of the estate of the said bankrupt.

John K. Hale, for assignee.
Clough & Wheat, for Henry Bell & Son.

DELAHAY, District Judge. The register in bankruptcy of this court, to whom the matter of the exceptions to the certificate of exempted property, filed by the assignee, was referred, having made his report to the court, said report is approved. And the court being of the opinion that the goods and merchandise mentioned in said certificate of exempted property, valued at three hundred

and ninety-nine dollars and ninety-nine cents, described on pages 4, 5, 6, and 7 of said certificate, set apart by the assignee to be retained by the bankrupt, as excepted from the operation of the bankrupt act, are not, by the provisions of said act, exempted from levy and sale upon execution or other process or order of any court by the exemption laws of the state of Kansas, in force in the year 1864, and are not, by the provisions of said act, exempted from the operation thereof, and should not have been so set apart to be retained by said bankrupt, it is

Ordered, that said certificate of exempted property be amended and corrected by striking from the same all the property described on pages 4, 5, 6, and 7 thereof, and that said assignee inventory and administer upon the same as other property belonging to said estate.

To which decision of the court the said assignee excepts.

(Below we give an extract from the exempt laws referred to in the preceding decision:) Comp. Laws, Kan. 1862, p. 549, § 11: "No property hereinafter mentioned or represented, shall be liable to attachment, execution or sale on any final process issued from any court in this territory. First. The family Bible. Second. Family pictures, schoolbooks, or library, and musical instruments for use of family. Third. A seat or pew in any house or place of public worship. Fourth. A lot in any burial ground. Fifth. All wearing apparel of the debtor and his family, all beds, bedsteads, and bedding, kept and used by the debtor and his family, all stoves and appendages put up or kept for the use of the debtor and his family, all cooking utensils, and all other household furniture not hereinafter mentioned, not exceeding five hundred dollars. Sixth. Three cows, ten swine, one yoke of oxen and one horse, or, in lieu of one yoke of oxen and one horse, a span of horses or mules, twenty sheep, and the wool from the same, either in the raw material or manufactured into yarn or cloth, the necessary food for all the stock mentioned in this section for one year's support, either provided or growing, or both, as the debtor may choose; also, one wagon, cart, or dray, one sleigh, two ploughs, one dray, and other farming utensils, including tackle for teams, not exceeding three hundred dollars in value. Seventh. The provisions for the debtor and his family, necessary for one year's support, either provided or growing, or both, and fuel necessary for one year. Eighth. The tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, not exceeding three hundred dollars in value, and, in addition thereto, stock in trade not exceeding four hundred dollars in value; the library and implements of any professional man; all of which articles, hereinbefore intended to be exempt, shall be chosen by the debtor, his agent, clerk, or legal representative, as the case may be."

Case No. 12,504.

SCHWARTZ v. INSURANCE CO. OF NORTH AMERICA.

[3 Wash. C. C. 117.] [1]

Circuit Court, D. Pennsylvania. Oct. Term. 1811.

MARINE INSURANCE — WARRANTY OF NEUTRALITY —NEUTRALITY LAWS—ACTS IN VIOLATION.

1. The meaning of the warranty of neutrality is, that the property insured is neutral in fact, and shall be so in appearance and conduct; that the property shall belong to neutrals; that it shall be so documented as to prove its neutrality; and that no act of the insured or his agents shall be done, which can legally compromise its neutrality.

2. The laws of nations do not prohibit the carrying of enemies' goods in neutral vessels; so far from so doing, upon the condemnation of the goods, the vessel is entitled to freight.

3. But, if a neutral endeavours by false appearances, to cover the property of a belligerant from the lawful seizure of his enemy, such conduct identifies the neutral with the belligerant whom he thus endeavours to protect; and the increase of risk, by being carried in for adjudication, is produced not by a legal act, but by a fraud on the neutrality of his own government, and upon the rights of the belligerant.

4. The warranty of neutrality is broken, by unneutral conduct in the insured.

5. It is enough to produce a forfeiture of the indemnity of the insurance, if the risk is varied or increased, by conduct inconsistent with the duties of neutrality.

Policy on the ship Margaret, at and from Batavia to Baltimore, dated January 19th, 1807; valued at 25,000 dollars, of which 20,000 dollars were underwritten—warranted American property, proof to be made at Baltimore only. The order for insurance mentioned, that the outward cargo of this vessel had consisted of goods contraband of war. The facts, as appeared by the evidence, were, that this ship sailed with a cargo of contraband, in 1804, commanded by William M'Fadon, the part owner, and stopped at the Cape of Good Hope, where she sold part of her cargo; thence she proceeded to the Isle of France, where she sold the balance, on credit, to the government. In November, she sailed for Batavia, with 12,000 dollars in specie, the greatest part of which was the proceeds of this outward cargo. There not being at Batavia produce sufficient to load her, M'Fadon chartered her to a Mr. Arnold, a Dutch merchant of that place, on a voyage to Tranquebar, and there left her under the command of one Deshon, the mate, and in

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

case of any accident to him, Herd was to command her; he, M'Fadon, returning to the United States in another vessel. By the illness or death of Deshon, the command devolved on Herd, who made the voyage to Tranquebar, and back to Batavia, as well as a second voyage to the same place, and on account of the same person. In consequence of the ship requiring twice to be repaired, Herd was compelled to expend considerable sums on that account; and not having funds sufficient for this purpose, and to procure her load, he entered into a written agreement with Arnold, (who wished to come to the United States with his family and property,) to the following effect: The ship was to be loaded with coffee, sugar, &c., the produce of the island, on account of Arnold and the plaintiffs [F. & A. Schwartz, survivors of William M'Fadon], to be consigned to the plaintiffs, who were to sell the same without charging commissions, and the proceeds to be paid one-half to Arnold. Arnold to pay a stipulated sum for the freight of his part of the cargo, and the transportation of himself and family; and also, to advance to Herd, what money he might want to pay for his half of the cargo. In order to neutralize the property, Herd was, in addition to the real bills to be drawn on his owners for their part of the cargo, to draw bills to the amount of 30,000 dollars on his owners, in favour of Arnold, which, however, they were not expected to pay. For the security of Arnold, Herd, by the same contract, agreed to hypothecate the vessel, cargo, and policies of insurance. The bill of lading, invoice, and other papers, stated the cargo to belong to the plaintiffs, citizens of the United States. In March, 1807, she sailed from Batavia—Arnold died on the voyage. She was afterwards brought to by a British cruiser, the captain of which, after inspecting such of her papers as were shown by Captain Herd, was induced, in consequence of suspicions excited by some of the sailors of the Margaret, to examine the trunks belonging to Arnold. Here they found the above agreement, as well as property of great value, in precious stones. The vessel and cargo were taken into Barbadoes, and condemned as enemy's property; the captain claimed the ship and half the cargo for the plaintiffs. On notice of the capture, the plaintiffs offered to abandon, which was refused. The order for insurance, stating the nature of the outward cargo, was communicated to the defendants. The objections made to the plaintiffs' recovery were —1. That the plaintiffs have not proved themselves to be citizens of the United States, as the certificate of naturalization of the plaintiff, Augustus Schwartz, mentions Augustus Jacob. The evidence, however, very clearly proved, that they were, in fact, the same person, the additional name of Jacob being dropped in the firm of the house. 2. A deficiency in the proof, that the vessel was the property of the plaintiffs. All her papers being lodged in the admiralty, at Barbadoes, and the defendants not consenting to read the record, the evidence to prove property, consisted principally of acts of ownership exercised by the plaintiffs, and the letters of Herd to them as owners. To prove such evidence as this sufficient, the plaintiffs read 5 Esp. 88. 3. Concealment of the circumstance, that this vessel had been engaged in carrying on the trade of belligerants, from one of their colonies, which was considered by the court of admiralty, as an adoption of her by belligerants, and which at all events, increased the risk of seizure and carrying in. 1. C. Rob. Adm. 10; 5 C. Rob. Adm. 327. 4. That the hypothecation of the vessel and cargo, amounted to a transfer to an enemy, so far as to vest an interest in him to the extent of his security, which, by the capture, became vested in his enemy, and consequently, amounted to a breach of the warranty. 2 Caines, 72. 5. That the hypothecation of the policies, transferred them to the obligee, so as to deprive the plaintiffs of the right of recovery on them. 2 Caines, 110. 6. The covering of the property of the belligerant, is a breach of the warranty. 1 Marsh. Ins. 410, 406, 473; [Darby v. The Erstern] 2 Dall. [2 U. S.] 34.

WASHINGTON, Circuit Justice (charging jury). The court, considering the last objection as fatal to the plaintiffs' recovery, the others will be passed over without observation. The meaning of the warranty of neutrality is, that the property insured is neutral in fact, and shall be so in appearance and in conduct. That is to say, that the property belongs to neutrals; that it shall be so documented as to prove its neutrality; and that no act of the insured or his agents shall be done, which can legally compromit its neutrality. If, for the want of papers required by the law of nations or treaties, or if by unneutral conduct, a loss ensues, or even an impediment occurs which varies or increases the risk, although a loss is not the consequence; the warranty is not complied with. This is clearly the doctrine established by the case of Rich v. Parker, 1 Marsh. 409. The want of the passport required by the treaty between the United States and France, did not justify a condemnation, if, in fact, the vessel was American; but it justified a seizure and carrying in for examination; whereas the passport, had it been on board, would, by the treaty, have been so conclusive, that it would have been the duty of the French cruiser, to have suffered the vessel to proceed. The want of this paper, therefore, was considered a breach of the warranty; since it authorized the carrying the neutral out of his course, and an interruption of his voyage, which is an increase of risk, from which the insurers were by the warranty to be relieved. In this case, it is argued, on behalf of the insured, that the circumstance of having belligerant property on board, was no breach of

the warranty of the neutrality of the vessel. This is very true; because the law of nations does not prohibit the carrying of enemy's goods in neutral vessels; so far from it, that upon the condemnation of the goods, the vessel is entitled to freight. But, if the neutral endeavours by false appearances, to cover the property of a belligerant from the lawful seizure of his enemy, such conduct identifies the neutral with the belligerant, whom he thus endeavours to protect; and the increase of risk, by being carried in for adjudication, is produced, not by a legal act, as in the former case, but by a fraud on the neutrality of his own government, and upon the rights of the belligerant. The warranty of neutrality is broken, by unneutral conduct in the insured. We do not mean to countenance the idea, that such conduct would justify the court of the belligerant in condemning the vessel, for the taint on the cargo, or even the whole of the cargo, because of a part, which can be distinguished from the residue, being covered. It is true, that in case of contraband, covered by a false destination, the British courts of admiralty condemn the vessel on account of the fraud, which seems to carry the punishment very far indeed. But it is enough to produce a forfeiture of the indemnity, if the risk is varied or increased by conduct inconsistent with the duties of neutrality. Upon the whole, there being no doubt as to the facts in this case, the law is clearly in favour of the defendants on this point.

The plaintiffs suffered a nonsuit.

SCHWARTZ (UNITED STATES v.). See Case No. 16,237.

Case No. 12,505.

SCHWARTZ et al. v. UNITED STATES INS. CO.

[3 Wash. C. C. 170.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1812.

MARINE INSURANCE — ACTION FOR RETURN OF PREMIUM—FRAUD IN PROCURING INSURANCE.

1. Action for a return of premium, on the insurance of the cargo of the Margaret, at and from Batavia to Baltimore.

2. Fraud is an answer to an action for a return of premium, not from any merit in the defendant, which justifies him in retaining money, which ex æquo et bono, is not his, but from the demerit of the plaintiff, which excludes him from the aid of a court, to draw it out of the defendant's hands.

[Cited in The Ann C. Pratt, Case No. 409.]

3. The court is not disposed to make nice distinctions between grades of fraud. The true rule is, that if the insured, by deception and false pretences, induces others to take a risk, which, had the truth been disclosed, they would have refused, or would have taken on different terms, thereby securing to himself a chance to claim an indemnity in case of loss, or a return premium in case of safe arrival; it is such a fraud as ought to defeat his claim to a return of premium.

[Cited in Tufts v. Tufts, Case No. 14,233.]

Action for a return of premium, paid on a policy effected on the cargo of the Margaret, 20th of January, 1807, at and from Batavia to Baltimore, at 7½ per cent., valued at 15,000 dollars; the coffee valued at thirty-four dollars per picul, the sugar fifteen dollars, and the pepper at twenty dollars. This is the same voyage as that mentioned in the case of the same plaintiffs against the Insurance Company of North America [Case No. 12,504], and the same evidence was given. The plaintiffs had insured on the cargo of this vessel, at other offices, to the amount of 75,500 dollars, prior to the one in question; and their interest on board, distinct from Arnold's, amounting only to 52,536 dollars, this suit is brought to recover back the premium, on the ground of short interest. The evidence not noticed in the report of the former case, but which becomes important in this, is as follows:

By the letters written by Captain Herd to the plaintiffs, from Batavia, and which were received two days before the first insurance on either vessel or cargo was made, the plaintiffs were informed that the cargo, on their account, would amount to upwards of 50,000 dollars, besides a conditional contract he had made with the Dutch government, for 1,000 piculs more of coffee; and they were advised by him to insure about 75,000 dollars on the cargo. After Herd had nearly taken in the greatest part of his cargo, he found the vessel had sprung a leak, which compelled him to unload, and to caulk and sheath, and put other repairs on her, which cost about 10,000 dollars. It was about that time, that Arnold became interested in the cargo; and the contract mentioned in the former case was entered into. Herd, in his deposition, swears, that he never gave to the plaintiffs, any information respecting the interest of Arnold in the cargo, or which contradicted his letters; which represented the whole cargo as belonging to the plaintiffs; until July, 1807, after his capture, in which last letter he unfolded the whole nature of the transaction. This letter was received by the plaintiffs on the 30th of August, 1807, and a letter was immediately written to the agent of the plaintiffs, in this city, directing him to abandon, and to claim for a total loss. This was done on the 31st, and refused. Some time after this, the agent was authorized to offer a compromise to the different offices, to receive 75 per cent. of the whole sum insured, with a promise to furnish the necessary proofs of property and loss, as soon as they should be received from Barbadoes, where the condemnation took place. This was refused, unless the agent would oblige himself to repay the money, if it should

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

appear that the plaintiffs were not entitled to it; which was not acceded to. Actions were accordingly brought, and a total loss claimed, without any counts for a return of premium being inserted in the declaration. The interest of Arnold, and the scheme pursued for covering his interest, were not communicated by the plaintiffs to the underwriters, but came accidentally, and in some other way, to their knowledge.

The claim for a return of premium, was resisted upon the following grounds: (1) Fraud in the plaintiffs (who, it was contended, must have known of Arnold's interest in the cargo), in attempting to cover, and to insure belligerent property as neutral. (2) That if they did not know it, still, they are chargeable with the fraud of Captain Herd, their agent and attorney. (3) That the cargo having been on board, or nearly so, before the interest of Arnold commenced, the policy attached, the policy being at and from; and of course, no claim can be made for a return of premium, independent of the question of fraud. Upon the first and second points were cited Park, Ins. (4th Ed.) 214; 2 Marsh, Ins. 652; 1 Bin. 116; 3 Caines, 90; 2 Johns. Cas. 58; [Maybin v. Coulon] 4 Dall. [4 U. S.] 298; 2 Johns. Cas. 310. On the third point were cited 3 Johns. 1; Park, Ins. (Last Ed.) 299; 1 Marsh. Ins. 165, 840; 3 Johns. Cas. 10.

For the plaintiffs, the fact of the fraud was insisted not to be brought home to the plaintiffs; and if it were, the law was disputed. As to the third point, it was answered, that the vessel not being seaworthy to receive the cargo, according to the decisions in the cases cited by the defendants, the policy of course never attached, until after she was repaired, and the interest of Arnold commenced. As to the plaintiffs being chargeable with the fraud of Captain Herd, it was said, that his conduct amounted to barratry, upon the argument of the defendants, for which they are liable; and of course, they cannot urge that, as a reason against a recovery of the premium. Any gross malversation by the master, is barratry. 2 Camp. 149.

WASHINGTON, Circuit Justice (charging jury). This is an action for money had and received, to recover back the premium paid by the plaintiffs to the defendants, for short interest, in the cargo of the Margaret; the whole having been covered by policies, prior to that underwritten by the defendants. The ground of the action is, that the defendants were never exposed to the risk, against which they bound themselves to indemnify the plaintiffs, and for which they received the premium; and consequently, that they cannot, in conscience, retain it. The principle of this action is unquestionably founded in sound law. The answer to this demand is, that the plaintiffs have been guilty of a fraud, in procuring this insurance to be effected; and that no court will, in such a case, lend its aid to recover back the money paid for effectuating such a purpose. Generally speaking, this too, is sound law. This is an equitable action, and the plaintiffs should derive their right to recover from pure sources. The title of the defendant, in such a case, to retain what he has received, and which, ex æquo et bono, is not his; does not arise from any merit in himself, but from the demerit of the plaintiff, which denies him a remedy to draw it out of the hands of the defendants. The alleged fraud consists in covering belligerent property by false papers, and insuring it as neutral. The first question, therefore, is a question of fact, for the decision of the jury; whether the plaintiffs were knowingly guilty of the imputed fraud. The second is a question of law, whether this is such a fraud, as ought to prevent the plaintiff from reclaiming in a court of justice, the premium which he has paid.

In ascertaining the fact, on which the law is to arise, you have direct evidence, opposed to that which is merely circumstantial. The former consists in the information given by Captain Herd to the plaintiffs, on which they appear to have acted; by which they were led to conclude, that the cargo was entirely their own, and about equal in value to the aggregate of the sum insured on it. The circumstances opposed to this positive proof are, the small capital carried from the Isle of France to Batavia; the knowledge which William M'Fadon, during his life a partner of the plaintiffs, had of the connexion with Arnold in the Tranquebar voyages; and some others of less weight. But it may be observed, that though Arnold might be willing to take a share in the short trading voyages from Batavia to Tranquebar, it by no means followed, that he would engage in a shipment to the United States; and at all events, as fraud is never to be presumed, the jury ought to be very well satisfied with the evidence offered to prove it, before they should believe it to have existed, especially when it is opposed by strong proofs to the contrary.

We wish it were in our power to speak as favourably of the conduct of the plaintiffs, after they received Captain Herd's letter, which contained a full and candid disclosure of the transactions at Batavia, in relation to the interest of Arnold in this cargo. Had they then communicated this information to the underwriters, it would, we think, have been very difficult to have brought home to the plaintiffs, a knowledge of, or concern in, this unfair transaction. But the demand which they made of a total loss on the whole sum insured; their offer to receive 75 per cent. of the whole, at a subsequent period, after they had more time for reflection; and their concealment of the truth from the defendants, until after they had by other means obtained a knowledge of it; these, if they do not so connect the plaintiffs with the transactions at Batavia, as to induce a belief that they had authorized, or knew of them, when these insurances were effected, do at least amount to an adoption and ratification of what was done by their agent;

which subjects them, in point of law, as much to the charge of fraud in the first instance, as if the fact was brought home to them by the clearest proof. This being the case, it becomes unnecessary to give any opinion on the second point made by the defendants' counsel.

The next inquiry is, whether this is such a fraud as ought to bar the plaintiffs' right of recovery? It is much to be wondered at, that only five cases are to be met with, in which this question has received a judicial decision. The cases of Whittingham v. Thornburgh, 2 Vern. 206, De Costa v. Scandret, 2 P. Wms. 170, and Wilson v. Ducket, 3 Burrows, 1361, in which the premium was decreed to be refunded, notwithstanding the fraud of the insured in obtaining the insurance, fall short of establishing the point for which the plaintiffs' counsel contend. In the two former, the insurers were plaintiffs in equity, seeking to set aside the policies on the ground of fraud; and since the insurers could not, in conscience, retain the premiums, no matter how great the demerit of the insured might be, a court of equity, governed by its own principles, could not relieve the insurers on other terms, than compelling them to disgorge that to which they had no equitable right, and placing the parties in the situation they were in, when the contract was entered into. The other case, though tried at law, was under a decree of the court of chancery, in which the insurers were complainants, and offered in their bill to repay the premium. The case of Tyler v. Horne, mentioned in Park, Ins. 218, which was decided at nisi prius, in 1785, since the Revolution, and is, of course, not authority in this court, establishes the doctrine, that, in a case of gross fraud, the insured cannot recover back the premium. Chapman v. Fraser, which was decided at a still later period, but in the king's bench, is so loosely stated in 2 Marsh. Ins. 652, that it is difficult to discover the precise principle which it establishes.

This court does not feel itself disposed to countenance a distinction between different grades of fraud, as affecting the right of the plaintiff, in actions of this kind. It is believed, that upon general principles of law, as well as of sound policy and morality, it may be safely laid down as a rule, that if the insured, by deception and false pretences, induces others to undertake a risk, which, had the truth been disclosed, they would not have taken at all, or would have done so on different terms from those agreed upon, thereby securing to the insured a chance to claim an indemnity in case of loss, or a return of premium in case of safe arrival; it is such a fraud as ought to defeat his right to maintain this action, for the premium. That is precisely the present case. The plaintiffs had this chance, and it might in all probability have been realized, had this vessel been lost at sea, or the evidence of the real transaction been otherwise kept from public view. The bill of lading and invoice, the ordinary proofs of property and value, were sufficient to authorize a recovery of the sums insured, or might have induced the underwriters to pay without a suit. If the jury think with the court on the facts of this case, their verdict ought to be for the defendants.

Verdict for defendants.

Case No 12,506.

SCHWARZEL v. HOLENSHADE et al.

[3 Fish. Pat. Cas. 116; 2 Bond, 29.] [1]

District Court, S. D. Ohio. April, 1866.

PATENTS — INFRINGEMENT — DAMAGES — JUDICIAL DISCRETION.

1. The plaintiff may fail, from a lack of evidence, in proving infringements which would have justified the jury in finding damages to a larger amount, but this is the fault or misfortune of the plaintiff, and does not authorize the jury in finding more than the actual damages proved.

2. It has happened, and may occur again, that a meritorious inventor of a valuable improvement, after spending years of patient thought and toil in making it practically useful, and obtaining a patent for it, has been wantonly and unjustly pirated upon, and compelled, for the establishment of his rights, to engage in long, vexatious, and expensive litigation, in which, at last, the sum that may be awarded by the verdict of a jury may be wholly inadequate. In such a case the instincts of justice would demand of a judge that he should exercise the discretion vested in him by law, in trebling the damages.

[Cited in Welling v. La Bau, 35 Fed. 304.]

3. But when the plaintiff has no claim or merit as an inventor, but is the mere assignee of a patent, which he has purchased on speculation, the law will give him the actual damages which his evidence shows he has sustained, but will give him nothing more.

[Cited in Welling v. La Bau, 35 Fed. 304.]

This was a motion, under section 14 of the act of 1836, to treble the damages found by the jury in an action, on the case, for the infringement of letters patent [No. 41232] for a new and useful "improvement in grain separators," granted to John W. Free and Harrison Ogborn, January 12, 1864, and assigned to plaintiff [John Schwarzel], for the counties of Ross, Pike, Pickaway, Scioto, and Fayette, in the state of Ohio.

Bartley & Burnett, for the motion.

S. S. Fisher, contra.

OPINION OF THE COURT. A motion is made in this case for a judgment for treble the amount of damages found by the jury against the defendants, on the ground that the infringements of the plaintiff's patents, as proved on the trial, were wanton and willful, and that the damages are altogether inadequate. The action was brought for an infringement of the plaintiff's exclusive right, by purchase and assignment, in a grain separator or fanning machine, for five counties in the state of Ohio. The defendants [Jacob W.

[1] [Reported by Samuel S. Fisher, Esq.; reprinted in 2 Bond, 29, and here republished by permission.]

Holenshade and Edward C. Morris] did not appear to defend the action, and in the early part of the present term of this court, a jury was sworn to assess the plaintiff's damages, as upon a default. The material facts proved on the inquiry to the jury were, that the plaintiff was the assignee of the right to make, use, and vend said machine in the counties of Ross, Pike, Pickaway, Scioto, and Fayette, in Ohio, and was largely engaged in the manufacture and sale of the same within said counties. It also appeared that the defendants were the assignees of an exclusive right to make, use, and sell said machines in six other counties of the state, some of which adjoined the counties in which the plaintiff had an exclusive right. It was proved on trial that the defendants had sold seven of the machines manufactured by them at Cincinnati, within the five counties before named, and that the plaintiff's profit on machines made and sold by him was fifteen dollars on each. This was the whole extent of the infringement proved, and the jury returned a verdict for one hundred and five dollars, being fifteen dollars for each machine sold by the defendants. The only evidence of these sales by the defendants was the admission of their agent, who made the sales; but the circumstances under which they were made were not disclosed by the evidence.

The only question for the court is, whether from these facts a case is made for the exercise of the discretion of the court in ordering a judgment to be entered for three times the amount of the damages returned by the jury. It is somewhat remarkable that in the almost countless reports of trials of patent right cases in the United States, there are so few in which the statute authorizing a judgment for treble damages has been presented for judicial consideration. It is inferable that but few cases have arisen in which a claim for an increase of damages has been urged. The legislation on this subject, from the first inception of our patent right policy, seems clearly to contemplate that cases may occur in which it may be proper for the court to increase the damages returned by the jury. By the first patent act, passed in 1790 [1 Stat. 109], an infringer was liable not only for the damages found by a jury, but also forfeited to the aggrieved party the infringing machine. By the act of 1793 [1 Stat. 318], it was provided that an infringer should forfeit and pay a sum equal to three times the price for which the patentee sold, or licensed to others, the use of the patented invention. The act of 1800 [2 Stat. 37] compelled an infringer to forfeit and pay the patentee a sum equal to three times the actual damage sustained. Thus the law stood until the act of 1836 [5 Stat. 117] was passed, and which, as applicable to the motion before the court, is still in force. Section 14 of this act essentially changes the previous legislation on this subject, and provides, where a verdict for damages has been rendered for an infringement of a patent right, "it shall be in the power of the court to render judgment for any sum above the amount found by such verdict as the actual damages sustained by the plaintiff, not exceeding three times the amount thereof, according to the circumstances of the case, with costs."

The question for the decision of the court is, therefore, whether the circumstances of this case require the court, in the exercise of a sound discretion, to treble the damages assessed by the jury. In every view I can take of the subject, I see no sufficient reason for granting the present motion. The statute expressly fixes the measure of the plaintiff's recovery to the "actual damages" he has sustained by the infringement. It is true, as declared by the supreme court of the United States, in the case of Seymour v. McCormick, 16 How. [57 U. S.] 480: "Where the injury is wanton or malicious, the jury may inflict vindictive or exemplary damages, not to recompense the plaintiff, but to punish the defendant." In the present case the jury returned a verdict for what they believed to be the actual damage sustained by the plaintiff from the infringement proved by the evidence. It is not controverted that upon even the most liberal estimate, the verdict is for a sum equal to the injury proved to have been sustained by the plaintiff. The facts did not justify the jury in giving a verdict for vindictive or exemplary damages; nor do they warrant the court in trebling the damages. From a lack of evidence on the part of the plaintiff he may have failed to prove infringements by the defendants, which would have justified the jury in finding damages to a larger amount than they returned, but this was the fault or misfortune of the plaintiff, and did not authorize the jury in finding more than the actual damages proved.

Cases may be readily conceived in which it would be the imperative duty of a court to exercise the discretion given by the statute, by increasing the damages. It has happened, and may occur again, that a meritorious inventor of a valuable improvement, after spending years of patient thought and toil, in making it practically useful, and obtaining a patent for it, has been wantonly and unjustly pirated upon, and compelled, for the establishment of his rights, to engage in long, vexatious, and expensive litigation, in which, at last, the sum that may be awarded by the verdict of a jury may be wholly inadequate as a compensation for the wrongs and injuries he has sustained. In such a case, the instincts of justice would demand of a judge that he should exercise the discretion vested in him by law, by trebling the damages, and thus, as far as practicable, doing justice to one, who, from the great utility of his invention, may be entitled to the name of a public benefactor. But clearly there is no such feature in the present case. The plain-

tiff has no claim or merit as an inventor, but is the mere assignee of a patented machine, the right to which he has purchased on speculation. The law under such circumstances will give him the actual damages which the evidence shows he has sustained, but will give him nothing more. The motion is overruled.

SCHWEDLER (STRUVE v.). See Case No. 13,551.

SCIENCE, The (UNITED STATES v.). See Cases Nos. 16,238 and 16,239.

Case No. 12,507.

The SCIOTA.

[See Case No. 16,240.]

Case No. 12,508.

The SCIOTO.

[2 Ware (Dav. 359) 360;[1] 5 N. Y. Leg. Obs. 442; 11 Law Rep. 16.]

District Court, D. Maine. Dec., 1847.

COLLISION—VESSEL AT ANCHOR—PRESUMPTION OF FAULT—ENTERING HARBOR—LOOKOUT—LIGHTS—DIVIDED DAMAGES.

1. When a collision takes place between a vessel under sail and one at anchor, the prima facie presumption, if there be any fault, is that it is on the vessel under sail.

[Cited in Saunders v. The Hanover, Case No. 12,374.]

2. A vessel entering a harbor is bound to keep the most vigilant watch to avoid collision with other vessels in motion or lying at anchor; and if in the night time she ought to have her whole crew on deck on the lookout.

[Cited in Nelson v. The Goliah, Case No. 10,106; The Lady Franklin, Id. 7,984. Distinguished in The J. W. Everman, Id. 7,591.]

3. When a collision takes place by the fault of one of the vessels, she is responsible for all the damage.

[Cited in Knowlton v. Sanford, 32 Me. 157.]

4. But if it happens without fault in either party, or if there was fault and it cannot be ascertained which vessel was in fault, or if both were in fault, then the damage and loss are divided between them in equal shares.

[Cited in The Bay State, Case No. 1,148; Lucas v. The Thomas Swann, Id. 8,588; The J. W. Everman, Id. 7,591; The Atlas, Id. 633.]

5. A vessel ought not to be moored and lie in the channel, or entrance to a port, except in cases of necessity; or, if anchored there from necessity she ought not to remain there longer than the necessity continues. If she does and a collision takes place with a vessel entering the harbor, she will be considered in fault.

[Cited in Amoskeag Manuf'g Co. v. The John Adams, Case No. 338; The Chauncey M. Depew, 59 Fed. 794.]

[Cited in Lambert v. Staten Island R. Co., 70 N. Y. 108.]

6. A vessel lying in the channel of a port, from necessity, is bound in the night time to show a light.

[Cited in Lenox v. Winisimmet Co., Case No. 8,248; Jones v. The Hanover, Id. 7,466.]

7. In cases of collision, a fault of one vessel will not excuse any want of care, diligence, and skill in another, so as to exempt her from sharing the loss and damage.

This was a case of collision occurring in the harbor of Portland, between the Scioto, as she was entering the harbor, and the Falcon lying at anchor.

Haines, Dist. Atty., for libellant.

Mr. Shepley, for respondent.

WARE, District Judge. The Scioto, on the evening of the 15th of December, being on her passage from Calais to Boston, deeply laden with a cargo of lumber, in consequence of the threatening aspect of the weather, put into the harbor of Portland. The wind was from the N. N. E., so that she could not lay her course into the harbor, but was obliged to beat in. Two other vessels were entering at the same time. As they entered, the Scioto put in upon one tack, as the other two did on the other, and each tacking at the same time, they passed each other in the channel After making three or four tacks, the Scioto, in her passage from the eastern to the western side, came in collision with the Falcon lying at anchor about 40 rods north-west of the block-house, on House Island, where she had been lying for a week. This was about one o'clock in the morning. The moon was then just setting, the sky moderately but not heavily overcast; some of the witnesses say that stars were visible, and others that they were not. During the first part of the night, there were flying clouds sometimes obscuring the moon and sometimes leaving it bright, but in the latter part, the clouds became more dense and heavy. Still it was light enough to see objects at considerable distance which were broad off on the water, unless land lay behind, so that the shade of the vessel was melted into that of the land beyond. It was in such a position that the Falcon lay when seen from a vessel entering the harbor, the high land of the town covering her hull. She lay also in the channel or passage way, not precisely in the track of a vessel entering the harbor with a fair wind, but within the range taken by vessels beating in, and very nearly in the track of a vessel going into Hog Island roads; and she showed no light.

In the case of a collision of vessels by which damage is done, the first rule, a rule dictated by natural justice, is that the vessel, by whose fault the collision took place, shall be answerable for all the damage. The first inquiry, therefore, is, by whose fault this collision was occasioned. It may be assumed as a general rule, that when a collision takes place between a vessel under sail and one not under sail, the prima facie presumption is that the fault is imputable to the vessel that is in motion. It is said in Jacobson's Sea Laws, p. 339, generally and without limitation, that when a vessel in full sail occasions damage to one that has no sail set, she

[1] [Reported by Edward H. Daveis, Esq.]

will be held liable for all the damage. The same is also stated as a rule of law by 4 Boul.-P. Dr. Mar. p. 492, tit. 12, § 6, and it is assumed to be law in the case of Strout v. Foster, 1 How. [42 U. S.] 29. Undoubtedly, the rule must admit of exceptions. But the first presumption will place the blame on her, because she has the power of changing her course, and a vessel at anchor is stationary. The vessel under sail must therefore clear herself from the imputation, by showing that every practicable effort was made to avoid the collision. It may be safely stated as another general rule admitting perhaps of no exception, that a vessel entering the harbor in the night time, is put on her utmost vigilance; and this is more especially the case if the port be one much resorted to in bad weather as a harbor of refuge, as that of Portland is. When there is reason to expect that the harbor may be crowded with vessels, and this is always to be anticipated of Portland harbor after a few days of bad or doubtful weather, the highest degree of vigilance may be justly required. The master and crew ought to be on deck, and in such parts of the vessel as to be able to control her motions, and to see any vessel that lies in her track, and which they may be approaching. If this is not done and a collision takes place, there will be great danger that the fault will be placed to her account. Under these general rules of the law, the prima facie presumption of fault, if there was any, will be against the Scioto. She was the moving vessel, and she was entering, on account of the doubtful aspect of the weather, a harbor much frequented by vessels on this coast for the very purposes for which it was sought by her. Consequently, we have a right to demand of her the utmost care and vigilance.

Taking the testimony of the crew, and I have seen no reason for questioning their fairness, I think that there was that degree of vigilance which the case required. The whole of the crew were on deck and stationed in those parts of the vessel where they had the best opportunity of controlling her motions and seeing any object which they might be approaching. But the fact was, that the Falcon was not seen from the Scioto until she was so near that it was impossible to avoid a collision. The master, who was forward, and the mate, at the helm, with one of the hands, saw her at the same moment, and the mate immediately put up the helm to bear away. She was moving in a direction that would have brought her on the Falcon's bow, but the helm changed her motion, so that she struck her quarter. At first, it may appear surprising that the master, mate, and one of the hands should all have seen her at the same moment when she was just under the Scioto's bows, at not more than the distance of thrice the length of the vessel. The testimony explains it. As they were approaching the Falcon, another vessel beating into the harbor was approaching them, between the Falcon and the Scioto, and entirely concealing her, and she was seen as soon as this vessel had so far passed as to clear her. It may still be asked why the Falcon was not seen before, when they were approaching her, and before the stranger vessel intervened to prevent it. The first answer is, that the Falcon showed no light. If she had suspended a lamp in her rigging, that would undoubtedly have been seen. But as the night was sufficiently clear to see objects at a considerable distance, it is contended that with a good lookout, she might and would have been seen sooner. It is not a satisfactory answer to this point in the case, insisted upon for the libellant, that the Falcon was seen from the Scioto as soon as the Scioto was seen by the watch in the Falcon. I fully agree with the libellant's counsel, that the obligation of a vessel entering a harbor, to keep a vigilant watch, is more stringent than it is on a vessel lying at anchor, for the obvious reason that, being in motion, she is in danger of collision, not only with vessels in motion like herself, but with those at anchor. And besides, the fault of the Falcon, if she was in fault, will not excuse the neglect of any precaution on the part of the Scioto. If by any reasonable degree of watchfulness the Falcon might have been seen, I hold that she ought to have been. A vessel entering a harbor under the circumstances of the Scioto, is responsible de levissima culpa.

Might, then, the Scioto, with a vigilant watch, be supposed to have seen the Falcon, while she was approaching her, before the view was intercepted by the other vessel, which was beating into the harbor at the same time; or was the night so obscure that, with a watch intently on the lookout, she might have escaped their sight? Undoubtedly there was light enough to see a vessel broad off on the water, considerably further than these two vessels were apart before the view was cut off by the intervening vessel. But then the Falcon was within the land, so that in the direction in which she would be seen as she was approached in any direction, the land rose behind her, above the line in which her hull would be seen, and then the shade of the vessel would be lost in that of the land; and, in the position in which she lay, she could in fact be discovered by the Scioto, as she approached, at but a short distance. The testimony of the crew is that they were on a sharp lookout; and fault is not ordinarily to be presumed; it must be proved. No vessel can reasonably be presumed wantonly to run into another, and in cases of collision the presumption, until the contrary is proved, is that it was fortuitous. Repertoire de Jurisprudence Abordage; Emerig. Assur. p. 414, c. 12, § 14; Boul.-P. Dr. Mar. p. 494, tit. 12, c. 6. Though there is some discrepancy in the testimony as to the obscurity of the night, without supposing it absolutely impossible to have seen the Falcon sooner, I do not feel authorized to

say that the Scioto must be in fault for not doing it, or that there was a want of due vigilance on her part. Some light might have been thrown on this obscure part of the case, if the crews of the other two vessels, which were passing the Falcon at the same time, had been called as witnesses. We should then have known at what time she was seen by them. But they have not been called by either party.

The next question is, whether a fault is imputable to the Falcon, or whether the collision must be considered as a simple misfortune, without fault on either side. When the collision is purely fortuitous and preceded by no fault of either party, the common law as well as that of Rome, following the principles of the law of nature, left the damage and loss to rest where they fell, on the principle that no one was responsible for fortuitous events or accidents of major force. 3 Kent, Comm. 231; Abb. Shipp. p. 1, pt. 3, c. 1; Am. Ed. 1846, p. 301; Dig. 9, 2, 29, §§ 2, 4. And under the term "fault" are included, not only acts of positive misconduct, but every want of due care, vigilance, or skill on the part of the master and crew. "Imperitia culpæ annumeratur." Dig. 50, 17, 133. But the maritime law, from considerations of public policy, divides the loss equally between them. The whole damage done to both vessels is put into one mass in common, and each pays one half, without regard to the different value of the vessels, when both parties have been in fault, without attempting to discriminate whether the faults had not been greater on one side than the other. Hay v. Le Neve, 2 Shaw, App. 395, cited Abb. Shipp. 230. If, says Valin, it should be objected that it would be more simple to leave each vessel to bear the damage which she has suffered, the answer is, that then the masters of large vessels would have little fear of striking vessels smaller and of less strength. Nothing, then, is more just than a contribution by moieties. Ord. de la Mar. liv. 3, tit. 7, art. 10; 2 Valin, p. 179; Abb. Shipp. p. 301, 3 Kent, Comm. 231. And this rule in the admiralty seems to prevail in three cases, first, when there has been no fault, on either side; second, when there may have been fault, but it is uncertain on which side it lies; and third, when there has been fault on both sides. Story, Bailm. §§ 608a–608d, 609, and notes.

It is contended on the part of the respondent, that two faults are imputable to the Falcon: First, that she anchored in the channel and thus obstructed the common passage way of vessels entering and leaving the port; the second, that she showed no light. The Falcon arrived on Thursday the 7th of December, just one week before this misfortune happened, and came to anchor in the place where she then lay. She was bound to Boston, and came in on account of the weather. On the very evening of her arrival, another vessel, the Medford, in entering the harbor came in collision with her. That has been the subject of examination in this court, and damages were awarded against the Medford. The Falcon then showed a light, but a question was then raised, whether she was excusable for placing herself in that part of the channel. The facts proved were, that the Falcon came into the harbor as a port of safety on account of the state of the weather, that the captain was unacquainted with the harbor, and that he brought his vessel to anchor in a place where vessels often anchor and lay for a short time. The Medford was entering with a fair wind and could easily lay her course directly into the harbor. My opinion then was, and I have seen no cause for changing it, that the collision happened from want of due care on the part of the Medford, without fault on that of the Falcon.[2] But the facts now before the court present a widely different case. The Falcon lay a little out of the track of a vessel entering the harbor as her home port with a fair wind, but precisely, as it was expressed by one of the witnesses, in the gangway leading to Hog Island roads, and that is the place aimed at by many, if not by most vessels which come into the harbor for safety from stress of weather. All the experienced shipmasters without exception, who have been examined, say that it was not a fit place for a vessel to anchor unless in a case of necessity, but that it was a place of danger both to herself and other vessels that were entering the harbor; and that no vessel anchoring there from necessity, ought to remain in so exposed a situation longer than the necessity continued. Now, the master had been very strongly admonished by one collision that he lay in an unsafe place, yet he remained there for a week after, without attempting to change his place. Admitting that the master of the Falcon, being little acquainted with the harbor, is excusable for bringing his vessel to anchor in that place when he first entered the harbor, is he excusable for remaining there after he had the most convincing proof that he was in a place that exposed him to collision with other vessels entering the harbor? It is contended by his counsel that he was, first, because the subject of the first collision was then under judicial examination, and he might naturally suppose that he would be chargeable with some impropriety if he removed while that matter was pending; and secondly, that there being no harbor-master or port regulations directing where vessels may lie, every master has a perfect right to choose his own place of anchorage, and that he has as much right to one part of the harbor as another. I can see no sufficient reason for his not removing his vessel from the channel where she was in constant danger of collision with vessels entering the port, from the fact that the process for the first collision was still pending and undecided. He might easily, by calling witnesses, have determined her exact position, or at least nearly enough for the purposes of that case. And

[2] The case of the Medford is not reported, an oral opinion only having been given.

though, in the absence of any harbor regulation, every master may choose his own place of anchorage, he makes the choice on his own responsibility. It does not follow, because there are no special laws or regulations for the port and harbor, that they are left without law. The general law of the sea then governs. In all situations men are bound by the common obligation of social duty, so to use their own right as not to injure others. "Sic utere tuo ut alienum non lædas," is a principle of the law as well as morals. The law of the state does not, it is true, attempt to enforce by penalties all the obligations of high and strict morality; but this is one in which, in a great variety of circumstances, it does come in aid of social duty and Christian charity. It requires men to care for others as well as themselves, and so to exercise their own unquestioned right, as not to violate or infringe the equal rights and endanger the security of others. Admit that in a case of urgent necessity, a master has a right to bring his ship to anchor in the very middle of the channel. Others have a right to that channel as a passage way as well as he. He could not remain there longer than his necessities required, without encroaching on the rights which others have to the free use of the channel, in passing in and out, without dangerous obstruction. He is bound, as soon as he is able, to remove his vessel to a place where she may be safe herself and not endanger the safety of others. It is an old rule of the maritime law, that a vessel improperly moored, or in an improper place, can claim nothing for damages she may suffer from collision with another vessel. Ord. de la Mar. liv. 3, tit. 7, art. 11, and Id. liv. 4, tit. 8, art. 3; 2 Valin, pp. 183–579; 1 Emerig. Assur. p. 412, c. 12, § 14. Laws of Oleron, art. 15. Notwithstanding the injury which this vessel had received in the former collision, I am entirely satisfied that she might have been moored with ease, and with perfect safety, where she would have been out of the way of vessels beating into the harbor, and, in my opinion, she was in fault in not doing it. All the witnesses agree on the point, which indeed seems too plain to require proof, that a vessel ought not to lie, day after day, in that part of the channel which is in the range vessels take in beating into the harbor.

Another fault is imputed to the Falcon, that of not showing a light. If she had shown one, it seems to me nearly certain that she would have been seen from the Scioto in approaching her, in season to have avoided the collision. If she had had a light suspended in a conspicuous place, and a collision had taken place, it would, to say the least, have been extremely difficult for the colliding vessel to have excused herself. For, admitting that she was anchored in an improper place, her fault would not excuse any want of care and caution in another vessel. But here it is again said, that there are no port regulations requiring vessels to show a light, and that in point of fact it is not customary for vessels to do so in this port. It is true that the testimony is, that though vessels lying in the harbor sometimes show a light, they usually do not. But whatever may be the custom, it appears to me hardly to admit a question, that a vessel lying in a channel, at the entrance of a harbor, where vessels are often passing and repassing, ought in the night time in common prudence to show a light. When she lies out of the channel way where vessels pass, it may not perhaps be required; but if she places herself in the common passage way, though she may have a right to lay there in a case of necessity, certainly it is not demanding too much to require her, while she is occupying the common highway, to give notice, by a light, of her position to others who are passing, and who are entitled of common right to a free and unobstructed passage. If she does not, it appears to me that no court could hold her free from fault. In some parts of this country this is said to be required by port regulations. And I apprehend that it is required by the law of the sea. In the case of Hay v. Le Neve, cited in Abb. Shipp. 230, which arose and was much litigated in Scotland and was ultimately decided on appeal by the house of lords, the Wells was lying at anchor in the Frith of Forth, and, in a cloudy night, was run down by the Sprightly and entirely lost. The house decided that both vessels were in fault, and following the rule of the maritime laws divided the loss between them, each bearing one-half. Lord Gifford, in delivering his opinion to the house, said he was strongly impressed with the negligence on the part of the Wells in not showing a light, and it would seem from the report of the case in Abbott that this was the only fault imputable to her. In Jacobson's Sea Laws, 340, it is said that the want of a lantern, in narrow waters, has always been looked on as an omission and neglect not entitling a party to redress when injured. And it is added, that it was so decided by the supreme court of Holland on the advice of Bynkershoek, and there is no higher authority in maritime law than this great civilian. The Ordonnance of the Marine, liv. 4, tit. 3, art. 4, directs that "when there are several vessels lying in the same road, that which shall be most outward to the water shall have, during the night, a light in the ship's lantern to warn vessels coming from the sea." "An extremely wise precaution," says Valin, "but too much neglected; but if not observed, the vessel receiving damage would not be entitled to an indemnity for it."

On these authorities, as well as the obvious reason of the thing, I feel justified in stating that a vessel lying in the channel of this port (and by the channel I mean that part of the water which is traversed by vessels coming into the harbor, whether they can lay their course in, or are under the necessity of beating in) is bound to show a light in the night time, whether the night is obscured by clouds, or it is star-light, provided there be no moon. It is required in my opinion by the general law of the sea, independent of all port regula-

tions. On both grounds my opinion is, that the Falcon was in fault and is not entitled to recover against the Scioto. But under the circumstances of the case, it being the first case of collision in this port which has been brought to the consideration of the court (except the recent instance of the Medford) the libel is dismissed without costs.

S. C. IVES, The (KYNOCH v.). See Case No. 7,958.

Case No. 12,509.

In re SCOFIELD et al.

[3 N. B. R. 551 (Quarto, 137).] [1]

District Court, S. D. New York. March 3, 1870.

BANKRUPTCY—PARTNERSHIP—FAILURE OF ONE TO FILE SCHEDULE—DISCHARGES.

Where a member of a bankrupt firm had failed to file schedule of his personal property, *held*, the other members would not, on that account, be refused a discharge.

[In the matter of Demetrius G. Scofield, Samuel L. Scofield, and John M. Moorhead, bankrupts. For prior proceedings in this litigation, see Case No. 12,510.]

Aaron J. Vanderpoel and J. Stanley Smith, for the bankrupts.

Elliott F. Shephard, for the creditor.

BLATCHFORD, District Judge. In this case the discharge of the two Scofields is opposed by the receiver of the Croton National Bank as a creditor. The bankrupts composed the firm of D. G. Scofield & Co. The first specification charges willful false swearing by the Scofields, in making oath that the schedules and inventory filed with their petition, state fully and truly their debts and estate, and those of said firm; whereas: 1st. The firm of W. H. and F. B. Taylor, who are in such schedules asserted to be creditors of said firm for the sum of twelve thousand three hundred and fifty dollars and eighty-three cents, are not its creditors for any sum, but are indebted to it or to D. G. Scofield, in the sum of eighty thousand dollars, or in a considerable sum of money, no part whereof is included among the assets of said firm or of either of said bankrupts, as stated in said schedules. 2d. H. N. Tibbits, who is asserted in said schedules to be a creditor of said firm for the sum of twenty-five thousand dollars, is not its creditor for any sum. 3d. The bankrupts, or said firm, or D. G. Scofield individually, owned at the time of the filing of the petition certain real estate known as the Cunningham mill property, situated at the southeasterly corner of First avenue and Twenty-Ninth street, in the city of New York, and four lots of land situated at the southwest corner of First avenue and Twenty-Seventh street in said city, which two parcels of property falsely and fraudulently stand in the name of William H. Taylor. 4th. D. G. Scofield was at the time of the filing of the petition the owner of a valuable horse now or lately in the possession of said Taylor, or his said firm, and of a certain library, certain furniture, and other personal property. The second specification alleges that the bankrupts have concealed a claim for an undisputed account against said Taylor or his said firm, arising from the sale of certain securities formerly given to said Taylor or his said firm, by the bankrupts or one of them, or their said firm, and also arising from the said real estate, which passed into the hands of said Taylor, from D. G. Scofield, with intent to defraud his creditors and those of his said firm, and for which Taylor or his said firm is under obligation to account to the creditors of D. G. Scofield or of his said firm, and also a horse, a library, and certain furniture, and other personal property. The third specification alleges that each of the bankrupts has been guilty of negligence and fraud in omitting to deliver the said property to the assignee herein. The fourth specification alleges that since the passage of the bankruptcy act [of 1867 (14 Stat. 517)] the bankrupts have altered their ledger A and their cash-book A, and other books of their said firm, and falsified the same by introducing therein entries showing large amounts of money from W. H. & F. B. Taylor, which were never so borrowed, and in other ways; a portion of said false and fraudulent entries being found on pages 25 and 26 of said ledger, and on pages 1 to 49, inclusive, of said cash-book, and others in said books. The fifth specification alleges that the bankrupts have made or been privy to making false and fraudulent entries in their books of account or those of their said firm, being the entries specified in the fourth specification, and others, with intent to defraud their creditors. The sixth specification alleges that since the passage of the bankruptcy act, D. G. Scofield has removed or caused to be removed from this district a portion of his property, to wit, a valuable horse and other property, with intent to defraud his creditors. The seventh specification alleges that the bankrupts have, in contemplation of becoming bankrupt, made certain pledges, payments, transfers, assignments, or conveyances of certain portions of their property, directly or indirectly, absolutely or conditionally, for the purpose of preferring a certain creditor or person or persons having a claim against them, or for the purpose of preventing the property from coming into the hands of the assignee or of being distributed under the act, to wit, certain gold checks and large sums of money amounting in the aggregate to seventy-five thousand dollars or thereabouts, paid by the bankrupts to said Taylor or his said firm, the whole or a portion of which moneys the bankrupts, in collusion with said Taylor, fraudulently obtained from the Croton National Bank; and the said real estate, and certain horses,

[1] [Reprinted by permission.]

carriages, furniture, etc., which were for said fraudulent purposes mortgaged to said Taylor about 10th March, 1866, and the proceeds whereof said Taylor has received. The eighth specification alleges that the firm of D. G. Scofield & Co. ought not to be discharged from its debts and liabilities, because the bankrupt Moorhead has not made or filed any schedule of debts, or inventory of effects, as required by the act, and has not delivered his property or any portion thereof into the hands of the assignee.

The firm of D. G. Scofield & Co. was formed about February 1st, 1866, and did business as brokers and speculators generally in stocks and gold. The firm kept its bank account in the Croton National Bank, which bank was in the habit of loaning to it daily large sums of money without taking any security, by allowing it to overdraw its account during the day, provided the deficiency was made good by the close of the day. On the 4th of April, 1866, the firm thus overdrew the sum of sixty-three thousand dollars, failed to replace it, and suspended payment. During its continuance in business, the firm did business as brokers in buying and selling gold for W. H. & F. B. Taylor, and borrowed large sums of money from W. H. & F. B. Taylor. On the 3d of April, 1866, W. H. Taylor gave to the bankrupt's firm an order to purchase for W. H. & F. B. Taylor, from fifty thousand to seventy-five thousand dollars of gold, and such firm purchased about seventy thousand dollars of gold, deliverable and to be paid for the next day. During the 4th of April, about fifty thousand dollars of the gold so purchased was delivered by the sellers of it to the bankrupt's firm. That firm paid for it by checks on the Croton National Bank, and delivered it to W. H. Taylor, and charged it to his said firm in account. The bankrupt's firm also delivered to W. H. & F. B. Taylor, on the 4th of April, currency checks to the amount of twenty-four thousand dollars, and charged the same to that firm in account.

The foregoing facts are not disputed. The contest is as to whether the bankrupt's firm were indebted to W. H. & F. B. Taylor to an amount equal to the amount of the gold and checks so put into the hands of W. H. & F. B. Taylor. The creditor alleges that such indebtedness did not exist, but that the transaction was a scheme of fraud to put into the hands of W. H. & F. B. Taylor, the gold and checks in question in trust for the benefit of the bankrupt's firm, and for the purpose of defrauding their creditors. The bankrupts claim that on the morning of April 4th, at the commencement of business, their firm was indebted to W. H. & F. B. Taylor for borrowed money in the sum of nearly one hundred thousand dollars. The Taylors had in their hands a large amount of stocks which they had received from the bankrupt's firm, and those stocks were returned by the Taylors to the bankrupt's firm on the 4th of April, after the Taylors had received the gold and checks in question. Those stocks were largely petroleum stocks. Such petroleum stocks were declining rapidly in selling value on and just before the 4th of April, and have since turned out to be almost wholly worthless. What became of the stocks so returned by the Taylors is fully shown by the evidence.

From a careful examination of the testimony I am satisfied that the creditor has failed to establish his claim that the gold and checks given to the Taylors on the 4th of April, were not given on account of bona fide indebtedness due by the bankrupt firm to the Taylors' firm at the time, or his claim that W. H. Taylor or his firm constituted a part of the copartnership of the bankrupts' firm, or that the amount alleged in the schedules of the bankrupts to be still due by their firm to W. H. & F. B. Talyor, is not due. The integrity of the entries found in the books of account of the bankrupts' firm as to their transactions with the Taylors' firm, is not successfully impeached. Those entries show that after charging against the Taylors' firm the gold and the checks in question, and all other items that ought to be so charged, the amount of indebtedness stated in such schedules still remains due to the Taylors' firm. Whether the debt to the Croton National Bank was created by fraud or will be discharged by a discharge granted herein, is not the question. The question is, whether the property turned over to the Taylors by the bankrupts went to apply on a bona fide debt due by the bankrupts' firm to the Taylors. I think on the evidence that it did. The indebtedness to Tibbets appears to be still outstanding. At all events no willful false swearing in respect thereto by the Scofields is shown. The transactions in regard to the creation of such indebtedness were carried on by the bankrupt Moorhead to the exclusion of the Scofields, and in inserting in their schedules that indebtedness as still existing, the Scofields acted on information derived from Moorhead, and which they had a right to believe to be true. On the proofs the real estate and horse and library and furniture mentioned, did not belong to the bankrupts, or to either of them, when their petition was filed. The bankrupts have not concealed any claim for an account against W. H. Taylor, or his firm, arising from the sale of any securities formerly given to said Taylor, or his firm, or from any real or personal property, nor have they been guilty of negligence or fraud in omitting to deliver any such property to the assignee. It is not established that the bankrupts have altered or falsified their books of account in any manner, or made, or been privy to making any false or fraudulent entries in any of them. There is no evidence that D. G. Scofield has removed or caused to be removed any property of his from this district.

The seventh specification, in so far as it purports to charge the existence at the time of the filing of the bankrupts' petition of property of theirs which they failed to dispose, is merely a repetition of preceding specifications. In so far as it charges the doing, in 1866, of

the acts which it specifies, it alleges acts which were done before the passage of the bankruptcy act, and which are therefore not within the purview of the 29th section of the act, as acts the doing of which authorizes the refusal of a discharge. The eighth specification amounts to nothing. The firm of D. G. Scofield & Co. is not to be discharged. The Scofields are to be discharged. By section 36 of the act a discharge is to be granted or refused to each of the Scofields as it would be if Moorhead were not a party to these proceedings. The specifications are all of them overruled, and discharges are granted to Demetrius G. Scofield, and Samuel L. Scofield.

Case No. 12,510.

SCOFIELD v. MOORHEAD.

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

District Court, S. D. New York. June 29, 1868.

BANKRUPTCY—COSTS OF EXAMINATION OF WITNESSES—BY WHOM PAID.

When witnesses are produced before the register, each party must pay for the direct examination of his own witnesses, and for such cross-examination as he may make of the witnesses of the adverse party.

[Criticised in Re Noyes, Case No. 10,370.]

By JAMES F. DWIGHT, Register:

In the course of the proceedings before me, arose a question pertinent to the proceedings, which was stated by the counsel on both sides, as appears by the papers hereto attached, which is referred to the court for decision, under section 4 of the act [of 1867 (14 Stat. 519)]. On the 18th of May, by order of the court, a reference was made to the register "to take and certify to the court, with all convenient speed, all such testimony as shall be offered before him on the part of either the said Demetrius G. Scofield, Samuel L. Scofield or John M. Moorhead, upon the issues raised," in a petition of D. G. Scofield asking for adjudication in bankruptcy of himself and his firm consisting of others, Samuel L. Scofield and John M. Moorhead. John M. Moorhead denies the bankruptcy of the firm, and obtains a reference to take the testimony as aforesaid. Under the order, D. G. Scofield is examined by his own calling, and Moorhead cross-examines. Scofield's attorney claims that he is responsible only for the register's fees on the direct examination of his own witnesses, and Moorhead's attorney claims that Scofield is responsible for not only the register's fees in the examination of his own witnesses, but their cross-examination, and also primarily for all witnesses called by Moorhead, the contesting party, and their points are stated and hereto attached.

In my opinion Scofield is responsible only for the fees on the direct examination of his own witnesses. Each party the same, and either party is responsible for all time occupied in examining witnesses for their benefit, whether direct or cross. Which is respectfully submitted.

BLATCHFORD, District Judge. I think the register is correct in his view. Under section 4 of the act the fees of the register must be paid to him by the party for whom the service is rendered, and under general order 29, the fees of the register must be paid or secured to him before he can be compelled to perform the duty required of him by the party requiring the service. Under these provisions, the taking of the direct examination of a witness is a service rendered for, and required by the party calling such witness, and the taking of the cross-examination of the same witness is a service rendered for, and required by the parties cross-examining such witness. This view applies to the matter only as between the register and the parties for whom he renders the services. Under general orders 29 and 31, and section 41 of the act, the court has power, in this case, to make such final disposition of the question of costs as the equity of the case shall demand.

[For subsequent proceedings in this litigation, see Case No. 12,509.]

[1] [Reprinted by permission.]

Case No. 12,511.

In re SCOGGIN.

[5 Sawy. 549; 8 Reporter, 330; 19 N. B. R. 197; 11 Chi. Leg. News, 36.] [1]

Circuit Court, D. Oregon. June 24, 1879.

ATTORNEY'S LIEN.

1. Under Civ. Code Or. § 1012, an attorney cannot acquire a lien for his compensation upon a judgment obtained by him unless he has a special agreement as to the amount thereof.

2. A mere debt due by the adverse party to the client of the attorney is not money in hands of such party within the meaning of subdivision 3 of said section 1012, and therefore no lien can be acquired upon it for the compensation of the attorney who may obtain a judgment therefor.

Objections to proof of debt.

O. P. Mason, in pro. per.

John Catlin, for assignee.

DEADY, District Judge. On January 9, 1874, J. L. Scoggin was adjudged a bankrupt in this court, being at the time administrator of the estate of A. H. McQuinn. On April 7, 1877, the county court of Multnomah county, upon the consideration of the final account of said administrator, gave a decree disallowing eight hundred and seventy-six dollars of the credits of the same, and made an order directing the distribution of this amount among the children and heirs of McQuinn, eleven in number. Upon the examination of

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 8 Reporter, 330, contains only a partial report.]

said final account, O. P. Mason appeared as attorney for said heirs, and as such was instrumental in procuring the disallowance aforesaid. Mason had no agreement with said heirs, most of whom were minors, for compensation for his services; but on April 10, 1879, he gave notice to the bankrupt that he claimed a lien upon the decree aforesaid, for his compensation as attorney for said heirs, "to the extent of twenty-five per cent. upon each heir's share in distribution, together with the full amount of costs and disbursements," which were thirty-three dollars and thirty-five cents. On April 25, 1879, Mason filed a proof of debt with the register for the sum of two hundred and fifty-two dollars and thirty-five cents, that being the amount of his claim for services and costs, and disbursements. The assignee objected to the proof and specified as follows: (1) That said claim, except the sum of thirty-three dollars and thirty-five cents costs, is not one against the estate of the bankrupt, nor were the alleged services rendered to or for him; (2) that said claim is not a lien upon the fund in the hands of the assignee; (3) that the alleged lien cannot affect moneys not in the hands of the administrator; and (4) that said claim not being one against the bankrupt, cannot be proven against his estate or become a lien thereon.

Seven of the eleven heirs of McQuinn proved their claims, each for the one eleventh of the amount, seventy-nine dollars and sixty-three cents, while the other four proved their claims for less than twenty-five per cent. of said amount, which they admitted to be due Mason. The register admitted the proof of debt for the amount of the costs and twenty-five per centum of four of the several sums claimed by the heirs, and upon the request of the parties certified the question here. The claimant relies upon section 1012 of the Civil Code, which provides among other things that "an attorney has a lien for his compensation, whether specially agreed upon or implied, * * * 3. Upon money in the hands of the adverse party in an action, suit or proceeding in which the attorney was employed from the time of giving notice of the lien to that party. 4. Upon a judgment or decree to the extent of the costs included therein, or if there be a special agreement, to the extent of the compensation specially agreed on, from the giving notice thereof to the party against whom the judgment or decree is given, and filing the original with the clerk when such judgment of decree is entered and docketed," —and insists that he acquired a lien under one or the other of these subdivisions from the time of giving the notice to the bankrupt, and that in equity he is to be deemed an assignee to the amount of such lien, and may therefore prove his claim for the same directly against the estate of the bankrupt. In support of this proposition he cites Marshall v. Meech, 51 N. Y. 140, and Wright v. Wright, 70 N. Y. 98, wherein it was held that an attorney has a lien upon a judgment recovered by him for an agreed compensation for the amount of such compensation and costs as against all persons having notice of the same; and that to the amount of such lien he is to be deemed an equitable assignee of the judgment.

This case does not fall within the third subdivision of section 1012. "Money in the hands of the adverse party" within the meaning of this provision is something more than a mere debt from such party to the client of the attorney who claims the lien. On the contrary, "money" in his hands means some specific funds which have actually come into his possession as custodian or trustee, and to obtain which the action or suit is brought. After judgment is obtained upon the claim or demand or for the money the lien of the attorney can only be acquired upon the judgment under subdivision four of said section.

Whether this sum was ever in the hands of the administrator as money, or whether his liability therefor grew out of a negligent failure to collect the same from the debtors of the estate does not appear. The decree of the county court, although referred to in the proof of debt, is not found among the papers presented to the court, and if present would probably shed no light on the subject.

Nor is the claimant entitled to a lien upon the decree in the county court under subdivision 4 of said section 1012, because it does not appear from the notice thereof or otherwise that there was any special agreement as to the amount of compensation to be received for his services. A lien is not given upon a judgment for the attorney's compensation, only to the extent the latter has been specially agreed upon. He cannot acquire a lien for compensation which is to be measured by a quantum meruit. Strictly speaking, the claimant is not entitled to make proof of any claim against the estate except for the costs. Having no lien upon a decree or money for his compensation, he is not a creditor of the estate of the bankrupt. His claim for services is against the heirs of McQuinn, and, if need be, may be inforced against them in an ordinary action, in which the value of the services may be ascertained by the verdict of a jury. But as four of the heirs have practically acknowledged the claim of Mr. Mason by deducting the amount from their proofs of debt, his proof may stand for that amount and the costs, as ordered by the register,—one hundred and twelve dollars and ninety-eight cents. It is also a question whether the notice of the alleged lien having been given after the administrator had been adjudged a bankrupt should not have been given to his assignee in bankruptcy. Besides, it does not appear when this defalcation took place or this liability occurred. If it was after the administrator was adjudged a bankrupt, then neither the heirs nor the attorney have any claim upon the assets of the estate, which belong wholly to the creditors existing

at the time of the adjudication. In such case the administrator is liable to them as if he had never been adjudged a bankrupt.

The ruling of the register is affirmed.

SCOGGINS (BROOKE v.). See Case No. 1,936.

SCOTIA, The. See Cases Nos. 390 and 391.

Case No. 12,512.

The SCOTIA.

[5 Blatchf. 227.] [1]

Circuit Court, S. D. New York. Nov. 22, 1864.

COLLISION—STEAM AND SAIL—CHANGE OF COURSE.

A sailing vessel discovering the lights of a steamer nearly ahead, on a dark and cloudy night, had no right afterwards to change her course, on the idea that she had not been seen by the steamer.

[Cited in The Free State, Case No. 5,090; McWilliams v. The Vim, 12 Fed. 909; The Alberta, 23 Fed. 811; The Allianca, 39 Fed. 479.]

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

This was a libel in rem, filed in the district court, by the owners of the schooner E. H. Parker, against the steamer Scotia, to recover damages for injuries sustained by the schooner, in a collision which took place between her and the Scotia, on the morning of the 20th of November, 1862, between five and six o'clock, in the lower bay of the city of New York, about a mile south of Fort Lafayette, and somewhat to the east of it. The wind was south-south-west, and the tide about three-quarters flood. The schooner was laden with a cargo of coal, and was on a voyage to New Haven, by the way of the East river and Long Island Sound. The steamer was proceeding down the bay, on one of her usual trips from the port of New York to Liverpool. The morning was dark and cloudy, but without fog or mist on the water. The district court dismissed the libel [case unreported], and the libellants appealed to this court.

Washington Q. Morton and Walter L. Livingston, for libellants.

Daniel D. Lord, for claimants.

NELSON, Circuit Justice. The case turns mainly on a question of fact, and that is, whether or not the schooner, after having been seen by the steamer, changed her course, by porting her helm and bearing to the east, thereby crossing the course or track of the steamer.

It is insisted by the master and hands on board of the steamer, that, on discovering the light of the schooner, which was then some three miles distant, it bore two points on their starboard bow, and that with a view to give her a free course, the helm of the steamer was starboarded, inclining her course to the east: but, that the schooner, instead of pursuing her course, ported her helm, and brought her across the track of the steamer, and thus occasioned the collision. It is admitted by the hands on board of the schooner, that, when they discovered the lights of the steamer, she appeared on a line nearly ahead of them; and that, intending to go up the bay on the east side, and to anchor at Red Hook Flats, they ported her helm and bore to the east. But they insist that this must have taken place before the schooner could have been seen by the hands on board of the steamer, and, hence, would not have influenced the course of the steamer. This I regard as the weak point in the case of the libellants. I am not satisfied, upon the proofs, that their position is well founded. On the contrary, I am inclined to think the weight of the evidence is, that the change of course took place after the schooner was discovered by the steamer. The error committed by the schooner was in changing her course after she had discovered the steamer. She had no right to assume she had not been seen by the steamer. The rule, that a steamer must take care and avoid a sailing vessel, if she keeps her course, is equally imperative, that the latter must not change her course. If she does she is in fault, and cannot invoke the rule against the steamer.

Besides, in this case, the night was dark, the steamer was moving down the bay with moderate speed, and the hands on board appear to have been active and attentive to avoid a collision, after discovering the schooner, and to have discovered her as soon as was practicable by the most vigilant lookouts.

Even if the schooner had not been chargeable with fault, I think it difficult to impute fault to the steamer. No doubt, if the collision had occurred in open day, or even on a clear and bright night, when the steamer could have seen the change made by the sailing vessel early enough to avoid her, it would have been her duty to take all proper measures for the purpose. But a change of course on a night dark and cloudy cannot be so readily discovered or so fully comprehended, and a less stringent rule must be applied.

I agree with the court below, that, upon the proofs in the case, the steamer was not in fault, and must affirm the decree.

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

Case No. 12,513.

The SCOTIA.

[7 Blatchf. 308;[1] 3 Chi. Leg. News, 10; 3 Am. Law Rev. 582; 5 Am. Law Rev. 382; 2 Am. Law Times Rep. U. S. Cts. 60.]

Circuit Court, S. D. New York. June 11, 1870.[2]

COLLISION—STEAM AND SAIL VESSELS—CONSTRUCTION OF RULE AS TO RIGHT OF WAY—LIGHTS—RULES OF NAVIGATION.

1. The rule that, when a steamer and a sailing vessel are approaching each other, so as to involve danger of collision, it is the duty of the steamer to keep out of the way of the sailing vessel, and that the mere fact of collision is prima facie evidence of fault in the steamer, is not so unyielding that it may not be shown that the steamer exercised due care.

2. If a steamer, on seeing a light at sea on another vessel, observes it diligently, and has no reasonable ground to apprehend a collision, it is not incumbent on her to slacken her speed or change her course.

[Cited in The Free State, Case No. 5,090; The Sunnyside, Id. 13,620; The Manitoba, Id. 9,029.]

3. A steamer, in this case, held not to have been in fault in porting her helm at the same time that she slowed, stopped and reversed, on seeing danger of collision with another vessel at night at sea, she having reasonable ground, induced by the light shown by such other vessel, to suppose that such other vessel was a steamer.

[Cited in The Free State, Case No. 5,090; The Sunnyside, Id. 13,620.]

4. Where a sailing vessel did not carry the lights required by the statute of the United States, but carried a white light, which, seen by a steamer, induced the steamer to believe that the sailing vessel was a steamer whose side lights had not yet come into view, and the steamer made such movements as were proper for her to make if meeting another steamer, and a collision ensued between the two vessels, *held*, that the steamer was not in fault; that the sailing vessel was wholly in fault; and that the sailing vessel could not recover against the steamer for the damage caused by the collision.

[Cited in The Continental, Case No. 3,141; The Free State, Id. 5,090; Leonard v. Whitwill, Id. 8,261.]

5. The binding force of the rules of navigation prescribed by the acts of congress, upon vessels of the United States, considered.

6. Where the neglect of a vessel of the United States to carry the lights required by those rules was the cause of her loss, through a collision between her and a foreign steamer, on the high seas, her owner cannot recover for such loss, against such steamer.

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

This was a libel filed in the district court by the owners of the American ship Berkshire against the British steamer Scotia, to recover the sum of $55,000 as the value of the Berkshire and her pending freight, and the sum of $340,000 as the value of a cargo of cotton under carriage by her, the Berkshire and her cargo having been sunk and totally lost by a collision which occurred between the two vessels, in the Atlantic Ocean, at about two o'clock on the morning of the 11th of April, 1867. The Berkshire was on a voyage from New Orleans to Havre in France, and the Scotia was on a voyage from Liverpool to New York. The district court dismissed the libel and the claimants appealed to this court.

The opinion of the district court (Blatchford, District Judge), was as follows:

"This case is an important one, from the large amount involved, and the gravity of some of the legal questions discussed, and was argued by the learned counsel for the respective parties, with a zeal and an ability commensurate with its demands; but I think it will not be found difficult to arrive at the proper solution of the controversy. The libel alleges that the Berkshire, while sailing with the wind somewhat free, on a course south east by east half east, under full sail and making about seven miles an hour, discovered a white light on her port bow from four to five miles distant; that the light seemed to come directly towards the Berkshire, and was thought to be the light of a sailing vessel, as no other light than a white light could be made out; that the master of the Berkshire, fearing a collision, ordered his helm to be put to starboard, and the vessel to be kept away; that, on this being done, the light was brought over the starboard bow of the Berkshire; that, shortly after this, the approaching vessel was discovered to be a steamer; that at that time the lights on board of the Berkshire were burning brightly, and were plainly seen on board of the Scotia; that the Scotia came on at full speed and struck the Berkshire about opposite the forechains, with a blow glancing a little forward, cutting off her bow, and carrying away her foremast with all her forerigging; that the Scotia had ample time to avoid the Berkshire, but put her helm to port, knowing that the Berkshire had the wind free, and attempted to cross the bows of the Berkshire, and followed her up until the collision took place; and that, by the collision, the Berkshire and her cargo were totally lost.

"The answer alleges, that when the lights of the Scotia were discovered by the Berkshire, the course of the Berkshire was very much to the south of east, and more southerly than southeast by east half east; that, at the time of the collision, the Berkshire had only a bright light, which was fastened to her anchor stock; that she was violating, in respect to lights, the laws of both England and America; that the Scotia had all proper lookouts properly stationed, and had her proper regulation white, green, and red lights; that, as the Scotia was steering west by north half north, making about thirteen knots an hour, her lookout discovered and

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

[2] [Affirmed in 14 Wall. (81 U. S.) 170.]

reported a bright light on her port bow; that the light then appeared to be about five miles off; that the steamer's helm was at once ported, and the light kept receding gradually from the Scotia's bow until very shortly before the collision, when it began to close in; that thereupon the engines of the Scotia were stopped and reversed and her headway stopped; that, when the two vessels first became visible from each other, their courses were divergent, the Scotia's being north of west, and the Berkshire's considerably south of east, and each bearing off the port bow of the other; that, if the Berkshire had kept her course, no collision would have happened, even if the Scotia had not ported; that the red and white lights of the Scotia were seen by the Berkshire, and her helm was put to port, and she came around towards the south, so as to be at times in the wind; that, some time after that, her helm was put hard a starboard, and her course was suddenly changed to the northward, and she fell off rapidly before the wind and got before the course of the Scotia; that, by reason of the Berkshire's not having the colored lights required by the laws and customs of both England and the United States, it was impossible for the Scotia to discover the changes in her course; and that the collision was caused entirely by the want of proper lights, and the mismanagement and want of care, on the part of those in charge of the Berkshire. This answer is sworn to by Mr. Sowerby, the chief officer of the Scotia, who states, in the jurat to the answer, that he was in charge of the Scotia, as officer of the deck, at the time of the collision. All of the allegations above recited from the answer, except the one as to the course of the Berkshire when she discovered the lights of the Scotia, are sworn to in the jurat, by Mr. Sowerby, to be true of his own knowledge.

"The general laws of navigation, as respects two vessels, where one of them is a steamer and the other is a sailing vessel, and entirely irrespective of any statutory regulations, are held by the supreme court of the United States to be, that when a steamer is meeting a sailing vessel, whether the sailing vessel is close-hauled or has the wind free, the sailing vessel has a right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid her; that when a steamer approaches a sailing vessel, the steamer is required to exercise the necessary precaution to avoid a collision; that if this be not done, prima facie the steamer is chargeable with fault; and that her excuse, to exempt her, must be clearly established by strong circumstances. St. John v. Paine, 10 How. [51 U. S.] 557, 583; The Oregon v. Rocca, 18 How. [59 U. S.] 570. The duty thus imposed upon a steamer is the same, in character and extent, with that now prescribed by statute regulation, in both Great Britain and the United States. By article 15 of the 'Steering and Sailing Rules,' in the act of congress approved April 29, 1864 (13 Stat. 60), and article 15 of the 'Regulations for Preventing Collisions at Sea,' which went into effect June 1, 1863, prescribed by an order in council, made January 9, 1863, by virtue of the merchant shipping amendment act of Great Britain, of July 29, 1862 (25 & 26 Vict. c. 63), it is provided as follows: 'If two ships, one of which is a sailing ship, and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.'

"What, then, is the excuse set up by the Scotia, in her answer, for colliding with the Berkshire? The substance of it is, that the Berkshire showed only a white light, and no colored light; that the Berkshire saw the colored lights of the Scotia, and first put her helm to port, and some time after suddenly changed her course by putting her helm to starboard, and running before the wind and across the course of the Scotia; that these manœuvres of the Berkshire were, however, not discovered by the Scotia, because the Berkshire did not have colored lights; that the Berkshire's light was discovered on the port bow of the Scotia, and the Scotia's helm was at once ported, and the Berkshire's light kept receding gradually from the Scotia's bow, until very shortly before the collision, when it began to close in; and that the engines of the Scotia were thereupon stopped and reversed. I am satisfied, from the evidence, that the statement in the answer is true, that any changes in the course of the Berkshire which were made were not discovered by the Scotia; that the light of the Berkshire was not seen by the Scotia until after the Berkshire had starboarded her helm and was running to the northward before the wind; that the receding of the Berkshire's light from the Scotia's bow, which took place, as the answer states, after the Scotia's helm was ported, was caused by such porting of the Scotia's helm and by the consequent movement of the Scotia's bow to the northward; and that the closing in of the Berkshire's light very shortly before the collision, was caused by the forward progress of the Berkshire on the same course on which she was running at the time her light was discovered by the Scotia. So far, therefore, as the movements of the Scotia, consequent upon her discovery of the light of the Berkshire, are concerned, any change of course by the Berkshire before the discovery of such light by the Scotia, is of no consequence. The case stands as if the Berkshire had never made any such change. What, then, did the Scotia do when she discovered this white light on her port bow? Without having anything whereby to determine which way the vessel carrying such light was heading, seeing no colored light, not waiting to see whether it

would not be more prudent to starboard than to port her helm, or more prudent to neither starboard nor port, but to stop and reverse her engines, she straightway ported her helm, but she still kept up her full speed of thirteen knots an hour, and it was not until the light which she had shaken off a little in appearance, but none in reality, by porting, began to close in, as the vessel which bore it moved forward, that the Scotia stopped and reversed her engines. I state the case as the answer states it. Of this the Scotia cannot complain; and the statement is as favorable to the Berkshire as anything warranted by the evidence.

"It is claimed, however, that the Scotia was not in fault, and that the Berkshire was wholly in fault, because the Berkshire, by carrying a white light, and which was a globe lantern, low down on her anchor-stock, induced the belief on the Scotia that the Berkshire was a steamer some five miles off, instead of a sailing vessel nearer at hand, and that the Scotia, thus making such a light on her port bow, was justified in believing that it was the light of a steamer and in porting her helm. This claim, on the part of the Scotia, is based on the proposition, that, as the Berkshire was a vessel belonging to the mercantile marine of the United States, and under way, she was forbidden, by the act of April 29, 1864, to carry the white light which she did carry, and was bound to carry the green and red lights which she did not carry. The British requirements as to lights, contained in the regulations before mentioned, are the same as those of the act of congress. That act prescribes the regulations for 'the navy and the mercantile marine of the United States.' The British regulations, as originally promulgated, 'apply to all ships, whatever their nationality, within the limits of British jurisdiction, and to British and French ships, whether within British jurisdiction, or not.' Order of the British Board of Trade, January, 1863, Macl. Supp. 81. The position of fact taken for the Scotia is, that the white light of the Berkshire was supposed to be the masthead light of a steamer at a considerable distance, and near the horizon, and, therefore, small in appearance, and that the steamer carrying such light was supposed to be so far off that her colored lights, much lower down and not visible as far off as the white light, had not yet come in view.

"The libellants, while they admit that the Berkshire did not carry the colored lights prescribed by the act of congress, and did carry and exhibit the white light referred to, insist that the Scotia cannot avail herself of a municipal statute of the United States to convict an American vessel of a tort committed on the high seas; that the questions in controversy must be determined without reference to the municipal laws of either the United States or Great Britain, and solely according to the general maritime law; that the regulations adopted by the two governments severally for the guidance of their respective vessels, cannot bind a vessel of either nation as against a vessel of the other nation, until such regulations are mutually adopted as international, and placed beyond the power of being changed by either nation without the consent of the other; and that, by the general maritime law, there was no obligation on the Berkshire to exhibit any side colored lights.

"In the case of The Dumfries, 1 Swab. 63, decided in 1856, the owners of a Danish vessel sued a British vessel to recover for a total loss occasioned by a collision between the two vessels on the high seas. In giving judgment in the case, Dr. Lushington says: 'This being a collision on the high seas, between a foreign and a British vessel, it appears to me that we cannot apply the act of parliament, but that the case must be governed entirely by ordinary nautical rules.' The point raised against the British vessel under the act was, that she did not carry the statute lights. The act was held not to apply to the British vessel, but she was condemned under the general law of the sea, for not having ported her helm soon enough.

"In the case of The Zollverein, 1 Swab. 96, decided in 1856, the Pet, a British brig, collided on the high seas with the Zollverein, a Prussian brig. The Pet brought suit in the British court. The Pet was sailing closehauled on her port tack. The Zollverein was running before the wind, and came in collision, stem on, with the port bow of the Pet. The Pet had kept her course. The Zollverein was held to have been in fault in not having soon enough ported her helm. It was also held, that the collision might have been avoided if the helm of the Pet had been ported, for which there was ample time; that, by the British act, the Pet was required to port; that, but for that act, the Pet would have been justified in keeping her course and in not porting; and that no circumstances were shown to render a departure from the rule laid down in the act necessary, to avoid immediate danger. As the Zollverein was found in fault, the question was, therefore, distinctly raised, whether the Pet was in fault for not obeying the British act. One section of that act provided, that if, in any case of collision, it should appear to the court before which the case was tried, that such collision was occasioned by the non-observance of any rule of navigation prescribed by the act, the owner of the ship by which such rule had been infringed should not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it should be shown, to the satisfaction of the court, that the circumstances of the case made a departure from the rule necessary. On the part of the Zollverein it was contended, that whatever might be her liability, the Pet was precluded from recovering, because of her violation of the British act. Dr. Lushington, in giving his judgment, said that he had given frequent and deliberate con-

sideration to the point, whether the British act could affect a British vessel which had been in collision with a foreign vessel on the high seas, the former being the party proceeding in the suit. He then proceeds: 'Generally, when a collision takes place between a British and a foreign vessel on the high seas, what law shall a court of admiralty follow? As regards the foreign ship, for her owner cannot be supposed to know or to be bound by the municipal law of this country, the case must be decided by the law maritime, by those rules of navigation which usually prevail among nations navigating the seas where the collision takes place.' He further holds, that the legislature has no power to determine how foreign vessels shall conduct themselves at the time of collision on the high seas, and that such conduct involves the rights and merits of the case. He then adds: 'Then comes the question, whether, in a trial of the merits of a collision, a foreigner may urge, in his defence, that the British vessel, though free by the law maritime, has violated her own municipal law, and so, being plaintiff, cannot recover? Reverse the position: suppose the foreigner plaintiff and to have done his duty by the law maritime. I am clear that he must recover for the damage done; if so, it is contrary to equity to say that the British ship-owner, in eadem conditione, shall not recover against the foreigner. What right can the foreigner have to put forward the British statute law, to which he is not amenable, so far as the merits are concerned?' The court pronounced for the damage proceeded for by the Pet against the Zollverein.

"In the case of Cope v. Doherty, 4 Kay & J. 367, 389, 390, decided in 1858, Sir W. Page Wood, then a vice chancellor, and now lord chancellor of England, cites with approbation the views, before referred to, held by Dr. Lushington, in the case of The Zollverein. He says that it is 'proper for every court of judicature, in construing the enactments of any legislature, to presume, prima facie, and unless the contrary be expressed, or be implied from the absolute necessity of the case, that such legislature intended, by its enactments, to regulate the rights which should subsist between its own subjects, and not in any way to affect the rights of foreigners, whether by way of restricting or augmenting their natural rights. In construing our own statutes, no other rule can be a sound rule to adopt, unless it be clear, from the absolute necessity of the case, that the legislature intended to affect the rights of foreigners.' The question involved in that case was, whether the limitation of liability provided for a ship-owner by the British act of 1854, where damage was occasioned by his ship to another ship, operated in favor of a foreign ship-owner sued in a British court. The vice chancellor held, that the limitation provided for did not relate to the form of judicial procedure, but to the substance of the controversy; that the lex fori was not applicable to the case; and that there was nothing in the British act to show that the legislature intended, by the provision as to limitation of liability, either to restrict or to enlarge the rights of any foreigners in respect to matters occurring out of its jurisdiction, even in a question between a foreigner and a British subject, still less in a question between two foreigners. The case was appealed, and the decision of the vice chancellor was affirmed. Lord Justice Turner, in his judgment (Cope v. Doherty, 2 De Gex & J. 614, 624), says: 'Was it, then, the intention of the legislature, that the general words contained in the sections to which I have referred should extend to the case of a collision between foreign ships owned by foreigners? I think it was not. This is a British act of parliament, and it is not, I think, to be presumed, that the British parliament could intend to legislate as to the rights and liabilities of foreigners.'

"In the case of The Saxonia, 1 Lush. 410, decided by the high court of admiralty, in 1861, and by the privy council, on appeal, in 1862, the Eclipse, a British barque, collided with the Saxonia, a Hamburg steamer, on the high seas. The green light of the Eclipse, was either extinguished, or so dimly burning as not to conform to the British regulation. The Eclipse, being closehauled on her port tack, sighted the Saxonia's lights three miles off, broad on her starboard bow, and they continued to approach her starboard side, until, shortly before the collision, a flare-up light was exhibited by the Eclipse on her starboard quarter, and her helm was starboarded. The Saxonia did not observe the green light of the Eclipse, and only observed the vessel herself right ahead, shortly before the exhibition of the flare-up light, and the Saxonia then, or after seeing the flare light, ported her helm, without slackening her speed. Both vessels were damaged and an action and a cross action were brought. It was contended, for the Saxonia, that, under the British act of 1854, the Eclipse could not recover, as she was in fault for not observing the statute in regard to lights. Dr. Lushington in giving judgment, says: 'When a British and foreign ship meet on the high seas, the usual rule is that the statute is not binding. Clearly, it is not binding on the foreigner; and, if it were considered binding on the British vessel, the British vessel would manifestly be under an undue disadvantage. I believe the practice of applying the maritime law to such cases has been followed universally up to the present moment, and I hold such to be the law.' The court held that the case must be decided by the ordinary rules of the sea, and that both vessels were to blame for the collision—the Eclipse for having improperly starboarded her helm, and the Saxonia for not having slowed her engines, when she was not able to discover what the other vessel was—and made a decree dividing the damages in each case. Both parties ap-

pealed to the privy council. It was there contended, for the Saxonia, that, under the British statute, the Eclipse could not recover anything, because she had violated that statute, in not carrying a sufficient green light, and in starboarding her helm. The privy council held that, as the collision took place on the high seas, in a place where a foreign vessel had a right of sailing without being bound by any of the provisions of the statutes enacted to govern British ships, it followed that the British act had no application to the case. The master of the rolls, who delivered the judgment of the privy council, adds: 'It has been fully determined, that where a British and a foreign ship meet on the high seas, the statute is not binding on either. The principle, therefore, by which this case must be decided, must be found in the ordinary rules of the sea.' The privy council held the Eclipse in fault for not showing a light in sufficient time to enable the Saxonia to avoid the collision, and the Saxonia in fault for continuing at full speed and not easing and stopping her engines when not able to discover what the Eclipse was doing, and affirmed the decree of the court below.

"The same doctrine was laid down in a case decided in 1861, by the privy council, where an American vessel was sued for a collision by the owners of a British vessel. It was held that the law of the sea must govern and not the British statute, as to the proper rule of navigation. The Chancellor, 4 Law T. (N. S.) 627; Williams v. Gutch, 14 Moore P. C. 202.

"The case of The Cleadon, 1 Lush. 158, 4 Law T. (N. S.) 157, also reported as Stevens v. Gourley, 14 Moore P. C. 92, cannot be regarded as an authority to the contrary. It was decided by the privy council, in December, 1860, the judges being Lord Chelmsford, Lord Kingsdown, and Sir Edward Ryan. It was the case of a collision on the high seas, between the A. H. Stevens, an American ship, and the Cleadon, a British ship, in tow of a steam-tug. The principal action was by the owners of the A. H. Stevens against the Cleadon, and there was a cross-action by the owners of the Cleadon against the A. H. Stevens. The judgment of the court was delivered by Lord Chelmsford. The court held that, as the Cleadon was in tow of the tug, she and the tug must be considered as one vessel, and as a steamer, the motive power being in the tug, and the governing power in the Cleadon. In his opinion, Lord Chelmsford says: 'The A. H. Stevens, being a foreign vessel, was not bound by our regulations, but was governed by the rule of the sea, which required her, being close hauled on the starboard tack, if she was meeting another vessel, to keep her course.' He then says, speaking of the Cleadon and her tug as one vessel and a steamer: 'Under these circumstances, her rule of conduct would be our regulations, because she would not be aware whether the vessel she was meeting was a foreign or a British vessel, and, at all events, as she was a British vessel navigating, of course she must be governed by the rules that apply to those vessels. It was her duty, being in fact a steamer, to get out of the way of another vessel that she was meeting.' It was held, in the case, that the A. H. Stevens was, by the rule of the sea, in fault, because she ported her helm instead of keeping her course, and that that manœuvre alone caused the collision, the Cleadon and her tug having kept their course. It having been held that the bad management of the A. H. Stevens, the foreign vessel, was, according to the general rule of the sea, the sole cause of the collision, the case really decides no point of law except that, in a collision between a foreign vessel and a British vessel, the former must be judged by the rule of the sea, and not by the British statute regulations. The Cleadon, although, as a steamer, she was said to have been bound by the British regulations to get out of the way of the A. H. Stevens, was held not to have been in fault. The only point in the case open to observation, is the remark of Lord Chelmsford, that the Cleadon, as a British vessel, was, as regarded the American vessel, bound by the British regulations, and that, at all events, as a British vessel navigating, she was bound to observe the British rules. But that remark cannot be regarded as a part of the judgment of the court, for the reasons already stated. If, however, it were to be so regarded, it has been, as a decision, overruled. In the case of The Saxonia, before cited, Lord Kingsdown and Sir Edward Ryan (the two judges who, with Lord Chelmsford, constituted the court in the case of The Cleadon), were two of the four judges who sat and took part in the decision, the other two being the master of the rolls and Sir John T. Coleridge, and, in the judgment of the court, delivered by the master of the rolls in February, 1862, it is said, as before cited: 'It has been fully determined that where a British and foreign ship meet on the high seas, the statute is not binding on either.' The same four judges who sat in the case of The Saxonia, sat in the case of The Chancellor, before cited, where it was held that the Chancellor, being an American vessel, was not bound by the British law. Lord Chelmsford, in the case of The Cleadon, assented to that view. The only point he made was, that a British vessel was, in a collision with a foreign vessel, bound by the British law. But it is quite evident, from the case of The Saxonia, decided subsequently to the case of The Cleadon, that the other two judges who sat with him in the case of The Cleadon, did not concur in that view.

"The principle laid down and applied in the cases of The Dumfries, The Zollverein, The Saxonia, and The Chancellor I regard as a sound one, to be adopted in all cases which

stand on substantially the same facts. That principle is, that, in regard to the rights and merits involved in actions, the law of the place where they originated is to govern. Story, Confl. Law, § 558. In the case of The Zollverein, such law, in respect to collisions on the high seas, called the 'law maritime,' is stated by Dr. Lushington to be 'those rules of navigation which usually prevail among nations navigating the seas where the collision takes place.' This rule is well expressed by Maclachlan in his treatise on the Law of Merchant Shipping (page 268), in this language: 'Between foreigners, or between a British and a foreign ship, when such cases of collision on the high seas are brought into the English court of admiralty, the only rules of navigation that can be appealed to are those usages of the sea generally known and customarily observed by the ships of various nations on the high seas. A foreign vessel, therefore, will not be allowed to set up the British rules, in order to show non-observance of them by a British ship that has been in collision with her, for they are not mutually binding, so as to be available for a British ship against a foreigner.' The same view was held by Judge Shipman, in this court, in the case of The Belle [Case No. 1,269].

"It is claimed, however, on the part of the Scotia, that, as the law of Great Britain, in reference to lights on sea going vessels, is like the statute law of the United States, the latter ought to be enforced here in favor of a British vessel against an American vessel. It is contended, also, that the only reason why the courts of Great Britain did not, in the cases cited, enforce the statute law of Great Britain in favor of foreign vessels and against British vessels, in cases of collisions on the high seas, was because, in those cases, it did not appear that the nations to which the foreign vessels belonged had adopted rules like those prescribed by the statute law of Great Britain. The answer put in by the Scotia to the libel rests the question of lights as to the Berkshire wholly on the statute laws of Great Britain and the United States, and not at all on the general rules of navigation. The allegations of the answer are, that the carrying by the Berkshire of a bright light on her anchor stock, and of no other light, was 'in violation of the laws both of England and America,' and that 'the Berkshire had not the red and green lights required by the laws and customs both of England and of the United States.' There is, afterwards, in the answer, a general allegation that the collision was caused entirely by 'the want of proper lights, and the mismanagement and want of care on the part of those in charge of the Berkshire,' but the only test set up in the answer, as to whether the Berkshire had or had not proper lights is as to whether such lights did or did not conform to the laws and customs of England and of the United States. We have already seen, that if the Berkshire were a British vessel suing an American vessel, in the British court of admiralty, for a collision on the high seas, that court would not apply British statute law to the case, unless required by such statute law to do so. Nor would it apply to the case the statute laws of the two countries, even where they were set up and shown to be alike, unless it were required by British statute law to do so. In the case of The Wild Ranger, 1 Lush. 553, 565, Dr. Lushington, in that court, held, that where a British statute was not made applicable to a foreign vessel on the high seas, the court could not apply it to the foreign vessel, when sued by a British vessel, simply because the country of the foreign vessel had enacted a like statute which would apply to a British vessel, under similar circumstances, in a court of such country. It is not stated, in any of the cases in the courts of Great Britain, which I have cited, that the reason for not applying the British statute law was, because the foreign nation had not enacted a like law. The case of The Girolamo, 3 Hagg. Adm. 169, does not establish the principle, that where like statute laws are enacted by two countries, as rules of navigation for their own vessels, respectively, the courts of each of those countries are bound to apply such rules as rules of navigation for the high seas, as between a vessel of the one country and a vessel of the other.

"It is quite certain, however, that if this case were pending in the British court of admiralty, that court would apply to it the rules as to navigation, lights, and fog signals, adopted by statute both by Great Britain and the United States. Those rules, as respects sea going vessels, are, to all intents, identical. The American rules, prescribed by the act of April 29, 1864, went into effect September 1, 1864. The British rules were made under authority of the twenty-fifth section of the merchant shipping amendment act of July 29, 1862, by an order in council, dated January 9, 1863, and published in the London Gazette of January 13, 1863, and went into operation on the 1st of June, 1863. The fifty-eighth section of that act provides, that whenever it is made to appear to her majesty, that the government of any foreign country is willing that the regulations, or any of them, for preventing collision, which shall be for the time being in force under that act, shall apply to the ships of such country when beyond the limits of British jurisdiction, her majesty may, by order in council, direct that such regulations shall apply to the ships of the said foreign country, whether within British jurisdiction or not. The act of congress of April 29, 1864, was regarded, and properly, as an expression, by the government of the United States, of a willingness that the British regulations prescribed by the order in council of January 9, 1863, and which were substantially identical with those contained in that act, should apply to ships of the United States when beyond the limits of British jurisdiction. Her majesty, there-

fore, by an order in council, published August 30, 1864, directed that such regulations should apply to all sea going ships of the United States, whether within British jurisdiction or not, and, by another order in council, published December 2, 1864, directed that such regulations should apply to all ships of the United States, on the inland waters of the United States, whether within British jurisdiction or not. Holt, Rule of Road, p. 2. By like orders in council it appears, that the governments of the following countries, other than the United States, have manifested their willingness that the British regulations of January 9, 1863, should apply to the ships of such countries respectively, when beyond the limits of British jurisdiction; and such orders in council direct that such regulations shall apply to the ships of such countries respectively, whether within British jurisdiction or not. The countries referred to are Austria, the Argentine Republic, Belgium, Brazil, Bremen, Chili, Denmark proper, the Republic of Ecuador, France, Greece, Hamburg, Hanover, the Hawaiian Islands, Hayti, Italy, Lubec, Mecklenburg, Schwerin, Morocco, the Netherlands, Norway, Oldenberg, Peru, Portugal, Prussia, the Roman States, Russia, Schleswig, Spain, Sweden, Turkey, and Uruguay. These orders in council were published at various dates, from January 13, 1863, to February 6, 1866. All the countries named, except Denmark, Greece, the Hawaiian Islands, Schleswig, and the United States, adopted the regulations in 1863. Holt, Rule of Road, p. 2. The law, therefore, as now held in Great Britain, is, that the distinction between foreign and British ships, as regards regulations respecting navigation, lights, and fog signals, is limited to ships of those countries which have not given in their adhesion to the terms of the fifty-eighth section of the British act of July 29, 1862, as respects such regulations, or whose adhesion has not been signified by an order in council. The vessels of all countries which have been declared by an order in council to have given in their adhesion to the British regulations respecting navigation, lights, and fog signals, are treated in all respects, in the courts of Great Britain, like British vessels. Lown. Col. p. 186. This is in pursuance of the sixty-first section of the British act of July 29, 1862, which provides, that whenever an order in council shall be issued, applying any regulation made under that act to the ships of any foreign country, such ships shall, in all cases arising in any British court, be deemed to be subject to such regulation, and shall, for the purpose of such regulation, be treated as if they were British ships. See form of order in council on the subject, 2 Pritch. Adm. Dig. (2d Ed. London, 1865), Append. pp. 281, 282. Accordingly, in the case of a collision which occurred on the high seas, in December, 1865, between the British steamship Samphire and the American barque Fanny Buck, actions having been brought by both vessels, the cross-action being by the Fanny Buck, it was held, in the court of admiralty, that the Fanny Buck was bound by the regulations which had been adopted by the United States respecting lights and courses. Holt, Rule of Road, p. 194. The principle on which that court so held, is shown by the case of The New Ed. v. The Gustow, Holt, Rule of Road, p. 28, where an action and a cross-action were brought for a collision which occurred on the high seas, between a Hamburg brig and a Bremen barque, on the 13th of September, 1863. An order in council, dated July 27, 1863, had declared the British regulations which went into effect June 1, 1863, to be applicable to Bremen and Hamburg vessels. The court refers to this fact and says, that by virtue of the act of parliament and the accession of Bremen and Hamburg, the two vessels were, for the purposes of the suit, to be considered as British vessels, and were to be treated the same as if the collision had taken place between two British vessels. Holt, Rule of Road, p. 28; 9 Law T. (N. S.) 547.

"There is no statute of the United States containing provisions like those found in the fifty-eighth and sixty-first sections of the British act of 1862. The only provision made by congress on the subject by statute, is that found in the act of April 29, 1864, to the effect, that the rules and regulations for preventing collisions on the water, therein contained, shall, from and after September 1, 1864, be adopted in the navy and the mercantile marine of the United States. The merits of the collision in this case must, therefore, be adjudicated according to the rules of navigation and usages of the sea which usually prevailed and were customarily observed at the time and place of the collision, among the ships which navigated the waters where the collision took place. The Fyenoord, 1 Swab. 374, 377. I can have no hesitation in saying what such rules and usages were, when I find them to have been before that time adopted, with such identity, by nearly all the nations whose ships usually navigated the waters where this collision took place, embracing, among others, the United States, Great Britain, France, Spain, Prussia, Russia, Norway, Sweden, Belgium, Bremen, Denmark, Hamburg, Lubec, Hanover, Schleswig, and the Netherlands. I rest my decision on that ground, and not on any municipal statute or statutes, as such, of the United States, or of Great Britain, or of both countries. I have not been referred to, nor have I met with, any case in the United States in which this question is discussed or decided. I must, therefore, resolve it on principle. But I have no hesitation in saying, that the result I have arrived at is very satisfactory, as bearing on the interests of commerce and the safety of human life, in substituting fixed written rules observed by

all the maritime nations, for those which, it is no disparagement to say, were not as definite or certain, or as universally recognized.

"It follows, from these views, that the claim, on the part of the Berkshire, that she was allowed to exhibit a white light, and that she was under no obligation to exhibit colored side lights, must be rejected. She had colored side lanterns on board, but they were not in position. The Berkshire was under an obligation, by articles 2, 3, and 5 of the regulations, to exhibit colored side lights, and she was also under an obligation, by the same articles, not to exhibit a white light. The testimony as to the snatching up of a light on board of the Berkshire and putting it into the green lantern, and holding that over the starboard side towards the approaching Scotia, does not vary the case. If exhibited at all, it was not exhibited so as to be seen on board of the Scotia, and it was not seen on board of her. But, if it had been seen, the only inference the Scotia would have been authorized to draw, from seeing a green light added to the white light on the Berkshire, would have been in confirmation of the conclusion warranted by the white light alone, namely, that the Berkshire was a steam vessel within two miles of the Scotia. By the rules, a white light and a colored light indicate a steam vessel, the white light being required to be visible at least five miles off, and the colored light at least two miles off.

"Did the exhibition of a white light on the Berkshire tend to deceive the Scotia? As the white light on a steamer is required to be visible five miles off and the colored light only two miles off, it was natural and proper for the Scotia to believe that the small white light she saw low down near the horizon was a mast-head light of a steamer more than two miles off, whose colored lights were not yet within sight. That those in charge of the Scotia did so believe, I can have no doubt, from the evidence. A pointed circumstance is the one, that rockets were prepared on board of the Scotia, when the white light of the Berkshire was first seen, to signal the approaching vessel, as a steamer, when she should have approached near enough. No such signalling would have been prepared for in respect to a sailing vessel. In reference to the Berkshire as a steamer, it was the duty of the Scotia, by article 13, seeing the light over her port bow, to port her helm, and she had a right to suppose that the Berkshire, as a steamer, would port her helm, as required by that article. Her duty towards the Berkshire as a sailing ship was, under article 15, very different, namely, to keep out of the way of the Berkshire, relying upon a compliance by the Berkshire with the requirement of article 18, to keep her course. The Berkshire having declared, by the language of the sea, to the Scotia, that she was a steamer, cannot be permitted to impute as a fault to the Scotia, the adoption by the latter of the movements which would have been proper if the Berkshire had in fact been a steamer. Under the circumstances, it was proper for the Scotia to port her helm, as she did, at once, on seeing the white light of the Berkshire, and she promptly stopped and reversed her engines the moment that light, by closing in, gave indication that there was danger of a collision. I can discover no fault on the part of the Scotia. The fault on the part of the Berkshire establishes the freedom from fault on the part of the Scotia. If the Berkshire had not been in fault as to her lights,—that is, if the white light she exhibited had been a proper light to be carried by a sailing vessel at the time and place of the collision,—I should have held the Scotia in fault, both in porting before she could clearly see what was the course of the vessel bearing the light, and in not slowing or stopping when she first discovered the light of the Berkshire. But the improper light on the Berkshire made it proper for the Scotia to port, when she did, and not to slow or stop till she did.

"It results, that the claimants will be allowed to amend their answer, so as to set up properly the fact that the Berkshire did not, as to lights, comply with the rules of navigation and usages of the sea which usually prevailed and were customarily observed at the time and place of the collision, among the ships which navigated the waters where the collision took place. Of those rules and usages, as the general law of the sea, the court will take judicial cognizance, without their being proved, as would be necessary in the case of a foreign municipal law or regulation.

"I have not overlooked the case of The Grey Eagle [Case No. 5,735], but I do not think it applies to this case. The principle of that case is a sound one, that the exhibition by a vessel of a prohibited light, does not absolve another vessel from the observance of that degree of caution, care and nautical skill which the exigencies of the case require. I see, in the present case, no want of caution, care or nautical skill on the part of the Scotia.

"When the answer is amended, the libel will be dismissed, with costs."

James C. Carter and Charles Donohue, for libellants.

Erastus C. Benedict and Daniel D. Lord, for claimants.

WOODRUFF, Circuit Judge. Although there is great discrepancy in the testimony of the respective witnesses, on both sides, in regard to many details, and, in some particulars, the testimony in behalf of the libellants is wholly inconsistent with that produced by the claimants, there are some facts in respect to which there is such concurrence of the witnesses that they may safely be tak-

en as established; and, although, in cases of this kind, the estimates of witnesses of the precise bearing of the two vessels at particular moments, and of the precise intervals of time which elapsed between different occurrences, are greatly liable to differ and are often quite unreliable, certain prominent facts in those respects may properly be inferred form a pretty uniform agreement of the whole or of nearly all the witnesses on either side. Some facts may also be gathered by necessary inference from others that are so established. As to some facts the parties themselves do not disagree.

In the present case, I regard it as established, that the course of the Berkshire, the ship of the libellants, was southeast by east half east, she having the wind about two points free, the wind being about south south west, and her speed seven miles an hour; that the course of the steamship Scotia was west by north half north, and her speed thirteen miles an hour; and that the Scotia, when first seen from the Berkshire, bore from one to two points off her port bow. Six witnesses on the Berkshire—every one who was examined to the point—agree in the fact that she bore off the port bow, differing slightly in the degree only; and no one makes the angle less than one point. From these facts it necessarily results, by laws that admit of no question, that the course of the Scotia must intersect that of the Berkshire at some point either ahead of or astern of the latter, or precisely where she then was; and that the two vessels were coming into neighborhood at the combined rate of twenty miles an hour, or one mile in three minutes.

The testimony of the witnesses on board the Berkshire shows, that the white light of the Scotia was seen from fifteen to twenty minutes before the collision; and, although there is not entire uniformity, the balance of their testimony is, that her helm was put to starboard, and she fell off before the wind, not less than ten minutes before the collision; and that, when first seen, the Scotia was from five to six and two-third miles distant, and, when the Berkshire fell off, not less than three and one-third miles distant. As the courses of the respective vessels must cross each other at an angle of one point only, (that being the precise difference between southeast by east half east, and west by north half north), no point on the Scotia's course could bear on any point on the Berkshire's course westwardly of, or beyond, the point of intersection, at an angle so great as one point. It would follow, as a mathematical necessity, that, if the Berkshire saw the Scotia precisely one point off her port bow, the Berkshire was at that precise moment at the point of intersection of the two courses; and, if the larger estimate of the witnesses, one and a half to two points, be taken as true, then it follows, that she had crossed the point of intersection and was to the eastward thereof, entirely out of danger of collision, before she saw the Scotia. Taking the testimony of her own witnesses, then, captain, mate and seamen, and making just allowance for possible inaccuracy of observation, by a concession from the larger estimate towards the less, the Berkshire had, when the Scotia was seen, passed the point at which the vessels, keeping their courses, could collide; and if, notwithstanding their testimony, it be assumed that the angle of observation was something less than one point, it would only follow that, when she first saw the Scotia, she was very near, though not precisely at, the intersecting point, because, when she was seen off the port bow of the Scotia, she had passed that point and was to the southward of the Scotia's course.

Bearing on the position of the Berkshire when seen from the Scotia, the following appears: She was first seen off the port bow of the Scotia. And here there is the same variation in the testimony as was exhibited in the observations made on the Berkshire. The smallest estimate is one point, the largest two points. But there are seven witnesses, and each testifies unqualifiedly, that he first saw the Berkshire over the port bow, and some of them give circumstances which make the proof to my mind conclusive; and that fact, if proved, establishes what no human testimony can confute, that the Berkshire had then passed, and then was some distance past, the point of the intersection of the two courses, else she could not have been so seen. Not only so; if the lowest estimate, namely, one point on the Scotia's port bow, be taken, then it is perfectly certain that she was at that moment as far to the eastward of the point of intersection as the distance the Scotia then was from her. If the Scotia was then three miles distant, the Berkshire was three miles eastwardly of the point of intersection. If the Scotia was two miles distant, then, when she was first seen, the Berkshire was two miles eastwardly from the point of intersection.

The witnesses from the Scotia, in their estimates of the minutes that elapsed before the collision, and of the distance of the Berkshire when sighted, vary, also, as do the witnesses as to time and distance on the Berkshire. The estimates vary from nine to fifteen minutes; but, in my judgment, the just inference from all of them would not warrant the conclusion that the interval between their discovery of the Berkshire and the collision was so much as ten minutes; and yet, if any reliance is to be placed on the estimates, it must have been very little less. If so, she must have then been three miles distant, and the like distance eastwardly from the point of intersection of the two courses. I am aware that strict mathematical precision cannot, in general, be assumed as the ground of inference from observations which are obviously in some degree imperfect. But we have necessarily to gather the facts from

the testimony. Some reliance must be placed on the estimates of time, bearings and distance; and, upon them, in connection with other facts that are either conceded or established, our conclusions must rest, else it is impossible to reach conclusions at all. When there is general concurrence in facts that bear the test of exact science, the latter strongly corroborates the conclusions drawn from the testimony. The argument is legitimate, and it has, in some form, been applied by counsel on both sides on the argument of the present appeal. And it is of some significance, that the fact last above stated not only harmonizes with the deductions I have above drawn from the testimony of the witnesses from the Berkshire, and shows that, when she first sighted the Scotia, she was out of danger, and to the eastward of the point of intersection of the two courses, but, taken together, the testimony of all the witnesses tends, also, strongly to sustain the conclusion of the district court, that the Berkshire was not seen from the Scotia before the Berkshire had put her helm a-starboard and begun to fall off before the wind. The argument submitted by the appellants deems it probable that they were but three or four miles distant when the Berkshire put her helm a-starboard, at which distance the Berkshire was, as above shown, first seen from the Scotia. The view of the counsel for the Berkshire, therefore, in connection with the reasoning above, makes the time of her falling off almost the same moment, or only very shortly before, she was seen from the Scotia. The question arising upon the facts which I have thus collated is, whether there was fault in the conduct of either, and, if so, of which of the vessels, before or after they respectively sighted each other; for, there is no ground for insisting that either failed to see the other so soon as such other became visible.

First, as to the Berkshire. It is conceded that she carried a white light at her bow, fastened to her anchor stock; and it was fully shown that she carried no other lights. After she had observed the Scotia about ten minutes, and about ten minutes before the collision, her helm was put a-starboard and she fell off before the wind. She was at that time in such a position that, if she had kept her proper course, on which she had been steering, she would have been in no danger, having already passed to the eastward of the point where the Scotia would cross her track. Her mate and the man at the wheel, on seeing the Scotia, had brought the vessel more closely to the wind, which had carried her still further from danger of collision. The master countermanded the order, and made the manœuvre which moved her towards and across the track of the Scotia. Before this was done, and while the Berkshire was, by order of the mate, brought nearer the wind, her wheelsman (according to his testimony) saw the Scotia's red light and her white light. This, of course, indicated to him, if he knew where it was common for vessels to carry the red light, that the Scotia was a steamer, and that she was heading in a direction which must clear the Berkshire, if the latter kept her course. Riley, the lookout on the Berkshire, who reported the Scotia, first saw her bright light, and heard the order of the master of the Berkshire to keep her luff, and, about ten or fifteen minutes after seeing the bright light, (which was about the time she changed her course, or very soon after,) saw the Scotia's red light; and he imputes the collision to the imprudent change of course when, as he testifies, the Scotia had opened on the port bow of the ship so as to indicate that she would pass clear. Wilson, a hand on the same watch, testified that, when he saw the Scotia, he also saw both a red and a white light. The master himself, after the Berkshire had fallen off so as to bring the bearing of the Scotia abeam, saw the Scotia's red light; and there can be no just pretence that a collision could have occurred, if he had then countermanded his order, for he could not have at that time reached the course of the Scotia, if her red light was in full view. The master testifies, that he had before that seen two lights on the Scotia, namely, one bright light and another the color of which he says he could not distinguish, but which he concluded was green, and, though he cannot swear it was green, he says it was not red. The course and position of the two vessels render this statement very improbable; and I am more disposed to credit the lookout and wheelsman on that point than the person who gave the unfortunate order, and on whom, if in fault, rests a very heavy responsibility.

Second, as to the Scotia. Her lights were all set and burning bright, a white light at mast-head, a green light on the starboard and a red light on the port side. She saw the Berkshire's white light near the horizon, off her port bow. She had no reason to anticipate danger of collision, and did apprehend none, until she saw that light closing in upon her bow, and the officer in command then immediately gave an order to port, then hard-a-port, and, observing that the light still closed in, gave the order to slow and then to stop. The engines were at once slowed, stopped and reversed, but the vessels, notwithstanding, came together.

Irrespective of the legal questions arising upon the undisputed fact that the Berkshire was not carrying the lights prescribed by the navigation laws of the United States, to be hereafter adverted to, it is upon this conduct of the Scotia that the question of fault on her part arises. For, conceding the general rule of the maritime law, prior to recent statutes, to be, that, when a steamer and a sailing vessel are approaching each other, so as to involve danger of collision, it is the duty of the steamer to keep out of the way of the sailing vessel and conceding, also, that, un-

der such circumstances, the mere fact of collision is prima facie evidence of fault and negligence in the steamer, this rule is not so unyielding and arbitrary that it may not be shown that, in truth, she exercised due care and acted in all respects prudently under the circumstances.

The fault in her conduct supposed, involves two enquiries: (1) Ought she to have slackened her speed sooner than she did? (2) Was it improper for her to port her helm when she did? And these enquiries also involve the more general one, was there any other step or manœuvre which ought to have been taken?

1. Whether the light she saw near the horizon was on a steamer or on a sailing vessel, no duty to slacken speed or change the course of the Scotia arose until there was some reason to apprehend a collision. The duty first called into exercise, on discovering the light, was to observe it closely, to see whether or not there was reason to apprehend such danger. The suggestion that it was her immediate duty to slacken speed when she saw the light, assumes what is not in the first instance to be assumed. The suggestion that, not knowing the course of the vessel bearing the light, she should have slackened her speed till she could ascertain such course, assumes that the apprehension of danger was the immediate consequence of seeing the light. Not so. If she saw the light and observed it diligently, without having reasonable ground for apprehending collision, no duty to either slacken speed or change her course was created. This makes the allegation and proof of the claimants, that the location of the light on the Berkshire, (so near the surface of the water as it confessedly was,) actually misled the officers of the Scotia in regard to the distance of such light from the steamer, important ones. Carrying a light in such a location was well calculated to mislead and did in fact mislead. But the still more important fact, that, when seen, the light was off the port bow of the Scotia, as to which there is an entire and conclusive concurrence of testimony, if followed by the opening of such light still further on her port bow, before the steamer ported her helm, is conclusive that, during the interval, and until that light began to close in, the officers of the Scotia had no reason to apprehend danger.

It is because of this that great importance is attached to the question, did the light of the Berkshire open on the port bow after it was seen by the Scotia, and before she ported her helm? The libellants insist that it did not; that the course of the Berkshire, when discovered by the Scotia, had already been changed by falling off; that such opening on the port bow of the Scotia was, therefore, impossible; and that, if such opening in fact occurred, it would have been impossible for the Berkshire to thereafter reach the track of the Scotia (when sailing at only about one-half the speed of the latter), until after the Scotia had passed. I am satisfied that the reasoning upon both these propositions is fallacious, and that the premises assumed therein do not necessarily establish the conclusion. But, in the first place, the officers and men on the Scotia are unqualified and clear in their testimony, not only that they were alert and vigilant in their observations, but that, after being discovered, the light on the Berkshire did open on the steamer's port bow. On this point they cannot, I think, be mistaken, and, to suppose them to misstate on such a point, is to impute to them intentional falsehood. Such a circumstance is not like a matter of judgment or opinion or estimate, as to which the liability to error is, by most collision cases, proved to be very great. The witnesses differ, it is true, in their estimate of the degree of such opening, and they differ very largely. This may be accounted for by their different posts of observation, or other grounds of questioning the correctness of their estimates, but the fact of such opening is nevertheless well established by their distinct concurrence therein. It is, nevertheless, claimed that, conceding the fact, still there is an error as to time, and that such opening took place after and not before the porting of the steamer's helm. This is urged in the face of the positive testimony of the witnesses to the contrary, and it is claimed that such positive testimony is overborne by the fact that the Berkshire, before her light was first seen, had fallen off, and was then and continuously thereafter sailing on a starboard helm, and so her opening on the port bow of the Scotia was impossible until the latter ported. This is the proposition first above stated and which I deem fallacious. The fact that the Berkshire had, when seen, already starboarded, does not forbid the opening of her light on the Scotia's port bow.

It has, I think, already been shown, that, when her light was seen, the Berkshire had passed a considerable distance eastwardly beyond the point of intersection of the two courses; and that she starboarded her helm not to exceed one minute before her light was so seen, if, as insisted by the claimants, it was not later. The order was first to starboard and afterwards to hard a-starboard. The speed of the Scotia was about double that of the Berkshire, while the latter was on her course. Her movements, first to starboard and then falling off, certainly did not diminish the disparity, but probably increased it, in the first stage of the movement of the Berkshire. Her light was first seen from the Scotia, from one to two points off her port bow. Now, with these facts in view, the allegation that the light of the Berkshire could not open further on the port bow of the Scotia is wholly unwarranted; and the uniform testimony of the witnesses from the Scotia is not to be overborne by such an assertion.

Considering the greater speed of the Scotia, it is perfectly easy to find them in such relative position, after the light was first seen, that the opening upon such port bow would be quite distinct and obvious. For, while the Scotia advanced on her course one mile, the Berkshire, on her starboard helm and with her less speed, may not have neared the track of the Scotia so as to counterbalance the tendency of the Scotia's motion to open the light very largely. Thus if the Berkshire had remained stationary or been on her original course, her light would have passed rapidly to the port of the Scotia. If the Berkshire was moving obliquely towards the track of the Scotia, this movement would have the counter tendency. But, whether such light would or would not continue still to open, would depend on the degree of change produced by her starboarding, and the relative speed which she then maintained. The inference that the testimony of the witnesses is erroneous is, therefore, not only unwarranted, but, in my judgment, the entire proofs on this precise point confirm that testimony.

But, the maintenance of her starboard helm, tended continually to bring the Berkshire around full before the wind; and then, putting her helm hard a-starboard brought her with even increased speed nearer the track of the Scotia, closed in her light just before the collision, and put the Scotia to instant efforts to avoid it. This involves the accomplishment by the Berkshire of the second alleged impossibility above argued by the libellants, which I have called deceptive or fallacious. It is said that, at her less rate of speed, she could not, if her light had so opened on the port bow of the Scotia, have thereafter reached the track of the Scotia until the latter had passed, and that, if the Scotia ported her helm as soon as the light of the Berkshire began to close in, the latter could not have overtaken the former. Obviously, this depends upon the precise location of the Berkshire when such closing in began, and the distance then between the vessels, with the speed attained by the Berkshire then sailing before the wind; and, unless it be assumed that her light had opened very considerably on the port bow of the Scotia before the change was discovered, her distance from the place of collision was greatly less than that of the Scotia. And the fallacy of the reasoning is greater, in view of the fact that the Scotia slowed and reversed immediately on porting her helm; and this was done instantly on such closing in becoming apparent.

To my mind the conclusion is inevitable, that there was nothing in the position or movement of the Berkshire that suggested, or even warranted, a suspicion of danger of collision, until the closing in of the light of the Berkshire upon her port bow became apparent; and, therefore, the Scotia properly kept her course down to that moment.

2. Was the Scotia in fault for then porting her helm, and slowing, stopping and reversing her engine? That slowing, stopping and reversing were proper, requires no discussion. And it is important to note here particularly, that, at this moment, the Berkshire was very near and off the Scotia's port bow. It was a question of judgment, whether, in that moment of sudden extreme peril, it was wisest to go to port or to starboard. It was night. The distance of the Berkshire at that instant could not be known. If the Scotia attempted to go to port, it was not at all improbable that she would meet the ship while in the act of turning, while, by turning to starboard, there was a like uncertainty. Her officers must choose. They did exercise their judgment in good faith, and yet the collision ensued. In my judgment, upon all the proofs, there was time but for a slight turn in her course; and they did what seemed to them best at what was, in view of the headway of the two, a moment of sudden peril, and very shortly before the contact of the vessels. I should hesitate very much in concluding that the porting of the helm showed either want of skill or due care in such circumstances, even if, by the light of the after result, it seemed probable that, had she starboarded, she would have gone clear.

This, however, is not all. The whole conduct of the Berkshire was unskilful and misjudged. The movement by which she was placed in peril was wholly her own; and, although it may have been made before the Scotia saw her light, it was, in truth, improvident and erroneous. I agree fully with one or more of her crew, that it was uncalled for and produced the collision. In short, she thrust herself in the track of a steamer in full view, when there was time for more deliberation, when she was not in the least danger, and when a minute more of deliberation, before changing her course, would have shown, by unmistakable signals, that there was no danger, and that she could and ought to keep her course. It is not unjust to her, and it is only fair to the Scotia, to say, that, by this, she involved the Scotia in that precise condition of doubt, in which, by stopping and reversing, the latter did all she could to arrest her own speed, and in which her officers were put to the exercise of judgment, as to the measure most likely to avoid collision.

Again, in this immediate connection, if it be conceded that the statute regulations were not binding upon the Berkshire, and that the presence of the white light did not, by reason of those regulations, require the officers of the Scotia to infer that she was a steamer, it is equally true that there was nothing to show that she was a sailing vessel. She might be the one or the other; and if, on the instant of apparent danger, the Scotia stopped her engines and reversed, it ought not to be imputed to her as a fault, that, in her further effort, made in the exercise of an honest judgment upon the subject, she con-

formed to the regulations which, in view of her being in the track of an immense commerce between England and the United States, were presumptively binding upon her.

The rule so strenuously relied upon by the libellants, by which it is made the duty of a vessel propelled by steam to keep out of the way of a sailing vessel, is not so arbitrary and inflexible as to make the former, under all circumstances, an insurer of safety to the latter. It assumes that, by reasonable skill and care, the former may know that the vessel in view is a sailing vessel, and that there will be time and opportunity, after the discovery of danger, to take measures effective to avoid her, and that the exercise of an honest judgment, by men of competent skill, and in the exercise of active vigilance, will enable the steam vessel to do so.

Moreover, I do not agree, that, even considering that our statute regulations had not the force of law to bind the Berkshire, it was a fault in the Scotia to mistake her for a steamer, and to act upon the assumption that she was one. If she was justified in that respect then she was justified in what she did; for, then, by the general maritime law, apart from the statute, she was bound to turn to starboard, unless the circumstances clearly indicated that this would render a collision more probable. The general rule required her to go to starboard, and, where the circumstances are doubtful, the rule is the same. Mr. Justice Clifford, in New York & B. Transp. Co. v. Philadelphia & S. Steam Nav. Co., 22 How. [63 U. S.] 461, 472, says: "Beyond question, the law is well settled, that steamers approaching each other from opposite directions are respectively bound to port their helms and pass each other on the larboard side." He cites numerous cases from the English court of admiralty, and from the supreme court of the United States, in which the principle is applied where it was doubtful which course would be most effectual. The officers of the Scotia were acting under the actual pressure of the English navigation laws, which, it is conceded, were operative upon them, since, by the proclamation thereof, they were applied to the vessels of both countries, so far as she was concerned. They knew that they were in the track of vessels navigating between the two countries. They may properly be assumed to have known that there was a strong probability, at least, that vessels in that track would carry lights indicating their course and character. So far from being in fault in the inference drawn from seeing the white light near the horizon, namely, that it was the masthead light of a steamer just coming into view, such an inference was natural; and, in carrying such a light, the Berkshire invited that inference, or, at the least, placed herself in such a situation as was liable to mislead, and did in fact mislead the other, and she ought not to be permitted to allege fault in the latter in acting according to an honest judgment thereupon, and in conformity with the rule of navigation which applied to the conclusion thus formed, namely, that she was a steamer.

These views, independently of the critical examination of the positions, courses, distances and bearings of the vessels respectively, in which I have indulged, seem to me to show that the Scotia was without fault, and, although they are not in harmony with some of the views expressed by the learned judge who tried the case in the district court, they lead to an affirmance of his decree.

I am aware of the very great difficulty of reasoning with strict accuracy, and of applying close mathematical tests, where witnesses disagree, and various hypotheses may be suggested to account for their discrepancies and for the occurrences of which they speak. As already remarked, the court must deal with the case upon the testimony, notwithstanding its conflict, and in the face of all the doubt and uncertainty which it gives rise to. Out of these materials I have arrived at the best judgment I can form, after a long and careful examination and comparison; and I derive some corroboration of my conclusions as to most of the details of time, place, distance, course and bearings, from the full analysis of the whole case in the very able argument of the counsel for the libellants, wherein his conclusions are very nearly identical with my own on these points.

If however, I were in so great doubt that I deemed it unsafe to rest upon the conclusions already stated, there would still remain in support of the decree dismissing the libel, the ground upon which the decision was placed by the district judge, namely, that the Berkshire did not carry the lights prescribed by the navigation laws of the United States. The absence of the red and green lights, and the presence of a white light in contravention of those laws, actually misled the officers of the Scotia into the belief that she was a steamer, which alone is authorized to carry a white light. Being thus misled, the officers of the Scotia did just what, upon the assumption that she was a steamer, it was her duty to do; and, as a necessary result, the collision was solely due to the fault of the Berkshire herself, and, therefore, she cannot recover.

These conclusions were placed below not on the ground that the navigation laws of the United States ex proprio vigore operated upon the Berkshire in her relation to a vessel of another nation, but that those laws have been adopted by all the principal maritime nations for the government of their own vessels, and that the court, taking judicial notice of that fact, are bound now to say that those regulations have received such general assent, as reasonable, proper and expedient, and, by such enactments, have been given so broad an application that they are now rules of the sea. If this reasoning be sound, it would seem to follow, that the vessels of all nations are now bound to observe them, whether their own par-

ticular government has approved them or not; for, if the general consent of nations, however expressed, is effectual to establish international law, the failure of a particular nation to express its consent does not destroy the rule.

Without placing my conclusion upon this idea, that the statutes of the several nations referred to have operated to make a rule of the sea or general maritime law, I prefer to state another view of the subject, not in harmony with the English decisions, but I think clearly just, and conformable to a more worthy estimate of what is due to ourselves as a nation interpreting its own laws, and no less just in its operation upon our own citizens, who, it may be conceded, are the immediate objects of legislative care and providence. While it is true that our navigation laws are, in a strict technical sense, municipal, because we have no power to legislate for other nations, or to enforce our laws beyond our own jurisdiction, they are, in their nature and scope, and, as I think, in their design, for the benefit of all mankind. The safety of human life and property on the highway of nations is of international concern. If the government of this people have adopted a rule to promote such safety, it is because it is wise and best to that end, and so our courts must declare. For this people and for our courts it is the rule of right reason, whether we can enforce it upon the people of other nations or not. It being wise and best, we can and do send out our navy and our mercantile marine charged with the duty to observe it, because it tends to secure the worthy purposes for which it is enacted. True, we can subject no others to its pressure as a law to them; but it is a narrow and technical view to say it is like the ordinary subjects of legislation, which are plainly only intended to operate within our immediate jurisdiction. The business it regulates is as extensive as the limits of the seas; and there are numerous rights of person and property which we recognize as governed by law, and which will be enforced and protected by our courts in whatever part of the world they originate or are invaded. Sending out our navy and marine instructed by our statutes, it is selfish and unworthy to say—although these rules for the preservation of life and property are eminently fitted to benefit all mankind, are expedient and advantageous as guides to your probable intercourse with other vessels, they do not require you to regard them towards any but vessels of our own nation. It is a more honorable and worthy language to say—if you disregard them, and loss is thereby caused, you shall not have a standing in our courts—perform your duty to observe our laws, and here and in our courts you will be protected, whether other nations are or are not just enough and wise enough to impose the same duty upon their vessels which you are liable to encounter.

My conviction, that sound judgment and right reason demand the observance of these rules, finds support and strength in the fact, that nearly all maritime nations have adopted them; but I would not make that a condition of their enforcement.

Again, if the considerations of prudence which have led to the enactment of these laws are less comprehensive in their scope, the reason for insisting upon their observance by our own vessels is not lessened. If those enactments are not, (as I have above suggested,) for the benefit of all mankind, and have no regard to the general safety of human life or property, as of international concern, they have respect to the lives of crews, passengers and property on board of our own vessels, as objects of special and providential legislation. Wherever our vessels may be and whomsoever they may meet upon the high seas, they and all on board are subjects of national solicitude. The observance of these laws gives early notice of their proximity, and, with such notice, the acknowledged law maritime puts all other vessels, of whatever nation, to diligence to avoid collision, and so tends to the safety of what are confessedly the objects of our care—the lives of our own citizens and their property. If to our legislature it is a matter of indifference whether the lives and property of citizens of other nations are made safe or not, it is matter of deep concern that our own are protected; and let it be remembered, that, in case of collision, we may be the chief or only sufferers, as well illustrated in the case now before the court. When one of our passenger ships is run down at sea by a foreign vessel, and the collision is plainly owing to a failure by the former to observe our laws, it is poor satisfaction to say—true, this neglect has caused the sacrifice of valued lives, but our legislature only intended to guard against collision with a vessel of our own nationality. Nor is this the truth. Our legislature has had regard not merely to the interest of owners of ships, not merely to the preservation of the property on board, but, as guardian of the lives of our citizens, whether crew or passengers, has prescribed rules which will serve in a large degree to protect them wherever upon the seas they may be, and whether any or many other nations observe like rules or not. In this much more selfish and narrow view of the subject than I have above suggested, our vessels are always and every where acting under the pressure of these rules and of the reasons for their enactment, and should not be permitted to disregard them. Our own interests and the declared wisdom of their observance forbid it, the lives and property of our own citizens at hazard forbid it, and none should be permitted to come into our courts of admiralty—in a very high sense, courts of equity—with unclean hands, to claim indemnity for a loss which is proved to be solely caused by their own wilful disregard of these regulations.

The decree dismissing the libel must be affirmed.

[On appeal to the supreme court, the decree of this court was affirmed. 14 Wall. (81 U. S.) 170.]

Case No. 12,514.

The SCOTIA.

[Blatchf. Pr. Cas. 299.] [1]

District Court, S. D. New York. Dec., 1862.

PRIZE—BLOCKADE—FALSE PAPERS.

Vessel and cargo condemned for an attempt to violate the blockade, and because the papers of the vessel were false as to her destination.

BETTS, District Judge. This vessel and cargo were seized, October 24, 1862, on the coast of South Carolina, by a United States vessel of war, and were sent to this port for adjudication. They were libelled November 15, 1862, and the claimants, British subjects, intervened and filed their claim to the vessel and cargo December 9. The ship's papers, the preparatory proofs in writing, were submitted to the court by the counsel for the respective parties. The court has examined all the evidence in the case, and, unless an appeal be taken in this suit, it will be quite needless to go into detailed statements of the facts of the case, or the reasons upon which the judgment of the court is founded. The result of the proofs is, that the vessel was British built, and was registered at Liverpool May 13, 1862. She had on board shipping articles, dated October 17, 1862, for an agreed voyage from Nassau to St. John, N. B. (written over "New York"), and back to Nassau, and a clearance at Nassau, dated October 18, 1862, of vessel and cargo for St. John. No other papers of the vessel relating to the voyage or cargo are brought into court, except two letters from members of the crew to the captain, dated at Nassau, July 25 and 26, 1862, stating to him that they understood that the vessel was destined to a blockaded port, and that they protested against being taken there. Six witnesses—the mate, a passenger, the first, second, and fourth engineers, and the steward—testify, on their examination, that, although the voyage was, on the papers, stated to be to St. John or New York, yet the destination was actually to Charleston, and was so represented by the master. It was notorious to all that Charleston was a blockaded port. The vessel was captured some twenty miles from Charleston, and two miles inside of the station of the blockading and capturing vessel. There is no ground to question the culpability of the voyage. Because of simulated and false papers, and of an attempt to evade the blockade of Charleston, there must be a decree of condemnation and forfeiture of vessel and cargo.

[A claim was made by the Housatonic, the Flambeau, the Flag and the Restless, four vessels which assisted in the capture of the Scotia, to participate in the proceeds of the prize. The claims were disallowed. Case No. 391.]

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

SCOTIA, The (SEARS v.). See Case No. 12,513.

SCOTLAND, The. See Cases Nos. 6,232 and 6,233.

SCOTLAND COUNTY (THOMAS v.). See Case No. 13,909.

Case No. 12,515.

The SCOTSMAN.

[5 Adm. Rec. 79.]

District Court, S. D. Florida. July 27, 1853.

SALVAGE SERVICE—COMPENSATION.

[Three vessels, with 35 men, were engaged four days in lightening and getting a vessel off the Florida Reef, and, but for the assistance rendered, both vessel and cargo would have been a total loss. The vessel was sold for $1,616.30, and the cargo was invoiced at $10,000. *Held*, that 45 per cent. of the net value was reasonable salvage.]

[This was a libel by Edgar A. Coste and others against the British brig Scotsman and cargo, for salvage services.]

F. F. King, for libellants.

W. W. McCall, for respondent.

MARVIN, District Judge. This brig, laden with mahogany and cedar, from Manzanilla, bound to London, on the night of the 22nd of June last, ran ashore upon that part of the Florida Reef known as "Rienzi Reef." Three of the larger wrecking vessels, with thirty-five men, were employed four days in lightening and getting her off. It is evident from the facts in the case, as set forth in the libel, that but for the services of these libellants the vessel and cargo would have been totally lost. The vessel was so much injured as to be unworthy of repairs, and has been sold for $1,616.30. The cargo, as ascertained by the invoice, is worth $10,000. Forty-five per cent. of the net value is considered a reasonable salvage.

It is therefore ordered, adjudged, and decreed, that the costs and expenses of this suit, the wharfage, storage, bills for labor, surveyor's and notary public's fees, commissions, and all other charges on the property except the proctor's fee for defending the brig and cargo, including storage to the time of reshipment, be first examined and deducted from the aforesaid amounts, and that forty-five per cent. of the residue be allowed the salvors in compensation for their services; and that upon the payment thereof and the costs, expenses and charges as aforesaid, the marshal restore said cargo to the master of said brig for and on account of whom it may concern.

Case No. 12,516.

In re SCOTT.

[See Case No. 7,070.]

Case No. 12,517.

In re SCOTT.

[1 Abb. U. S. 336;[1] 3 N. B. R. 742 (Quarto, 181); 9 Am. Law Reg. (N. S.) 349; 18 Pittsb. Leg. J. 53; 12 Int. Rev. Rec. 129; 2 Chi. Leg. News, 398.]

District Court, N. D. Ohio. 1869.[2]

BANKRUPTCY—PRIORITY OF LIENS ON VESSELS.

1. Courts of bankruptcy will, in general, give effect to liens according to priority of date.

2. Maritime liens, which by the law of the admiralty would take precedence over charges of an earlier date, may, however, be accorded a similar preference in a court of bankruptcy.

3. A lien for supplies, &c., furnished to a vessel, founded upon a state statute, and not of a strictly maritime character, may be recognized and enforced in a court of bankruptcy; but it cannot relate back, as a maritime lien may do, so as to take priority over a mortgage recorded prior to the creation of such lien.

[Cited in note in Francis v. The Harrison, Case No. 5,038. Disapproved in The William T. Graves, Id. 17,759. Cited in Moir v. The Dubuque, Id. 9,696; Baldwin v. The Bradish Johnson, Id. 798.]

Exceptions to the report of a commissioner in bankruptcy.

In 1867, Dwight Scott was the sole owner of two propellers, the S. D. Caldwell and the Ironsides. In June, 1868, both vessels were libeled, at Cleveland, for debts which were liens; and they were sold by order of the district court. Previous to the sale of them, Scott filed a petition in bankruptcy and was adjudged a bankrupt. After the sale of the vessels, the demands upon which the libels were founded, were paid out of the proceeds, and the balance was paid over to the assignee in bankruptcy. Motions were then made in the proceedings in bankruptcy to distribute these proceeds among the different lienholders; and the case was referred to a special commissioner to report on the claims and their priorities. The cause now came before the court upon exceptions to the report of the commissioner. The principal question made was, upon the relative priority of claims arising upon mortgages upon the vessels, and claims for supplies, &c. furnished under the "watercraft law" of the state of Ohio.

Willey & Cary, for mortgagees.

R. P. Ranney, S. Williamson, Mr. Backus, Estep & Burke, J. T. Carran, S. O. Griswold, and Mr. Wyman, for various claimants under the watercraft law.

SHERMAN, District Judge. Under the bankrupt law the court is bound to recognize and enforce all valid liens; and the estate of the bankrupt passes to the assignee, subject to all liens that were subsisting upon it or its proceeds. The inquiry is therefore a proper one: What were the valid and subsisting liens, and their order, at the time the proceeds came into the hands of the assignee?

From the character of the claims presented, and the difficult questions of priority arising in the cases, on application of the parties the motions were referred to J. D. Cleveland, Esq., as special commissioner, to inquire into, and report upon the various claims and liens presented, and the order of their priority. The commissioner in the discharge of his duty made an able and elaborate report on the various questions submitted to him, which, from its fullness and general accuracy, has certainly entitled him to great credit.

From that report and the proof it appears that the propellers Caldwell and Ironsides, one of eight hundred tons, and the other of twelve hundred tons, were both enrolled and licensed at the custom-house of the Cuyahoga district, where Dwight Scott, the owner, resided, and were both engaged in commerce and navigation between Cleveland and other lake ports in different states, during the whole time, between the accruing of the earliest lien and the time they were seized, libeled and sold.

There were three classes of liens set up against the proceeds:

1st. Strictly maritime liens, such as seamen's wages, materials, supplies and repairs in ports of other states, for damages for collision, and for towage and wharfage in foreign ports. There was no question as to the validity and priority of these liens, and under former orders of the court they have been paid.

2nd. Statutory Liens.—That is, claims for supplies, materials, &c. which the laws of Ohio declare shall be liens upon vessels navigating the waters in, or bordering upon the state, and that they shall at once attach upon the accruing of the debt.

3rd. Mortgage Liens.—A mortgage on each propeller was given by Dwight Scott, the owner, in part, for the purchase money, and the mortgages were duly recorded according to the act of congress of July 29, 1850 [9 Stat. 440], in the district of Cuyahoga, the home port of the vessels.

The question presented is, as to the priority of the statutory liens and the liens of the mortgages.

If the so-called "watercraft laws" of Ohio attached to these propellers, and had the force and effect that from their terms they were intended to have by the legislature, then unquestionably the statutory liens will have the preference. Authorities are cited, both in the federal and state courts, to the effect that this class of liens should be recognized and declared valid, to take effect next after purely maritime liens. But on an examination of these authorities, I am satisfied that these liens were so recognized, by reason of the provisions of the act of congress of February 26, 1845 (5 Stat. 726), which reserved concurrent remedies, as given by the state laws, in proceedings against vessels navigating the western waters. Under that law, this class of claims was treated as a species of maritime liens, only inferior in their nature and

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

[2] [Affirmed in Case No. 7,070.]

precedence to liens allowed by the maritime law. Even the supreme court, about that time, under the power conferred upon it by congress to prescribe forms and process, made the twelfth rule in admiralty, which provided that this class of claims, depending upon state statutes, might be enforced by proceedings in rem in the district court, as a court of admiralty. This rule was, however, afterwards repealed, but for reasons other than want of jurisdiction. The St. Lawrence, 1 Black [66 U. S.] 522.

Previous to the act of 1845, the opinion was entertained and frequently asserted that the admiralty jurisdiction of the federal courts did not extend beyond the ebb and flow of the tide, and therefore state laws and state courts governed and controlled all matters in controversy arising on the western lakes and rivers. The Thomas Jefferson, 10 Wheat. [23 U. S.] 428; The Orleans v. Phœbus, 11 Pet. [36 U. S.] 175; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344. In view of the vast and rapid increase of commerce on those waters, the act of 1845 was passed, conferring admiralty jurisdiction on the district court as to claims against vessels navigating the lakes and waters connecting them, saving, however, to the parties, whatever concurrent remedy the common law might give them, and also such remedies as may be given by the laws of the states. Under this law, and with the ideas then universally prevailing, the doctrine grew up that the state laws could create and establish liens upon that description of property. However, as time progressed, and the want of uniformity and consistency in the state laws became manifest, the subject of jurisdiction over vessels navigating the lakes received more attention, and was more closely investigated. From the time of the case of The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443, 459, down to the cases of The Moses Taylor, 4 Wall. [71 U. S.] 411; The Hine v. Trevor, Id. 555; and The Belfast, 7 Wall. [74 U. S.] 624, the opinion has been growing that the district court did not derive its admiralty jurisdiction over the western waters by reason of the act of 1845, but that it was always possessed under section 9 of the judiciary act of 1789 [1 Stat. 76]. Finally, these doubts and opinions were settled at the late session of the supreme court, by a decision pronounced by Judge Nelson, in the case of The Eagle, 8 Wall. [75 U. S.] 15, to the effect that the act of 1845 was obsolete and of no effect, and that general jurisdiction in admiralty upon the lakes was conferred upon the district courts by the judiciary act of 1789.

It follows, as the result of that decision, that if admiralty jurisdiction was conferred upon the district courts by the original judiciary act, it is an exclusive jurisdiction, and that the state laws cannot create, upon property that is subject exclusively to admiralty laws, charges and incumbrances that in any way partake of the character and force of maritime liens, that might be superior to other charges or incumbrances of an older date. This opinion, so well considered, and so much in harmony, as it is, with the rulings of all the district courts along the lakes for years past, is decisive of the nature and character of these claims, and the force, and priority and effect, that will hereafter be given them in the courts.

In this connection, I may cite the decision of the supreme court of Ohio, in a very late case, of The General Buell v. Long, 18 Ohio St. 521, recognizing the principles laid down in the Moses Taylor and the Belfast Cases, and adopting them as the latest and most authoritative law on this subject. Similar cases, involving similar principles, have lately been decided in New York,—Bird v. The Josephine, 39 N. Y. 19; in Minnesota,—Griswold v. The Otter, 12 Minn. 465 (Gil. 364); in Indiana,—Ballard v. Wiltshire, 28 Ind. 341; and in Kentucky,—Stewart v. Harry, 3 Bush, 438.

The judiciary act of 1789 saves to the parties all the concurrent remedies of the common law. The lien which the statutes of Ohio declare that these domestic claims shall have, is not a common law lien or remedy. It is the creation of the statutes. The state of Ohio, as between her own citizens, and upon property within her jurisdiction, has the authority to declare what claims or indebtedness shall or shall not be liens, and the force and effect of those liens upon property. She has by her statutes declared that the class of claims now in question shall be liens, and shall at once attach upon the property, at the time of the creation of the debt. This court, as a bankrupt court, recognizes these statutes, and would be governed by them as far as possible, in the disposition of the proceeds of property sold in the hands of an assignee. And if the question before the court was, whether these claims had a preference over a mortgage of a prior date executed and recorded according to the laws of Ohio, or over any other debt against Dwight Scott, the bankrupt, even if it were in judgment and execution levied on the propellers previous to the accruing of their claims, the court might order the payment of them out of their proceeds, before the mortgage and judgment were paid. It would do so, if the statute or the decisions under it had made them the first lien, for the state has full authority to discriminate by law and create preferable liens upon property, so far as these liens are created or given validity to by the state legislation. But the mortgages on these propellers were of prior date to any of these domestic claims. They are both dated and recorded in April, 1867. The claims bear date at different times from May, 1867, to May, 1868. The mortgages are both recorded in pursuance of the act of congress of July 29, 1850, which provides substantially that no mortgage of a vessel shall be valid against any person, except the mortgagor and his representatives, unless such mortgage shall be recorded in the office of the collector of cus-

toms, in the district where the vessel is registered or enrolled. By virtue of the mortgage, the mortgagees acquired a lien on the vessels to the amount named in them, and by the recording of them, they gave notice to the world, including these claimants, that such a lien existed. The mortgages are no more a maritime lien than these domestic claims are. The mortgages and claims are of equal validity, and both were a charge and lien upon the propellers, to be paid according to their priority of date. If the claims had been of a prior date to the mortgages, they would have had a preference, and been paid first out of the proceeds of the sale; but as they happened to be of subsequent date, they must give way to the mortgages.

That congress has the power to give validity to mortgages on vessels, by authorizing their record in the office of the collector of the customs in the home port, has been repeatedly settled. Under the power given in the constitution to regulate commerce, congress having created, as it were, this species of property, and conferred upon it its chief value, there can be no reason why that power should not be extended to the security and protection of the rights and title of all persons dealing therein. Blanchard v. The Martha Washington [Case No. 1,513]; White's Bank v. Smith, 7 Wall. [74 U. S.] 646.

The conclusion I have arrived at may seem to be in conflict with the decisions in Kellogg v. Brennan, 14 Ohio, 72, and Provost v. Wilcox, 17 Ohio, 359, wherein it is held that the claims of creditors for supplies and materials to a vessel, are, under the watercraft laws of Ohio, to be preferred as against a mortgage. These decisions were made in 1846 and 1848, and previous to the act of congress of July, 1850, and the question in those cases was between the domestic lienholders, and a mortgage executed and recorded under the state statutes. It was, therefore, a different question from the one presented in this case, and in view of their late decision in the case of The General Buell v. Long, supra, there can be no doubt but that that court would arrive at the same conclusion I have done.

Let an order be entered, and distribution made according to the principles herein laid down.

[The decision in this case involves a fund of about thirty thousand dollars.] [3]

[See Case No. 7,069.]

Case No. 12,518.

In re SCOTT et al.

[4 N. B. R. 414 (Quarto, 139).] [1]

District Court, E. D. Michigan. Nov., 1870.

BANKRUPTCY — RIGHT TO PROVE DEBTS — SURRENDER OF PROPERTY—RECOVERY UNDER BANKRUPT ACT.

1. The right of a preferred creditor to prove his debt is conferred by the bankrupt act [of 1867 (14 Stat. 517)], independent of the second clause of section 23, the operation of that clause being merely to suspend that right until such creditor shall have surrendered all property, etc., as therein provided, and in the construction of this clause it makes no difference whether the petition be voluntary or involuntary.

[Cited in Re Stephens, Case No. 13,365; Re Leland, Id. 8,230.]

2. A creditor is only barred from proving his debt when a recovery has been had under sections 35 and 39 of said bankrupt act.

[Cited in Re Kipp, Case No. 7,836.]

At Detroit, in said district, on the 7th day of November, A. D. 1870, before Hovey K. Clarke, register in bankruptcy. I, the above-named register, do hereby certify that, on the 24th day of January last, Jeremiah Fisher filed his deposition to prove his claim against the above-named bankrupts' estate, the consideration of which was stated to be for money paid on the 28th of August, 1869, to take up a note dated June 17th, 1869, payable sixty days after date, and which said Fisher had, at the date of said note, indorsed for the accommodation of said bankrupts; appended to the deposition was a chattel mortgage, dated August 18, 1869, the day before the note became due, executed by the bankrupts, conditioned to pay "a certain note dated June 17th, A. D. 1869, payable sixty days after date, for the sum of five hundred dollars, at the banking office of Fisher, Booth & Co., Detroit, and indorsed by said Jeremiah Fisher, party of the second part, and to save said Fisher harmless from all costs, damages, and expenses by reason of such indorsement; and also to save said Fisher harmless from all costs, damages, and expenses that may accrue to him by reason of the indorsement of any note or notes that may be made to renew or extend the payment of said five hundred dollar note, and to repay to said Fisher any sum of money he may pay on said note of five hundred dollars, or any note given to renew or extend the payment of the same, on demand." The property covered by this mortgage is described as "all the stock of shelf-goods, groceries, and provisions, of the party of the first part, contained in the store now occupied by them in the National Block, on Genesee street, East Saginaw, Michigan, No. 317; also, such other goods kept by said first parties in said store, for sale, not enumerated in the above designation; also the counters, shelving, stove, and gas fixtures, and stove furniture, in the said premises; also, one harness and one delivery wagon, one box-stove and pipe." The deposition filed, as above stated, to prove the claim of said Fisher, sets forth that "deponent has a chattel mortgage, hereunto annexed, marked B, on the property therein mentioned, given as security for his said claim, of which property the assignee has possession, and the estimated value of which is about fourteen hundred dollars. Deponent hereby releases and conveys his claim upon said property to the assignee. On the 29th of March, 1869, A. R. & W. F. Linn, creditors, who had proved their claim against said bankrupts' estate, filed their

[3] [From 3 N. B. R. 742 (Quarto, 181).]

[1] [Reprinted by permission.]

petition for the re-examination of the said claim of said Fisher, and alleged, in several specifications, objections to its allowance; whereupon I made an order appointing the 14th day of April for the hearing of said petition, at which time the parties appeared; said Fisher filed an answer and demurrer to said petition, and the examination of said Fisher and of James Moore was taken; and it appearing that questions of law and fact have arisen, as to the right of said Fisher to prove his claim against said bankrupts' estate, I have adjourned the same into court for the decision of the district judge.

On the 18th day of August, 1869, Fisher, the claimant, was liable, as indorser for the bankrupts of their note of July 17, 1869, for five hundred dollars, payable sixty days after date. He has since paid the note, and the amount he claims is the amount he paid to take it up, less the amount of a store account the bankrupts had against him on that day, the 18th of August, one day before the note became due; and upon the statement by the bankrupts, that they would be unable to pay the note at maturity, they executed to the claimant, and he accepted, a chattel mortgage upon their entire stock of goods and fixtures, stated to be worth about fourteen hundred dollars.

By HOVEY K. CLARKE, Register:

The bankrupt act (section 39) provides that any person * * * who, being bankrupt or insolvent, or in contemplation of either, shall make any * * * conveyance or transfer of * * * property * * * with intent to give a preference to * * * any person who * * * may be liable for him as indorser, * * * shall be deemed to have committed an act of bankruptcy. * * * And if such person shall be adjudged a bankrupt, the assignee may recover back the * * * property so * * * conveyed * * * or transferred contrary to the act; provided, the person receiving such * * * conveyance has reasonable cause to believe that a fraud on the act was intended, and that the debtor was insolvent; and such creditor shall not be allowed to prove his debt in bankruptcy.

It is insisted by the objecting creditors, that on the 18th day of August, 1869, Scott & McCarty were bankrupt or insolvent, that the conveyance of their stock which they made on that day by chattel mortgage to Fisher, was made with intent to give him a preference as an indorser of their note of five hundred dollars. They insist, also, that Fisher had reasonable cause to believe that Scott & McCarty were insolvent at the time he took the mortgage; and, therefore, that under the provisions of section 39 of the bankrupt act, he shall not be allowed to prove his debt. The bankruptcy or insolvency of Scott & McCarty; the intent to prefer their indorser Fisher; and the existence of a reasonable cause for belief of both these facts, by Fisher, are essential to the maintenance of the objections offered by the opposing creditors.

The nature of the transaction is such as to leave no room for doubt that the bankrupts intended to prefer their indorser. They convey to him their entire stock of goods and store fixtures, upon a condition which will be broken the next day, unless they pay the note which will then fall due, and which they have told Fisher they will not be able to pay. It is difficult to imagine a case more literally within the provisions of section 35 of the bankrupt act, which declares that any transfer or conveyance not made in the usual and ordinary course of business of the debtor, shall be prima facie fraudulent; and this presumption, as I understand it, affects all parts of such a transaction as the one under examination. Such a sale the act declares to be "evidence of fraud," which, to mean anything, must include the bankruptcy, or insolvency, of the vendors, and their intent to give, and the intent of the vendee to accept a preference. This, however, is only a presumption; yet, I suppose it becomes, and is to be treated as conclusive, unless it shall be successfully rebutted. But I do not find anything in the testimony which does this. Fisher testifies, it is true, that he believed Scott & McCarty to be solvent; the question, however, is not of actual belief of solvency, but whether reasonable cause for belief of insolvency existed; and the testimony taken increases, rather than diminishes, the cause to believe the bankrupts to be insolvent at the time the mortgage was given. The claimant, however, rests his right to prove his claim upon the fact, that he has surrendered the mortgaged property to the assignee, as stated in his deposition, and he claims, that, by such surrender, he is entitled to prove his debt, and share in the distribution of the proceeds of the bankrupts' estate. The middle sentence of section 23 of the act, is cited in support of this claim; "any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made, or given, by the debtor, contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom, until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference." The conditional clause at the end of the sentence is construed to confer the right claimed.

To say that a creditor shall not prove until he surrenders, is certainly not equivalent to saying that he may prove when he surrenders; whether such a result be even admissible as an inference, may well be doubted. Possibly it would be, if such inference were not repugnant to any other provision of the statute, nor in conflict with its general policy as gathered from the whole of it. But there is in section 39, a provision utterly repugnant to the exercise of the right claimed under section 23, when the facts of the case are within the provisions of section 39. These facts are: 1st. An adjudication under a cred-

itor's petition. 2d. A preference to a creditor. 3d. Accepted with reasonable cause to believe a fraud on the act intended. When these conditions exist the prohibition of section 39 applies, "such creditor shall not be allowed to prove his debt." This point was decided in Walton's Case [Case No. 17,130], before Judge Deady, in the district court, for the district of Oregon. The facts of this case were, that the bankrupts had confessed judgments in favor of two of their creditors who issued executions and levied on the property of the bankrupts, and notwithstanding they professed that it was not their intention to get any preference in the final distribution of the property, but that their object was to avoid the expenses of a division of the moneys under the bankrupt law, their acts were held to be in fraud of the bankrupt act; and though they made no resistance to the seizure by the marshal of the property covered by the execution, and offered to surrender any advantage or preference which they had obtained, they were not allowed to prove their debts. The judge in deciding the case, says: "When the question was first raised as to the right of Allen & Lewis and Henry Failing to prove their debts, I inclined to the opinion, that a creditor who had taken a preference contrary to the act, might in any case be allowed to prove his debt upon the surrender of the property, benefit, or advantage obtained by him under such preference, as provided in section 23. But after long and careful deliberation, I am forced to come to a different conclusion; I am now satisfied that to allow these creditors to surrender their unlawful preference, and come in and prove their debts under section 23, would be to violate both the letter and spirit of the act. It may be admitted that section 23 is of general application in both voluntary and involuntary cases, except as otherwise provided in section 39. But the special provision in the latter section, declaring that a creditor shall not be allowed to prove his debt in a particular case, so far excludes the operation of the general words of the former. Now, this special provision of section 39, covers this case at every point, and therefore takes it out of section 23." Princeton's Case [Case No. 11,433], decided by Judge Miller in the district court for the district of Wisconsin, is to the same effect. The Case of Montgomery [Case No. 9,728], on the other hand, is regarded as an authority in support of the right for which the claimant contends. I think it not improper to say that this case seems to have been very hastily considered; one indication of which is that it assumes to state the provisions of the section above cited, thus: "But section 22 (section 23, undoubtedly intended) provides, that if a person shall accept a preference, having reasonable cause, etc., he may nevertheless prove his claim and receive dividends, if he surrender to his assignee all the property, etc., received by him under such preference." The important difference between a conditional and an absolute proposition, between permissive and prohibitive statutes, seems not to have attracted the attention of the register who prepared the opinion, nor of the judge who approved it. The utmost that can be claimed for the clause in section 23, is that it becomes permissive on the performance of a condition. To allow a permissive clause to control a prohibitive would certainly be a novelty in the construction of statutes. But to subject a prohibitive clause to the control of one that is only conditionally permissive, seems to me a construction too remote from any possible intention of congress to require further consideration.

This case, Montgomery's, is also regarded as an authority for such a construction of the last sentence of section 39, as makes a recovery by the assignee from the preferred creditor of the money, or property, received, as essential to bar the right of such creditor to prove his debt; and the opinion of the distinguished gentleman who is reputed to be the author of the bankrupt act, and who for this reason is supposed to be well informed as to the intention of the law-makers, is cited as favoring this construction. This, so far as I know, is the only precedent for this method of ascertaining the intention of the legislature, and, it seems to me to be so plainly in conflict with well-established principles of interpretation, that I hesitate to follow it. I hesitate also, because, a close scrutiny of the words of the act neither requires, nor, as I think, permits it. Such a construction necessarily assumes that the words "such creditor," who shall not be allowed to prove his debt, are identical in their application with the words, "the person," in the same sentence, from whom the recovery was had. There is no such identity, because "the person" may be one who has colluded with the bankrupt in making a "disposition of his property to defeat or delay the operation of the act," and not be a creditor at all. It is a more literal, and, therefore, perhaps, more likely to be the true interpretation, to refer the words, "such creditor" back for their antecedent to where the word "creditor" previously occurs, as the object of the bankrupts' intent to give a preference. A "creditor" is also a "person," and therefore the imputation of reasonable cause to believe a fraud upon the act is intended, is a necessity to justify a recovery predicated of both. But "person" will not include "creditor," and, therefore, the party who is forbidden to prove his debt is not identical with the "person" against whom a recovery may be had.

There is, however, a much more satisfactory reason, for rejecting the construction approved in the Montgomery Case than can be derived from such verbal criticisms. I suppose that there is no sounder rule for the interpretation of statutes, none entitled to a more controlling influence, than that all parts of an act must be construed to effectuate its

main purpose. A bankrupt is one who is unable, or who wilfully refuses to pay his debts in full. The main purpose of a bankrupt act is to take the bankrupts' property into the custody of the law, and distribute it equally, in just proportions, among all his creditors. Preferences are the conspicuous frauds in the sense of a bankrupt system, which the law aims to suppress; and just so far as it fails in this, it fails to justify its existence, while, on the contrary, so far as it accomplishes this object, it commends itself to all fair-minded men, and contributes essentially to promote the business interests of the community. But creditors are quite as zealous in seeking preferences, quite as urgent in demanding them, as debtors are to offer or to yield them; and the law which aims to prevent them must apply its restraints upon both. There is, indeed, greater reason for applying these restraints to creditors, than there is to debtors. The motives which actuate debtors to give preferences are, almost always, more excusable than those which, under a uniform bankrupt system, induce creditors to demand them; and it is unjust to visit upon an embarrassed debtor the penalty for giving a preference, and allow the pressing creditor to escape the penalty for the participation in the same transaction, for without the concurrence of both, debtor and creditor, a preference is impossible. The penalty to the debtor is, the deprivation of his right to a discharge. For him there is no atonement. The penalty he has incurred may be enforced by any creditor. The penalty to the creditor should be, exclusion from participation in the distribution of the bankrupts' estate. This is what I understand to be intended by sections 35, and 39. The first of these sections provides for the recovery by the assignee from the preferred creditor of the fruits of such preference. The last excludes the creditor from proving his debt. The enforcement of this penalty with the utmost vigor will still leave a much greater measure of severity to be borne by the debtor. But it is to be remembered, also, that unless the petition, for adjudication of the debtor as a bankrupt, is filed within four months of the time when the preference was given, the creditor will be allowed to retain the fruits of his shrewd forecast for his individual interest; and will be, of course, beyond the reach of any penalty the bankrupt act can inflict. But if the petition for adjudication shall be filed within the four months, and the act shall be construed as to allow him, by a surrender, to enjoy the right, equally with all other creditors, of proving his debt, it is obvious that the whole reliance for the enforcement of the provisions of the bankrupt act, so far as penalties are concerned, must be upon those which are denounced against debtors; creditors will still be at liberty to employ all the arts and power with which their position invests them to secure themselves; assured of complete success, if the short statute of limitations of four months shall run in their favor; and if not, that they "can remove the stain of fraud by surrendering the property and disclaiming all intent to become a party to the bankrupts' fraudulent proceedings;" be admitted to equality with every other creditor, to the same extent as though they had made no attempt to evade the letter and spirit of the bankrupt act. I do not think the act ought to receive any such construction; I think that embarrassed debtors are entitled to all the protection against the importunities of their creditors to violate the act, which may fairly be deduced from its provisions. I think that creditors who prescribe to themselves the rule of a careful obedience to the spirit of the act, are entitled to protection against the unscrupulous activity of those who still deem the "race of diligence" open to them and spare no effort to gain its prizes. I think the interpretation of the bankrupt act, should, as far as possible, by the application of every fair rule, be such as will vindicate its equity: and that it should not, by a partial construction in favor of one class of the subjects of its jurisdiction—creditors—weaken any of the safeguards upon which reliance must be placed for the enforcement of the policy embodied in its provisions. With these views I cannot think that any creditor within the provisions of section 39, who has accepted a preference, having reasonable cause to believe a fraud on the act was intended, should be allowed to prove his debt.

All of which is respectfully submitted to the decision of the district judge; together with the depositions and the papers of the parties to the proceeding before me.

LONGYEAR, District Judge. As to the construction of the second clause of section 23 of the bankrupt act. The right to prove claims against a bankrupt's estate is conferred, and the claims which may be proven are defined by section 19. Section 19 is broad enough to cover a claim like that of Fisher, on account of which a preference had been accepted, and but for section 23 such claim would undoubtedly be provable under said section 19. Section 23 operates to suspend the right conferred by section 19 until the creditor holding such preferred claim shall first have surrendered to the assignee all property, etc., received by him under such preference. When such surrender is made the suspension ceases, and the right conferred by section 19, revives and is in full force the same as if no such preference had existed. The office of the clause of section 23, under consideration, is therefore, in the first instance, that of suspension merely, to ripen, however, into absolute prohibition in case of a refusal or neglect to surrender. In re Tonkin [Case No. 14,094]. The right, therefore, to prove the claim after a surrender has been made is not derived from section 23, but is conferred by section 19.

As to the construction of the last clause of section 39, absolutely prohibiting the proof of claims in certain cases. It is a well settled rule that in putting a construction upon any part of a statute, the whole is to be considered, and effect is to be given, if possible, to every clause and section of it; and it is the duty of courts, as far as practicable, so to reconcile the different provisions as to make the whole act consistent and harmonious. Sedg. St. & Const. Law, 238; Com. v. Duane, 1 Bin. 601; Com. v. Alger, 7 Cush. 53-89; Attorney General v. Detroit & E. P. R. Co., 2 Mich. 138.

The position contended for in opposition to the right of Fisher to prove his debt, viz.: That no creditor who has accepted a preference, having reasonable cause to believe a fraud on the act was intended, should be allowed to prove his debt, would render the words "until he shall first have surrendered," etc., in section 23, inoperative and of no force or effect whatever. It will not do to say that those words of section 23, above quoted, are to be given effect in voluntary and not in involuntary cases, because that would involve the absurdity of saying that the quality and consequences of the act of the creditor in accepting a preference, having reasonable cause to believe a fraud upon the act was intended, are to be measured and judged of, not by the act itself, but by what the debtor may see fit subsequently to do or omit to do. That is, if the debtor should see fit to go into voluntary bankruptcy, then the creditor may surrender and prove his debt; but on the other hand, if the debtor should see fit to omit going into voluntary bankruptcy, and some of his other creditors, taking advantage of that circumstance, should put him into involuntary bankruptcy, then such preferred creditor may not surrender and prove his debt, no matter how anxious and willing he may be to do so, and this, too, notwithstanding that the vitiating element of the act of accepting a preference, the fraud is the same in the one case as in the other. It must be a strong necessity growing out of positive and unmistakable provisions of the act, that would induce a court to adopt a construction leading to such unreasonable and inconsistent results. Let us see if that necessity exists, and if a construction of the clause of section 39, under consideration, cannot be adopted, which will lead to more consistent and harmonious results. In Re Tonkin [Case No. 14,094], above cited, this court held that the "recovery" provided for in the first clause of section 35, is the alternative of the "surrender" contemplated by the second clause of section 23; that sections 35 and 39 must be construed together in pari materia; and that, so far as those sections relate to the same class of matters, all the qualifications, conditions, and prohibitions of the one will apply equally to the other. This view has been recently maintained also by Judge Dillon in the United States circuit court in Missouri. Bean v. Brookmire [Case No. 1,168]. This court further held in Re Tonkin, that the class of cases provided for in the first clause of section 35, is also provided for in section 39, and therefore, under the rule stated, the express prohibition contained in the last clause of section 39, applies equally to section 35; that the conditional prohibition of section 23 becomes absolute and perpetual in case of a recovery under the first clause of section 35, and that so far as that class of cases, viz., unlawful preferences, is concerned, the express prohibition of section 39 was unnecessary, but that sections 35 and 39 provide for recovery in other cases than those of preference merely, such as payments, sales made, etc., with a view to prevent the debtor's property from coming to his assignee in bankruptcy; money, goods, etc., obtained by a creditor as an inducement to forbear opposition to the bankrupt's discharge; and assignments, gifts, sales, etc., with intent to delay, defraud, or hinder creditors, to none of which the prohibition of section 23 will apply. And this court, in view of the above considerations, further held as follows: "The express prohibition contained in the last clause of section 39 was inserted there in order to prescribe one general rule, applicable alike to all cases of recovery of money, or property, paid, conveyed, etc., to creditors, contrary to the bankrupt act."

After a thorough and careful reconsideration, I see no grounds for changing, or in any manner qualifying, the above construction of the clauses in question, and although that construction was given in a case somewhat different from the present one, yet it is fully applicable to this case.

The construction above given to the clauses in question, results then as follows: First. That the right of a preferred creditor to prove his debt is conferred by the bankrupt act, independent of the second clause of section 23, and that the operation of that clause is merely to suspend that right until such creditor shall have surrendered all property, etc., as therein provided. Second. That upon such surrender being made the right of such creditor to prove his debt revives, and is in full force, the same as if such suspension had never existed. This applies the same whether the proceedings in bankruptcy are voluntary or involuntary. Third. That the prohibition of the right of a preferred creditor to prove his debt, contained in the last clause of section 39, applies only in cases where a recovery has been had under sections 35 and 39; and, that the right to surrender under section 23 ceases, and the right of such creditor to prove his debt is forever barred after such recovery.

This construction gives to each clause of the act under consideration full force and effect, and makes one consistent and harmonious system of the two. It is entirely consistent, too, with the general purpose and scope of the bankrupt act. It says to the

creditor who has accepted an unlawful preference, surrender what you have thus unlawfully received, and thereby make the estate whole, as it would have been but for your act, so that no harm shall come to the other creditors on account of it, and you may come in and share with the other creditors; but if you refuse or neglect to do this, what you have so received shall be recovered from you, and you shall be deprived of all benefit or advantage on account of your debt.

In this case, it appearing from the facts certified by the register that the creditor, Jeremiah Fisher, has surrendered to the assignee all property, etc., received by him under his preference, within the meaning of section 23 of the bankrupt act, he may prove his debt against the said bankrupt's estate.

Case No. 12,519.

In re SCOTT et al.

[15 N. B. R. 73;[1] 4 Cent. Law J. 29.]

District Court, E. D. Missouri. Dec., 1876.

BANKRUPTCY—COMPOSITION MEETING—WHO MAY VOTE—OBJECTIONS TO RESOLUTION—BEST INTEREST OF ALL—ATTORNEY FOR CREDITOR.

1. A creditor who has an attachment issued within four months before the commencement of proceedings in bankruptcy cannot vote at a composition meeting.

[Cited in Re Shields, Case No. 12,784.]

2. An order referring a proposition of compromise to a register should require him to report whether the resolution of composition is duly passed at the first meeting, whether it has been confirmed by the required signatures, and whether the terms of the composition are for the best interests of all concerned.

[Cited in Litchfield v. Johnson, Case No. 8,387; Re Jacobs, Id. 7,159.]

3. No second meeting of creditors, as such, is necessary to be held to confirm the resolution of composition.

4. At the hearing for the ratification of the resolution, objections can be presented as to the due passing of the resolution, as to the confirmatory signatures, and as to what is for the best interest of all concerned.

[Cited in Farwell v. Raddin, 129 Mass. 8.]

5. None but unsecured creditors can object to the ratification of a resolution.

6. A resolution cannot be defeated on the mere ground that by the defeat some peculiar benefit may accrue to the objecting creditor.

7. The debtor is not required to appear at the hearing for a ratification, or submit any statements.

8. The statute does not contemplate that the confirmatory signatures must necessarily be attached at the first meeting.

9. The confirmatory signatures must be attached at or before the hearing for a ratification.

[Cited in Home Nat. Bank v. Carpenter, 129 Mass. 4.]

10. The meeting for the purpose of adding to or varying the original proposition is one to follow the confirmation and recording thereof.

11. An advance in the percentage is demonstrative of the fact that the original proposition is not for the best interest of all concerned.

12. Creditors must prove their claims in order to vote on a resolution of composition.

13. In involuntary proceedings the petitioning creditors on whose motion an order to show cause has been issued need not prove their debts anew.

14. The register is an officer of the court, and must take judicial notice of its judgments and decrees.

15. When an attorney at law appears before a register to represent a person, he is to be accepted as such attorney unless some one puts him to proof, by a rule therefor, to show his authority.

16. If a person who is not an attorney at law desires to represent another before a register, he must show a formal power of attorney.

17. If a telegram is produced revoking a power of attorney, the register, if the facts justify it, may in his discretion suspend action until proof of the revocation and new appointment can be presented to him.

18. If there is a concealment of assets or a failure to name all of the creditors, this does not necessarily render the proceedings void, but the question is for the determination of the court.

[19. Cited in Sage v. Heller, 124 Mass. 214, to the point that, when no adjudication or assignment is made, a composition under the statute does not dissolve an attachment or affect the rights of the attaching creditor, who took no part in those proceedings.]

[In the matter of Scott, Collins & Co., bankrupts.]

TREAT, District Judge. This is a proceeding by creditors to have the debtors adjudicated bankrupts. The original petition, with accompanying papers, was filed July 22, 1876. Thereupon, under an order to show cause, the debtors, on August 9, 1876, filed their answer, and demanded a jury. On September 5th they filed a petition for composition, a meeting to consider which was ordered for September 18th. The history of what ensued is set out in the report of the register, to understand which many supplementary facts and proceedings must be considered.

At the first meeting held for composition certain attaching creditors appeared and claimed the right to participate therein, which claim was denied—and rightfully. See section 17 of act of 1874 [18 Stat. 182]. These attaching creditors, unless an adjudication were had, would retain their lien as security; and, therefore, within the terms of the act might, or might not, be secured creditors, dependent on the fact whether an adjudication of bankruptcy should be had. The act contemplates that secured creditors shall not have a vote at said composition meeting unless they first relinquish their security. True, the act, in terms, refers to creditors fully secured; but that must be held to have reference solely to the value of the security compared with the amount of the debt. Hence, if the attaching creditors desired to participate in said meeting, they should have released their attachments. It seems they pre-

[1] [Reprinted from 15 N. B. R. 73, by permission.]

ferred, inasmuch as no adjudication was had, to hold their attachments; so that, if the composition were effected, they could obtain their demands in full; yet it was obvious that the debtors, who had interposed a denial of bankruptcy, could, at any moment, by consenting to the adjudication, cause the attachments and the supposed security based thereon to disappear. Thus the attaching creditors were, in a certain sense, subject to the will of the debtors. The latter denied bankruptcy, and if no adjudication followed, the attaching creditors were secured, and consequently could not be heard at the composition meeting. If the composition were effected, in that condition of affairs, without adjudication, the attaching creditors would not be disturbed in their secured demands. Still, the debtors had it in their power to cause that security, by attachment, to disappear at any instant, by consenting to adjudication. The way out of that difficulty was for the creditors to release their attachments, or for the debtors to permit adjudication to be made. No such action having been had, the first composition meeting was held and the resolution duly passed; the votes of the attaching creditors having been rightfully excluded.

The second meeting, or hearing, was then ordered, at which the attaching creditors again appeared and insisted upon entering into a protracted examination, not of the bankrupts alone, but of an indefinite number of witnesses. Application having been made to the court to determine what was the lawful course to be pursued under the then state of facts, it was held, substantially, that the attaching creditors could not, nor could the debtors, play "fast and loose;" that if the attaching creditors wished to intervene, they must assume the position of unsecured creditors; and, on the other hand, if the debtors wished to contest the allegations of bankruptcy, in good faith, whereby the attaching creditors were secured if no adjudication followed, they ought, in some way, so to appear of record. It was obvious that the respective parties were standing at bay—each holding the other at arm's length—to the great injury of all others in interest, and involving an indefinite delay in the proceedings, with accumulating costs. Hence, on application to the court, it was ruled that the proceedings for the hearing should not be delayed or interrupted by the attaching creditors, unless they first released their supposed securities; nor should they or other creditors protract the investigation unnecessarily. That ruling may have been improvident from a failure to scrutinize with due accuracy the precise condition of the case as then pending. It was supposed by the court that the order of reference to the register required him to report not only whether the resolution for composition had been duly passed at the first meeting, but, also, whether it had been confirmed by the required signatures, and whether the terms of the composition were for the best interest of all concerned. It seems that the order did not include either of the latter questions, as it should have done. Hence, much of the confusion and difficulty, entailing upon the register and others a large measure of embarrassment.

Before proceeding to consider in detail any of the many exceptions to the register's report, it is necessary to interpret carefully the provisions of the statute under which these proceedings for composition have been had. The United States act, as to composition (1874), is, to a large extent, borrowed from the English act of 1868. The changes made must be carefully noted, in order to ascertain what congress designed should be the proper course of proceedings in this country. It is well known, and was so pronounced by Justice Miller on this circuit, that the act of 1874 was designed to mitigate, in favor of the debtor, the rigors of the act of 1867 [14 Stat. 517]. One of the most important amendments, by the act of 1874, related to involuntary bankruptcy, whereby it was no longer left in the power of one creditor, regardless of the wishes of all others, to force a debtor into bankruptcy. The amendatory act of 1874 required one-fourth in number of the creditors, whose demands were equal, in the aggregate, to one-third of the provable debts, to join, in order to commence involuntary proceedings. The act of 1874 permits a discharge of a voluntary bankrupt whose assets equal thirty per cent. of his debts proved, or who procures the assent of at least one-fourth of his creditors in number and one-third in value. That act, therefore, had a plain and evident intent, viz.: to put proceedings in voluntary and involuntary bankruptcy on exactly the same footing so far as the action of creditors was needed; for precisely the same requirements for a discharge in voluntary cases are exacted as for involuntary proceedings—discharges, under the latter, following, as a matter of course, so far as dependent on the assent of creditors. Thus, if the required number to force a debtor into bankruptcy choose so to do, they thus act with full knowledge that the debtor's discharge will follow irrespective of the percentage realized from his estate. The law was thus made simple and uniform. In voluntary cases the required number assent to the discharge at the close of proceedings, and in involuntary the same number, by instituting the proceedings, assent in advance. So, when the provisions as to composition are considered, we find the same design to favor the unfortunate debtor. Previously, compositions had (to be effective) to have the assent, as a general rule, of all the creditors—a rule which put it in the power of one creditor, as in the cases of involuntary bankruptcy, to thwart the wishes and interests of all other creditors and of the debtor. As to composition, however, a larger number is required than to effect involuntary bank-

ruptcy, to wit: a majority in number, and three-fourths in value of the creditors assembled, to be confirmed by the signatures of two-thirds in number and one-half in value of all the creditors. This provision as to composition proceedings, furnished a large measure of relief to the debtor and assenting creditors. It is in view of the purpose of this congressional legislation that the act of 1874 should be interpreted, viz.: that it is no longer left in the power of one creditor to force a debtor into bankruptcy, or to defeat a composition, against the wishes of all other creditors and of debtors. With these considerations in mind, it is necessary to look to the provisions of the British statute of 1868, and of the United States statute of 1874, to ascertain what congress designed should, as to composition proceedings, be the mode of action, and the rules to be observed.

A reproduction of the respective statutes, in hæc verba, in parallel columns, will show wherein congress changed the borrowed British statute; and in the light of the liberal purpose above suggested, what congress intended should be the rule in this country. It must be noted that the British act contemplates composition proceedings without first commencing an action in bankruptcy, while the United States act contemplates that composition proceedings shall follow a bankruptcy suit commenced.

UNITED STATES.	BRITISH.
"That in all cases in bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to each known creditor of the time, place, and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition, proposed by the debtor, shall be accepted in satisfaction of the debts due to them from the debtor."	"The creditors of a debtor unable to pay his debts may, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor."
"And such resolution shall, to be operative, have been passed by a *majority in number and three-fourths in value* of the creditors of the debtor, assembled at such meeting either in person OR BY PROXY, and shall be *confirmed by the signature thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor.*"	"An extraordinary resolution of creditors shall be a resolution which has been passed by *a majority in number and three-fourths in value* of the creditors of the debtor, assembled at a general meeting to be held in the manner prescribed, of which notice has been given in the prescribed manner, and has been *confirmed by a majority in number and value of the creditors assembled at a subsequent general meeting*, of which notice has been given in the prescribed manner, and held at an interval of not less than SEVEN days nor more than FOURTEEN days from the date of the meeting at which such resolution was first passed."
"And in calculating a majority for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding *fifty dollars, shall be reckoned in the majority in value, but not on the majority in number;* and the value of the debts of secured creditors above the amount of such security to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way."	"In calculating a majority for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding *ten pounds shall be reckoned in the majority in value, but not in the majority in number*, and the value of the debts of secured creditors shall, as nearly as circumstances admit, be estimated in the same way, and the same description of creditors shall be entitled to vote at such general MEETINGS as in bankruptcy."
"And creditors whose debts are fully secured shall not be entitled to vote upon or to sign such resolution without first relinquishing such security for the benefit of the estate."	(No similar provision.)
"The debtor, unless prevented by sickness, or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him; and he, or, if he is so prevented from being at such meeting, some one in his behalf, shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due."	"The debtor, unless prevented by sickness or other cause satisfactory to such meetings, shall be present at *both the meetings* at which the extraordinary resolution is passed, and shall answer any inquiries made of him, and he, or if he is so prevented from being at such MEETINGS, some one on his behalf, shall produce to the *meetings* a statement showing the whole of his assets and debts and the names and addresses of the creditors to whom such debts respectively are due."
"Such resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the court; and the court shall, *upon notice to all the creditors of the debtor of not less than five days, and upon hearing, inquire whether* such resolution has been passed in the manner directed by this section; and if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the best interest of all concerned, cause such resolution to be recorded and statement of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity. And any creditor of the debtor may inspect such record and statement at all reasonable times."	"The extraordinary resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the registrar, and it shall be his duty to inquire whether such resolution has been passed in the manner directed by this section, and if satisfied that it has been so passed, he shall forthwith register the resolution and statement of assets and debts; but until such registration has taken place, such resolution shall be of no validity; and any creditor of the debtor may inspect such statement at prescribed times, and on payment of such fee, if any, as may be prescribed."
"The creditors may, by resolution passed in the manner and under the circumstances aforesaid, add to, or vary the provisions of, any composition previously accepted by them, without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation. And any such additional resolution shall be presented to the *court* in the same manner, and proceeded with in the same way and with the same consequences, as the resolution by which the composition was accepted in the first instance."	"The creditors may, by an extraordinary resolution, add to or vary the provisions of any composition previously accepted by them, without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation; and any such extraordinary resolution shall be presented to the *registrar* in the same manner and with the same consequences as the extraordinary resolution by which the composition was accepted in the first instance."
"The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and address-	"The provisions of a composition, accepted by an extraordinary resolution in pursuance of this section, shall be binding on all the creditors whose names and

es, and the amounts of the debts due to whom, are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors."	addresses, and the amount of the debts due to whom, are shown in the statement of the debtor produced to the MEETINGS at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors."
"Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the names of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt.	"Where a debt arises on a bill of exchange or promissory note, if the debtor is ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor or person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description of the creditor of the debtor in respect of such debt, and any mistake made inadvertently by a debtor in a statement of his debts may be corrected after the prescribed notice has been given, with the consent of a general meeting of his creditors."
"Any mistake made inadvertently by a debtor in the statement of his debts may be corrected upon reasonable notice, and with the consent of a general meeting of his creditors."	
"Every such composition shall, subject to priorities declared in said act, provide for a *pro rata* payment or satisfaction, in money, to the creditors of such debtor, in proportion to the amount of th ir unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up."	(No similar provision.)
'The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner by any person interested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court."	"The provisions of any composition made in pursuance of this section may be enforced by the court, on a motion made in a summary manner by any person interested, and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court."
"Rules and regulations of court may be made in relation to proceedings of composition herein provided for in the same manner, and to the same extent as now provided by law in relation to proceedings in bankruptcy."	"Rules of court may be made in relation to proceedings on the occasion of the acceptance of a composition by an extraordinary resolution of creditors, in the same manner, and to the same extent and of the same authority, as in respect of proceedings in bankruptcy."
"If it shall at any time appear to the court, on notice, satisfactory evidence, and hearing, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition, or may set the same aside; and in either case the debtor shall be proceeded with as a bankrupt, in conformity with the provisions of law, and proceedings may be had accordingly; *and the time during which such composition shall have been in force shall not, in such case, be computed in calculating periods of time prescribed by said act.*"	"If it appear to the court, on satisfactory evidence, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice, or undue delay to the creditors or to the debtor, the court may adjudge the debtor a bankrupt, and proceedings may be had accordingly."

A correct analysis of these statutes will show, as to the questions now before the court, the evident intent of the United States statute in changing the provisions of the borrowed British act. By the latter (British) act, two meetings of creditors are required, at each of which the debtor must appear, etc., and submit a statement of his assets, debts, etc. The United States statute, seemingly, provides that, instead of the debtor's appearance at a second meeting, with the production of his statement anew, a confirmation of the original resolution by the signatures thereto of the debtor and two-thirds in number and one-half in value of all his creditors shall be sufficient. At the first meeting the debtor must appear, make his statement, etc., the resolution to be passed by a majority in number and three-fourths in value of the creditors assembled, due notice to each creditor having been given as required by the act, which resolution must be confirmed (when?) by the signatures of two-thirds in number and one-half in value of all the creditors. The British act requiring two meetings, makes it necessary that at the first meeting a majority in number and three-fourths in value of those assembled shall assent, and so does the United States statute. The British statute calls for a second general meeting of creditors, after due notice, at which second general meeting the confirmation must be voted for by a majority in number and value of the creditors assembled. The distinction is apparent. Under the United States statute, as also under the British, the vote of a majority in number and three-fourths in value of creditors assembled, is necessary to pass the composition resolution at the first meeting.

At the second meeting, for which the British statute provides (to be held on full notice, etc.), a majority in number and value of creditors assembled decide for confirmation. Not so under the United States statute; for it requires two-thirds in number and one-half in value of all the creditors of the debtor to confirm the composition resolution by their signatures. Why this change? Was it not the design of the United States statute to obviate the necessity and expense of the second meeting of creditors as required by the British statute, and to substitute therefor the signatures of the creditors, requiring, however, two-thirds of all the creditors, instead of those assembled? The important differences are that, under the British statute, a second meeting of creditors is required, at which a majority in number and value of those assembled can confirm; while under the United States statute, there is no second meeting of creditors to formally pass upon the confirmation. The United States statute says the resolution passed at the first meeting shall be confirmed, not by a majority in number and value of those assembled at the second meeting, but by the signatures of two-thirds in number and one-half in value

of all the creditors. Hence, under the British statute, the creditors have two meetings, at each of which the debtor must appear with his statements; and the creditors must decide at the first meeting, by a majority in number and three-fourths in value, and at the second meeting by a majority in number and value of the creditors assembled. But by the United States statute, the same number is required for the first meeting; but instead of a second meeting, where, as under the British statute, a majority in number and value of those assembled would prevail, a confirmation by signatures is required of two-thirds in number and one-half in value of all the creditors of the debtor.

This absence of a second meeting, with its attendant costs and possible delay, is compensated under the United States statute by the fact that the signatures of two-thirds of all the creditors, instead of a mere majority of those assembled, together with a half in value, are requisite. Still, the United States statute provides that, after the first meeting, notice shall be given to all the creditors, and a hearing be had whether the composition resolution was duly passed, and that the court, if satisfied that it was so passed, and that the same is for the best interest of all concerned, cause the same to be recorded, whereby the composition becomes effective. Was this notice to the creditors for the said hearing to take the place of the second meeting under the British statute, or was the confirmation by signatures to have that effect? If the latter, why notify creditors of this hearing? The court can ordinarily determine by the record whether the resolution was duly passed, if the creditors have not, as under the British statute, a second vote upon the proposition. Why, then, the notice to the creditors of this hearing? Obviously, that they may be present and submit any objection they may have as to the validity of the first meeting and what was done thereat, and also show what they deem the best interest of all concerned may require. Unless this is the purpose of the notice, no reason therefor appears.

It is, therefore, ruled as to many of the exceptions filed, based on the theory that, as under the British statute, a second meeting of creditors is necessary to be held to confirm the original resolution, that no such second meeting, as such, is necessary. It is also ruled that at the hearing, of which creditors are to have the required notice, objections can be presented as to the due passage of the original resolution as to the confirmatory signatures, and as to what is for the best interest of all concerned. In this view the court has heretofore given several orders in this case, some of which, for lack of precision, have caused embarrassment.

At the hearing, for which due notice was given, none but unsecured creditors should have been heard. It may be a question whether a secured creditor, who does not release his security, at or before the first meeting, can have any status at the subsequent hearing by then releasing for the purposes of opposition. In this case he was permitted to do so, and although no exceptions thereto are filed, yet the court does not wish it to be considered that such a right exists. Parties ought to elect at a proper time what to do, where the right of election exists, and not speculate upon the chances of litigation. The court, however, did permit the parties having attachment, on releasing the same, to appear and contest at the hearing. From the insufficiency of the order entered, requiring an investigation as to the signatures confirmatory of the resolution, and also as to what the best interest of all concerned demands, much of the doubt and difficulty in this case has arisen.

At the hearing, on notice to the creditors, many have appeared, and object: First. As to several matters connected with the adoption of the resolution and confirmatory signatures. Second. As to what may be for the best interest of all concerned. Under this objection it must not be supposed that they are at liberty to defeat the proposed composition against the wishes of the creditors generally, because, if defeated, some peculiar benefit may accrue to the objectors, who are in a minority. The design of the statute is to give the required number the control of the proposition, which, if passed as the law exists, ought to be recorded and become operative, unless such facts are brought to the knowledge of the court as demonstrate that the resolution passed and confirmed is not for the best interest of all concerned. It will be seen that, by the British statute, the registrar records the resolution after the second meeting, if the proceedings to that stage have conformed to the law. It is twice stated in the United States statute, on the other hand, when the court may interpose to prevent or set aside the composition. Again, this marked difference is observable, viz.: Under the British statute the required votes are those of the creditors assembled at both meetings; but under the United States statute it is the required votes of those assembled at the first meeting, and confirmed by the required signatures of all the creditors.

This distinction between the two acts indicates that under the United States statute, only one meeting of creditors, as such, is to be held, and that, instead of the second meeting required by the British statute, the confirmatory signatures shall be sufficient. Some of the English cases cited evidently rest on this difference. Where a majority assembled are to decide, it is imperative that all should have had notice of the meeting; but where the composition cannot be effective without the confirmation of all creditors, whether present at a meeting or not, a safeguard exists independent of formal notice. Ex parte Sidey, 24 Law T. (N. S.) 401; Ex parte Rogers, 22 Law T. (N. S.) 283.

Without entering more at large into the differences between the two statutes, and the reasons therefor, it must suffice to state, succinctly, the rulings of this court on the various propositions submitted.

First. Notice to the creditors having been given, the required number of unsecured creditors assembled at the first meeting called, could pass the resolution. If a fully secured creditor wishes then to vote or interfere, he must first relinquish his security. At that meeting the debtor must appear in person, or by a representative, and submit the statement required. As no other formal meeting of the creditors is required, he is not bound to appear at the hearing, to submit anew the statement previously made by him, or any other statements.

Second. The resolution purporting to have been previously passed, together with the debtor's statement as required, having been presented to the court, a hearing is to be ordered on notice to the creditors; at which hearing it must be decided whether such resolution was duly passed, etc. If it be held that the resolution was duly passed, and the needed confirmatory signatures had, the next step is to satisfy the court that the terms offered, etc., are for the best interest of all concerned. At this point it should be noted that more than the formal passage of the resolution at the previous meeting is necessary to make the same operative, viz., the required confirmatory signatures.

But when are those signatures to be had? The resolution is to be first passed by a majority in number and three-fourths in value of the creditors assembled, and confirmed by the signatures of the debtor and two-thirds in number and one-half in value of all the creditors, whether present or absent. It is obvious that the statute does not contemplate that the confirmatory signatures shall necessarily be attached to the resolution at no other time than at the first meeting; for, if a majority in number and three-fourths in value of those assembled vote for the resolution, it has passed. To that resolution, as thus passed, confirmatory signatures of a very different number of creditors are necessary, who are not necessarily present and voting at that meeting.

Third. After due notice for the hearing, the court must ascertain, therefore, not only whether the resolution was formally passed, but also whether the confirmatory signatures required have been secured. Those signatures may, or may not, be attached to the resolution at the prior meeting; but they must have been attached before the hearing, or be attached at the hearing. The confirmatory signatures are essential to make the resolution operative.

Fourth. A meeting for the purpose of adding to or varying the original proposition, the statute contemplates, is one to follow the recording, etc., of the former resolution. Such are the requirements of the British statute, and such is the evident intent of the United States statute. Each statute proceeds, as to that provision, upon the theory that a composition has previously been duly confirmed and recorded. From some cause, subsequently occurring or discovered, the creditors may compel a new meeting to be held, following, however, all the modes of proceeding exacted with regard to the original resolution and proposition. While this is true, this court is not prepared to say that, if after the first meeting the debtors agree to enlarge their offer, the creditors ought to be precluded from having the benefit thereof, without being driven to the necessity of a new meeting and hearing, with confirmatory signatures, etc.; thereby adding costs and expenses, to the injury of creditors, it may be, and of the debtors. Still, the technical difficulty, urged by counsel, remains, viz.: that as the hearing is only for the purposes mentioned concerning the original proposition, how can the court consider entirely new and independent propositions at the instance of the debtor or of any creditor? On the other hand, if the required number passed the original resolution and the required signatures confirmatory had been attached, so that no objection thereto could be sustained, and the court had advanced to the second stage of inquiry, viz.: whether the terms agreed upon were for the best interests of all concerned, should it refuse to give to the creditors the proffered benefit of the increased sum? Under the British statute the third meeting, to add or to vary, occurs when from subsequent events the debtor becomes unable to comply with the original terms. No instance is known where such a meeting was needed or held to enable the creditors, already bound to a smaller sum, to agree to receive more than the law had awarded, with their consent, in the absence of fraud.

If, however, the needed inquiries at the hearing disclose that there were concealed assets, or that the original terms were not for the best interest of all concerned, should the debtor, by advancing the terms, drive the court into a new inquiry, viz.: whether some new proposition, instead of the first, would not satisfy the court as to what the interest of all concerned might require under the changed phase of the case? If this is permissible, would not these proceedings be extended indefinitely, compelling the court, when the debtor thus confesses that he could and ought to do better than he proposed, to enter upon a new inquiry with not only suspicion aroused, but with a confessed fact before it, that the debtor had not acted fairly towards his creditors? It is held, therefore, that the proposed advance in the percentage is only demonstrative of the fact that the original proposition, whether confirmed or not by the needed signatures, is not for the best interest of the creditors.

It may be important, however, as doubts

exist with respect to former rulings of this court in some particulars, and as the questions arise on the face of the register's report, with exceptions thereto, that decisions thereon should be made. As to these subsidiary propositions, the court holds:

First. That when proceedings are commenced, voluntarily or involuntarily, and a list of creditors is presented, it is not to be taken for granted that each creditor thus named is really what the debtor in his schedule chooses to state. None but bona fide creditors are to have a voice in the composition proceedings, and the simple fact that the debtor chooses to place them on his list, does not, even prima facie, establish that they are creditors. On the other hand, when involuntary proceedings are instituted, and the court has held that the moving creditors are such for initiating the proceedings, they are to be considered such at composition meetings without further proof. If any one desires to go behind that action of the court, he must do so by instituting proper proceedings therefor. It must suffice for the register that such creditors have had their demands passed upon by the court, and he must take notice thereof. The register is an officer of this court, and as such he cannot act independently of its judgments or decrees, but must take notice of them. Were this not so, there would be an independent court held by the register, to whom the United States district court must certify its action, under all the solemnities of certificates, to the great expense, delay, and annoyance of those whose demands have already been passed upon by the judge. This would involve the folly of having a register review the action of the judge, when the register's action the judge has to pass upon finally. It has been urged that as the debtor is, in either a voluntary or an involuntary case, to furnish a list of his creditors, those named by him have a right to appear at the composition meeting without proof, and to be recognized as such creditors for the sum named. Such is not the law. If a debtor can furnish an unscrutinized list, which must be received as correct without proof, then it would be within the power of any debtor to defeat the main purposes of the bankrupt act. Every one who claims to be a creditor must establish his claim. If his claim as such creditor has already been established by the court, so as to permit him to move in involuntary proceedings, he is decided to be a creditor. The rule, therefore, is this: that in involuntary proceedings, the petitioning creditors, on whose motion an order to show cause has been issued, are not bound to prove anew, and in another and more formal manner, that they are such creditors, at a meeting for composition. All other creditors must prove themselves to be such in the formal manner required by the statute and general orders in bankruptcy.

Second. It has heretofore been ruled that, when an attorney, duly admitted to practice in this court, appears before the register to represent a person in interest, he is to be accepted as such attorney, unless some one puts him to proof, by a rule therefor, to show his authority. All others must show formal powers of attorney as prescribed by law and general orders in bankruptcy.

Third. A more difficult proposition arises as presented in this case, when a duly authorized attorney appears before the register and offers to vote under a power previously given, but at the same time another person, claiming to be an attorney, also appears, and produces a telegram just received from the principal, revoking the former power, and requesting the last named to act. In such cases it may be well for the register, in his discretion, to defer action until it is ascertained, without unnecessary delay, whether the revocation and new appointment have actually been made. It is obvious that such dilatory matters, through erroneous statements, may be started at the last moment to the serious injury of others. While such telegrams should be treated with extreme caution, and not received as authoritative, yet, it would not be objectionable for the register to suspend action, if in his discretion the facts justified, until within due time he could have presented to him the proofs of revocation and of a new appointment. Such cases cannot be subjected to any fixed rules; for they are suspicious in all instances growing out of supposed laches.

Fourth. It is objected that some individual assets were omitted in the statement at the first meeting, and consequently all done thereat was void. The act provides for the correction of any inadvertent mistake as to debts; but nothing is, in terms, stated concerning errors as to assets. Under the British statute, where two successive meetings have to be held, at each of which a statement by the debtor has to be made, it has been held (quære?) that a failure to make a full and accurate statement, or a failure to disclose all the creditors, would render the meetings void. But the United States statute subjects all of these proceedings to the investigation of the court. It is for the court to decide, in the light of the facts, upon the alleged concealment of assets, and upon the failure to name all of the creditors. This is the more obvious from the fact that the composition, if recorded, does not bind any creditor whose name does not appear in the debtor's statement.

There are many specific objections made as to receiving or rejecting votes at the last meeting or hearing, which, if the parties desire, will be passed upon seriatim. All of those objections are supposed to be covered by the rules now stated. While creditors, duly shown to be such, should have the amplest opportunity, consistent with legal rules, to determine their line of action at each

stage of the case, they must be held to the proper measure of diligence. Whether acting in person, or by proxy, they should reach a conclusion at the proper time, and not delay or embarrass proceedings by shifting their course after action had, or by changing proxies while final action is about to occur at the hearing ordered. Neither the register nor the judge should, at such a time, be asked to delay the hearing, to the annoyance of all present, in order to embark upon a new inquiry as to the changing views of the respective creditors concerning their proxies, etc. It is the duty of all to be at the hearing, prepared to act. If the provisions of the bankrupt act are to be so administered as to promote dilatory motions, its beneficence will disappear. Both debtor and creditor may be otherwise devoured at the will or caprice of one or more creditors, or at the shifting caprices of a debtor. It is the duty of those intrusted with the administration of the bankrupt act to protect the interests of all concerned, and not suffer needless expense and delays. The very object of a composition may be defeated, if one or more factious creditors can defeat the wishes of others; yet a reasonable time should be given for investigation, and for the correction of formal errors.

Case No. 12,520.

In re SCOTT.

[1 Wkly. Notes Cas. 21.]

District Court, E. D. Pennsylvania. Oct. 7, 1874.

BANKRUPTCY—LEAVE TO SUE IN STATE COURTS—NOTICE.

This was an application by a creditor for leave to sue said bankrupt in the state courts, over a year having elapsed since the adjudication, and no discharge having been had by the bankrupt.

THE COURT ordered personal service of notice of the application to be made on the bankrupt.

[See Case No. 12,521.]

Case No. 12,521.

In re SCOTT.

[1 Wkly. Notes Cas. 30.]

District Court, E. D. Pennsylvania. Oct. 14, 1874.

See [Case No. 12,520]. Proof of personal service of rule on bankrupt being given, THE COURT made the same order as in Re Whiting [Id. 17,574].

Case No. 12,522.

SCOTT'S CASE.

[See Case No. 12,517.]

Case No. 12,523.

SCOTT v. AULD.

[3 Cranch, C. C. 647.] [1]

Circuit Court, District of Columbia. Nov., 1829.

SLAVERY—COVENANT TO SET FREE—INCREASE OF FEMALE—EVIDENCE.

The owner of a female slave sold her, without reserving any reversionary right, and took a covenant from the vendee that he would set her free after twelve years' service; nothing being said of her increase in the mean time. *Held*, that parol evidence of the declarations of the vendor that he had sold the slave for her full value as a slave for life, could not be admitted to be given by the defendant; and that the written evidence purported that the vendor had parted with his whole right in the slave to the vendee, and that the vendor was not entitled to the issue born after the sale.

Detinue [by Jesse Scott's executor against Colin Auld] for three negroes who were born while Hannah, their mother, was in the possession of James Anderson, under the following instrument:

"Alexandria, March 1, 1816. I have this bo't of Mr. Jessey Scott, Hannah and her sonn John; Hannah to serve twelve years, and John untull he is thirty-five years old, and then both to be free; for the faithful performance of which I bind myself, my heirs, &c. Jas. Anderson.

"Test, Jas. W. Scott."

Upon the trial, Mr. Mason, for defendant, offered parol evidence of the declarations of Scott, that he had sold Hannah and John for their full value as slaves for life; and that Anderson was to set them free, and that nothing was said by Scott respecting the issue born during the twelve years.

Mr. Wise, on the same side, cited 1 Phil. Ev. 476, and Peisch v. Dickson [Case No. 10,911], and Livingston v. Ten Broeck, 16 Johns. 14. This suit was brought after the expiration of the twelve years.

Mr. Taylor, for plaintiff, objected, and

THE COURT (nem. con.) rejected the parol evidence.

A verdict was taken for the plaintiff, subject to the opinion of the court upon the case as it appears above stated.

Mr. Taylor and Mr. Hewitt, for plaintiff, contended that there was a reversion in Scott, the vendor, and that the children of Hannah, born during the twelve years' servitude, were his slaves. Negro Maria v. Surbaugh, 2 Rand. [Va.] 228.

THE COURT (MORSELL, Circuit Judge, contra) was of opinion that Scott parted with his whole right in the slaves Hannah and John, to Anderson, who contracted with Scott to emancipate them when they should have served out the respective terms stipulated, &c. Judgment of nonsuit to be entered.

SCOTT (BANK OF COLUMBIA v.). See Case No. 880.

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

Case No. 12,524.

SCOTT v. BARTLEMAN.

[2 Cranch, C. C. 313.] [3]

Circuit Court, District of Columbia. May Term, 1822.

CONTRACTS—HIRING SLAVES—LOSS BY ARREST.

If I hire a slave for a year, and he be arrested for theft at any time during the year, and imprisoned therefor during the residue of the term for which I have hired him, I must pay the stipulated hire, and suffer the loss of service.

Assumpsit, for $36, for one year's hire of a negro woman, the slave of the plaintiff [Richard M. Scott], hired by the defendant [W. Bartleman] for a year. Within ten days after hiring, she was arrested and imprisoned upon a warrant for theft, and kept in custody the rest of the year.

Mr. Swann and Mr. Fendall, for plaintiff.

Mr. Taylor, for defendant.

THE COURT (THRUSTON, Circuit Judge, absent) instructed the jury that the loss of time and service must fall on the defendant.

SCOTT (BEN v.). See Cases Nos. 1,286–1,288.

SCOTT (BENNETT v.). See Case No. 1,323.

SCOTT (BLACK v.). See Case No. 1,464.

Case No. 12,525.

SCOTT v. BLAINE.

[Baldw. 287.] [1]

Circuit Court, Pennsylvania. Oct., 1830.[2]

PRACTICE IN EQUITY — DEATH OF PARTY — TERM ENDED—HOW DECREE REVERSED.

1. A final decree rendered against two defendants jointly, will not be set aside on motion, on account of the death of one of the defendants before the hearing.

2. After the term in which a final decree has been rendered, it cannot be reversed, annulled or set aside, except by appeal or bill of review.

[Cited in Linder v. Lewis, 1 Fed. 380; Allen v. Wilson, 21 Fed. 884; Glenn v. Dimmock, 43 Fed. 551.]

The bill was filed against Blaine, Irwin and Carothers, in October, 1824. Carothers died before answer. His death was averred in the answer of Irwin. The answer of Blaine and Irwin was filed in September, 1825. Blaine died some time before October, 1828, but no suggestion of his death was entered on the record, or any notice taken of it. The case came on for a hearing in May, 1829, when a decree was rendered jointly against Blaine and Irwin that they pay to certain persons therein named the sum of 5000 dollars.

Mr. Kittera moved to set aside the decree against both on the ground that, being joint, it was void by the death of Blaine before the term antecedent to that in which the decree was rendered, or the cause ordered for a hearing. The utmost extent to which a court of equity goes, is to order the decree to have relation back to the time of the argument, where one of the defendants dies between the hearing and the decree, as in 4 Johns. Ch. 342, or where the cause has stood some time for judgment and a defendant dies in the interval, and the suit not revived when set down for judgment, as in 9 Ves. 461, or where a defendant dies after hearing and before judgment. 2 Madd. Ch. 529, cited. In a court of law, the remedy would be by writ of error coram vobis, but in equity it is only on motion to set aside the decree.

Joseph R. Ingersoll and Mr. Chauncey opposed the motion on the ground that the obligation on which suit was brought, and the answer being joint, the suit did not abate, as a decree could be rendered against the survivor, who ought to have suggested or pleaded the death of the other defendant. In a court of law, the death of one joint plaintiff before judgment was allowed to be suggested on the roll, and execution to go in favour of the survivor. Newnham v. Law, 5 Durn. & E. [Term R.] 577. So where judgment was entered against two defendants, and execution against the survivor, the court, on a writ of error coram vobis, allowed the record to be amended by suggesting the death of one on the record. Hamilton v. Holcomb, 1 Johns. Cas. 29; Dumond v. Carpenter, 2 Johns. 184; Hill v. West, 1 Bin. 486. In equity a suit abates by the death of a party only who is necessary for a decree. 1 Har. Ch. 120, 126, 153; Mitf. Eq. Pl. 53; Coop. Ch. Pl. 62; Brown v. Higden, 1 Atk. 291.

BY THE COURT. The decree in this case is final. It was rendered on hearing and argument more than two terms since, on an issue regularly made up. It is therefore too late to annul it on motion. We might correct any clerical errors, miscasting or inaccuracies, but cannot declare it void on account of any thing now suggested. It is among the earliest rules of chancery, which have been in force from the time of Lord Bacon, that no decree after enrolment can be reversed, annulled or set aside but on a bill of review for error apparent, or some new matter not known at the time of the decree. However erroneous, therefore, this decree may be in law or fact, it must stand till reversed on appeal or by bill of review. It is not necessary to decide on what may be done on petition, cross bill, or otherwise, in order to prevent injustice being done to the surviving defendant; or what would be the proper course to pursue, on an application by the legal representative of the deceased defendant, or of the complainant. A court of equity is competent to model its process for enforcing a decree according to justice

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

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

[2] [District not given.]

and good conscience, but after the term in which it is rendered cannot annul it on motion. The motion is therefore overruled.

SCOTT v. BURROUGHS. See Cases Nos. 9,111 and 9,112.

SCOTT (CHAPMAN v.). See Case No. 2,609.

Case No. 12,526.

SCOTT v. CHICAGO.

[1 Biss. 510.] [1]

Circuit Court, N. D. Illinois. Feb., 1866.

BRIDGES — FAILURE TO OPEN DRAW — DAMAGE ON ACCOUNT OF FREEZING — MITIGATING CIRCUMSTANCES — MEASURE OF DAMAGES.

1. The city of Chicago is bound to use proper care and precautions to allow vessels to pass the bridges across the Chicago river. If a vessel gives notice to the proper persons that she intends to move up or down the river, it is the duty of the city to prepare for her passage, and remove any obstacles which may appear. If no notice is given until the whistle sounds, then the proper efforts must be made as soon as practicable thereafter.

2. After ice has formed in the river, less vigilance is required than during the season of navigation. When a vessel has given notice, the same exertion must be made as ever.

3. State of the weather may be considered, and as it is one of the incidents of a bridge, that snow and ice may interrupt its movement, all that can be required of the city is the use of every reasonable effort, as soon as practicable, to remove the obstacle.

4. If the city has been guilty of negligence, and in consequence a vessel has been obliged to cut her way out of the ice, the damages would be, 1st, the necessary expense incurred; 2d, reasonable damages for the delay; 3d, the damages actually sustained by the vessel. But no damages can be given for injuries sustained in doing anything not warranted by skill and prudence.

This was an action on the case by Dwight Scott, owner of the propeller S. D. Caldwell, for damages caused by the neglect to open a bridge across the Chicago river, on account of which the propeller was frozen in, and delayed and damaged.

H. F. Waite, for plaintiff.

S. A. Goodwin, for defendant.

DRUMMOND, District Judge (charging jury). On the afternoon of the 31st day of December, 1863, the propeller S. D. Caldwell, of which the plaintiff is the owner, having had some repairs made in the dock of Doolittle & Olcott, on the south branch of the Chicago river, was proceeding down the river, stern foremost, with the purpose of going to Milwaukee, to carry out a contract made by the propeller to run between that port and Grand Haven, Michigan. There was considerable ice in the river at the time, which, though impeding the progress of the propeller, did not prevent her from making her way somewhat slowly down the river.

Having reached the Madison street bridge, she gave the usual notice by whistle of her approach. The bridge tender and assistant were absent. On the return of the latter, he made some efforts, with the aid of others, to open the draw, but failed, owing, as it seems, to some snow and ice, or other obstacle getting in between the moving and stationary part of the bridge. The weather was becoming cold and the following day, the 1st of January, 1864, was of unexampled severity; so that some of the persons engaged in trying to open the bridge on that day had their hands and feet more or less frozen. The bridge tender returned on the 2d of January, and the next day they succeeded in opening the bridge and the propeller passed through. But in the meantime the cold had so much increased and strengthened the ice, that after winding and trying with her bow, which was cased in iron, to force her way through, the propeller, after some days of trial, relinquished the attempt to go out in that way, and a contract was made with some parties, at a large expense, to cut the ice, by means of which, at length, on the 16th day of January, the propeller was enabled to proceed into the lake and to Milwaukee, where she arrived on the same day. In trying to go through the ice in the river, the propeller sustained considerable damage, and for this, the delay, and the additional expense, the action is brought against the city.

The only material fact controverted, is as to the notice given to the city authorities on the 30th of December. It is claimed on the part of the propeller that on that day notice was given to the proper persons that the propeller would pass down the river on the following day. This is denied by the city, and it is contended that no such notice was given.

The only aspect in which this fact is of importance, is the bearing it may have on the question of care and diligence of the city under the circumstances; because, if notice were actually given on the day before, it was the duty of the city authorities to take measures immediately to remove any obstacle which, upon inspection, might appear to be in the way of opening the bridge; whereas, if no notice were given, as navigation in the south branch was generally closed for the season, the same degree of preparation might not be expected on the part of the bridge tender. But in any event, it was the duty of the city, upon the approach of the propeller, to use all proper and reasonable efforts to open the bridge, looking at the circumstances as they existed at the time.

The Chicago river is a public navigable highway, and vessels have the right to pass up and down, without unnecessary detention; and consequently the propeller S. D. Caldwell had the right to go down the river at the time mentioned. But the right of navigation does not take away the right of crossing the

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

river, and it must be considered settled that the city has the power to construct bridges for the purpose of crossing, provided the bridges are so constructed and maintained as not materially or unnecessarily to obstruct navigation. The two rights co-exist, and each one must be construed with reference to the other, precisely as we qualify the right to travel along a street by the right to cross it. The navigator must yield something to the foot passenger, just as the latter must yield something to the navigator.

Generally, and perhaps with reason, the navigator has the preference on the Chicago river, as he is permitted to pass at once, while foot passengers and vehicles are constantly being stopped in the season of navigation, in their efforts to cross the bridges.

It follows, from what has been said, that the Madison street bridge was properly there, and the only question in this part of the case is: Was everything done that under the circumstances ought to have been done by the city authorities to enable the propeller to pass through the bridge?

There is no serious objection made to the construction of the bridge, which was what is termed an iron bridge, and moved upon what is called a turn-table on a pier in the middle of the river. The main complaint on the part of the plaintiff is that proper precautions were not taken by the bridge tender, and that the necessary assistance was not there at the time.

Whether this complaint is well founded, must be determined by the light of the facts found to exist when the application was made to pass the bridge. If notice were given the previous day, then, so far as it was practicable, the proper efforts should have already been made; if no notice were given till the whistle sounded, then the proper efforts should have been made as soon as practicable thereafter. It may be assumed that at the time notice was received, considering the season of the year, the ice in the river, the non-passage of vessels for some days through the bridge, the same degree of vigilance could scarcely be looked for as in the midst of the season of navigation; but, making due allowance for this difference, there ought to have been the same exertions made as at any other time. But of course the jury will take into consideration the state of the weather. For example, while it was the duty of the city to keep the bridge in a condition to be turned, when steamers or vessels could pass up or down the river, still it is one of the incidents of a bridge so constructed that snow and ice may occasionally interrupt the movement, and if, by a sudden change of weather, ice should form so as to obstruct the turning, all that could be required would be the use of every reasonable effort, as soon as practicable, to remove the obstacle. I think every exertion should have been made that, under the circumstances, was practicable, to allow the propeller to pass that night.

The question is not precisely, whether those there did what they could, but is rather, whether there was the necessary and competent assistance there at the time, and whether, if it had been and proper exertions made, the result would have been the same. The probability seems to be that if the propeller had got through the bridge immediately, she would have reached the mouth of the river that night. If it was not practicable to open the bridge that night, was everything done that could in reason be done on the next day and the following day to accomplish it? The cold was intense on the first of January, and the evidence shows that it was with difficulty that men could work in the open air, and yet what could be done ought to have been done.

On the whole, I shall leave it to be decided by the jury whether the city authorities did all that was required of them, all that skill and diligence could effect, to accomplish what the propeller demanded, viz: the opening of the Madison street bridge in order that she might pass down the river as soon as possible.

If the city in all respects performed its duty, then the plaintiff cannot recover; but if it was guilty of neglect, and in consequence thereof the plaintiff has sustained damage, then the city may be held responsible for the loss. If you shall find that the city was guilty of a neglect of duty, and that the plaintiff has thereby suffered damage, the next question is as to the amount of the damages. These would be,—in case the jury find for the plaintiff:

1. The necessary expense paid by him in cutting the propeller out. Though a larger amount was originally agreed on, yet the sum actually paid was $600.

2. The value in the nature of demurrage of the propeller while necessarily detained by the act of the defendant, and in such a manner as fully to indemnify the plaintiff for any loss sustained by him in consequence of such detention.

3. The damage that the propeller actually suffered through the neglect of the city authorities. But the jury should not give anything for injury received in doing what skill and prudence would not warrant the propeller to do. For example, if the propeller persisted in forcing her way through the ice longer than skill and prudence would justify, before the contract for cutting the ice was made, then for such injury compensation should not be given. But it is for the jury to determine how far the damage done to the propeller was the result of want of skill or prudence on the part of the propeller and how far it was the result of the fault of the city authorities.

Verdict for plaintiff.

Case No. 12,526a.

SCOTT et al. v. The CLARA E. BERGEN.[1]

District Court, D. South Carolina. June 23, 1882.

ADMIRALTY — SALVAGE — AMOUNT — BASIS OF ALLOWANCE.

[1. The schooner B., loaded with a cargo of iron rails, ran hard aground on a sand bar on the side of a narrow channel near the entrance to Charleston Harbor, at nearly high tide. She lay in a position of actual danger, which was likely to be very greatly increased by the sudden changes of wind and weather to which the locality was subject, and the state of the tide allowed a very short time for getting her off before the ebb. The steamer P. and a tug, seeing the situation of the B., went promptly to her assistance, and, by their combined efforts,—the aid of both being necessary, in order to exert force in the proper direction,—pulled the B. off the shoal without material injury. The steamer and tug incurred some risk, but not much. The time occupied was about an hour. The value of the B. and cargo was $38,000; and of the steamer and her cargo, and the tug, $44,000. *Held*, that $1,200 was a proper compensation for the salvage service rendered by the steamer and tug.]

[2. Allowances for salvage services, being dependent wholly on success, and the encouragement of such services being of high importance to commerce, are based, not on the principle of quantum meruit, but on the benefit conferred on the owners of the salved property, and should be awarded with such liberality as to give a proper encouragement to their rendition.]

[This was a libel for salvage by Dominick Boyle, master of the steam tug Jacob Brandow, for himself and owners, officers, etc., of the tug, and Richard Scott, master of the steamer Planter, for himself and owners, officers, etc., of the steamer, against the schooner Clara E. Bergen and cargo.]

A. J. Magrath, for libelants.

A. T. Smythe, for The Clara E. Bergen.

Brawley & Barnwell, for cargo.

BRYAN, District Judge. There is no question in this case that a salvage service has been rendered. The only question is one of degree, and the measure of compensation. In the apt language of Judge Lowell, where the vessel (as in this case) "is in actual or apparent danger, or her position or condition is such that she may probably soon be in danger, and the master acts, and permits others to act, upon that supposition, it would require a strong case of mistake on his part to reduce the service to something less than a salvage service." The M. B. Stetson [Case No. 9,363]. A vessel on shore, on a sand bar, at the mouth of any one of our harbors on this coast, whatever the weather at the time of getting aground, is in a position of intrinsic danger,—if not at the very time, probably soon will be. The position is one of danger, essentially. But the schooner in this case, from the circumstances when she went ashore, the time of the tide, and the strength and direction of the wind, made her condition one of actual danger, and exposed to even greater and uncertain danger. She was driven ashore with all sails set, with a full spread of canvass, under a fairly fresh breeze, and with a cargo of iron, which gave the greatest momentum to her progress and aggression on the shore; and, to make the matter the worst possible for her, she took the ground nearly at top of the tide, and was under the pressure of nearly all her sails, till high water, carrying her still farther on the shore.

Under these circumstances, the time for a successful relief to her was limited, if she was to be pulled off without loss of any portion of her cargo. The delay of an hour or more would have rendered any attempt hopeless. The opportunity unimproved would have compelled a delay of 12 hours, or waiting till the coming round of another high tide, at midnight, and exposure to all the chances involved in such delay. Another controlling element, resulting from her position and the inevitable action of tide and wind, was that no one vessel could possibly have relieved her, for no one vessel could have been held up or kept in position, which was absolutely necessary for a straight pull, or direct application of force. One vessel, tug or steamer, would have been swept out of line by wind and tide, and her force spent in an oblique direction, and to no good purpose, if not positively harmful. How hard she was aground, and the difficulty of her extrication under the best possible conditions, are manifested by the history of the attempts to relieve her. At high water the first effort at relief was made by a small tug, of large power for her size,—the Royal Arch. It ended in a failure, and the parting of her hawser; she could not hold up. In the second and successful effort, made by the libelant, the hawser of the schooner was parted, as also the hawser of the tug Brandow. The schooner was most fortunate in her rescue; the two vessels coming together almost at the same time, and such time of tide as to render their combined forces properly effective, and in fact successful. They arrived half an hour after the ebb tide set in, and sooner than any aid could have been supplied by means of any message sent to the city by the captain of the schooner.

The captain, in his testimony, stated that he depended upon a tug and lighterage, if he did not get off at high tide. He did not get off at high water, and, as has been seen, could not have been taken off by any one vessel. The tug Morgan (Charles F. Hard, master), which, it appears in evidence, went down in the afternoon, could have done nothing of herself, and additional aid could not have been procured, of tug or steamer, under an hour or more, especially if a flat was to have accompanied the additional tug for the purpose of lighterage. I think it will be conceded, in the light of what did happen when, at the first moment, the efforts were made to get her off, that, after the falling of the tide for an hour, no force that could have been put upon the schooner could have taken her off.

[1] [Not previously reported.]

and no hawser could have borne the strain necessary to move her. Lighterage then, or jettison of the cargo, would have been the only remedies; and upon this last, if need be, the captain was resolved (such was his sense of the danger of his position), if he had to throw over all his cargo to relieve his vessel. But, conceding that the process of lighterage could have been resorted to, yet it would have been resorted to, necessarily, under untoward circumstances. Whilst the vessel was being lightened, and the tide at the same time was falling, the two processes were going on together; and it is not easy to say what portion of the cargo would have to be thrown overboard, or removed to the lighter, before the vessel could have been relieved, even with the combined power of two vessels. From injury to the vessel by strain and thumping attending on delay (if nothing worse), and from the loss, not easily measured, by the process of jettison, and the cost of lighterage, if that process were practicable, the schooner and her cargo were happily relieved, without appreciable loss or damage, by the timely and effective interposition of the steamer Planter and the tug Jacob Brandow, the libelants in this case.

We have seen that the Bergen was aground, and in a dangerous position. Was the salving service rendered to her without danger to them? A landsman might think so, if not positively instructed by facts, and the demonstration of experience. If the pulling off a vessel from a shoal on the side of a narrow channel, where she was hard aground (which is salvage), could be confounded with simple towage, then there would be no appreciable danger. Towage has to deal only with water,—its head winds, calms, tides, and currents. These are all, ordinarily, yielding elements. They offer no sharp, peremptory, abrupt resistance. The tenacious grip of the ground is in contrast with the soft clasp of the watery element,—its loose embrace and slippery hold. To confound the two involves a confusion of ideas, an abuse of language, and a denial of justice. They are different in essence, incidents, and consequences, as in the principles that govern them, as set forth and sanctioned by the authority of the books, in decided cases, in unbroken succession. In no case stronger than in this could the difference between them have been more forcibly and strikingly illustrated. No less than three hawsers were snapped in the attempt to loosen the hold of the schooner on the land. Any one of these hawsers would have towed this vessel, or one twice her size, if afloat, from the bar to the city, without danger or difficulty. This is done every day in the year. But this sudden snapping of hawsers (not to be foreseen or provided against) involves the danger of their entanglement in the wheels or screw of the salving steamer or tug, and when more than one tug or steamer are employed in the salvage, may lead to collisions, which no forecast can anticipate, or skill guard against. This is a danger inseparable from such service, and cannot properly be ignored when the dangers to the salving service are to be taken into account, and the measure of compensation to be passed upon. A retrospect of the cases tried in this forum for many years past will abundantly confirm this statement, and enforce this view. There was no danger to the salving steamer and tug, in the performance of their work, from lack of water. They could operate with entire safety and freedom from all apprehension of taking bottom. The only possible, if not probable, danger, to the steamer and tug, arose out of the narrowness of the channel (swash channel), and the proximity of the shoal upon which the schooner lay to the jetties, and upon the revulsion upon parting of hawsers, being thrown upon the jetties. Whilst this danger, in the range of contingencies, could not be regarded as wholly imaginary, and not to be considered, yet it is rather remote to carry much weight with it.

It must ever be borne in mind that the salvor depends wholly, for any compensation, upon success. If he fail,—never mind what his enterprise, labors, sacrifices, damage to property, or injury to person,—he can get nothing. All attempts, however costly, meritorious, or praiseworthy, go for nothing. In the event of failure, he has to make his own repairs and pocket all losses, and he must give before he can get. He must save before he can ask to share what is saved. The owner, in fact and in law, can only be called upon to give to the salvor a portion of that very property which the salvor has saved for him; to restore only a portion of that which, but for the salvor, would have been lost to him. Thus it is the salvor who enables the owner to make the payment. And it must ever be remembered, also,—never mind what the injury to the salvor, in person or property; it may be double or treble of the property saved,—he can only be remunerated so far as the property saved can remunerate him. He has no personal claim against the owners. His only means of payment is the property saved. And such is the appreciation of the services of the salvor, and benefit conferred upon the owner of the property saved, that the law regards the property saved as the property of the salvor, to the extent of the salvage service, mortgages it to the salvor, puts him in possession of it, and confirms and maintains his possession until the salvage is paid. It only restores the ship and cargo to the owners upon payment of the salvage, or ample security for the payment. The remuneration of the salvor, then, does not proceed chiefly (the opposite, rather) upon the principle of "pro opere et labore," but upon the benefit conferred upon the owners. This will be more clearly apprehended, as it is most strikingly illustrated, in the case of derelict, or vessel abandoned at sea. The highest salvage

is given in case of a derelict, one-third to one-half being the general rule. The ship may have been abandoned in a gale. but it is not necessary that the salvors should have encountered a tempest, or hazarded life or property, in bringing the derelict into port. The foundation of this rule is, not that proceeding upon work and labor, but upon benefit conferred, and doing that necessary to be done to secure the benefit to the owners. Heroic effort, the hazard of life and property, may enhance the service, exalt its character, and increase the reward; but the remuneration, in general, is founded, and finds its justification, in the fact of benefit in the rescue and return to the owners of property which, but for the interposition of the salvors, might have perished in the sea. The remuneration that results from mere labor and work excludes all idea of danger to either party. Neither hazard to the property, or benefit conferred on the property, or danger to the person or property, of the person performing the work,—these elements do not enter into it and modify or measure the compensation. Towage belongs to this class. It ranks with drayage, or freight by sea or land; conveying a bale of cotton on a dray from the rail to the wharf, or a box of goods on the railroad to Augusta or Columbia. The only thing paid for is conveyance,—the transportation from one point to another,—without any reference to danger of person or property to either party. Such is the ordinary service, "pro opere et labore," of the towage of a vessel over the bar from our wharves, or the towage of a vessel (to save a tide in a calm or head wind) from over the bar to our wharves.

At the risk of being tedious, and the fact of being somewhat episodical, I have thought it necessary to dilate upon the distinction, between services which depend for their compensation upon the rule of merit for work and labor done, and salvage services proper, which demand a return or reward based upon very different principles and considerations. I do so because I think it not a little necessary, and in full accord and hearty sympathy with the timely, earnest, cogent, and enlightened remarks of Mr. Justice Hughes, of Virginia, expressed in the recent, very important case of The Sandringham, as reported in the March number of the Federal Reporter (pages 572, 573) for the year 1882 [volume 10]. The judge says: "It may be laid down as a cardinal principle of salvage that the rule of compensation to be allowed in any case must not only contemplate the labor and exertion and danger attending the particular enterprise, but must be so liberal. if the condition of the fund at disposal permit, as to attract public attention; the court looking not merely to the exact quantum of service performed, and its actual value, but to the general interests of navigation and commerce, which depend for protection upon services of this character. I have emphasized the latter feature of the policy of the law of salvage, because there is a growing complaint, among wreckers and salvors, that the admiralty courts of our Atlantic coast—more particularly, those of New York—have, until quite recently, been disposed, for a long time, to ignore it, in their awards of salvage, and to confine themselves too much to the quantum meruit view of the value of salvage services. Whether the policy of the courts has been too restricted, or not, in this respect, it is not for me to say; but the fact is, whether resulting from this or other causes, that almost every wrecking company which has operated along the Atlantic seaboard for the last fifty years has ceased to exist. In this country we have no legislation having for its object the encouragement of salvors, like the merchants' shipping act of Great Britain (17 & 18 Vict. c. 4, §§ 458 et seq.), and the duty of affording this encouragement devolves upon the admiralty courts; and I think it is generally contended that unless these courts are more liberal in their awards of salvage than they were for a considerable period, until recently, the business of wrecking, as an organized pursuit, conducted by reputable men, will soon be wholly abandoned. Certainly, if it be the policy of the law and humanity for the courts to encourage, by liberal bounties, the rendering of aid to persons and property in peril at sea, that encouragement ought not to be doled out so illiberally, as to destroy all organized and reputable wrecking companies on our seaboard. I do not propose, in this case at bar, however, to make any violent departure from the policy of our American decisions. I think a more liberal policy has already been inaugurated in most of our courts, especially by the supreme court of the United States; its decisions in the case of The Comanche, 8 Wall. [75 U. S.] 448, and The Blackwall, 10 Wall. [77 U. S.] 1, being conspicuous pioneers in the line of a liberal policy. The recent cases in the English high court of admiralty of The Hebe, 4 Prob. Div. 217, and of The Craigs, 5 Prob. Div. 186, indicate a liberalized policy in England, also."

Let me add, in enforcement and development of these views, that it cannot be too often and emphatically repeated that commerce, the ship owner, the shipper, and the insurance companies, cannot afford to be stingy in their dealings with salvors. They cannot consult their best and permanent interests, and an enlightened selfishness, but by the uniform practice of a wise liberality, which is in fact but a just recognition of the services rendered to them. It should not be regarded, truly considered, as a bounty, but as the legitimate price and proper return for the benefit conferred. And such a return as will most certainly and inevitably secure and command the needed service, such as will stimulate enterprise, sharpen vigilance, intensify devotion, nerve the timid, provoke the selfish, appeal alike to all that is generous and sordid in human nature, most promptly and thoroughly, under all circumstances, to undertake and carry through

at whatever expenses of hardship, sacrifice, and exposure, the vital saving work.

But, to come directly to the case in hand. In the opening of this opinion, I have stated that the only question was one of measure and compensation. The nature of the service (salvage) is conceded.

Let me now state and consider in detail all the several elements which go to determine the degree of the salvage and measure the compensation.

1. The degree of danger from which the property was rescued. We have already seen the danger to the salved vessel; that she was in actual danger, and in a position of indefinite danger. She grounded, under the pressure of a high wind, with all sails set, nearly at top of tide, on a shoal on the western side of a narrow channel (swash), from 4 to 5 miles from Charleston. I have already in this case, as in several others, stated my opinion, from my own experience, and from facts known to our community generally, and especially to all engaged in commerce, how full of danger such a position is, how sudden the change of wind and weather, how treacherous every smiling appearance, and what disaster lurks in the hidden, masked vicissitudes of a few hours, or even an hour. To be surprised by a squall or thunder storm, coming almost without warning from land or sea, and thrashed on the sands of these shoals, reveal a danger to all men, and are especially known to and keenly appreciated by seamen, and by none more intelligently and deeply than by the captain of the schooner Bergen, in this case.

2. The value of the property saved was, schooner and cargo, in all $38,000,—schooner, $11,000; cargo, $27,000. The schooner was saved with but a very slight damage, the loss of a portion of her false keel. The damage to the cargo, which was of iron rails, there was none. It may be said, roundly, that the salvage of the vessel and cargo was complete.

3. The risk incurred by the salvors in the performance of their work is such as I have already stated, that growing out of possible collisions of salvage vessels, or the entanglement of the parted hawsers in the machinery of the steamer or tug. It was something, if not much.

4. The value of the property employed in the salvage was, in all, $44,000,—the steamer Planter and her cargo of rice, $30,000, and the tug Brandow, $14,000. The danger to which this property was exposed in the performance of this service we have already sufficiently considered.

5. The skill exhibited was apt, and all that was needful, and commanded prompt and complete success. The steamer Planter, on her way from Georgetown, perceiving that the schooner was aground and in distress, immediately proceeded to her rescue. The tug Brandow, lying at her wharf in Charleston with steam up, observing that, when in company with other vessels, she alone stopped, took for granted that she had grounded, and without any delay steamed down to relieve her. And the steamer and the tug, arriving at the schooner almost at the same time, joined their forces, and each playing their several and most effective part, by their united effort, with the use of their own and the schooner's hawsers hauled her off from the shoal. They were both necessary to the achievement of success. The steamer applied the power, and the tug, as we have seen, rendered that power most effective, and which alone was sufficient for success.

6. The service of hauling the schooner off the shoal was the real and only substantial service rendered, and occupied about half an hour or so, and the whole service about an hour.

It is stated by the libelants that they accompanied the schooner up to the city. If so, it was in point of fact wholly unnecessary. When extricated from the shoal and once afloat, she was perfectly capable of taking care of herself, and did take care of herself. She sailed up to the city immediately upon getting afloat. Her imprisonment was her only difficulty. Upon this full review of the facts and principles involved in this case, while it cannot be doubted that a meritorious salvage service has been rendered, and all that was done was faithfully done, without imputation of unfairness in any regard, and with such skill and labor as were apt and necessary to the success of the service, it will be admitted that the salvage was not one of high degree. There were wanting, as not needed, some of the elements that most enhance the degree of the salvage, and most contribute to its largest rewards.

In the endeavor to arrive at a sound conclusion, just to both parties, and moderate as to either, always a matter of difficulty, I have taken special advisement from the case of The M. B. Stetson [Case No. 9,363]. That was the case of a brig driven ashore in a gale of wind in the harbor of Boston. She was relieved by one vessel, a powerful tug, valued at $18,000, which "dragged the brig off the shore in 15 or 20 minutes, with some aid from her own crew, who heaved up on the port chain." In this case Judge Lowell, one of the soundest and most discriminating of judges, gave $1,500, nearly 5 per cent. upon the amount saved, and the salvage in that case was almost perfect as to cargo and vessel, and entirely so as to the cargo. It is most material to observe that the cargo of the brig was sugar, and the danger apprehended, as to both cargo and vessel, was damage, and not destruction, and in case the bark had sprung a leak, the damage to the sugar must have been serious. It is also material to observe that the vessel in this case was driven ashore in a gale of wind, and was assisted while the gale was still blowing. And it is pertinent to note that, immediately after the brig was relieved, the gale began to moderate, and before high water it had become comparatively

calm. As in the case at bar, the weather succeeding the salvage was good. And as illustrating the point of danger to the salving vessel, the judge remarks: "Neither was danger to the tug very considerable. There was some danger, undoubtedly arising from the high pressure of steam necessary to be used, and if this strain should break the machinery, there would be great danger, but this was not probable." This special danger, here stated by the judge, is additional to that heretofore stated by me in the course of this opinion, namely, that growing out of the parting of hawsers, and their probable entanglement with the screw of the tug or the wheels of the steamer, and also, when two vessels are employed in the service, as in the case in hand, the quite probable danger of collisions.

After the fullest and most careful consideration of the facts in this case, and in the light of the principles herein set forth, I have reached the conclusion that the respondents, as a moderate and reasonable compensation, shall pay to the libelants the sum of $1,200; and it is so ordered and decreed.

SCOTT (CLARK v.). See Case No. 2,833.

Case No. 12,527.

SCOTT et al. v. CLINTON & S. R. CO.

[6 Biss. 529; [1] 8 Chi. Leg. News, 210.]

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

REMOVAL OF CAUSES—PROPER TERM—CERTIORARI—PERSONAL PROPERTY—ROLLING STOCK OF RAILROAD.

1. The existence of a suit by stockholders of a railroad company, and even possession by trustees under the order of the state court therein, do not affect the right to remove into the federal court a suit brought by bondholders under a deed of trust, which is paramount to the rights of the stockholders; and the possession must follow into the federal court.

2. The provision in the Illinois constitution of 1870, that the rolling stock of a railroad company shall be deemed personal property, does not change the rule that a mortgage made by the company, covering all after-acquired property, includes such acquired rolling stock, if obtained before the rights of execution creditors attach.

[Cited in Hamlin v. Jerrard, 72 Me. 75; Williamson v. New Jersey Southern R. Co., 29 N. J. Eq. 326.]

3. The term at which a cause could be first tried, within the meaning of section 3, of the act of March 3, 1875 [18 Stat. 471], is the term at which the issues are first made up, the party applying for removal not having been guilty of negligence.

[Cited in Michigan Central R. Co. v. Andes Ins. Co., Case No. 9,526; Chester v. Wellford, Id. 2,662; Whitehouse v. Continental Fire Ins. Co., 2 Fed. 499; Public Grain & Stock Exchange v. W. U. Tel. Co., 16 Fed. 291; National Bank of Clinton, Iowa, v. Dorset Pipe & Paving Co., 20 Fed. 708; Wilkinson v. Delaware, L. & W. R. Co., 22 Fed. 355.]

[Cited in Eldred v. Becker, 60 Wis. 45, 18 N. W. 643; First Nat. Bank of Wausau v. Conway, 67 Wis. 218, 30 N. W. 218; New York Warehouse & S. Co. v. Loomis, 122 Mass. 432; Phœnix Life Ins. Co. v. Saettel, 33 Ohio St. 282.]

4. A certiorari is not necessary where the record of the state court is already before the federal court.

[Cited in Stone v. Sargent, 129 Mass. 507.]

[5. Cited in Sharpe v. Gutcher, 74 Ind. 364, to the point that, after application for removal is properly made, the jurisdiction of the state court is transferred to the federal courts, and the state court can do nothing more with the same except to perfect the removel. Any other acts of the state court thereafter are coram non judice and void.]

[This was a suit by Thomas A. Scott and others, trustees, against the Clinton & Springfield Railroad Company.]

This cause, originally instituted in the circuit court of McLean county, Illinois, was removed to the circuit court of the United States for the Southern district of Illinois, in December, 1875, under the act of congress of March 3, 1875, and a motion having been made by Henry Crawford on behalf of the respondents to strike the record from the files, and TREAT, District Judge, having intimated a desire to have the opinion of DRUMMOND, Circuit Judge, upon the question, the motion was argued before Judge DRUMMOND, February 14, 1876, by Mr. Crawford for the motion, and R. Biddle Roberts, of Chicago, for the plaintiffs, contra.

DRUMMOND, Circuit Judge, having intimated an opinion, and TREAT, District Judge, concurring, an order was entered at Springfield on the 15th of February, taking jurisdiction of the case, and requiring the defendants to answer.

Subsequently an application was made to the court, praying them to rescind the order taking jurisdiction of the case, and the court allowed the same to be heard, and on March 8, 1876, it was re-argued.

Lawrence Weldon, for motion to remand.

R. Biddle Roberts and Robert E. Williams, contra.

DRUMMOND, Circuit Judge. This was a suit originally brought in the circuit court of McLean county, and which has been removed from that court to this court under the act of congress of March 3, 1875. At the time the application was made to the state court for the removal of the cause, there was also pending in the circuit court of McLean county a bill filed by one Kelly for himself and others as stockholders of the railroad company, against the company and the directors, in which the latter were charged with certain wrongful acts,

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

to the injury of the stockholders, among which was one that the directors were interested in a company known as the Morgan Improvement Company, which had contracted to construct the railroad, upon which contract the directors had realized large profits, and it was claimed that these profits should inure to the benefit of the company. That case had gone to a decree, which was affirmed by the supreme court of the state, and all the questions in the case appear to have been settled except the taking of an account.

The plaintiffs in this suit are trustees and bondholders under a certain deed of trust given by the railroad company to secure bonds which had been issued for the construction of the railroad, and which it is not controverted were paramount to any claims which might exist on the part of the plaintiffs in the Kelly case, upon the property of the road, or upon profits that might be realized upon any contract made by the directors, and which might inure to the company.

The state court had appointed a receiver in the Kelly case, who, in August last, had been superseded by the appointment of two of the plaintiffs in this case, Scott and Jewett, as trustees, under the deed of trust, the receiver being required to deliver to them all the property held by him as receiver. The trustees were restrained from selling the property until the further order of the court, but were to receive and hold it, and operate the road, under the powers vested in them by the deed of trust, and they were to retain, use and operate the road until the further order of the court, or until discharged from their trust according to law.

At the same time an order precisely similar was made by the state court in this case, so that Scott and Jewett had possession of the road, and were operating it as trustees under the deed of trust (which authorized them in a certain contingency so to do), and in conformity with the order of the state court.

This being the condition of the two cases, and a record of this case being filed in this court, a motion is made, the effect of which is to remand the cause to the state court—First, for the reason that at the time the application was made for a removal, the order made in August in the Kelly case so operated upon the property that it was still in the custody of the state court, in the hands of the trustees, as quasi receivers; and second, because the petition filed by the plaintiffs in this case for the removal of the case was not in apt time. No objection is made to the sufficiency of the petition, or of the bond given in the state court, and there is no controversy but that the plaintiffs in this case and the defendants were citizens of different states, and so that the cause as to citizenship was removable.

As to the first objection. The suit in the Kelly case was a controversy in relation to the property confessedly subordinate to any rights existing on the part of the trustees and bondholders under the deed of trust, the plaintiffs in this case. The controversy existing in the Kelly case was substantially settled when the application was made for removal in this case. That case did not claim to interfere with the rights of any of the bondholders, or of the trustees representing them. This, then, was a controversy at the time the application was made, wholly between citizens of different states. Did the order made in August by the state court in the Kelly case, turning the property over to the trustees as custodians, to hold and operate the road under the deed of trust, prevent the removal of this cause? It is to be observed that that order was in no respect different from that made in this case by the state court; the property, therefore, was just as much in the possession and control of the trustees in this case as in the Kelly case, and when the case is removed to this court, if by law that can be done, it necessarily brings with it the order made by the state court transferring the property to the trustees in this case, and the order certainly is just as binding and conclusive upon the rights of parties in this case; and the question is, whether the court cannot look into the real controversies existing in the two cases, for the purpose of determining whether or not the order made by the state court in the Kelly case could prevent the removal of this case.

It is manifest that the order in both cases was made because the deed of trust authorized, under certain circumstances, the trustees to take possession of the property. It is not disputed but that the circumstances authorizing such possession under the deed of trust had occurred, and that, independent of the order of the court, the trustees had a right, according to the terms of the deed of trust, to take possession of the property.

The effect, then, of the order made in each case, was to put the trustees in possession under the deed of trust, and because there was a litigation pending, affecting the property in the two cases, to make the trustees subject, to some extent at least, to the control of the court. But it seems to me that when we are considering a question of jurisdiction, and whether or not these parties in an independent suit, seeking different relief, can be prevented from exercising an undoubted right under the act of congress, we can look to the real status of the two cases to determine whether this is an insuperable obstacle to the removal of the cause.

A receiver had been appointed in the Kelly case. That receiver had been removed because, it is to be presumed, the court deemed the trustees, under the circumstances, the proper custodians of the property. In fact, it seems to be conceded that the Kelly case was not one where a receiver should have been appointed. It may be regarded, therefore, only a possession of the trustees, so far as the court was concerned, for the purpose of exercising a certain control over the property, so as to protect the rights of all parties. Now what rights have any of the parties in the

Kelly case, as compared with the plaintiffs in this case?

In this case their rights are paramount. This is a distinct and separate controversy, with which the Kelly case has nothing to do. All serious questions in that litigation have been settled by the opinion of the supreme court of the state; they do not interfere with the controversy in this case, and as to the possession of the property, that is substantially under the authority of the deed of trust to which these plaintiffs are parties, and under which it is their duty to take possession and operate the road in the interests of the bond-holders, whom the trustees represent. And certainly, as already mentioned, the effect of the order of the state court, so far as it can have any upon the right of removal, is just as strong, and places just as effectually the property in the possession of the trustees in this case, as it does in the Kelly case.

A priority of equity and of right must give this court a paramount control over the property, where the case is removed, as we think it can be, from the state to the federal court. It follows, therefore, that the control of the state court over the property in the Kelly case, as against the trustees in this case, and the parties and interests they represent, is little more than nominal, and if the trustees are called on by the state court, it would be sufficient to answer that they are subject to the terms of the deed of trust, and to the orders of this court in this case, at least to the extent and priorities of the interests the trustees represent.

It is said, however, that there is, or may be, a large amount of property not covered by the mortgage or deeds of trust, and therefore not subject to the claims of the bondholders represented in the mortgage.

There seems to be considerable misapprehension as to the effect of the provision in the constitution of 1870 in this state, which declares that the rolling stock and other movable property of railroads shall be personal property. I do not understand that this changes the rule of equity which the supreme court of the United States declared in the case of Pennock v. Coe, 23 How. [64 U. S.] 117, to the effect that whenever a mortgage is made by a railroad company to secure bonds, and the mortgage includes all present and after-acquired property, as soon as the property is acquired, the mortgage operates upon it. In other words, it seizes the property or operates on it by way of estoppel as soon as it comes into existence, and is in possession of the mortgagor, and the mortgagees, under such circumstances, have a prior equity to the claims of creditors obtaining judgments and executions after the property is thus acquired and placed in possession of the mortgagor. That was a case of locomotives and rolling stock which had been purchased by the mortgagor long after the mortgage was executed, and of which the mortgagor had acquired possession prior to the obtaining of judgments by the parties who sought to make them available for the payment of their debts.

That principle has been adhered to in the case of Dunham v. Cincinnati, P. & C. R. Co., 1 Wall. [68 U. S.] 254, and also in the case of Galveston R. Co. v. Cowdrey, 11 Wall. [78 U. S.] 459, and must be considered as the settled law of the federal courts upon that subject, so that all property that was acquired in this case by the railroad company, the deeds of trust having expressly declared that it was given for all the property then in possession of the railroad, or thereafter to be acquired, was covered by the deed of trust, and the mortgagees have a superior equity as against all parties who, at the time that any after-acquired property came into possession of the railroad company, had not an inchoate or perfect lien upon the same.

The principles declared in the case of Pennock v. Coe [supra] and other cases referred to in the supreme court of the United States, directly apply in this case. I do not understand that it makes any difference whether the property is real or personal. It is true that we have, as a sort of necessity of the case, and yielding, to some extent, to the statute of this state, where supplies and materials have been furnished to a railroad, and the diligence required by the statute has been used by the creditors to enforce their claims within six months, allowed the payment of those claims, which, perhaps, is stretching the principle referred to as decided by the supreme court beyond its legitimate operation.

Then, as to the second objection, that the application was not made in time: The third section of the act of 1875, declares that a party seeking a removal from the state to the federal court, shall make and file a petition in the suit in the state court, before or at the term at which said cause could be first tried, and before the trial thereof.

It is objected, that as more than a term elapsed from the time that this suit was pending in the state court before the application was made, therefore it was too late; and the question arises as to the true construction of this part of the third section of the act of 1875.

When is the term at which the cause could be first tried, and when is it that it can be said to be before the trial thereof? Could this cause have been tried or heard before this application was made? We are required to say, upon the facts as they appear in the record, that this cause could have been tried at a term before the application was made. In a case which was recently decided by me at Chicago, I held that where a cause was pending in the state court, being a bill in chancery, and where an answer had been filed and an issue thereon, and where it appeared that the cause could have been tried, but that by consent of both parties it had been continued over the term, the application

for removal came too late, for the cause was at issue and could have been heard, as it satisfactorily appeared, by the court, and therefore the action of the parties in postponing it was neither an act of the law or of the court, and consequently the application came too late.

But in this case, there was not only no issue when the application was made, but there was no answer filed by the parties. It does not appear that there had been any such negligence by those who made the application in this case, as to deprive them of the right which was clearly given by the act of 1875. The object of this provision of the law was to prevent parties from making an application after the term when the cause could have been tried.

Now, the cause cannot be heard until there is an issue; and in this case, therefore, it was not competent for the court to try the case, there being no issue before the court to try. And, therefore, I think that within the meaning of the law, a term had not elapsed during which the cause could have been heard. It is to be regretted, perhaps, that the language of the statute upon this subject is not more precise. It will be observed that is more especially applicable literally to the trial of a case at law at "the term at which said cause could be first tried:" and it is often a matter of difficulty to determine what is the first term at which a chancery cause can be tried or heard. Whether the parties seeking a removal could be guilty of such laches as to prevent it, although an issue had not been made up, and the cause might not be ripe for hearing, it is not necessary now to decide. It is sufficient that it does not affirmatively appear in this case, upon inspection of the record, that such laches existed on the part of these plaintiffs. Neither is it necessary to decide whether it is competent for this court to hear evidence on that point outside of the record. It is sufficient for us to decide the case as it exists before us.

We think that this is a controversy between citizens of different states, and that the application was made for removal at or before the term at which the cause could be first heard, and that, therefore, it is properly removed to this court.

The only object of a certiorari, upon which stress is sometimes laid, is to bring the record from the state into the federal court.

The act of 1875 provides for the issue of that writ by the federal court, in cases within the terms of the act, and gives the federal court power to enforce the writ. But here the record itself of the state court is before us, and the issue of a certiorari would therefore be a useless act.

The motion to remand is overruled.

SCOTT (CONNOR v.). See Case No. 3,119.

SCOTT (DELANO v.). See Case No. 3,753.

Case No. 12,528.

SCOTT et al. v. The DICK KEYES et al.

RILEY et al. v. The YORKTOWN NO. 2 et al.

[1 Bond, 164.] [1]

District Court, S. D. Ohio. Dec. Term, 1857.[2]

CONTRACTS—CONSTRUCTION—PAROL EVIDENCE.

1. A contract, made between the masters of two steamboats, providing for the exchange of certain barges, and stipulating, among other things, that the two boats "shall have the use of each other's barge until such time as they can meet and exchange barges, without injury or loss to either party," must have a reasonable interpretation. Slight loss or inconvenience would not justify either in a refusal to exchange; but each party is entitled to a reasonable time to make the necessary arrangements for an exchange.

2. Where the intention of the parties is sufficiently apparent, from the terms of a written contract, and there is no ambiguity, either latent or patent, it is clearly inadmissible to give parol evidence in explanation of the agreement.

[These were cross actions by John C. Riley and others against the steamboat Yorktown No. 2 and others, and by John Scott and John A. Duble, owners of the steamboat Yorktown No. 2, against the steamboat Dick Keyes and others.]

Mills & Hoadly, for libelants.

Lincoln, Smith & Warnock, for respondents.

LEAVITT, District Judge. The libel in this case asserts a claim for $560, against the steamboat Dick Keyes and its owners, for the hire of the barge Yorktown No. 2, belonging to the owners of the said steamboat Yorktown No. 2, and also for $12, paid for repairs, under circumstances that will be hereafter noticed. In the second of the above cases, the libellants allege a claim, against the said steamboat Yorktown No. 2 and its owners, for the hire of the barge Damon, the property of the libellants, from January 21st to March 10, 1855, a period of forty-seven days, at $20 per day, amounting to $940, and also for an incidental charge of $40.70. The libels in these cases were filed on the same day; and by the agreement of the proctors on both sides they have been consolidated, and are submitted as one case, to be disposed of by one decree.

It will not be necessary, in deciding the points arising in this controversy, to state specially the allegations of the libels and answers of these parties. The essential facts in evidence are, that on December 2, 1854, the said Scott and Duble were the owners, and the said Scott the master of the said steamboat Yorktown No. 2, and also the owners of a barge used in connection with said boat, called the Yorktown No. 2. At that date, the said John C. Riley was the master, and a part owner, with the other persons named in the

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

[2] [Affirmed in Case No. 3,898.]

libel, of the steamboat Dick Keyes, and two barges, called Damon and Pythias. The Yorktown No. 2 was a large boat, equipped and fitted out for the transportation of freight and passengers, and employed in navigating the Ohio and Mississippi rivers, between Cincinnati and New Orleans, using the barge Yorktown No. 2 as a lighter and also for the carriage of freight. The Dick Keyes was exclusively a freight boat, doing business between the places above named, and using the said two barges in tow in transferring freight. On the said 2d of December the said steamboats were lying at Cincinnati, the Yorktown having its barge in possession, and one of the barges of the Dick Keyes being at Louisville, and the other at Paducah, in the state of Kentucky. On that day, the said John C. Riley, as master of the Dick Keyes, executed a written agreement, as follows: "I, John C. Riley, for and in behalf of the steamboat Dick Keyes and owners, hereby obligate myself and said boat to pay to the order of the steamboat Yorktown No. 2 and owners twenty dollars per day, for the use of the barge Yorktown No. 2, commencing this day, and continuing until such time as I shall deliver to them either of the barges, Damon or Pythias, in thorough repair and ready for business. It is then understood and agreed, that said steamboat Yorktown No. 2 and said steamboat Dick Keyes shall have the use of each other's barge until such time as they can meet and exchange barges without injury or loss to either party. It is also further understood, that should the steamboat Yorktown No. 2 not wish to use the barge belonging to the steamboat Dick Keyes, that I will, for and in behalf of said steamboat Dick Keyes and owners, pay a fair remuneration for the use of the said barge, belonging to the steamboat Yorktown No. 2, until such time as I shall return it to the said boat and owners, in the same good order as received."

In accordance with this agreement, the barge of the Yorktown was immediately delivered to the master of the Dick Keyes, and soon after the boat, with said barge in tow, started for New Orleans. On the 29th or 30th of December, one of the barges of the Dick Keyes, the Damon, having been sent up the river for that purpose, was put into the possession of the master of the Yorktown; and that boat, having taken on board a large cargo of lard in barrels and tierces, and pork in boxes, and having the said barge Damon in tow, laden with some eighteen tons of oil-cake in bags, left Cincinnati for New Orleans the 31st of December, and arrived at the latter place the 16th or 17th of January, 1855. The Dick Keyes was lying at New Orleans when the Yorktown arrived, having reached there some time before. Immediately after the Yorktown landed at New Orleans the master of the Dick Keyes notified the master of the Yorktown that he did not wish any longer to retain his barge, and requested an exchange of barges. This request was not acceded to, for reasons which will be noticed hereafter. And on the 19th of January, the master of the Dick Keyes, not having freight for the Yorktown's barge, sent it to Algiers, opposite to New Orleans, and placed it in possession of a person there, under an agreement to pay seventy-five cents per day for keeping it. On the same day, it appears, the Dick Keyes started for Cincinnati. This was a day or a day and a half after the Yorktown arrived. After the Dick Keyes left New Orleans the master of the Yorktown, then expecting to get a full cargo for his boat, loaded the barge Damon, with a quantity of bulk chalk, for Cincinnati. Failing to secure such a cargo as would justify towing the barge to Cincinnati, he sent it across the river to Algiers, and left it in charge of the same person who had the keeping of the Yorktown's barge, with instructions to retain it till further orders from him. On the 10th of March following, the Dick Keyes returned to New Orleans. The Yorktown not being there, the master of the Dick Keyes directed the chalk, which had been stored on the barge Damon, then lying at Algiers, to be transferred to the barge of the Yorktown, lying at the same place. This was done at an expense of $40.70, which was paid by the master of the Dick Keyes, who then took possession of the Damon.

There is no controversy as to the claim made by the owners of the Yorktown for the hire of its barge from the 2d to the 31st of December. This claim of $580 was distinctly admitted by the master of the Dick Keyes when presented at New Orleans in January, and he requested a postponement of payment until the return of his boat to Cincinnati. It is also admitted in the libel of J. C. Riley and others, in one of the cases under consideration. The only question, therefore, before the court grows out of the claim of the owners of the Dick Keyes, for the use or hire of the barge Damon from the 21st of January to March 10, 1855. As already noticed, they claim compensation for this period, being forty-seven days, at $20 per day, making $940, which, adding the claim of $40.70 for unlading the chalk, leaves a balance against the Yorktown's owners exceeding $400. For this sum a decree in favor of the owners of the Dick Keyes is asked for. The right of the owners of the Dick Keyes to recover anything depends mainly on the inquiry, whether under the contract which has been noticed and the facts proved, the master of the Yorktown was bound to return the barge Damon on the 19th of January, when notified by the master of the Dick Keyes, at New Orleans, that he wished the barge to be delivered to him. The circumstances under which this request was made have been partially adverted to; but it is proper here to notice that the master of the Yorktown, in taking the large quantity of oil-cake on the barge, had signed a bill of lading in which it was specially agreed that the oil-cake should remain on

board for four days, if necessary, after the arrival of the boat at New Orleans. This oil-cake, it appears, was intended for market in Europe; and the shipper, wishing to avoid, if possible, the heavy expense of its removal to a warehouse and thence to a vessel for shipment abroad, had caused the proviso just noticed to be inserted in the bill of lading, expecting that within the four days named there would be a vessel in port to which the oil-cake could be directly removed without the expense of drayage, storage, etc. The evidence shows, that within the four days the oil-cake was shipped on a vessel for exportation abroad.

In reference to the written contract between the parties for the exchange of barges, there would seem to be no difficulty in giving it an intelligent construction without reference to any evidence by parol of facts or circumstances connected with its execution. The intention of the parties is sufficiently apparent from the terms of the written agreement; and as there is no ambiguity, either latent or patent, it is clearly inadmissible to give parol evidence in explanation or contradiction of the agreement. It is one of the provisions of the contract that the two boats "shall have the use of each other's barge until such time as they can meet and exchange barges without injury or loss to either party." There is no other restriction or limitation as to the right to exchange except that which the parties have expressly stated. From the terms of the agreement, and the circumstances existing when it was made, it is obvious that neither party considered it important to fix on any time or place where the exchange should be made; and they therefore made the exchange to depend on the question whether it could be done "without injury or loss to either party." This clause must have a reasonable interpretation. The fact that some inconvenience or slight loss would result to one or both parties from an exchange would not justify either in a refusal to exchange. Each party was entitled to a reasonable time to make the necessary arrangements for an exchange. As already noticed, the Dick Keyes was at New Orleans and nearly ready to leave when the Yorktown arrived; and the request for the exchange was made immediately after the arrival of the latter boat. The Keyes remained only a day or a day and a half after the arrival of the Yorktown, and having sent the Yorktown's barge to Algiers left port for Cincinnati. This did not allow a reasonable time to the master of the Yorktown to unlade and deliver the barge. It was clearly within the contemplation of the parties, in making the agreement for the exchange of barges, that they should be used in the transportation of freight; and it is clearly implied, from the agreement, that a reasonable time should be allowed to either party to make the exchange. The facts show that it was impossible to deliver the barge of the Dick Keyes immediately on the request being made. It was laden with a large quantity of oil-cake, shipped by its owner under an express agreement that, if necessary, it should remain four days on board after the arrival of the boat at New Orleans. The master of the Yorktown had an undoubted right to make such an agreement, and was in no way restricted from doing so by the contract for the exchange of barges. And, if it was of importance to the master of the Dick Keyes to have the possession of the barge before starting from New Orleans he should have waited long enough to have enabled the master of the Yorktown to have complied with the request for an exchange without "injury or loss." Under the agreement for the shipment of the oil-cake a heavy loss would have been incurred by unlading it and sending it to a warehouse for safe-keeping. The facts, therefore, clearly warrant the conclusion that there could not have been an immediate delivery of the barge "without loss or injury;" and, therefore, that the master of the Yorktown did not violate the agreement.

If there had been unreasonable delay in unlading the barge, the Yorktown would have incurred liability in failing to deliver it when requested; but the evidence is that the boat and the barge were unloaded as promptly as circumstances would permit. It is clear the master of the Yorktown could have no interest in postponing the delivery of the barge unnecessarily; and there is no ground for the inference that he was influenced by any improper motive in not complying with the request for the exchange. Nor can it be presumed, from the facts, that the owners of the Dick Keyes sustained any injury from the non-delivery of the barge. The barge of the Yorktown was in the possession of the master of the Dick Keyes, and if that boat needed a barge when leaving New Orleans, the master had an undoubted right to retain and use the Yorktown's barge.

But, if it were conceded that the master of the Yorktown violated the agreement for the exchange of barges, does it follow that the owners of the Dick Keyes are entitled to recover the charter value of their barge from the date of the request for an exchange until they obtained possession, on the 10th of March following? This they claim in their libel, asserting the charter value of the barge to be twenty dollars a day. The proof is, that the charter value of such a barge was ten, fifteen, or twenty dollars a day. This, however, must necessarily depend on circumstances existing at the time. If the state of business was such that no profitable employment for a barge could be found, it is evident the charter value would be nothing, as no one, in that state of things, would hire it. The evidence, in this case, is altogether conclusive, that from the middle of January to the middle of February, 1855, the river business at New Orleans was unusually stagnant, and that freight for Cincinnati was ex-

ceedingly scarce, and when procurable was taken at very low rates. In the opinion of several witnesses of apparent candor and intelligence, connected with shipping houses in New Orleans, there were a number of Cincinnati boats, during the time stated, that were unable to get freight, and that at the rates then paid there was no profit in carrying it. It is, therefore, a fair inference from the facts in evidence, that the owners of the Keyes sustained no loss by the failure of the master of the Yorktown to deliver the barge when requested. This inference is strongly supported by the fact that neither of the steamboats could find cargoes for their barges, and both therefore were left at Algiers. One witness, the mate of the Keyes, states in his deposition that this boat had no difficulty in procuring a cargo at the time referred to. His statement, however, is so clearly contradicted by other witnesses as to render it wholly unreliable.

I am satisfied, therefore, there is no basis for a decree in favor of the owners of the Dick Keyes for the charter value of their barge for the forty-seven days as claimed. But, as before noticed, the master of the Yorktown, after the Keyes left New Orleans, received on board the barge a large quantity of chalk, intending to take it to Cincinnati. For the reason before stated, the barge with its cargo was left at Algiers. It would seem clear, that for the time the barge was thus used by the master of the Yorktown for the storage of the chalk, a fair compensation must be allowed to the owners of the Keyes. There is no evidence in the case proving what the rate of compensation for this storage should be; and the amount involved is too small to justify the expense of a reference to a commissioner for the purpose of ascertaining it. The proctors for the parties can probably agree on this and thus avoid a reference. The owners of the Keyes are also allowed for the expense of transferring the chalk to the Yorktown's barge; proved to have been $40.70. And the two items of $3 and $9, claimed by the owners of the Yorktown as the expense incurred by that boat in repairing the barges, are also allowed.

A decree, on the basis indicated, may be entered.

[On appeal to the circuit court the decree of this court was affirmed. Case No. 3,898.]

Case No. 12,528a.

SCOTT v. DOE.

[Hempst. 275.] [1]

Superior Court, Territory of Arkansas. July, 1835.

DEEDS—RECORDING ACTS — COMPLIANCE — FILING FOR RECORD—CONSTRUCTIVE NOTICE.

1. The statute (Terr. Dig. Ark. 134) requires conveyances affecting lands to be recorded in the county where the lands lie within three months from the date thereof; otherwise, to be void as against subsequent purchasers who shall record their deeds in that time.

2. The requisition is that a deed shall be recorded, and mere filing for record is not equivalent to it, nor a compliance with the law. The deed must be actually recorded in a record book within three months.

3. A deed recorded is constructive notice only from the time it was actually recorded by being transcribed into the record book.

Appeal from Hempstead circuit court.

Before JOHNSON and YELL, JJ.

JOHNSON, J. This is an appeal by the defendant in an action of ejectment from a judgment in favor of the plaintiff. On the trial, the plaintiff, to prove his title, produced in evidence a patent from the United States to William Hickman, a deed from Hickman to Hardin Wilson, and the record of a judgment and execution against him, together with a deed from the sheriff to the plaintiff Peter T. Hickman, bearing date on the 12th of April, 1832, and acknowledged and recorded on the 14th of the same month, for the land in controversy, purporting to be made to him as the purchaser at the sale under the execution; to the admission of which, as evidence, no objection was made. The defendant, Scott, then produced in court a deed from the said Hardin Wilson to his daughter Artemisia Wilson, for the land in controversy, bearing date on the 7th of October, 1830, with the following indorsements thereon:

"Arkansas Territory, Hempstead County, sct. Be it remembered, that on the 7th day of October, A. D. 1830, Hardin Wilson personally appeared before me, Allen M. Oakley, an acting justice of the peace, and acknowledged the foregoing deed to be his act and hand and seal, for the purposes and uses therein mentioned and contained. Given under my hand and seal this 23d day of April, 1832. Allen M. Oakley, J. P. (Seal.)"

"Territory of Arkansas, County of Hempstead, sct. I, Allen M. Oakley, clerk of the circuit court, and ex officio recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record, in my office, on the 23d day of April, A. D. 1832, and the same is now duly recorded in Record Book B, pages 439, 440. In testimony whereof, I have hereunto set my hand and affixed the seal of my office, at Washington, the 23d day of April, 1832, and of the independence of the United States the 56th year. Allen M. Oakley, Clerk and Ex Officio Recorder."

"Filed 7th October, 1830. A. M. Oakley, Clerk."

"F. W. Scott this day appeared and requested this deed to be recorded. Filed 23d April, 1832. A. M. Oakley, Clerk."

And the defendant also adduced the said Allen M. Oakley as a witness, who, being sworn, stated that the deed from Hardin Wilson to Artemisia Wilson, was produced to him in

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

his office, by Hardin Wilson, to be recorded, on the 7th day of October, 1830, which then and there he marked "Filed," with his official signature, and that some short time afterwards Hardin Wilson asked him if the deed had been recorded, to which he replied in the negative, and that Hardin Wilson then said he, the witness, need not record the deed, and that by reason of this direction he did not record the deed at that time, and he believed the deed remained in his office on file until the 23d of April, 1832, when the defendant, Scott, requested the deed to be recorded, and thereupon he recorded the deed, and that he drew his pen in manner and form as certified by him on the deed, and that he drew his pen across the indorsement, "Filed 7th October, 1830. A. M. Oakley, Clerk." But whether it was when requested by Scott to record the deed, or when told by Hardin Wilson that he need not record it, he did not recollect, and thereupon the defendant offered the deed in evidence to the jury; to the reading of which the plaintiff objected, which objection was sustained by the court, and the deed rejected.

The only question presented for the consideration of the court is, whether the court below erred in rejecting the deed adduced as evidence on the part of the defendant. Our statute requiring deeds to be recorded, provides that all deeds, conveyances, bonds, and other obligations for lands, tenements, or hereditaments hereafter made and proven or acknowledged before any competent authority shall be recorded in the county in which the lands are situate, within three months from the date thereof, or the same shall be void against subsequent purchasers, so recording the said deeds within the time prescribed by this section. Geyer, Dig. 129. The plaintiff occupied the attitude of both creditor and purchaser, and the deed under which he claimed was duly recorded within three months from its date. The deed offered by the defendant was not recorded within three months from its date, and not until the plaintiff's deed was recorded. According to the plain and express provision of the statute, the deed offered by the defendant was void against a subsequent purchaser duly recording his deed, not having been recorded within three months from its date, and the plaintiff being a subsequent purchaser, and having recorded his deed in due time, it was null and void against him. It is insisted, however, that it was filed with the proper officer for record on the day of its date, and although not in fact recorded until more than twelve months had elapsed, it was equally valid to all intents and purposes as if it had been recorded within the time prescribed by law. It is a sufficient answer to this argument, that the statute requires the deed to be recorded, or the same shall be void against subsequent purchasers. The filing it for record and transcribing it into the record book, are different and distinct acts. The reason and object of the law, in requiring a deed to be recorded, is to afford notice to creditors and subsequent purchasers, to enable them to guard against fraud. The filing of a deed for record is not as well calculated to give that notice as if it were recorded in the record book. The purchaser is not referred by the law to the clerk, but to the records made by him, in order to ascertain whether a sale or conveyance has been made. We have no hesitation in declaring that the bare filing of a deed for record is not a substantial compliance with the statute, unless it is actually recorded within three months from its date.

It has been further contended that the filing of the deed for record was sufficient evidence to authorize a jury to presume that subsequent purchasers had notice of the deed. We cannot yield our assent to this proposition. Notice is of two kinds, actual and constructive. It cannot be contended that the filing of the deed for record with Oakley was actual notice to Hickman of the existence of the deed, or that it conduced in the slightest degree to prove notice to him unless he was required by law to inquire of the clerk for deeds filed with him for record. Hickman was required to make no such inquiry, neither can the filing the deed for record operate as constructive notice. Nothing less than the actual recording of the deed, can make it operate as notice by construction of law. We think the court below correctly excluded the deed from being read as evidence. Judgment affirmed.

Case No. 12,529.

SCOTT v. EVANS.

[1 McLean, 486.] [1]

Circuit Court, D. Ohio. July Term, 1839.

ADVERSE POSSESSION—COTENANTS—LAPSE OF TIME—ASSIGNMENT—NOTICE.

1. Lapse of time a good bar to a claim of title though the statute of limitations would not operate in the case.

2. An adverse possession held by a tenant in common, to the exclusion of his cotenants, bars under the statute or by lapse of time.

3. An assignment recited in a patent that the warrant was assigned by the representatives of A. B. is no notice to the purchaser that the assignment was made without authority.

[Cited in Acer v. Westcott, 46 N. Y. 390.]

[This was a bill in equity by Joseph Scott against Richard Evans.]

Mr. Wilcox, for complainant.

Mr. Swan, for defendant.

LEAVITT, District Judge. This case is submitted to the court upon the bill and answer. The bill alleges that the complainant, a citizen of the state of Virginia, is the son and only heir of Stephen Scott, who served in the Revolution, in the Virginia line, and was entitled to two hundred acres of land, from said state; that said Scott continued in the service till the capture of Charlestown, where he was taken prisoner, and shortly after died, a prisoner,

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

leaving a widow, Mary Scott, who on the 15th of August, 1787, (the complainant then being an infant) assigned her right to her deceased husband's claim to William Putnam; that on the 10th of November, 1792, Putnam assigned his right to William Bigger, who, on the 25th of January, 1793, obtained a land warrant for the same; that on the 5th of July, 1794, Bigger assigned the warrant to John Graham, who located it, with others, on one thousand two hundred and ninety-six and two-thirds acres, in Highland county, Ohio, and obtained a patent therefor, dated February 3d, 1800. The bill also alleges, that the defendant is in possession of, and claims title to four hundred acres of land embraced in the patent to Graham; and that the complainant is entitled to the same proportion of said four hundred acres, that two hundred bears to one thousand two hundred and ninety-six and two-thirds acres. The bill further sets forth, that defendant and all under whom he claims, are chargeable in equity, with notice of his claim, and prays that defendant may answer under oath, and that he may be compelled to convey complainant's proportion of said land, and that the same may be set off to him in severalty. A copy of the patent to Graham reciting the assignments is exhibited and made a part of the bill.

The defendant in his answer sets up a legal title to three hundred and sixty-six acres of the survey of one thousand two hundred and ninety-six and two-thirds acres, obtained in the year 1800, by purchase from Nathaniel Massie, who sold it, for himself (being entitled to one-third as locator) and as the agent and attorney of the said John Graham. He also alleges that he settled on the land in the year 1801; has had peaceable possession since that time; and has made lasting and valuable improvements thereon: and moreover, that he had no notice of complainant's claim, or of any defect in his title, till about two years since, when he received a letter from Mr. Wilcox, the solicitor of complainant, informing him of the claim now set up. Defendant also insists, that he is an innocent purchaser, without notice; that he has a good legal right to the land; and that if complainant ever had any claim thereto, it is long since barred by the lapse of time: and he prays that the complainant may be held to strict proof.

No proof is exhibited in support of the allegation in the bill, that the complainant is the son and heir of Stephen Scott: and in the absence of such proof, the court could not render a decree, in his favor. But as the counsel for the defendant does not insist upon this point, the court will proceed to examine some other questions which are presented.

And first: Is the complainant barred by the lapse of time? The period of the complainant's birth is not explicitly set forth in the bill, but may be ascertained with sufficient certainty from other facts which are stated. It is alleged that his father was made prisoner at the capture of Charlestown, and died shortly after that event: from which it is safely inferred, that his death took place anterior to the close of the war; and consequently, that the complainant would not have been born, posterior to the year 1783. And assuming that to have been the year of his birth, he arrived at full age in the year 1804. Thirty-three years have therefore elapsed from his majority to the year 1837, when he first made known to the defendant, the claim which he now asserts. It is also an undisputed fact in the case that the defendant has been in peaceable possession of the land from the year 1801, till the year 1837.

It is assumed for the complainant, that having been absent from, or a non-resident of, the state of Ohio, the statute of limitations cannot be relied on, as a bar to his right. The facts of absence and non-residence are neither averred in the bill, or established by proof: and upon the authority of the principle laid down by the court, in the case of Piatt v. Vattier, 9 Pet. [34 U. S.] 415, these facts cannot properly be taken into consideration, without being averred and proved. In the case here referred to, these facts were proved, but were not alleged in the bill. And the court said, unless they were put in issue by the pleadings, they could take no notice of the proofs, "for, the proofs, to be admissible, must be founded on some allegations in the bill and answer." It was held therefore by the court, that the case, as presented, was not within any of the exceptions mentioned in the statute of limitations. But, as the answer relied generally upon the lapse of time, and not upon the statute, the court proceeded to render a decree upon the former ground. And in the present case, as the statute is not expressly set up in bar of the complainant's right, the court will consider it upon the ground of lapse of time.

The doctrine, that promptness and vigilance are required in the assertion of legal rights, has long received the sanction, both of courts of law and equity. Hence, for the purpose of quieting titles, and preventing litigious controversies, presumptions are raised and sustained, which are not based upon matters of proof. Thus after a lapse of twenty years, without the payment of interest, satisfaction of a debt will be presumed. Cruder v. Philadelphia Ins. Co. [Case No. 3,452]. And, after a long possession in severalty, a deed of partition may be presumed. [Hepburn v. Auld] 5 Cranch [9 U. S.] 262. So in the case of Elmendorff v. Taylor, 10 Wheat. [23 U. S.] 152, it is laid down, that courts of equity from the earliest ages have refused their aid to those who have neglected for an unreasonable length of time, to assert their claims, especially when the legal estate has been transferred to purchasers, without notice. In a case reported [Alexander v. Pendleton] 8 Cranch [12 U. S.] 462, it is said by the court, that an adversary possession of fifty years, though with knowledge of a better title, constitutes a good defence against that title.

But without multiplying references in sup-

port of the principle here laid down, it will be sufficient to notice the case of Piatt v. Vattier, 9 Pet. [34 U. S.] 405. That case was decided solely on the ground, that the complainant's right was barred by lapse of time. The court then refused to enquire into the validity of Bartle's title, under whom the complainant claimed, or whether the defendants, and other purchasers under Barr, had any knowledge of Bartle's title; and they placed this refusal upon the ground that these matters were not deemed necessary to a correct decision of the cause. They say, "that the lapse of time, is upon the principles of a court of equity, a clear bar to the present suit, independently of the statute." "There has been a clear adverse possession of thirty years, without the acknowledgment of any equity or trust estate in Bartle; and no circumstances are stated in the bill, or shown in the evidence, which overcome the decisive influence of such adverse possession."

Applying these principles to the case before the court, we cannot hesitate in saying, that the complainant's claim is barred by the lapse of time. He has slept upon his rights for the long period of thirty-three years, and has not alleged or proved any circumstances to explain or justify this unreasonable delay. The defendant has been in the undisturbed possession of the premises for thirty-six years, under a good legal title: and alleges in his answer, that he was a purchaser, without notice, of any opposing claim. Under this state of facts, the court cannot sanction the right to these premises, set up by the complainant.

It seems to be supposed, however, by the counsel for the complainant, that these parties are to be regarded as tenants in common of the land in question; therefore, that the doctrine of presumption, on the ground of lapse of time, does not apply. Without stopping to enquire, whether there is any just foundation for treating the interest of these parties, as constituting a tenancy in common between them, it is sufficient to say, that even on this assumption, the complainant is barred.

The complainant has referred to, and relies upon, the case of Butler v. Phelps, 17 Wend. 642, in support of this position. In that case Butler had conveyed by deed to Phelps and Blanchard two-thirds of the iron, and other ore, contained upon or within, a certain tract of land, described in the deed, with the right of entering upon the land, and digging and taking away, the ores. The grantees did not attempt to avail themselves of the right conveyed to them, for the period of thirty-four years, during which time the grantor, and his heirs, continued to occupy the land for agricultural purposes. After the lapse of this time, one of the grantees, and the heirs of the other, asked permission to enter upon the land, and dig for ores; which was refused: and they then brought an action of ejectment to establish their rights under the deed. It was insisted on the trial, that under the circumstances of the case, it was a fair presumption of law, that the deed had been surrendered, or canceled, and the agreement between the parties abandoned. It was held however, that the parties were tenants in common of the right to the ores, and as there had been no adverse possession or exercise of this right, on the part of the grantor, or his heirs, until a short period before the commencement of the action of ejectment, the presumption insisted on, did not arise. The court held, that the long continued use and possession of the land, by the grantor and his heirs, for agricultural purposes, was not inconsistent with the grant, and therefore afforded no presumption, unfavorable to the rights of the grantees. But the court say expressly, if the possession of the grantor or his heirs, had been adverse, an ouster of the cotenants or a release of their interest, might be presumed.

It is contended also, that the defendant is to be regarded as a purchaser, with notice of the complainant's right, and therefore to be treated as holding the land in trust. It is claimed, that the reference to the assignments, as contained in the patent, raises a legal presumption of notice, and that this case is similar to that of Ware v. Brush [Case No. 17,171], heretofore decided by this court. But, we do not view the question arising on this point, in the present case, as involving the principle settled in the case referred to. In this case, the assignment is referred to in the patent as having been made, not by the widow, but the representatives of Stephen Scott, who, for aught that appears in the patent, might have been heirs of full age, and therefore competent to make the assignment, and convey a good title to the assignee. In the case of Ware v. Brush [supra], the executor of Hockaday gave an order, as executor, directing the register of the land office to issue a warrant to one Ladd, who, in virtue of such order, procured the warrant. And the court held, that the executor of Hockaday had no legal right to assign the claim, as it vested in the heirs of Hockaday, and not in the executor. In that case it was in proof, that there were minor heirs; and moreover, that there were other circumstances which cast suspicion upon the assignment by the executor. The court therefore held, the assignment by the executor to be void, and that the persons claiming the premises under the assignment by him, were to be considered as trustees for the heirs.

The bill is dismissed at the costs of the complainant.

Case No. 12,530.

SCOTT v. FAILES.

[5 Ben. 82.] [1]

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

SHIPPING—WAGES—COOK ON CANAL-BOAT—CREDIT OF MASTER.

S. was hired as cook on a canal-boat running between New York and Buffalo, and between

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

New York and New Jersey. She was hired by the master of the boat, and on his exclusive credit. *Held*, that the owner of the boat was not liable for the wages of S.

[Cited in The International, 30 Fed. 376; The L. L. Lamb, 31 Fed. 34.]

[This was a libel for wages by Eliza Scott against David Failes.]

BENEDICT, District Judge. This is an action against the owner of a canal-boat, to recover for services rendered on board that boat during several voyages from New York City to Buffalo, upon the Hudson river and the Erie canal, including also trips from New York to New Jersey, during the winter season. It involves some questions respecting the jurisdiction of the admiralty, which, however, I do not feel called upon to decide. I rest my decision of the case solely upon the fact, which I consider the evidence clearly proves, that the libellant made a special agreement with the master of the boat, and contracted upon his credit exclusively. I do not doubt that the libellant clearly understood, when the engagement was made,. and when the services were performed, that she was to look to the master of the boat, and to him alone, for her compensation, and assented thereto. Under such a state of facts, the owners of the vessel could not be held liable, they having, as the evidence also shows, so understood the contract of the libellant, and having settled their accounts with the master upon that basis. The libel must, therefore, be dismissed.

SCOTT (FRYE v.). See Case No. 5,144.

SCOTT (GORDON v.). See Case No. 5,620.

SCOTT (GREELEY v.). See Case No. 5,746.

Case No. 12,531.

SCOTT v. The GREENWICH.

[1 Pet. Adm. 155.] [1]

District Court, D. Pennsylvania. 1802.

SEAMEN—WAGES—DEATH DURING SERVICE—CLAIM FOR WHOLE VOYAGE.

A seaman died on the return voyage, and wages claimed by administrator until the arrival of the ship. The court gave wages until the time of the seaman's death, and ordered the balance in dispute to be lodged in court until the determination of an appeal in another case involving the same principle.

[Cited in Carey v. The Kitty, Case No. 2,402.]

[This was a libel by Scott, administrator of Ellis, a mariner, against the brig Greenwich.] The mariner died on the home passage. Payment to the time of his decease, agreed to be paid; but the residue for the voyage disputed.

PETERS, District Judge. I have determined this question upon deliberation; and my decree may be seen in the clerk's office. I am obliged to decide this, and many points arising here, on what I conceive to be the principles of the maritime laws. I find in many cases few, and in some, no decisions in the books to guide me. I have seen no reason to alter my opinion. I perceive in a late English publication, that the writer (Abb. Shipp. 356 et seq.) is doubtful on this question. He says, "There is no general decision on this subject, in our law books." He alleges, "that it is not clear whether the payment thus directed, is to be understood of a sum proportionate to the time of his service, or of the whole sum earned, if he had lived to the end of the voyage." He cites much at large, the case of Cutter v. Powell, 6 Term R. 320, on which I have heretofore remarked. It appears to my mind, and if my opinion is erroneous, it is in a train to be corrected, that the maritime laws have not left it doubtful, but to me clear, that the wages must be paid for the whole voyage. He (Abbott) agrees, and cites authorities to prove, that, by the maritime laws, wages for the entire voyage, are due, though inability to do service has occurred by any casualty in actual duty, or by natural sickness. I have before made my observations on the analogy between those cases, and that now before me. The relative bearing of a point on the whole system, is necessary to a correct conclusion; and in this case, perhaps, more so, than a partial view of it under its own circumstances. My habit is always to decide according to my best judgment. I never prolong litigation, when my own mind is satisfied, because differences of opinion arise on questions brought before this court. Decision here, forwards final determination, if the discontented party chooses to appeal. There has been an appeal, in another case, long depending in the superior court. My practice is, when an appeal is depending (if bona fide intended to procure a decision, and not for delay) to order payment in posterior and similar cases, so far as the point is not questioned, and direct the litigated portion to be paid into court, liable to further order. Let the administrator in this case receive to the time of the seaman's death; and let the residue be paid into court, or stipulation be entered into therefor. If no steps are taken, in a reasonable time, to obtain the decision of the circuit court, I shall think myself warranted to effectuate my own judgment.

NOTE. Many cases have been brought before the court in which the points here decided have been recognized, but it has not been thought necessary to publish any others. The operation of these decisions, has been in some instances, extremely severe on ship owners; and their effect is now, in most cases, prevented by the insertion of a covenant in the shipping articles, that "wages shall cease on the death of the seaman." Of the legality of this agreement no doubt can be entertained, and to its omission in their contracts, merchants must hereafter attribute any claims which may be made on them, by the representatives of seamen dying on a voyage. In the case of Sims v. Jackson [Case No. 12,890], the claims of the administratrix were for wages during the whole voyage, although her husband had died before the

[1] [Reported by Richard Peters, Jr., Esq.]

return of the ship, on board which he sailed as mate. The district court, referring to the case of Walton v. The Neptune [Id. 17,135], decreed full wages, and an appeal was entered to the circuit court. The case was heard at the April sessions, 1806, Moylan for the appellant, and Milnor for the appellee, and the decree of the district court was confirmed by the Hon. Judge Washington.

Case No. 12,532.

SCOTT et al. v. HAWSMAN.

[2 McLean, 180.] [1]

Circuit Court, D. Ohio. July Term, 1840.]

LANDLORD AND TENANT — LEASE — NEW AGREEMENT—USE AND OCCUPATION—HOLDING OVER.

1. A lease, under seal, may be put an end to by a new and substantial agreement, between the parties, for the same premises; which has been sanctioned by a court of chancery, and performed by the party, who alledges the abrogation of the lease.

2. A parol lease, under which no act has been done by the lessee, who has constantly repudiated it, but who has enjoyed the premises the term named in the lease, may be treated by the lessor as a subsisting lease, and he may seek his remedy under it; or he may bring his action and recover the rent on a count for use and occupation.

[Cited in Sherman v. Champlain Transp. Co., 31 Vt. 173.]

3. The defendant having disclaimed the lease, and refused to perform its conditions, cannot defeat the action for use and occupation, by showing that under the lease, the amount of the second year's rent was to be fixed by a third person, which had not been done.

4. The tenant, under such circumstances, may be considered as holding over.

5. Having refused to abide by the lease he cannot complain of being treated as a tenant bound, after the enjoyment of the premises, to pay a reasonable rent.

[This was an action by Joseph Scott and M. T. Scott against William Hawsman. Heard on motion for a new trial.]

Mr. Leonard, for plaintiffs.

Mr. Swan, for defendant.

OPINION OF THE COURT. This action was brought for use and occupation, and it was agreed by the counsel that no objection should be made to the declaration for want of a special count. From the facts proved, it appeared that in March, 1832, Joseph Scott and Matthew T. Scott, the plaintiffs, owning a stock farm in Ohio, Joseph Scott and William Hawsman, the defendant, entered into a contract, under seal, with Matthew T. Scott to rent the farm for five years, and to pay him one hundred and eighty dollars per annum. Certain improvements were to be made on the farm, on conditions specified in the lease. The parties, also, entered into an agreement in regard to the stock which should be purchased for the farm, &c. Afterwards, the 28th January, 1835, a final settlement took place respecting the partnership transaction, in which certain sums of money were to be paid, and were in fact paid by Joseph Scott to Hawsman, and certain things were to be done by the latter. By this settlement and agreement, Hawsman was to remain in possession of the farm for the years 1835 and 1836; the rent for the first year was to be paid for by improvements on the farm, and the amount of the second year's rent was to be fixed by Judge Hawsman. A memorandum of this agreement was made, but it has been lost. Among other arrangements the defendant signed the following paper: "On settlement of accounts this day, I am to deliver to Joseph Scott the wagon and the yoke of cattle on hand, and five hundred and eighty five dollars worth of stock cattle on demand. January 28th, 1835." Signed, "William Hawsman." A short time after this settlement, Hawsman filed a bill against Joseph Scott and M. T. Scott to set aside the settlement, &c., which was answered by Joseph Scott; and on the final hearing the court refused to set aside the agreement but affirmed it, and in their decree they "dismissed the bill as to all matters as to which the decree is not rendered, and especially to the rents and profits of the place and farm mentioned in the bill subsequent to the settlement of the partnership, and not included therein made at the time in the bill specified." It was proved that the defendant refused to deliver the cattle as he had agreed to do and repudiated the settlement, and the new lease which was connected with it. This was done more than once, though he remained in possession of the farm for two years, for the rent of which this action was brought. The court instructed the jury that the action was not founded on the original lease between the defendant, Joseph Scott and Matthew T. Scott, and that under the agreement of the parties and the decree of the court, it could not be considered as a subsisting lease, and that if the jury believed the evidence the plaintiffs were entitled to recover. And the jury found a verdict for the plaintiff.

A motion for a new trial was made on two grounds: First, because the court erred in deciding that the original lease was rescinded; and, second, because they erred in their instruction to the jury that the plaintiff was entitled to recover, for the second years rent, before Judge Hawsman had fixed the amount.

During the existence of the lease, under seal, sums of money were advanced by Matthew T. Scott, to Hawsman, to buy stock for the farm. Their partnership extended beyond the terms of the written lease, to the stock thus purchased; and it appears when the settlement took place, in January, 1835, it included not only the partnership in the stock then on the farm, but the written lease. It was clearly intended to be a final settle-

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

ment of all matters, and, of course, it embraced, up to that time, all matters of contract, and of account. This appears from the terms of the settlement. Certain outstanding obligations were to be delivered up, and certain sums paid by the respective parties; and Hawsman gave the note for five hundred and eighty five dollars, payable in stock cattle, as above stated; and in the same writing he agreed to deliver to Joseph Scott a wagon and yoke of cattle, then on hand, &c. And it was agreed that Hawsman should continue on the farm for two years; the first year's rent to be paid for by improvements and repairs on the farm, and for the second year he agreed to pay an amount of rent that Judge Hawsman, the brother of the defendant, should determine. Now this arrangement closed all former dealings between the parties, and is wholly inconsistent with the subsistence of the prior written lease. A judgment having been obtained by Joseph Scott on the above instrument, given to him by the defendant, the defendant filed a bill against Joseph and M. T. Scott to set aside the settlement on the ground of fraud, &c., and obtained an injunction. Joseph Scott answered the bill, and on the final hearing, among other matters it was decreed, that an order for four hundred and fifty dollars, drawn by William Hawsman on Joseph Scott, 11th April, 1834, also a note for two thousand dollars, signed by William Hawsman, Joseph Scott, Isaac Hawsman, Jacob Hawsman and David Reeves, dated 26th April, 1832, payable to Matthew T. Scott, shall be delivered up to the clerk to be canceled; that the injunction should be dissolved at the costs of the complainant; and the bill was dismissed "as to all matters as to which the decree is not rendered, and especially to the rents and profits of the place and farm mentioned in the bill subsequent to the settlement of the partnership, and not included therein." This decree was made the 25th December, 1837. The language of this decree is very explicit, and shows that, from the time of the settlement, rents were to accrue from the defendant, and that all matters, up to the time of the settlement, were closed by it. Now the rents, under the written lease, were to be paid by Joseph Scott and the defendant to Matthew T. Scott. The terms of the settlement, with the exception of the delivery of the order and note, named in the decree, were complied with by the Scotts; and by their decree the court sanction the settlement. It was a material part of that settlement that the written lease should be annulled, and a new lease beween Joseph and Matthew T. Scott and the defendant was agreed to. Under these circumstances the court consider the old lease as abrogated and not as subsisting, and that it cannot be used to defeat the action of the plaintiffs.

The counsel for the defendant contends that Matthew T. Scott was a party to the written lease, and does not appear to have been a party to the settlement or the second lease; and that it does not appear that Joseph Scott was authorized to act for his brother in these matters. That on this ground the settlement ought not to be binding on Matthew T. Scott. That, however this may be in regard to the stock on the farm, it cannot be held to have rescinded the lease, under seal, which can only be rescinded by an instrument of equal dignity, if it be not in fact canceled. The evidence does not show that this lease was delivered up to be canceled. It is not produced on this trial, and whether the writing has been destroyed or not does not appear. It is only adverted to by defendant's counsel to show that the plaintiff's remedy is on the deed and not on the parol agreement. For this purpose, as before remarked, we think this lease cannot be used. The plaintiffs do not rely on a parol cancelment. But they rely upon a final settlement, which annulled the lease, a performance of the conditions on their part, and the express sanction of the settlement by a court of chancery. This is not then an alteration of a writing, under seal by parol, nor an attempt to set up a parol release of the same. But if the written lease were subsisting, we should be equally clear that this action could be maintained. Where a contract, under seal, has afterwards been varied in the terms of it by a distinct simple contract, made upon a sufficient consideration, such substituted or new agreement must be the subject of an action of assumpsit, and not of an action of covenant; and where several things, unconnected with a deed, are, with other stipulations in a deed, afterwards made the subject of a parol contract, assumpsit may be sustained for the breach of it. 1 Chit. Pl. 119; 1 East, 630; 3 Term R. 596; 4 Taunt. 748; 2 Caines, 296; [Baits v. Peters] 9 Wheat. [22 U. S.] 556. A parol enlargement of the time set, in a sealed instrument, for the performance of covenants, is good; but where there is such enlargement of a condition precedent, the plaintiff loses his remedy upon the covenant itself, and must seek it upon the agreement enlarging the time of performance. 2 Wend. 587; 6 Halst. [11 N. J. Law] 327. If, in respect of a new consideration, there has been a new simple contract to pay a debt, or perform a contract, under seal, assumpsit may be supported. 12 East, 578; 7 Cow. 39; 2 Rawle, 350.

From these authorities it is clear that the plaintiffs may recover under the new lease, even if the one under seal were subsisting; but we think, under the settlement and the proceedings which followed it, that the old lease is annulled, and that the parol lease was substituted in its place. The objection of want of power in Joseph Scott to bind his brother, we think is entitled to but little consideration. Joseph and Matthew are broth-

ers, and own the farm in partnership. Joseph was the active partner, and there is evidence, positive and presumptive, which shows an acquiescence and sanction by Matthew T. Scott in the acts of his brother, in regard to the settlement and the proceedings which followed. Both of the plaintiffs are citizens of Kentucky, and one of the reasons assigned for putting an end to the first lease, was a wish, on the part of Joseph Scott, to remove to Kentucky. We think the verdict ought not to be set aside and a new trial granted, on the ground that Judge Hawsman did not fix the amount of rent for the second year, under the parol lease. The verdict is fully sustained by the equity of the case, and, under such circumstances, a court will not readily set aside the verdict on a technical objection.

The principle is admitted, that where the defendant's contract was executory, or his performance was to depend on some act to be done or forborne by the plaintiff, or on some other event, the plaintiff must aver the fulfilment of such condition precedent, whether it were in the affirmative or negative, or to be performed or observed by him or by the defendant, or by any other person, or must show some excuse for the nonperformance. 7 Coke, 10a; Com. Dig. "Pleader," 6, 51, 52; Doug. 686; 1 Term R. 638; 3 Johns. 146; 13 Johns. 94, 53, 57; 10 Johns. 359. But in the case under consideration the defendant, shortly after the new contract or lease was made, repudiated it and utterly refused to be governed by it. Having been in possession under the prior lease, he did not enter under the new one, and he seems to have done no single act under it. He still retained possession of the farm for two years, disclaiming the new lease, and claiming to hold under the lease which had been put an end to. In addition to the positive proof on the trial of the declarations and acts of the defendant, to this effect, proof of his intention is shown by the bill he filed to open up the settlement. Failing in this, he now endeavors to defeat the present action, not only by relying on the lease, under seal, but on the ground that the proof does not show the second year's rent has been fixed by the person named in the contract for this purpose; and this, it is insisted, is a condition precedent to the payment of the rent. The force of this objection could not be resisted if the defendant had, by his declarations and acts, entitled himself to the benefits of the new lease. He disclaimed it, refused to make the improvements or do any act under it, and avowed a holding under the abrogated lease. Shall the defendant, under these circumstances, having occupied the farm two years, avoid the payment of a reasonable rent under a count for use and occupation? He cannot be considered in the light of a trespasser, as his entry was not tortious; but rather in the light of holding over after the expiration of his term. But, in this case, the prior lease cannot regulate the rent, as that gave him possession only of a part of the farm, and that, under circumstances, which looked chiefly to the rearing of stock as profit; when, for the two years specified, he has enjoyed the entire farm. The new lease was by parol, and the parties had a right to rescind it by parol; and, we think, that from the facts proved the plaintiffs had the right to consider the lease as rescinded, and they have so treated it by bringing this action. The contract being proved, they undoubtedly had a right to treat it as a subsisting lease and seek their remedy under it; but the declarations and the acts of the defendant gave them the right to annul it, and consider him as a tenant at sufferance, or as holding over. They took no steps to dispossess him until the expiration of the two years, and we think, under the circumstances, that the general action, for use and occupation, will lie against him; and that the plaintiffs were not bound to treat the parol lease as subsisting and refer to Judge Hawsman the amount to be paid for the second year's rent

The motion for a new trial is overruled, and judgment, &c.

SCOTT (HILL v.). See Case No. 6,498.

Case No. 12,533.

SCOTT et al. v. HOME INS. CO.

[1 Dill. 105;[1] 2 Leg. Op. 27; 5 West. Jur. 499; 1 Ins. Law J. 750.]

Circuit Court, D. Missouri. April Term, 1870.

FIRE INSURANCE—EVIDENCE TO ESTABLISH FRAUDULENT BURNING.

1. In an action on a fire policy, where the defense is that the assured burned the property, the rule in civil, and not the one in criminal cases, as to the quantum of proof, applies; but in view of the nature of the charge, the evidence to establish it ought to be such as clearly to satisfy the jury of its truth.

[Cited in Continental Ins. Co. v. Jachnichen, 110 Ind. 64, 10 N. E. 639; Fowler v. Wallace, 131 Ind. 360, 31 N. E. 57. Cited in brief in Germania Fire Ins. Co. v. Klewer, 129 Ill. 602, 22 N. E. 489. Cited in Hills v. Goodyear, 4 Lea, 244; Welch v. Jugenheimer, 56 Iowa, 19, 8 N. W. 673. Criticised in Kane v. Hibernia Mut. Fire Ins. Co., 38 N. J. Law, 452.]

2. Confessions extorted from the plaintiff, or those not voluntarily made, should not be regarded by the jury.

Action on fire policy. Defense, that the plaintiffs burned their own property, covered by the policy. Similar actions had been brought by the plaintiffs on other policies. By consent, certain special issues were submitted to the jury, and their answers were to be taken as applicable to all the cases. It was made a question on the trial as to the degree, or quantum of proof requisite to establish the charge that the assured had

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

themselves burned the property. Certain confessions of one of the plaintiffs were given in evidence, without objection at the time, that they were not voluntary, but it was claimed by the plaintiffs that these confessions should be disregarded by the jury, because they were not voluntary, and made when they were under arrest on a criminal charge of arson. On these two points the court charged the jury.

Mr. Knox, for plaintiffs.
Sharp & Broadhead, for defendants.

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

DILLON, Circuit Judge (charging jury). The questions of fact specially submitted to you, require at the hands of the court a statement of the rules of law applicable to the decision of such questions. The second interrogatory requires you to find "whether the plaintiffs, or either of them, caused, procured, planned, or instigated the burning, or whether either one of them set fire to the building, consented to, or connived at the burning?" The charge of willful burning is made by defendants, and must be proved by them.

In the trial of ordinary civil suits, like the present, the jury determine the issues upon what is called the weight or preponderance of evidence. If the evidence preponderates in favor of the plaintiff, he is entitled to a verdict, though the evidence may not be so strong as to exclude all reasonable doubt. So if the balance is in favor of the defendant, the finding should be for him, although the jury are not convinced beyond all possible, or even beyond all reasonable question. This is the ordinary rule in civil actions. In criminal cases, where the United States or the government is plaintiff, the rule is different, and no mere weight of evidence is adequate to warrant a verdict of guilty unless it be sufficient to exclude all reasonable doubt.

One of the issues submitted requires you to find whether the plaintiffs set fire, or caused fire to be set, to the insured property; and it becomes the duty of the court to instruct you respecting the degree of proof essential to enable you to find that issue against the plaintiffs, and in favor of the insurance company.

1. The court instructs you that it is not necessary that the degree of proof should be the same as if the plaintiffs were on trial under an indictment for willfully burning the property to defraud the insurance companies. On the contrary, as between the rule in criminal and the rule in civil cases, as above defined, it is the rule in civil cases that is to be your guide in this case. But the charge is a grave one. The act charged is one which men in general will not commit, but of which men are sometimes guilty; in view of which, the court instructs you that in order to justify you in finding that the plaintiffs themselves burned, or caused the property to be burned, the legal evidence taken altogether, must be such as clearly satisfies you of the truth of the proposition. It need not be such as to exclude all doubt, but it should be such as to satisfy your minds and judgment that they did, or caused or procured the act in question to be done. On this point the decided cases are conflicting, but the foregoing seems to the court to express the sound and true rule of law on the subject.

2. As to the question whether any or what weight should be given by you to the confessions in evidence, the court instructs you, that any confessions extorted from either of the plaintiffs, are to be entirely disregarded. It is a free and voluntary confession only that should be considered by you. It should be observed, however, that in a case like the present, confessions made from hope of personal benefit, unaccompanied by apprehensions of danger or duress, and not obtained by promises, are competent evidence, and should be weighed by you with a view of ascertaining the exact truth.

In your deliberations you will bear in mind the distinction between the evidence outside of the confessions, and the confessions themselves. Though you should arrive at the conclusion to disregard all confessions, yet if evidence outside of the confessions satisfies your mind of the truth of any matter in issue, you will find accordingly. You are the exclusive judges of the weight of evidence. You may regard or disregard portions, or all of the testimony given by any witness, attribute little or great weight to the whole, or such portions as you may regard; in fine, deal in your deliberations with the testimony as you may deem proper, always bearing in mind, however, the object,—arriving at the truth of the matters submitted to you.

Verdict for defendants.

Case No. 12,534.

SCOTT et al. v. HOME INS. CO.

[The case reported under above title in 1 Ins. Law J. 750, is the same as Case No. 12,533.]

Case No. 12,535.

SCOTT v. HORE.

[1 Hughes, 163.] [1]

Circuit Court, E. D. Virginia. July, 1875.

PRACTICE IN EQUITY—DECREE BY DEFAULT—NEGLECT OF COUNSEL—REHEARING—FINAL DECREE.

1. A decree taken by default in consequence of the neglect of counsel for the defendant, will not be opened on motion for rehearing.

2. The Virginia law, settled by repeated decisions of the court of appeals, that a rehearing for neglect of counsel will not be granted, and never except on a bill of injunction, is observed

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

in the United States circuit court for this district.

[Cited in Rogers v. Parker, Case No. 12,018.]

3. United States circuit courts have no power to set aside their decrees in equity, on motion, after the term at which they are rendered.

4. The eighty-eighth rule in equity, forbidding a United States circuit court, on motion, to grant a rehearing, after the term, of final decrees to which appeal lies to the supreme court, is imperative.

[Cited in Glenn v. Dimmock, 43 Fed. 551.]

5. What is a final decree?

[Cited in Knox v. Columbia Liberty Iron Co., 42 Fed. 379.]

In equity.

Some time previously to 1849, Richard M. Scott, of Stafford county, Virginia, devised his St. Marysville plantation in that county to trustees for the benefit of his eldest son during his life; and after his death, to Eliza Scott, wife of the devisor, for her life; charging the estate with a small annual rent per annum for the benefit of his heirs. He afterwards died. The son also died, leaving Virginia Scott his widow, and a son, Richard M. Scott, Jr. This Richard M. Scott, Jr., in the course of time, August, 1850, made a contract (called a lease by the contracting parties) with his grandmother, Eliza Scott, by which he covenanted and agreed to pay her an annuity of $700 (called rent by the parties) for the surrender of her life interest in St. Marysville. This contract was in writing in the nature of an agreement, and the Virginia court of appeals, in passing afterwards upon the transaction, decided that "though the instrument was called a lease, and the sum reserved was called a rent, the contract was a surrender, and the life estate of Eliza Scott was merged in the estate of Richard M. Scott, Jr.;" and furthermore, that "the instrument not being under seal, it was not an express surrender, but it was a contract for a surrender which was carried out by the parties, by the delivery of possession and the payment of money under it, and it therefore had all the legal effect of an express surrender by deceased." The acting trustee as party to this contract was afterwards relieved by the court from service under it. After the making of this contract, and the delivery of possession to Richard M. Scott, Jr., this Scott died, and his estate passed to his mother, Virginia Scott, his executrix. In the year 1870, Virginia Scott, who seems to have had possession and full title to the land (charged, it may be, with the covenants of Richard M. Scott, her testator, from whom she probably inherited as heir), without express notice to the grantee, sold or conveyed by deed of bargain and sale to Elias A. W. Hore the St. Marysville plantation. During the Civil War of 1861-65, the records of Stafford county were burnt or destroyed, and there was probably no record notice to Hore of the title of St. Marysville, or of the charge running with the land (if it were such) which had been fixed upon this estate by the covenant of Richard M. Scott, Jr. Hore has remained in possession ever since, and is still in possession. In the fall of 1873, Mrs. Elizabeth D. Scott, having become a resident of Indiana, filed her bill in chancery against Hore in this court at Richmond, setting forth the facts, some of which have been recited, and praying that Hore, the holder of the land, should be required to pay to her such of the $700 annuities as were in arrear (some three or four of them), and be decreed to pay the future annuities as they should become due. On being served with process, Hore went to Richmond, and employed counsel for his defence, but there is no allegation that he furnished his counsel with his grounds of defence. At the December rules, 1873, there was a rule nisi. At the January rules, 1874, there was an entry pro confesso; and at the spring term of the court, on the 9th of April, which was the fifth day of the term, no answer having been filed, and no defence been made, and no counsel marked for Hore on the docket, a decree was taken by default. This decree was a full adjudication of all the principles of law involved in the case, and a careful provision for all the contingencies that might arise in the course of executing it. It decreed against Hore to Mrs. Scott the annuities that were in arrear, directed that execution might issue for the amount; decreed that the future annuities should be paid as they should accrue; and provided that if the execution which it directed to issue should be returned no effects, then the land should be sold. In such event the decree appointed a commissioner to make sale, and prescribed all the proper rules and conditions which he should observe in making the sale. It furthermore adjudged costs to the complainant, and declared expressly that it was a final decree. No notice was taken of this decree by Hore during the spring term, 1874, of the court. No notice was taken of it by him during the regular session of the fall term of the court, in October, 1874. But at an adjourned term held for special purposes, in 1875, at Richmond, the defendant, Hore, by counsel, moved the court for a rehearing of the cause, on the ground that his counsel had neglected to make defence. At another adjourned term of the court, held at Alexandria, May 17, 1875, the motion was argued, and a paper filed informally in the nature of an answer to the original bill of Mrs. Eliza Scott.

HUGHES, District Judge. I am to decide, upon the foregoing facts, whether this motion for a rehearing of the cause can be granted, and whether the decree of this court, entered on the 9th of April, 1874, can be set aside on such motion. I think it is now settled law in Virginia, notwithstanding the remarks of the court in 9 Leigh, 289, on the case of Patterson v. Campbell, never reported, that a judgment or decree, rendered

by default, cannot be opened on the ground of the negligence of counsel. In Hill v. Bowyer, 18 Grat. 382–386, the court of appeals says: "A defendant upon whom process has been served, who wholly neglects his defence, or contents himself with employing a lawyer who practices in the court to defend him without giving any information about his defence, or inquiring whether he is attending to the case, is not entitled to relief on the ground of surprise, however grossly unjust the decree may be." For other decisions of the court on this point, see 9 Leigh, 478, 10 Grat. 506, 22 Grat. 136, and Wallace v. Richmond [26 Grat. 67]. It is also to be gathered from these cases that the proceeding proper to be employed in applications for opening judgments or decrees taken on default through negligence of counsel, is not that by motion for a rehearing, but by bill in chancery. Under the Virginia law, this application by motion cannot be sustained at all; and the decisions are against it even though made by bill.

If this motion depended alone upon the law as settled in Virginia for the courts of the state, I should feel bound to deny it on the grounds—1st. That negligence of counsel is in Virginia no ground for opening a judgment or decree; and, 2d. That even though in extreme cases it be so, yet the proper mode of proceeding for defendant is by bill of injunction and not by motion. But behind these reasons, which forbid a rehearing of this case, on motion, there is another objection to it more insurmountable than the rest. The eighty-eighth rule of the supreme court of the United States, prescribed for proceedings in chancery in the inferior courts, forbids the rehearing of a cause after the term at which the final decree of the court shall have been entered and rendered, if an appeal lies to the supreme court. The spring term and the fall term for 1874 of this court had both passed before this motion was entered. The general decisions of the courts of England and the States of America, many of which have been cited in argument, can have no force in this court in opposition to such a rule. We are bound here by rule 88. The very fact of there having been a diversity of rulings on this subject by other courts, was probably the inducement which led the supreme court to lay down its rule 88. That rule is the law here, whatever may be the rulings of other courts of the highest authority on this subject. The supreme court has not only laid down its rule 88, but in the cases of Cameron v. McRoberts, 3 Wheat. [16 U. S.] 591, and McMicken v. Perrin, 18 How. [59 U. S.] 507, it has construed that rule and decided that circuit courts have no power to set aside their decrees in equity, on motion, after the term at which they are rendered. If the decree of 9th April, 1874, was a final decree, and if an appeal lies from it to the supreme court, then I am not at liberty to grant a rehearing. If it is a final decree, then an appeal does lie to the supreme court, because the amount involved exceeds two thousand dollars, the sum then requisite to give jurisdiction of an appeal to that court. The only inquiry therefore is, whether the decree in question was a final decree.

It has been truly said in argument that there are two classes of decisions by appellate courts with reference to this character of finality in decrees: 1st, those in which it is necessary to determine whether an appeal lies; and 2d, those in which a limitation of time for an appeal cuts off the right. In the first class of cases the courts go farther to construe a decree as final than they do in the last class of cases; in each class aiming to preserve to the suitor this valuable right. A court will, when no limitation of time occurs, strain a point to treat a decree as final from which an appeal has been taken; and in the other case it will strain a point to treat a decree as not final where an appeal would be cut off by limitation. Hence has arisen a diversity of decisions on this question, all made in the interest of the suitor's right of appeal. I admit the difficulty of defining a final decree in such precise terms as will hold good in all cases. I have been in the habit of thinking those decrees to be final which determine all the principles of law and equity arising in a case, and which give direction for carrying the principles so decided into execution. If decrees which are made after all evidence is taken, and full and final argument heard, and which determine all questions raised, do not go on to provide for carrying into complete execution the principles decided, they are in that respect defective. They are final decrees, though as such they may be defective in their ministerial parts. The supreme court of the United States has not unfrequently complained of district and circuit courts for not entering complete final decrees, and of their carrying into execution by piecemeal decisions which finally settle all questions arising in causes. The difficulty of defining what are final decrees has arisen chiefly from the fact that decrees really final in character have been defective in providing fully for the ministerial measures to be taken by officers of the court in carrying them into execution. Of course it would be exceedingly empirical to hold that a final decree is the order entered last in point of time, in a cause. A final decree is one which finally adjudicates the questions of right and of law involved in a cause, and proceeds to provide with reasonable completeness for the execution of such measures as may be necessary and proper for placing successful suitors in possession of the rights decreed to them.

The decree now under consideration is final, in my judgment, not only in its express terms, but in its subject-matter. Being a final decree, and one from which an appeal may be taken to the supreme court, it can-

not be opened now on a motion for rehearing The only possible method by which it can be re-examined in this court is upon bill of review. If such a bill is not brought, there is no way of staying the execution of it other than by appeal.

The motion of the defendant is denied.

Case No. 12,536.

SCOTT v. JONES.

[1 Brock. 244.] [1]

Circuit Court, D. Virginia. Nov. Term, 1812.

SET OFF—ACTION ON BOND—ASSIGNMENT—PRESENT DEMAND—NOTICE.

1. J. S. executed his bond to T. M. R. who assigned it to J. At the time of the assignment, there was a running account between J. S. and T. M. R. The assignee instituted suit against the obligor, and some time afterwards, but before judgment, upon a settlement of accounts, between J. S. and T. M. R., there was found a balance due from T. M. R. to J. S., which was acknowledged at the foot of the account, by T. M. R., who promised to pay it three years after the date of the settlement. *Held*, that this claim cannot be used as an offset against the bond, against the assignee, either at law, or in equity.

2. A debt, payable in future, cannot be pleaded in bar of a present demand.

3. The obligor in an assigned bond, who has equitable discounts against it, ought to inform the assignee of his claims, when notice of the assignment is given to him.

[Questioned in Stebbins v. Bruce, 80 Va. 398. Cited in brief in Washington v. Pollard, 5 Grat. 452.]

In equity.

MARSHALL, Circuit Justice. On the 7th of October, 1776, Peter Field Trent, Alexander Trent, John Harris, John Scott, and William Gay, executed a bond to T. M. Randolph, for six hundred pounds, payable on the 25th of April, 1783. Peter Field Trent was the principal, and the other obligors, his sureties. On the 1st of May, 1789, T. M. Randolph assigned this bond to W. Jones. From 1763 to 1788, there was a running account between T. M. Randolph and the obligor J. Scott, which was settled on the 2d of September, 1791, when T. M. Randolph acknowledged himself to owe J. Scott £360 9s. 2d., to be paid in three years. The acknowledgment is at the foot of the account, and is for the precise balance, but does not in terms refer to the account. On this bond, a suit was instituted by the assignee, and the writ was executed to November, 1790, and a judgment was rendered thereon, against John Scott, one of the obligors, in May or November, 1794. For the purpose of using his claim against T. M. Randolph, as a discount, J. Scott placed the acknowledgment which has been mentioned in the hands of counsel, who, by a mistake, which is stated in his affidavit, omitted to produce it at the trial of the cause. In December, 1795, J. Scott obtained an injunction to this judgment, and the case now comes on for a final hearing. The failure to produce this acknowledgment at the trial, is accounted for in so satisfactory a manner, that it is admitted, that the discount may now be used, if the plaintiff in equity could have availed himself of it at law.

The first question, therefore, to be decided is, could John Scott have used this acknowledgment of T. M. Randolph, as a discount at law? The act of assembly, under which the assignee sues, obliges him to allow all just discounts, not only against himself, but against the assignor, before notice of the assignment was given to the defendant.[2] Was this a just discount, when notice of the assignment was given to the obligor?[3] Notice was given, if not sooner, by the service of the writ, which was previous to November, 1790, and, consequently, prior to the settlement of this account with T. M. Randolph. Could the items of that account have been substantiated without the acknowledgment of T. M. Randolph, it might have been used as an offset in the suit at law, had the items not have been barred by the act of limitations; but by making that settlement, and giving to T. M. Randolph credit for three years, the applicability of this account as an offset against the bond in the hands of the assignee seems to be taken away. A debt payable in future cannot be pleaded in bar of a present demand; and, therefore, when this acknowledgment was given, it could not have been set up against the bond. The credit given upon it seems to prove, that it was the intention of the parties not to oppose this account to the bond, which, at that time, was the property of the assignee. On no other principle could a credit have been given. The debt from Scott, upon the bond, being due at the time, if the right to oppose the account to the bond had been contemplated to be reserved, no credit could have been desired or given. It seems to have been a part of the stipulation, by which an acknowledgment of the account, so as to remove the bar created by the act of limitations, was obtained. It may well be doubted, whether this acknowledgment can operate against a person previously the assignee of the bond, so as to revive a claim against him. But be this as it may,

[1] [Reported by John W. Brockenbrough, Esq.]

[2] 1 Rev. Code 1819, p. 484, c. 125, § 5. Tate, Dig. 30.

[3] In an action by the assignee, against the maker of a promissory note, he cannot set off against it a bill of exchange, for which the assignor is responsible to him, unless it appear that he was the owner thereof, before he received notice of the assignment. Ritchie v. Moore, 5 Munf. 388. Though the assignee of a bond, for valuable consideration, and without notice, takes it, subject to all the equity of the obligor, (Norton v. Rose, 2 Wash. (Va.) 233; Picket v. Morris, Id. 255,) and is in no better situation than the assignor, (Stockton v. Cook, 3 Munf. 68. But see an exception to this principle in Buckner v. Smith, 1 Wash. (Va.) 296; Elliott's Ex'r v. Smock, Id. 389), yet such equity must be clearly established by proof, before it shall affect an assignee without notice; especially if the obligor, after assignment, promise payment to the full amount of the bond, to the assignee. Mayo v. Giles' Adm'r 1 Munf. 533; Ludwick v. Croll, 2 Yeates, 464; Henry v. Brown, 19 Johns. 49.

the credit stipulated in the promise to pay the money, proves the agreement to look to T. M. Randolph for payment. This acknowledgment is in the nature of a promissory note, given after notice of the assignment of the bond, and, consequently, is incapable of being discounted from it at law.[4] If J. Scott could not have used this acknowledgment at law, can he avail himself of it in a court of equity? Had no settlement of accounts or acknowledgment on the part of T. M. Randolph been obtained, it would probably have been impossible to establish the items of the account; and if they could have been established, the claim might have been barred by the act of limitations. The acknowledgment of Randolph does not appear to give any equity as against this bond. The credit stipulated destroys any equity which might have arisen from the existence of an actual debt at the time of the assignment. Independent of the evidence which the face of the paper affords, of an understanding that J. Scott was to look to Randolph for the money due on the account, a creditor has not a right to give such a credit by which a third person is affected. The mere circumstance of giving the credit amounts to a taking the debt upon himself, and relinquishing the power to make it the debt of a third person. Upon other grounds, too, the plaintiff has abandoned his equity as against the bond on which this judgment was obtained. The obligor in an assigned bond who has equitable discounts against it, ought to inform the assignee of his claims, when notice of the assignment is given to him. In fair dealing, he is bound to do this, that the assignee may take measures to secure himself against the assignor. It was decided in the case of Wardrop v. Dobson's Adm'rs, that the omission of the obligor to give this notice to the assignee, deprived him of his equity in the event of a total loss to be sustained by the one or the other of the parties, and with that decision the court is satisfied.[5]

It is the opinion of the court, that the plaintiff could not have availed himself at law of this claim as a discount, and is not at liberty to set it up in equity. The bill, therefore, must be dismissed with costs.

Case No. 12,537.

SCOTT v. LAW.

[2 Cranch, C. C. 530.][1]

Circuit Court, District of Columbia. May Term, 1825.

APPEAL—PROPER TERM TO TRANSMIT RECORD.

In Maryland, in the year 1819, the appellant was not bound to prosecute his appeal and transmit the record until the term next after the approval of the appeal-bond.

Debt [by Alexander Scott against John Law's administrator] on an appeal-bond, dated 5th June, 1819, in the penalty of $42,000, with condition, which, after reciting the judgment of Charles county court in favor of Scott for $20,000, and that the said John Law hath "prayed an appeal to the next court of appeals to be held for the western shore," says: "Now the condition of the above obligation is such, that if the above bound John Law shall not pursue the directions of the act of assembly of Maryland, entitled 'An act for regulating writs of error and granting appeals from and to the courts of common law within this province,' at the next court of appeals to be held for the western shore, and prosecute the same writ with effect, and also satisfy and pay unto the said Alexander Scott, his executors, &c., or assigns in case the said judgment shall be affirmed as well all and singular the damages and costs adjudged by the county court aforesaid, as also all costs and damages that shall be awarded by the court of appeals aforesaid, then this bond to be and remain in full force and virtue, otherwise of no effect." The declaration was in the common form for the penalty.

The defendant prayed oyer of the bond and condition; and the indorsement of the judge approving the bond, in these words: "Approved by me, one of the associate judges of the First judicial district of Maryland, June 15, 1819, J. R. Plater;" and pleaded general performance, to which the plaintiff replied, "That the said John did not pursue the directions of the said act of assembly in the said condition mentioned at the said next court of appeals, for the western shore, then ensuing; and did not pursue the method and rule of the prosecution of the said appeal in the manner and form in the said act mentioned and expressed; but altogether failed and neglected, at the said next court to cause a transcript of the full proceedings of the said court in the said condition named, from whence the said appeal was made, as in the said condition mentioned, to be transmitted to the said court of appeals, at the said next court, and also wholly failed and neglected to file in the same court, namely, at the said next court, in writing, according to the rule of the same court, such causes or reasons as he had for making the said appeal; and did not prosecute his appeal, mentioned in the said condition of the said obligation, at the next court of appeals of the state of Maryland for the western shore; which the said Alexander avers was begun and held at Annapolis, in the said state, on the second Monday of June, in the year 1819, as he was bound to do by the said obligation and the condition thereof; but that the said John in his life," &c., "altogether omitted and failed so to do; and continued so to fail and omit to prosecute the said appeal until the first Monday of December in the said year, which

[4] See footnote 3 on preceding page.

[5] The editor has not been able to find the case cited in support of this position. The presumption is, that it was a case before the chief justice himself in the circuit court. It seems to be amply sustained, however, by the cases cited in note (2) to this case.

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

was the second term of the said court of appeals after the execution of the said obligation; and so the plaintiff says that the condition of the said obligation was broken; by reason whereof the plaintiff has sustained damage to the value of $52,000; and this he is ready to verify," &c.

To this replication the defendant rejoined, "That the said John Law did, immediately after the rendition of the said judgment of the Charles county court, pray an appeal from the said judgment; and thereupon directed the clerk of the said Charles county court to make out the record of the said judgment and send the same to the said court of appeals, as he the said clerk was bound to do; and that the said John did well and truly prosecute the said appeal with effect; and that the said judgment was afterwards, namely, on the second Monday in June in the year 1822, by the judgment of the said court of appeals, reversed, as by the record of the said appeals now remaining in the said court of appeals will appear; and this the said defendant is ready to verify," &c. To this rejoinder there was a general demurrer and joinder.

The act of Maryland referred to in the condition of the bond was the act of October, 1713, c. 4, § 4.

Mr. Jones and Mr. Ashton, for plaintiff, contended that the bond, although not approved until after the second Monday of June, 1819, the day of the commencement of the June term of the court of appeals, related back to the fifth day of June, the date of the bond; and that therefore the defendant was bound to prosecute his appeal, and transmit the record, at the June term of the court of appeals; whereas he did not prosecute it and transmit the record until the December term. That it was not the duty of the clerk of Charles county court to transmit the record, and that his failing to do so was no excuse for the delay of the defendant. That the bond takes effect from its delivery; and the delivery is presumed to be made at its date, unless the contrary be shown.

Mr. Key, contrà. The bond was not to be delivered to the party, but to the clerk; and the clerk could not receive it until it was approved, so that until it was approved it could not be delivered; and as it was not delivered until after the first day of the June term, the next court mentioned in the condition was the December court.

CRANCH, Chief Judge. We think the rejoinder is bad, because it does not answer all the breaches assigned in the replication. The replication assigns three breaches. 1st, that John Law did not, at the next court, cause a transcript of the record to be transmitted to the court of appeals; 2d, that he did not, at the next court, file in writing his causes or reasons for making the appeal; and 3d, that he did not prosecute his appeal at the court of appeals, held at Annapolis on the second Monday of June, 1819.

To the first breach, the rejoinder answers that J. L. immediately after the rendition of the judgment, prayed an appeal and directed the clerk of the county court to make out the record and send it to the court of appeals. This is no excuse for not causing the transcript of the record to be sent. It was not the duty of the clerk to send it; nor even to make out the transcript unless his fees were paid or secured; and there is no averment that they were either secured or paid. The second breach is not answered at all; but as the replication does not set forth the rule of the court on that subject, we think the assignment of this breach is bad, and the defendant is not bound to answer to it. The answer to the third breach is that J. L. prosecuted his appeal with effect; and that the judgment of the county court was reversed.

The question, whether this is a sufficient answer to the third breach, depends upon the question whether J. L. was bound by his obligation, at all events, to prosecute his appeal at June term, 1819. The condition of the bond is that he shall pursue the directions of the act of Maryland, 1713, c. 4, at the next court of appeals to be held for the western shore. Next, after what? The judgment? or the date of the bond? or the approval of the bond? or the delivery of the bond? or, according to the words of the act of assembly, is it "the next court ensuing, before whom such appeal ought to be tried"? Certainly the directions of the act ought to be pursued at, or in, the court before whom such appeal ought to be tried; but these words designate the court, not the term of the court, in which the appeal should be tried; otherwise the legislature would not have used the expression, "before whom;" but, at which.

The principal object of the act of assembly was to ascertain the cases in which an appeal should be a supersedeas to the judgment below. It is reasonable to suppose, therefore, that the legislature had in view the time of the supersedeas, and intended that the appellant should prosecute his appeal as soon as possible after he had suspended the judgment by giving the necessary security. The appeal was not to operate as a supersedeas until the security should have been approved by the justices of the court below. The term of the court, then, at which the defendant ought to prosecute his appeal would be the court next after the approval of the security. In the present case it appears by the indorsement of the judge upon the bond, that it was not approved until the 15th of June, 1819, which must have been after the 2d Monday of June, the day appointed by law for holding the court of appeals. It might have been a matter of doubt whether the court, at that term, would have jurisdiction of the appeal; and the defendant could not know that the court would sit more than one day.

Being of opinion that the defendant was not bound to prosecute his appeal until the term next after the approval of his bond, we think the third breach assigned in the replication is bad, and that the defendant is not bound to answer it. This also disposes of the first breach; for the "next court" mentioned in the assignment of this breach is afterwards, in the same replication, explained to be the June term, 1819, to which term we do not think the defendant was bound to transmit the transcript of the record.

Upon the whole we think the replication bad in all its assignments of breaches; and that the judgment upon the demurrer must be for the defendant.

[See Case No. 8,129.]

SCOTT (LAW v.). See Case No. 8,129.

Case No. 12,538.

SCOTT et al. v. LENOX.

[2 Brock. 57.] [1]

Circuit Court, D. Virginia. Dec. 26, 1822.

WASTE—TENANT BY ELEGIT.

An action of waste is not maintainable against a tenant by elegit, either upon the principles of the common law or under the statute law of Virginia.

[Cited in brief in Dejarnatte v. Allen, 5 Grat. 503.]

This was an action brought by James B. Scott and James Lyle, trustees for Scott, Irvine & Co., against Samuel Lenox, surviving partner of Heron, Lenox & Co. subjects of the king of Great Britain, to recover damages for waste alleged to have been committed on fourteen half-acre lots in the town of Manchester, and state of Virginia, which lots were held by Samuel Lenox, surviving partner as aforesaid, as tenant by elegit. On the 9th day of June, 1818, a decree was rendered by the circuit court of the United States for this district, in favour of Heron, Lenox & Co., against Archibald Freeland, for the sum of $3,672.55, with interest thereon at the rate of five per cent. per annum from the 1st day of May, 1798, till paid. This decree was subsequently enjoined, and on the 12th day of June, 1820, the injunction was perpetuated as to $622.48, part thereof, and was dissolved as to the residue; and on the 13th day of July following, Samuel Lenox, surviving partner, as aforesaid, of Heron, Lenox & Co., sued out a writ of elegit, by virtue of which the Manchester property above mentioned was extended and appraised, and a moiety of it delivered to Samuel Lenox, until he should have levied thereof the sum of money, and interest, for which the last decree was rendered, at the annual rent of $535.04, which was declared to be a reasonable annual rent by the inquisition taken in obedience to the said writ of elegit. During the pendency of the injunction referred to, to wit: on the 29th of October, 1819, the said Archibald Freeland conveyed to Scott and Lyle, the plaintiffs, the Manchester property aforesaid, in trust to secure a debt due to Scott, Irvine & Co., amounting to $8,000, which deed was duly recorded in the clerk's office of Chesterfield county on the 30th of December following. On the 15th day of May, 1822, the plaintiffs sued out a writ of waste against Samuel Lenox, returnable on the 22d day of the same month, requiring him "to show why, when, by the laws of the Commonwealth of Virginia, it is provided that it be not lawful for any one to make waste, sale, or destruction in lands, houses, woods, or orchards, to them demised for life or years, &c. the said Samuel Lenox in divers lands and houses, with their appurtenances, &c., in the town of Manchester, county of Chesterfield, and state of Virginia, whereof the said James B. Scott and James Lyle, for the benefit of the said Scott, Irvine & Co., and of the said Archibald Freeland, are tenants of the fee, and the said Samuel Lenox, surviving partner aforesaid is tenant of the freehold, by virtue of an extent and delivery thereof to him, in pursuance of a writ of elegit, &c., committed waste, &c." This writ was not executed, and an alias was issued, returnable to the August rules, which was executed on the tenant in possession of the improved lots, and copies of it were posted at the doors of the unoccupied tenements.

The defendant, by his counsel, craved oyer of the writ, and the return thereon, of the decree in the suits of Lenox v. Freeland and Freeland v. Lenox, of the elegit and inquisition returned thereon, of the deed of trust referred to above, which being read, he demurred generally to the plaintiff's declaration.

MARSHALL, Circuit Justice. This is a demurrer to a declaration in an action of waste; and the only question is, can the action be maintained against a tenant by elegit? Could the court be guided solely by considerations of the reason and policy of the law, the argument of the counsel for the plaintiffs would certainly have great weight; but it is a case of strict authority, and by authority my opinion will be regulated. The Register contains the form of a writ of waste against a tenant by elegit, and the Register is admitted to be a book entitled to great respect. Its authority on this particular point is, however, in some degree diminished, by the circumstance that the editor has placed this note in the margin: "Quære, If it be maintainable by the law against him?" Fitzherbert, in his Natura Brevium, says that this writ is in the Register, and that it stands with reason that this action should lie, but adds, that some say the debtor shall not have this action, because he may have account.[2]

[1] [Reported by John W. Brockenbrough, Esq.]

[2] "And there is a writ of waste in the Register for him in the reversion against tenant by elegit, who hath lands and tenements in execution for debt or damages; and so against tenant by

The plaintiff also relies on a case reported in the Year Books, and decided 21 Edw. III.; that was a scire facias sued out by the person whose lands had been delivered on a recognizance, praying that the tenant might receive the money due, and restore the land. He also suggested that the tenant had cut trees growing in a wood delivered to him, and prayed for a writ to compel him to answer for the cutting aforesaid; the writ was granted.

The counsel for the plaintiff assumes that this was a writ of waste; but the case does not say so; nor does it furnish any thing that will justify this inference. A writ to compel a tenant to answer for cutting trees, is not necessarily a writ of waste. The writ was awarded, but I do not find any decision of the cause; a similar case came on at Trinity term the same year, where the judges said it would be advisable for the plaintiff to strike the cutting of the trees out of the suit, as he might bring trespass on the case for that injury. The writ in the Register, then, and the opinion of Fitzherbert, are the only authorities in support of the action.

In support of the demurrer, the counsel for the defendant has cited 1 Inst. 54a, where Lord Coke says, "No action of waste lieth against a guardian in socage, but an account or trespass; nor against a tenant by statute staple, &c., or elegit." 1 Co. Litt. 54a. It is unnecessary to speak of the high respect which is due to the opinions of Lord Coke, especially on subjects of this sort. He was particularly conversant in all the ancient decisions, and was well acquainted with the writs in the Register, with their reason, and with the authority on which they were founded. He understood, too, all the ancient opinions and doctrines on this subject. In Dean, etc., of Worcester's Case, 6 Coke, 37, it was contended at the bar, that the lease was void under the statute of 13 Eliz. c. 10, "because it was made for the life of others, in which case it might happen that there might be an occupant who would not be subject to waste, no more than tenant by statute merchant, or tenant by elegit, &c." It was admitted by the court, that the dean and chapter are restrained to make leases dispunishable of waste, but it was resolved that an occupant is punishable for waste, because he has the estate of the lessee for life, and is therefore within the statute of Gloucester; "but tenants by statute merchant, statute staple, or elegit, do not hold for life or years, and therefore they are not of the statute."

Two objections have been made to the authority of this case: 1. The question was not a point in the case, and the opinion, therefore, is a mere obiter dictum. 2. This dictum goes no farther than to deny that the action is given by the statute of Gloucester.

To the first objection, I answer, that although the opinion expressed by a court on a principle stated in argument, as analogous to that contended for in the cause, be not of equal authority with a decision on the very point in issue, yet, in such a case as this, it is of great weight. It was the usage of the court, in the time of Lord Coke, to decide the collateral points of law which were stated in argument, and considered by the judges as bearing on the main question. Those points were argued, and deliberately considered and settled. In this case, it was contended at the bar, that an occupant was not punishable for wastes, no more than a tenant by elegit. The court resolved that an occupant was punishable for waste, which was the very point in controversy, though a tenant by elegit was not, and took the distinction between the two tenants. Certainly when a principle is stated at the bar as acknowledged law, and is declared by the court to be law, it deserves great respect, though it may not have all the authority of an express decision on the very point in issue.

2. To the second objection, it is to be observed, that the proposition made at the bar was general, that the action was not maintainable. Of course it was not maintainable either at the common law or by statute. The court assents to this proposition, and gives as a reason, that it is not within the statute. The inference is, that by the admission of all, it was not maintainable at common law; and to show the truth of the general propo-

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elegit, who hath lands in execution by recognizance of debt: and also against his executor who hath lands in execution by elegit: and it seemeth to stand with good reason that the action doth lie. But some say that he against whom the execution is sued, shall not have an action of waste, because he may have a writ of venire facias ad computandum, &c., and there the waste shall be recovered in the debt; but by the action of waste he shall recover treble damages, and so it seemeth he shall not do by that writ of venire facias ad computandum." Fitzh. Nat. Brev. 134, tit. "Writ of Waste."

Sir Matthew Hale, in his commentary upon the passages from Fitzherbert above quoted, says: "A scire facias was against a tenant by elegit, who had cut trees, to pay the residue of the money, to answer for the trees cut, and for the plaintiff to have his lands again. Curia. By the statute against cutting trees, this is a nature of trespass, and lies not in account. Nor is he punishable by this writ, (of waste,) but in an action on the case only." Y. B. 21 Edw. III. p. 26.

Again, Fitzherbert says, "And also if a man hath lands in execution by elegit, and afterwards be in the reversion granteth the reversion to a stranger in fee, that the grantee shall have an action of waste against the tenant by elegit, seems reasonable, because the waste is to his disinheritance, and he ought not to satisfy the debt due by the grantor. And see 21 Edw. III. in title 'Scire Facias,' whether recognizor had scire facias upon his surmise that the recognizee had levied all the debt by cutting of trees." Id.

Sir Matthew Hale says: "Note, he cannot in a scire facias compel him to answer to the waste and cutting of the trees, and therefore it was waived." Y. B. 21 Edw. III. p. 30. See Fitzh. Nat. Brev. 104, noted that waste lies. Quære.

sition that the action could not be sustained, it was necessary to state only that it was not given by statute. In 4 Inst. pt. 2, p. 299, Lord Coke says: "At the common law, waste was punishable in three persons, viz. tenant in dower, tenant by the curtesy, and the guardian."

It is argued, that although tenant by elegit is not comprehended in this enumeration, Lord Coke is not to be understood as denying that the action might be maintained independent of any statute, because the estate did not exist at common law, but was created by statute. When created, it is contended, the principles of the common law give the action, because the estate is created by act of law, and not by the act of the party. This argument is not without its weight; but it is opposed by other reasons, which seem to me to be entitled to greater consideration. When we consider the fullness with which Lord Coke discusses every question on which he treats, we cannot resist the conviction that, had he supposed that the action was maintainable on the principles of the common law, he would have said so, and not have left the student to draw the very strong inference against the action which his words justify. But his opinion on this point is expressly declared in his 1st Inst., in the passage already cited.

If this action cannot be maintained at the common law, it depends entirely on an act of assembly. Act Dec. 26, 1792; 1 Rev. Code, 1819, c. 117, p. 462. That act seems to have been intended to comprehend the whole subject, since it enumerates the persons against whom the action lay at common law. If a tenant by elegit be comprehended in this act, it must be under the words "tenant for years." It has been contended at the bar, that a tenant by elegit is a tenant for years, because that is certain which may be rendered certain, and when the land is delivered to him at a certain annual rent, to be held till it discharges a certain sum, he is tenant for a certain number of years, which may be computed with exactness. Were this a case of the first impression, I should incline strongly to this opinion. I do not clearly perceive the distinction between the tenant who holds lands at ten dollars per acre, until he shall receive one hundred dollars, and a lease for ten years, if J. S. shall so long live. The tenancy by elegit is determinable within the time by the payment of the money, and the estate for ten years is determinable within the time by the death of J. S. But the question is as completely settled as a question of law can be settled by authority. Lord Coke, in his commentary on the statute of Gloucester, says, that tenant by elegit is not within it, because he is not a tenant for years. All the books concur in this opinion. There is not, I believe, a dictum against it.

I think the demurrer must be sustained.

Case No. 12,539.

SCOTT v. LEWIS.

[2 Cranch, C. C. 203.] [1]

Circuit Court, District of Columbia. June Term, 1820.

PLEADING AT LAW—TIME TO PLEAD—LEAVE OF COURT.

If the statute of limitations be pleaded after the plea day, without leave of the court, the plea will, on motion, be ordered to be stricken out.

Assumpsit, upon a promissory note. The rule to plead expired on the second Monday of December, 1818. At the next term, the defendant pleaded the statute of limitations, which was entered (short) and issue joined by the clerk, under the agreement of the bar that the clerk should enter the pleas and make up the issues.

Mr. Caldwell, for plaintiff, moved the court to order the plea to be stricken out, under the general rule of the court that the plea of limitations should not be received unless filed before the expiration of the rule to plead.

Mr. Jones, for defendant.

THE COURT (THRUSTON, Circuit Judge, contra) ordered the plea to be stricken out.

SCOTT (LLOYD v.). See Case No. 8,434.

SCOTT (LOUDON v.). See Case No. 8,526.

Case No. 12,540.

SCOTT v. LUNT.

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

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

LANDLORD AND TENANT — DEATH OF TENANT — ACTION AGAINST ADMINISTRATOR.

The assignee of a ground-rent, in fee, may maintain an action of covenant against the administrator of the original grantee, for rent accruing after the death of that grantee, although the land has descended to his heirs, subject to the rent.

Covenant by [Richard M. Scott] the assignee of the ground-rent of a lot in Alexandria, conveyed in fee, by the late General George Washington, to Ezra Lunt, who covenanted for himself, his heirs, and assigns, to pay an annual rent of $73 forever. The declaration and oyer set forth the original deed from General Washington to Ezra Lunt, in fee, reserving an annual ground-rent of $73 forever; the covenant, on the part of Lunt, to pay the rent; the assignment of the rent, by General Washington, to the plaintiff; the death of Lunt; the granting of administration of his estate to the defendant; and the accruing of the rent since his death.

Mr. Taylor, for defendant, after oyer, de-

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

murred to the declaration, and contended that the action could not be maintained.

The question was, at the last term, submitted to the court by Mr. Taylor, for defendant, and Mr. Swann, for plaintiff.

THE COURT considered it in the vacation, and its opinion (THRUSTON, Circuit Judge, absent) was now delivered by CRANCH, Chief Judge.

The late General George Washington conveyed a certain lot of land in Alexandria to Ezra Lunt, in fee, reserving an annual rent of $73; and there was an express covenant by Lunt, for himself, his heirs, and assigns, to pay the rent. Lunt died, and this action of covenant is brought against his administrator for rent which accrued after his death, and, consequently, after the land had descended to his heirs at law.

Mr. Taylor, for defendant, contended that as the estate became vested in the heirs by the act of the law, and not by the voluntary assignment of the lessee, the privity of contract was destroyed, as well as the privity of estate, between the assignee of the lessor and the personal representatives of the lessee. The lessee, after a voluntary assignment, may be liable upon his express covenant; because he has voluntarily parted with the estate, and may take counter security from his assignee. But the law, which takes away the estate, for the enjoyment of which the rent is given, would be unjust if it left the lessee liable for the rent; and the person who acquires the estate in the right of the lessee would stand in a much better situation than the lessee himself, as he would have the whole benefit of the estate without its burden. "Nemo debet locupletari aliena jactura."

No authority was cited by Mr. Taylor in support of this view of the case. It was, however, probably suggested by what fell from Mr. Justice Yates, in the case of Mayor v. Steward, 4 Burrows, 2439, 2443, namely, "As the act devests him of his whole estate, and renders him absolutely incapable of performing the covenant, it would be a hardship upon him if he should remain still liable to it when he is disabled by the act of parliament from performing it;" and by the arguments of the counsel in that case, and in the case of Mills v. Auriol, 1 H. Bl. 443, and of Auriol v. Mills, 4 Term R. 94. But those arguments were overruled by the judgment of the court.

It is said, however, that those cases were under the bankrupt act; and that the assignment, being in consequence of the act of the bankrupt himself, the property cannot strictly be said to have passed out of him, by the act of the law, without his own concurrence.

Some countenance is given to this idea by the language of Lord Loughborough, in Mills v. Auriol, 1 H. Bl. 444. But the opinion of the court of king's bench in the same case, in 4 Term R. 98, does not seem to have been at all influenced by that consideration. Lord Kenyon, in delivering the opinion of the court there, says: "It is extremely clear that a person who enters into an express covenant in a lease, continues liable on his covenant, notwithstanding the lease be assigned over. The distinction between the actions of debt and covenant, which was taken in early times, is equally clear. If the lessee assign over the lease, and the lessor accept the assignee as his lessee, either tacitly or expressly, it appears, by the authorities, that an action of debt will not lie against the original lessee; but all those cases, with one voice, declare that if there be an express covenant, the obligation upon such covenant still continues." "It cannot be disputed that, where a disposition of the lease has been made by virtue of a fieri facias, or an elegit, the lessee continues liable upon his covenant, notwithstanding the estate be taken from him against his consent. On the same principle, the South Sea director was held liable, although he was devested of his property by the act of confiscation. Hornby v. Houlditch, Andr. 40; 1 Term R. 93, note a. So in the case of an attainder, and other cases." "Then it was contended that the bankruptcy put an end to the contract; but that argument is not well founded. For it was asked by Lord Hardwicke, in the case of Hornby v. Houlditch, what is there here to discharge the privity of contract, or estate, between the lessor and lessee? or what is there to discharge an express covenant?" "I may ask the same questions in this case. Has the landlord done any act to discharge the lessee? Even in cases where the landlord has expressly consented to receive the assignee as his tenant, the original lessee has always been held liable on his covenant; and those, in my opinion, are much stronger cases than the present, where the assignees are forced upon the landlord without his consent."

In the case of Kunkle v. Wynick, 1 Dall. [1 U. S.] 305, the plaintiff had conveyed a lot of land to the defendant in fee, rendering an annual rent; the defendant had assigned his interest in the premises before any rent had become due; and the plaintiff had received one year's rent from the assignee. The plaintiff brought his action of covenant against his original grantee, and recovered judgment.

The difference between that case and this is, that there the assignment was voluntary, and the plaintiff had accepted rent from the assignee; but here was no assignment, and no acceptance of rent from the heirs at law by the plaintiff; and no other act of the plaintiff waiving his right of action upon the covenant. The original grantee of the land knew that upon his dying seized, and intestate, the land would descend to his heirs at law, and that his administrator would be bound by the covenant. There is no more hardship in this case than in that of a mortgage, where the administrator may be compelled, by the bond or covenant of the intestate, to pay the mortgage-money for the benefit of the heir at law; or in that of a contract to purchase land, and

the purchaser has given his bond for the purchase-money, the land being conveyed upon the faith of the personal security. The land would descend to the heirs, and the personal obligation would devolve on the administrator, who, if obliged to pay the money, could not compel the heirs to refund it.

Upon the authority of these cases cited by the plaintiff's counsel, as well as upon the general principles of reason and law, we think the plaintiff is clearly entitled to maintain his action of covenant against the administrator.

This opinion is substantially affirmed by the supreme court of the United States in Scott v. Lunt, 7 Pet. [32 U. S.] 602, per Story, J. See, also, Pember v. Mathers, 1 Brown, Ch. 52.

[NOTE. Upon the trial of the case, there was verdict and judgment in favor of the defendant, upon his plea of re-entry by plaintiff. The plaintiff sued out writ of error in the supreme court, and the case was first heard upon motion of defendant to dismiss for want of jurisdiction. Motion overruled. 6 Pet. (31 U. S.) 349. Subsequently the court reversed the court below upon certain instructions given and refused upon the plea of re-entry. 7 Pet. (32 U. S.) 596.]

Case No. 12,541.

SCOTT et al. v. MANSFIELD, C. & L. M. R. CO.

[2 Flip. 15;[1] 5 Am. Law Rec. 436; 9 Chi. Leg. News, 92.]

Circuit Court, N. D. Ohio. April Term, 1877.

PRACTICE IN CHANCERY—PARTIES—AMENDMENT.

A party interested in the res in controversy, not made a party in the bill, may on his motion or petition, be made a party by amendment of the bill.

[This was a bill in equity, to foreclose a mortgage, by Thomas A. Scott and G. W. Cass, trustees, against the Mansfield, Coldwater & Lake Michigan Railroad Company.]

John P. Shipman, H. C. Hedges, and Otis, Adams & Russell, for the motion.

Rufus P. Ranney, and J. T. Brooks, contra.

WELKER, District Judge. The bill is filed by complainants as trustees of bondholders to foreclose a mortgage executed by the defendant upon their railroad, to secure bonds issued by the company, and prays the sale of the railroad to pay the same.

Swan, Rose & Co., who are not parties to the bill, file their motion asking an order that the complainants may be required to amend their bill so as to make them parties defendant, with leave to answer. They state that they were contractors for the building of the railroad of the defendant, that they built a large part of it, for which defendant was indebted to them, and that before the filing of the bill, they had recovered a judgment in the state court against the defendant for a large amount, and on which execution was issued and duly levied upon the road, and which is claimed to be a subsisting lien upon the road; the judgment not having been paid. They also allege that the mortgage of the complainants is not a valid lien upon the railroad, and not superior to their lien thereon, and that they have a good and sufficient defense to the mortgage of the complainants.

The motion is resisted by the complainants on the ground that they have made the only party necessary, and that to amend by making these lien holders parties is unnecessary, claiming that the proper parties are before the court to enable it to make a final and complete decree in the premises. The question is whether Swan, Rose & Co. can be thus made parties on their motion so made?

From a very careful examination of the authorities, I find it stated as a general proposition in equity proceedings, that all parties interested in the subject-matter of the suit should be made parties; that if it appear at any stage of the case, that there are parties in interest, not so made parties, the court may withhold a decree until such parties are brought before the court, or dismiss the bill for want of such parties; but that a bill would not be dismissed if such parties were in court as would enable the court to determine the whole case.

In this case, the railroad company having been made defendant, with the right to make defense to the claim of the complainants, and to set up all legal defenses to the bonds of the complainant, would enable the court to make a final decree in the case between the parties. But Swan, Rose & Co., have an interest in the subject-matter of the suit, by reason of their judgment and levy upon the railroad, and which interest would also be determined by the decree between the present parties, for if the mortgage of the complainant be held to be a good and valid lien upon the road and the value of the road not be sufficient to pay both liens, it will necessarily take from them the lien thus acquired by them.

It is conceded that they could file their original bill, making the complainants and the railroad company defendants, and in that way attack the bonds and mortgage of the complainants, and ask the court to enforce the lien upon the road. That being done, the court would then have two cases, involving substantially the same controversy, and which, no doubt, could be consolidated into and tried as one suit. The practice proposed to be adopted will save this circuity of actions, and puts this one in a shape to settle all the questions made in the case. It would be but the enforcement of the general practice in chancery of making all lien holders defendants where a bill is filed by one lien holder to enforce the lien by sale of mortgaged premises.

I find, in the case of Coleman v. Martin

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

[Case No. 2,985], this practice approved by Judge Blatchford. In that case he lays down this general rule: "In a suit in rem, where the court has jurisdiction over the res, and its decree affects the interest in the res of all persons who have any interest in the res, a person who has a lien or claim upon, or other interest in the res, is allowed to intervene, and be heard for his own interest in the res. The theory of this is, that the person, by his interest in the res, has an interest, in a legal sense, in the subject matter of the controversy."

In 16 Ga. 137, it was held: "That a court of equity will extend to one who is not a party to the bill, the privilege of becoming a party at his own instance, when, from the case made, it sees that the ends of justice would be subserved by it."

It seems to me, therefore, that upon principle, as well as upon precedent, Swan, Rose & Co. ought to be made parties; and that it is good practice, and a proper way to require this to be done on their motion or petition; and the order is accordingly made requiring the complainants to amend their bill by making them also defendants in this case.

SCOTT (MAUL v.). See Case No. 9,306.

SCOTT (MEAD v.). See Case No. 9,368.

Case No. 12,542.

SCOTT et al. v. The MORNING GLORY.

[Hoff. Op. 448.]

District Court, N. D. California. April 22, 1859.

ADMIRALTY—JURISDICTION—SERVICES IN PROCURING CREW—DOMESTIC SERVICE.

[Admiralty has no jurisdiction of a suit by shipping masters to recover for services in procuring a crew to navigate a vessel from one port to another in the same state.]

[This was a libel by Scott and Curtis against the Morning Glory.]

E. H. Hodges, for libelants.

Robert Rankin, for claimant.

HOFFMAN, District Judge. The libel in this case is filed to recover compensation for services rendered to the above vessel by the libelants, as shipping masters, in procuring 10 men to navigate the vessel from Benicia to this city. Exceptions to the libel are filed on the grounds (1) that the contract is not of admiralty jurisdiction; (2) that it is not alleged that any necessity existed for creating a lien on the vessel, by reason of want of funds in the master's possession, or of personal credit of the owners.

As to the first exception. In The Gustavia [Case No. 5,876], it was held by the judge that a ship's broker has a lien on a foreign vessel for services in shipping a crew, and for advances for their wages. On the other hand, it has been decided that stevedores had no lien, and this court has rejected the claim, in rem, of runners, or persons who are hired to solicit passengers. It is impossible not to recognize, in the recent decisions of the supreme court, a disposition to confine the admiralty jurisdiction within narrower limits, and restrict maritime liens to fewer cases than is desired by its more ardent advocates. The Yankee Blade, 19 How. [60 U. S.] 82. To give the court jurisdiction over a contract as maritime, it must relate "to the trade and business of the sea," or must be essentially maritime in its character. It is not enough that it relates to a vessel. Thus, the admiralty jurisdiction to enforce a mortgage of a ship has been denied by the supreme court. 8 How. [49 U. S.] And, in Philips v. The Thomas Scattergood [Case No. 11,106], Judge Hopkinson held that a seaman whose wages have been paid up to the termination of the voyage, but who afterwards remained on board the vessel moored at the wharf, has no claim for services which the admiralty can enforce. In the case of People's Ferry Co. v. Beers, the supreme court held that the jurisdiction does not extend to cases where a lien is claimed by the builders of a vessel for work done and materials furnished in its construction. 20 How. [61 U. S.] 393. If the jurisdiction be construed to embrace not only matters directly connected with maritime commerce, but those tending toward or conducive to it, a large and indefinite field would be opened. With respect to materials, etc., furnished to a vessel, the maritime lien of America creates a lien only when the vessel is foreign. The lien given by local laws for materials furnished to domestic vessels, can no longer, by a recent rule of the supreme court, be enforced in the admiralty.

The only other cases on which a lien arising out of contract is admitted, are those of seamen, engineers, etc., for services rendered on board during a voyage, express hypothecations for supplies or necessary funds, and the reciprocal liens which arise out of the contract of affreightment. But, if the claim of a shipping master, as a quasi material man, be allowed, on the ground that his services are necessary or advantageous to the vessel, I cannot perceive why, on the same principle, the claims of runners, or persons who solicit freight or passengers, or that of the printer who advertises the ship, or even that of the drayman who carts their stores, or many others who directly or indirectly contribute to her profitable employment, must not also be admitted. That such liens are not necessary to commerce, nor generally supposed to exist, may be fairly inferred from the fact that the books contain no reports of attempts made to enforce them, if we except the case of The Gustavia, already cited. I am persuaded that the admiralty jurisdiction, as understood by the supreme court, will not be extended by that tribunal to em-

brace a large and novel class of cases, the assertion of cognizance over which would be to forsake ancient and well-defined boundaries, and to enter upon a broad and indefinite field of jurisdiction. I think, therefore, that the first exception should be sustained.

But, even if this court had jurisdiction over this contract to enforce a lien in rem, it is clear that the libel does not allege sufficient to create that lien. In the case of The Gustavia, relied on by the advocate for the libelants, the ship's broker is treated as a material man. The rules with respect to liens for materials and supplies must therefore be applied to him. He certainly can have no higher rights than the person who supplies materials to a foreign ship. In the case of Pratt v. Reed [19 How. (60 U. S.) 359], it is decided by the supreme court that, to create a maritime lien for supplies furnished to a vessel, there must not only be an actual or apparent necessity for the supplies, but there must be a necessity for resorting to the credit of the vessel. In other words, it must appear that they could not have been obtained on the credit of the owners. If such a state of facts is necessary to give rise to the lien, it is clear that it should be alleged in the pleadings and proved at the trial. The libel in this case contains no such allegation. The second exception must therefore be sustained. The defect might, if the facts justify such a course, be cured by amendments, but the view taken of the first exception renders it useless. Exceptions sustained.

SCOTT v. The M. W. WRIGHT. See Case No. 9,983.

SCOTT (NEVES v.). See Case No. 10,134.

Case No. 12,543.

SCOTT v. OTIS et al.

[23 Int. Rev. Rec. 367; 4 Law & Eq. Rep. 598; 5 N. Y. Wkly. Dig. 264;[1] 10 Chi. Leg. News, 41.]

Circuit Court, D. Iowa. Oct. 23, 1877.

REMOVAL OF CAUSES—POWER OF STATE COURT IN VACATION.

1. A cause was referred to a referee. under the statute of Iowa for trial, in vacation. A petition, affidavit and bond were filed in the office of the clerk of the state court, under Rev. St. § 639, subd. 3, for the removal of the cause to the federal court. *Held*, not to have the effect to divest the jurisdiction of the state court, or of the referee to proceed to a trial pursuant to the order of reference.

2. Under section 639 of the Revised Statutes, a removal of a cause from the state court cannot be effected in vacation, without any action of the state court.

On motion by the defendants [H. W. Otis and others] to remand cause to the state court. The suit was brought [by M. T. Scott] in the state court at the May term, 1875, and at the May term, 1877, it was by consent referred by the court to a referee for trial. This reference was made in pursuance of the Code of Iowa on that subject. The following sections of that Code relate to the powers and duties of a referee:

"Sec. 2820. The trial by referee shall be conducted in the same manner as a trial by the court. He shall have the same power to summon and enforce by attachment. The attendance of witnesses to punish them as for a contempt for non-attendance or refusal, to be sworn or to testify, and to administer all necessary oaths in the trial of the case, to take testimony by commission, allow amendments to pleadings, grant continuances, preserve order, and punish all violations thereof.

"Sec. 2821. The report of the referee on the whole issue must state the facts found and the conclusions of law separately, and shall stand as the finding of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. The report may be excepted to and reviewed in like manner.

"Sec. 2822. When the reference is to report the facts, the report shall have the effect of a special verdict.

"Sec. 2823. The referee shall sign any true bill of exceptions taken to any ruling by him made in the case whereto any party demands a bill of exceptions; and the party shall have the same rights to obtain such bill as exists in the court, and such bill shall be returned with the report."

In the vacation after the May term, 1877, and prior to the November term, 1877, viz. on October 6, 1877, the plaintiff filed with the clerk of the state court, a petition, affidavit and bond, under the prejudice and local influence act (Rev. St. § 639, subd. 3; Act March 2, 1867 [14 Stat. 558]), to remove the cause to this court. The state court not being in session, did not act on the petition or accept the bond. It has neither ordered nor refused to order the removal. Notice of the filing of the petition and bond was given to the referee, whom nevertheless, it seems, commenced the trial of the cause, pursuant to the order of reference, but the trial has not yet been concluded by the referee. The next term of the state court does not occur until the 5th day of November, proximo.

C. E. Richards, for the motion.

P. T. Lomax, contra.

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

DILLON, Circuit Judge. The act under which this cause was attempted to be removed (Rev. St. § 639, subd. 3) requires the petition and affidavit for the removal to be filed "in the state court." And "in order to such removal the petitioner must at the time of filing his petition therefor, offer in said state court, good and sufficient surety," etc. "It shall thereupon

[1] [5 N. Y. Wkly. Dig. 264, contains only a partial report.]

be the duty of the state court to accept the surety and to proceed no further in the cause against the petitioner." Unlike the act of March 3, 1875 [18 Stat. 470], the statute under which the removal was here attempted contains no provision authorizing the petition for the transfer, to be filed in vacation. It is our opinion that the filing in vacation of the petition, and affidavit and bond for the removal of this cause, did not have the effect to divest the jurisdiction of the state court, or that of the referee under the order of reference. The precise point presented is, whether under Rev. St. § 639, the removal of a cause can be effected by a petition and bond filed in the clerk's office in vacation, without any action of the state court. We hold that it cannot.

Under the statutes of Iowa, courts act only in term, and judges have only a few enumerated powers which can be exercised in vacation. "Upon any final adjournment of the court all business not otherwise disposed of, stands continued generally" until the next term. Code, § 172. Without the consent of parties, the courts cannot decide cases in vacation (Id. § 183), or the judges do anything except to make provisional orders in specified cases. Judges in this state cannot, in vacation, exercise the power of courts in term. The act of congress (Rev. St. § 639) requires the petition and bond to be filed in the state court, and requires the state court to accept the surety, and to proceed no further in the cause. This implies action, to some extent, on the part of the state court, viz. to accept the surety if it be sufficient, and negatively the duty not to take any subsequent steps in the cause—action which in Iowa can only be taken by the court when acting as a court, that is, in term time. Whether the mere consent of the plaintiff to refer the cause, without more, waives the right of removal under Rev. St. § 639, subd. 3, as insisted by the defendant's counsel, we need not determine. Hanover Nat. Bank v. Smith [Case No. 6,035]. I have doubt on this point and give no opinion upon it.

The case is not legally removed to this court, and is therefore dismissed. Case dismissed.

Case No. 12,544.

SCOTT v. The PLYMOUTH.

[6 McLean, 463; [1] Newb. 56.]

District Court, D. Michigan. June Term, 1855.

MARITIME LIENS — HOME PORT — LABOR — INTERESTED WITNESS—COMPETENCY.

1. A steam propeller, built by ship-builders at Cleveland, Ohio, under a contract with parties resident in Buffalo, New York. The former place is her home port until after her delivery and her first voyage.

2. Painting a vessel before her completion, and while still in the custody of the ship-builder, is work done at the home port, and creates no lien in favor of the painter on the vessel.

3. When the interest of a witness is balanced, his testimony is competent.

Libel filed [by Dwight Scott] for the recovery of a bill for painting the propeller while lying in the port of Cleveland, Ohio. It appeared in the proofs that the propeller was built by the firm of Lafronier & Stevenson, boat builders, Cleveland, under contract with George H. Bryant & Co., merchants, Buffalo, N. Y. That a considerable sum had been advanced, and the balance due satisfactorily adjusted before the delivery of the vessel, which formally took place in May, 1854, when she sailed on her first voyage to Buffalo, the libelant interposing no claim, and making no objection, although aware of the delivery of the vessel to Bryant & Co. The libelant was a ship-painter, and was engaged, when he performed the work for the Plymouth, in painting other vessels in the ship-yard of Lafronier & Stevenson, with whom he kept a general account of work and cash payments. The painting of the Plymouth was at the request of Lafronier & Stevenson, and amounted in all to about thirteen hundred dollars, upon which five hundred had been paid, and credited to Lafronier & Stevenson when the propeller was delivered to Bryant & Co. Subsequently, Lafronier & Stevenson failed in business, and the libelant institutes this action against the vessel for the balance due.

Miller & Campbell, for libellant, contended: (1) That there was a maritime lien, inasmuch as the owners resided in Buffalo, and the work was on their vessel. There was no owner until the vessel was finished; and when finished, by the contract she was owned in a foreign port. In support of this proposition, the counsel cited 3 Kent, Comm. 132, 143; Conk. Adm. 56; The Hull of a New Ship [Case No. 6,859]; [Gibbons v. Ogden] 9 Wheat. [22 U. S.] 65. (2) If the libellant had not a maritime lien for the painting, he acquired such lien under the local law of Ohio, which will be enforced in the United States court. Swan, St. Ohio, 185, 551; Conk. Adm. 57; De Lovio v. Boit [Case No. 3,776]; Read v. Hull of a New Brig [Id. 11,609]; The Nestor [Id. 10,126]; Davis v. New Brig [Id. 3,643]. (3) The allegations of the answer unsupported, because the testimony of Lafronier & Stevenson is incompetent, and should not be received.

Contra, Lathrop & Duffield, who replied: (1) That the ownership of the Plymouth, when the debt was contracted, was in Lafronier & Stevenson; Bryant & Co. having no interest until she was finished and delivered. Mucklow v. Mungles, 1 Taunt. 318; Oldfield v. Lowe, 9 Barn. & C. 73; Simmons v. Swift, 5 Barn. & C. 857; Atkinson v. Bell, 8 Barn. & C. 277; Clarke v. Spence, 4 Adol. & E. 488; Laidler v. Burlinson, 2 Mees. & W. 602; 4 Rawle, 260; 7 Johns. 473; 11 Wend. 135; 6 Pick. 209; 9 Pick. 500. (2) No lien given by the law of Ohio. Jones v. The Commerce, 14 Ohio, 409. (3) The interest of La-

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

fronier & Stevenson balanced, and therefore competent.

OPINION OF THE COURT. 1. Under the proofs submitted, the libellant acquired no maritime lien. His contract was with Lafronier & Stevenson, to whom alone he gave credit. Bryant & Co., had no property in the vessel until delivered; and the work, for which the suit is instituted, was performed by the libellant before the vessel was delivered. Cleveland was her home port, when in process of construction, and the fact that the libellant kept a general account with Lafronier & Stevenson for painting the various vessels built by them, and that he was engaged in painting other vessels at the same time with the Plymouth, shows, that he looked to them for his payments, and not to the future vessel. Until completed, there was no vessel in existence on which a maritime lien could attach. The material man and his employer resided at Cleveland, and not until after her first voyage was her home port at Buffalo. So far, therefore, the libel sets forth a claim for work and materials, furnished at a home port, and, consequently, created no lien. Abb. Shipp. 143, note.

2. No lien was given by the statutes of Ohio. The mechanics' lien law of that state (Swan, St. c. 69), passed March 11, 1843, creating a lien in favor of mechanics, does not apply to this case, as the pre-requisite acts to perfect the lien, prescribed in the substitute for section 7, have not been complied with. And the statute of 1840, commonly called the "Boat and Vessel Law," according to the construction of the supreme court of Ohio, gives no such lien. Jones v. The Commerce, 14 Ohio, 409.

3. Lafronier & Stevenson, under the circumstances, are considered by the court as competent witnesses. Their interest, in this controversy, is balanced. They are answerable to the libellant for the amount claimed, should he fail in this suit; and should he recover—Bryant & Co., having paid for the propeller according to contract, they would be obligated to refund them the amount recovered here. Libel dismissed.

Case No. 12,545.

SCOTT v. ROSE.

[2 Lowell, 381.] [1]

District Court, D. Massachusetts. Dec., 1874.

SEAMEN—WAGES—ABSENCE WITHOUT LEAVE—JUDICIAL DISCRETION—ENTRY IN LOG BOOK—REPEAL OF STATUTES.

1. The act of 20th July, 1790, § 5 (1 Stat. 133), so far as relates to absence without leave, and an entry thereof in the log-book, was repealed by the statute of 7th June, 1872, § 51, &c. (17 Stat. 273); and, if that statute is repealed, as to coasting voyages, by St. 1874, c. 260 (18 Stat. 64), the repeal does not affect rights accrued before the repeal.

[Cited in Ross v. Bourne, 14 Fed. 859; Welcome v. The Yosemite, 18 Fed. 384; Brink v. Lyons, Id. 607; U. S. v. Buckley, 31 Fed. 808.]

[Cited in Eddy v. O'Hara, 132 Mass. 60.]

2. The forfeiture of wages for absence without leave is left largely to the discretion of the court; and, where such absence was not fully justified, but had caused no pecuniary loss to the master, a small deduction from the wages was made.

[Cited in Brink v. Lyons, 18 Fed. 607.]

[This was a libel for wages by W. Scott against H. Rose.]

C. G. Thomas, for libellant.

F. Dodge, for respondent.

LOWELL, District Judge. This little case involves some nice points of law and fact. The libellant proceeds for wages said to have been earned in 1873. It appears that the libellant lives in Baltimore, and that he was employed as cook on board the brig Chimborazo, of which the defendant is one of the owners, in a considerable number of coasting voyages from Massachusetts and Maine to Baltimore and other Southern ports. Twice it happened that he stayed away from the ship in Baltimore, under circumstances which the respondent contends were such as to forfeit the wages due him. On the first occasion the master had hired the vessel by a parol charter, which, by the common law as administered in Massachusetts and Maine, would render the charterer alone responsible for the wages of that voyage. I agree with the opinion of Judge Ware, that the general owner, who has received his share of the freight, is liable in admiralty for the wages, notwithstanding such a charter. I do not now enlarge upon that topic, because my decision in this case does not turn upon that question.

In the conflict of evidence, I think one thing is tolerably certain, that the libellant is entitled to thirteen dollars as wages, which the owners were to pay, because they had been earned while the vessel was lying in Boston, before the master had taken her on shares. This was the written statement of the master at the time, given to the libellant, now produced in court, and admitted to be genuine. The master, as between himself and the owners, was the only person who suffered any loss by the absence of the libellant from the vessel, because he was to furnish a cook as well as all other seamen; and, therefore, taking the defence precisely as it is put, the absence cannot affect the right to wages earned under another contract with different parties, and accrued before the master chartered the vessel. I cannot see my way to decree more than this sum in respect to this voyage, and that sum is due on any possible construction of the law.

The second voyage was under a different master, who has testified upon the stand.

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

The voyage was from Belfast, in Maine, to Baltimore, and back to a Northern port of discharge, for which articles were signed. The master says that the libellant, being given leave of absence on Saturday, to extend through Sunday, did not return until Wednesday; that on Monday night the master entered the libellant as a deserter in the log-book, and on Wednesday morning hired another cook. When the libellant returned, he said his wife had been ill, and there was some discussion about that, but the master refused to take him back. The articles and log-book were lost in the brig on her return trip. There was remaining due to the libellant at this time, according to the master's computation, about thirty-four dollars. The contention of the defendant is that the wages were wholly forfeited by a statutory desertion.

I am of opinion that Act 1790, § 5 (1 Stat. 133), so far as relates to absence without leave and an entry thereof in the log-book, was repealed by St. June 7, 1872, § 51, &c. (17 Stat. 273). These sections have always been construed to apply to all voyages, and not merely to those mentioned in section 12 of the act; and it is clear that they are of a general nature, and there is nothing to confine or limit their application, excepting that section 52 requires an entry of absences to be made in the "official log-book," and section 58 only requires such log-books to be kept in foreign voyages, or those between the Atlantic and Pacific coasts. But this mere incidental discrepancy cannot vary the construction of this part of the law. It may, perhaps, excuse the officers from making the entries in the ordinary log-books; but this is the extent of its effect, if it has any.

It is said that by St. 1874, c. 260 (18 Stat. 64), coasting voyages are taken entirely out from all the provisions of the statute of 1872; and this seems to be so. But that statute cannot retroactively affect the civil rights of these parties, which were fixed before the repealing act was passed, though it might cut off any criminal penalties, which could be enforced only by virtue of that act.

I conclude, then, that there was no forfeiture of the whole wages under the statute of 1790, but that the case must be decided by section 51 of the act of 1872, which leaves the forfeiture very largely to the discretion of the court. If the libellant's wife was so ill that he could not properly leave her, he should have sent word to the master. He says he hired some one to go and inform the master; but this seems to be doubtful. Still the absence was not very serious, and was not in any sense a desertion by the maritime law, and there is no evidence that the master suffered any pecuniary loss, though he must have been put to some inconvenience. His new cook appears to have been hired at five dollars a month less than the wages of the libellant.

Upon the whole, I think a deduction of ten dollars a sufficient penalty for this absence. This leaves due the libellant, on the first voyage, $13; on the second, $23; total, $36. Decree for $36 and costs.

Case No. 12,546.

SCOTT v. RUSSELL.

[1 Abb. Adm. 258.] [1]

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

SEAMEN—WAGES—DUTY TO SHIP—SMUGGLING—BARRATRY—SUBTRACTION OF WAGES.

1. For a seaman wilfully to do any act which puts the vessel in jeopardy,—e. g. for one to violate a notorious excise law by smuggling,—is a breach of the duty which he owes to the ship.

2. Such breach of duty may be considered in diminution or in bar of the seaman's wages; it being an offence in the nature of barratry, causing loss and delay to the vessel, for which he would justly be subject to make amends, by forfeiture or subtraction of wages.

[Cited in The Horace E. Bell, Case No. 6,702; The T. F. Whiton, Id. 13,849.]

This was a libel in personam, by John Scott, against William H. Russell, master of the ship Niagara, to recover for seamen's wages. It appeared that the libellant, a resident of Liverpool, shipped, at the port of New York, on board the Niagara, as cook, for a voyage to Liverpool and back, and earned wages on the voyage. In defence it was shown, that while the vessel was yet in New York, he carried on board of her, clandestinely, a large package of tobacco, two feet long and ten inches wide, crowded full. It was also proved, that on the arrival of the ship in Liverpool, forty or fifty pounds of tobacco were found under the cook's caboose, crowded beneath the floor, and were there detected by the custom-house searchers, and the ship was in consequence detained for several days, under the provisions of Act 8 & 9 Vict., which prohibits the smuggling of tobacco into the country under penalty of forfeiture of the vessel. No proof was given of the amount of loss incurred by the owner in consequence of this detention.

Alanson Nash, for libellant.

(1) There is no proof that the tobacco found under the galley at Liverpool was that brought on board at New York by the libellant; nor that the libellant was in any way interested or concerned in the tobacco found under the galley, or in placing it there.

(2) There is no evidence that the master or owner suffered any damage on account of the finding the tobacco at Liverpool. There is no proof that any penalty was paid, nor any proof that the detention of the vessel was occasioned by the finding of the tobacco.

(3) If it were proved that damage had been incurred in consequence of the conduct of the libellant, as contended, they could not be off-set in this cause. The damages sug-

[1] [Reported by Abbott Bros.]

gested are only matter of off-set. The circumstances alleged do not constitute either a payment to the libellant or a forfeiture; or if they were a forfeiture, it could only apply to wages antecedently earned, and could not operate as a prospective punishment. Cloutman v. Tunison [Case No. 2,907]; The Rovena [Id. 12,090]; Abb. Shipp. 767.

Burr & Benedict, for respondent.

(1) The fraudulent misconduct of the libellant forfeited his wages.

(2) The damages sustained in this case may be set-off against the wages. Willard v. Dorr [Case No. 17,680]; Abb. Shipp. 653, note; Brown v. The Neptune [Case No. 2,022].

BETTS, District Judge. It is sufficiently proved that the libellant clandestinely carried on board the vessel in New York a considerable quantity of tobacco, and that, immediately on the arrival of the vessel in Liverpool, a very similar quantity was found secreted under the caboose occupied by him as cook. This is, I think, sufficient evidence that he took on board the tobacco there detected, and that his misconduct caused the arrest of the vessel. If it were the fact, as suggested by counsel, that there were two distinct parcels of tobacco discovered, it would not have been difficult for the libellant to have produced evidence tending to show what disposal was made by him of the portion which it is amply proved he carried on board. In the absence of any evidence of that character, it is fair to presume that the parcels were the same; especially as the place of concealment was peculiarly accessible to the libellant.

For a seaman wilfully to commit an act of dishonesty or fraud, which exposes the vessel to jeopardy, is a breach of the duty and fidelity which he owes to the ship. Such act amounts to barratry. (3 Durn. & E. [3 Term R.] 277; 2 Caines, 222; Wesk. Inst. tit. "Barratry"), and may be considered in diminution or in bar of his wages (Curt. Merch. Seam. 118). The wrong may be used by the ship-owner to countervail the seaman's suit for wages, without resorting to a cross-action to that end. The libellant, if not a British subject, was shipped in a British port, and must be presumed cognizant of a law so notorious as that smuggling tobacco into Great Britain subjects the vessel to the danger of confiscation. Carrying the tobacco on board clandestinely, and keeping it closely concealed in port, imports his consciousness that the act was unlawful. His conduct must, therefore, be regarded as a gross violation of duty, attended with expense and delay to the ship, for which it is proper to impose a subtraction of wages by way of correction and amends.

As, however, the respondent has not proved the amount of loss occasioned to the ship by the misconduct of the libellant, (though estimates are given which import that it must have greatly exceeded the whole amount of wages earned,) the court is disposed to abate the wages only in part, and with a view to operate as a proper check to seamen, rather than to recompense the owner in this case. The decree will therefore be, that the libellant recover the wages due him on the voyage out and back, but without costs as against the respondent, and with a deduction of $25 for his unfaithful conduct and breach of duty in attempting to smuggle tobacco in the ship on the voyage. Decree accordingly.

SCOTT (SIMMS v.). See Case No. 12,871.

SCOTT (THOMAS v.). See Case No. 13,910.

SCOTT (THOMPSON v.). See Case No. 13,975.

SCOTT (TRACY v.). See Case No. 14,126.

SCOTT (UNITED STATES v.). See Cases Nos. 16,241 and 16,242.

Case No. 12,547.

SCOTT et al. v. WIDDINGTON.

[1 McLean, 193.] [1]

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

WRIT OF RIGHT—TITLE ALLEGED—PROOF—VARIATION.

This was a writ of right brought by Robert E. Scott, Susan Scott and James C. Madison, citizens of Virginia, in which they demanded of the defendant [Henry Widdington] the land in controversy, &c. whereupon the said Robert G. Scott and Susan Scott say that they have a right to the farm and tenement aforesaid, with the appurtenances, and offer proof, &c. and issue, &c. After the evidence was heard, the defendant's counsel moved the court to instruct the jury to find for the defendant, as the evidence did not correspond with the title alleged in the count, the demandants having sued and counted as three separate demandants, each equally interested, and entitled to the land in contest: whereas the proof is of title in Susan R. Scott and James C. Madison only, or of title in the said Robert E. Scott and Susan his wife, with the said James C. Madison in fee; and in Robert E. Scott for life, and said Susan in remainder, after the death of Robert E. Scott.

OPINION OF THE COURT. In this action great strictness is observed. The proof must correspond with the count. As the issue is on the title, and not on the right of possession only, as in the action of ejectment, the evidence of title must strictly conform to the title as set out in the count. And the court think that there is in this case such a variance as must be fatal to the plaintiffs in their action.

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

The plaintiffs' counsel asked leave to suffer a non-suit, which the court granted, with the understanding that the defendant's counsel should be heard against the right of the demandants to suffer a non-suit in this action.

Case No. 12,548.

SCOTT v. WISE.

[1 Cranch, C. C. 473.] [1]

Circuit Court, District of Columbia. Nov. Term, 1807.

IMPRISONMENT FOR DEBT — PRISON-BOUNDS BOND —ASSIGNMENT.

A prison-bounds bond may be assigned by a deputy-marshal.

THE COURT (DUCKETT, Circuit Judge, absent) decided, upon general demurrer, that an assignment of a prison-bounds bond by the deputy-marshal, in the name of the chief marshal, was a good assignment. The assignment, on oyer, appeared to be signed "R. Moss, Deputy-Marshal, for D. C. Brent, Marshal of the District of Columbia." See Virginia law of 24th November, 1792 (page 119, § 2).

SCOTT (WRIGHT v.). See Case No. 18,092.

Case No. 12,549.

SCOTT v. The YOUNG AMERICA.

[Newb. 101.] [2]

District Court, D. Michigan. 1856.

COURTS — FEDERAL JURISDICTION — ADMIRALTY — NAVIGABLE WATERS — CANALS.

1. The district courts of the United States derive their jurisdiction from the constitution of the United States and the acts of congress made in pursuance thereof.

2. The second section of the third article of the constitution of the United States, which declares that the judicial power of the courts of the United States "shall extend to all cases of admiralty and maritime jurisdiction," embraces those subjects, whether of contract or tort, which, at the time the constitution was adopted, under the general maritime law, were the appropriate subjects of the jurisdiction of admiralty courts.

3. The act of congress of the 26th of February, 1845 [5 Stat. 726], did not enlarge the jurisdiction of the national courts as to questions of admiralty.

4. The term "navigable waters," used in the act of congress of 26th February, 1845, is not to be understood in the same sense as "natural streams;" and must be held to include an artificial communication such as the Welland canal.

[Cited in The Avon, Case No. 680.]

The libel in this case was filed by [Dwight Scott] the owner of the schooner Constitution to recover damages resulting to the schooner from a collision with the propeller, in the month of August, 1855, while the schooner was lying windbound in the Welland canal. The usual allegations of carelessness and negligence on the part of the libeled vessel were contained in the libel. At the time of the collision the schooner was bound with a cargo of coal, upon a voyage from Erie, a port on the south shore of Lake Erie, in the state of Pennsylvania, to Toronto, a port on the north shore of Lake Ontario, in the province of Upper Canada. The Welland canal is the only navigable water communication between Lakes Erie and Ontario. No appearance having been made on behalf of the propeller, her default was entered and the libel taken as confessed. A motion was subsequently made, in behalf of the American Transportation Company, owner and claimant of the propeller, to set aside the default and order pro confesso, and for leave to file an answer. This motion was urged on the sole ground that the court had no jurisdiction of the cause, inasmuch as the collision alleged did not occur either "upon the lakes, or the navigable waters connecting the lakes." To sustain this position it was contended that the Welland canal, being an artificial communication, was not "navigable water," within the meaning of the act of 1845.

Jacob M. Howard, in support of the motion.

The tort complained of was not committed on the lakes, nor on any of the waters naturally connecting them. To apply the jurisdiction given by the act of 1845 to every case arising upon waters which may form an artificial communication between the lakes, would be to give the admiralty jurisdiction of any contract or tort that might arise upon a canal connecting Lake Michigan with Lake Huron, Lake Erie or Lake Superior; or connecting Lake Huron or Lake Erie with Lake Ontario, through Canada, no matter in what circuitous route that connection might be made. It could not have been the intention of congress to confer such a strange and anomalous jurisdiction upon the district courts. It will, of course, be conceded that the court could not take cognizance of a case arising upon a stream from the interior of Michigan into Lake Erie, nor of one arising upon a stream flowing from the interior into Lake Michigan, for the reason that neither stream would be water connecting two lakes. But the construction claimed by the libelant in this case would give the court jurisdiction upon both streams the moment an artificial channel capable of navigation should connect those streams at their fountains in the interior. It is submitted that the powers of the court cannot depend upon any such uncertain and contingent circumstances, and that the "navigable waters connecting the lakes," contemplated by the act of 1845, must be such waters as are made navigable by nature; otherwise almost any canal connecting the navigable waters, would furnish ground of jurisdiction. No statute of the United States has ever applied the term "navigable

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

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

waters," to an artificial channel or canal, but only to natural streams capable of being navigated. See Ben. Adm. § 236, and statutes there referred to. At the common law rivers were held to be navigable only up to the head of tide-water. 1 E. C. L. 240; 5 Pick. 199; Ang. Water Courses, § 545. It is submitted that the words "navigable waters connecting," etc., mean natural, and not artificial channels, and that as the tort complained of by the libelant is alleged to have occurred on the Welland canal, it is not cognizable by this court. The navigable waters connecting the lakes are well known—they are the rivers St. Marie, St. Clair, Detroit and Niagara—all well known channels of navigation, as well known as the Straits of Gibraltar, the Bosphorus and the Dardanelles. These "navigable waters" must be taken to limit the extent of the jurisdiction of the admiralty in the same manner as it is limited by the phrases "high seas," or "tide water," in cases arising in the ocean. In such cases the jurisdiction is determined by the place where the cause of action arises; and if it arise within the body of the county the admiralty has no power to redress the wrong. Conk. Adm. 22, 23, &c.

H. K. Clark, contra.

The jurisdiction of this court, in admiralty, in cases of tort, does not depend upon the place where the tort complained of was committed, but upon the employment of the vessel concerned. The act of congress of 1845, on this point, requires that the vessel be "employed in the business of commerce and navigation between ports and places in different states and territories, upon the lakes and navigable waters connecting said lakes." The questions to be determined on this motion are: (1) Was the Constitution employed in the manner contemplated by the act of 1845, when the alleged tort occurred? (2) Does the tort "concern" her? The answer proposed to be filed does not deny either of these questions; but seeks to set up, by way of plea, the simple alleged fact that the place where the tort was committed was within the body of a county within the British dominions. Jurisdiction in our courts extends to everything which the authority establishing the courts enacts. It might have made the place where a contract was made, or tort committed, the test of jurisdiction; but it has not done so. It is not torts committed in such and such places, or in a particular manner, which this court is limited to adjudicating; but torts concerning such and such vessels, while engaged in a particular employment. It is asserted by the respondent, as a fact, that the collision occurred within the limits of a British county, and therefore this court is ousted of jurisdiction. Will not this fact, if available for this purpose, be also available to defeat the jurisdiction of this court in every case where the Welland canal must be employed? This canal is indispensable for the commerce between Lakes Erie and Ontario. If the canal is "navigable water" within the meaning of the act of congress, as regards contracts relating to that commerce, there exists no reason why it should not be so considered as regards torts. If it is not "navigable water," then the provisions of said act do not apply to commerce and navigation between those two great lakes. It will not be insisted that the cause of action in this case is in the nature of an intransitory action, which cannot be brought in a jurisdiction foreign to that wherein the cause of action arose. This is sufficiently met by the case of Smith v. Cowdry, 1 How. [42 U. S.] 28. The ground must be, if sustained at all, that the cause of action having occurred "within the body of the county," it is not merely without the jurisdiction of this court, but also without the jurisdiction of any admiralty court; and this proposition is fully met by the case of Waring v. Clark, 5 How. [46 U. S.] 441. This case disposes of the infra corpus comitatus restriction upon the jurisdiction of the admiralty courts; and the "ebb and flow of the tide" restriction was also swept away in the case of The Genesee Chief, 12 How. [53 U. S.] 449; Ben. Adm. § 312.

WILKINS, District Judge. The question presented in this case, is one of jurisdiction, and arises on a motion made to set aside a default regularly obtained three months before, and for leave now to file an answer. The libel was brought to recover damages, which resulted from a collision between the Young America, and the schooner Constitution, of which the libelant was the proprietor. It states, "that the schooner started from the port of Erie, in the state of Pennsylvania, on the 20th of August last, with a cargo of coal bound for Toronto on Lake Ontario; and that while she was lying windbound on the heel path side of the Welland canal, and against its bank, she was carelessly run into by the propeller," and greatly damaged. The proposed answer shows, that the "alleged collision occurred within the Welland canal," an artificial water communication, connecting Lakes Erie and Ontario, "and that the said canal is situated wholly within one of the counties of the province of Canada West," a jurisdiction foreign to that of the United States.

This court derives its jurisdiction from the constitution of the United States, and the acts of congress made in pursuance thereof. The second section of article 3 of the constitution of the United States, in defining the judicial power of the courts of the United States, declares that it "shall extend to all cases of admiralty and maritime jurisdiction:" which manifestly embraces those subjects, whether of contract or tort, which were then, under the general maritime law, the appropriate subjects of the jurisdiction of courts of admiralty. There were cases upon, and contracts pertaining to the navigation of the high

seas, in contradistinction to contracts made, or to be executed on land, or to torts of the same character as to locality, comprehending navigable rivers in which the tide ebbed and flowed. The act of congress of the 26th of February, 1845, did not, as has been held by the supreme court in the case of The Genesee Chief [supra] enlarge the jurisdiction of the national courts as to questions of admiralty, but merely conferred a new jurisdiction on the district court. It declares that these courts shall "have the same jurisdiction in matters of contract and tort, arising in or upon vessels of certain character, which at the time were employed in business of commerce and navigation between ports and places in different states and territories, as was then exercised by the district courts as to vessels employed in navigation and commerce on the high seas."

It is contended by the respondent, that the tort complained of was not committed on any waters naturally connecting Lakes Erie and Ontario, but on an artificial communication, and without the jurisdiction of the United States. The force of this objection rests upon the construction of the declaratory words of the statute. Jurisdiction is given over contracts and torts pertaining to vessels navigating between "different ports in different states and territories, upon the lakes and the navigable waters connecting said lakes." A natural stream properly signifies a river flowing from its source to the ocean, or an outlet between one interior sea or lake and another, such as the rivers Mississippi, St. Clair and the Detroit. The statutory language is more comprehensive, and when we take into consideration the date of the statute, and the history of the Welland canal, with which great internal improvement and commercial facility we must suppose the legislature to have been acquainted, the phrase "navigable waters" connecting said lakes, cannot otherwise be construed than as embracing the Welland canal, the only "navigable waters" connecting Lakes Erie and Ontario, known at the time the act was passed.

It is conceded in the argument, that at the time the collision occurred, the schooner was engaged in navigating between a port on Lake Erie, and another port on Lake Ontario. These ports were in different states and territories. It is also conceded, that the Welland canal was the only water communication between the lakes. If this canal, then, is held not to be "navigable waters," within the meaning of the act, it would operate to exclude a large portion of the commerce of the lower lakes. Shall there then be no remedy for breach of contracts and torts, arising in the navigation and commerce between these lakes? For many years before the law of 1845 was enacted, a great and growing commerce was carried on between the different states bordering on both of them. In legislating, then, upon the subject, with the view of conferring jurisdiction, was it the intention to exclude this commerce, from the protection afforded by the law, to the commerce of the upper lakes, connected by rivers or natural waters. If such was the intention, wherefore the language employed, navigable waters, and not navigable rivers? But the act does not make the jurisdiction of the court to depend upon the locality or place where the tort was committed. That rests upon the character and the employment of the vessel. And if this vessel was of that character, and was engaged at the time of the collision, in this description of commerce, we think the jurisdiction attaches. The court, therefore, refuses to open the default, and denies the leave to answer.

[The motion was renewed upon affidavits, but was denied. Case No. 12,550.]

Case No. 12,550.

SCOTT v. The YOUNG AMERICA.

[Newb. 107.] [1]

District Court, D. Michigan. 1856.

PRACTICE IN ADMIRALTY — DEFAULT — MOTION TO VACATE—WHAT MUST BE SHOWN—AFFIDAVIT—COLLISION.

1. A rule of practice established by virtue of an act of congress, has the force of a statute.

2. Upon a motion to vacate an order pro confesso, and for leave to answer, the respondent must satisfactorily account for his laches, and exhibit by answer or affidavit, a meritorious defence.

3. Where the respondent is a foreign transportation company, and the respondent's agent and proctor residing in the district where the libel is filed, were not apprised of the facts upon which to base an answer until some months after the libel was filed, a motion to dismiss the libel for want of jurisdiction, having in the meantime been pending, *held*, a satisfactory excuse for the respondent's laches.

4. An affidavit read with a view of showing a meritorious defence, upon a motion to set aside default and for leave to answer, in a case of collision, which does not deny the collision, and states the opinion of the affiant, that the collision was not occasioned by the negligent conduct of the master and officers of the vessel libeled, but was the result of unavoidable accident, without setting out the facts upon which the opinion is based, *held* insufficient.

This was a case of collision. [The libel was filed by Dwight Scott, owner of the schooner Constitution, against the propeller Young America.] A motion was made in the case to vacate an order taking the libel as confessed, and for leave to answer, based upon the sole ground that the alleged collision, as appeared from the libel, occurred upon waters beyond the jurisdiction of the court. The facts relied upon in support of this motion, and the opinion of the court thereupon, are reported [Case No. 12,549]. The court having decided to retain jurisdiction, the motion was renewed upon affidavits, which, it was contended, presented and made out a case of meritorious defence. The affidavits read were

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

those of Jacob Howard, one of the claimant's proctors, and Lewis W. Bancroft, master of the propeller. Mr. Howard's affidavit, after setting out the facts which had delayed the preparation of an answer, states that "from the statements he (the affiant) has received from Bancroft (the master), he believes the libelant has no just and valid claim for damages in this case; or if he has, the amount thereof will be materially reduced by the evidence which the owners of the Young America will be able to produce on the trial." Captain Bancroft, in his affidavit, alleges "that at the time of the collision, he was on board the propeller; that he was standing on the top of the pilot-house of the propeller, from which he could see, and did see all that took place respecting said collision: that the same was not occasioned by the careless, negligent, unskillful or improper management of said propeller, of this affiant, or of the crew thereof; but that the same occurred by unavoidable accident: that immediately after the same occurred, he went on board the Constitution (the vessel collided with), and examined the injury done to her by said collision, and is confident that the amount of damage to her occasioned thereby, could not, and did not, exceed fifty dollars: that the Constitution was by no means cut down to the water's edge, as stated in the libel, but that all the damage done to her consisted in the breaking off of only about three feet of her taffrail, and bruising her counter, which was occasioned by the stem of the propeller coming in contact with the stern of the Constitution, and that the schooner was hit by no other part of the propeller, except by her stem."

Howard & Mandell, in support of the motion, relied upon and cited the 29th rule of the rules of practice in admiralty cases, prescribed by the supreme court of the United States, which is as follows: "If the defendant shall omit or refuse to make due answer to the libel upon the return day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken pro confesso against him, and the court shall proceed to hear the cause ex parte, and adjudge therein as to law and justice shall appertain. But the court may, in its discretion, set aside the default, and upon the application of the defendant, admit him to make answer to the libel at any time before the final hearing and decree, and upon his payment of all the costs of the suit, up to the time of granting leave therefor." It was contended that the affidavits of Mr. Howard and Capt. Bancroft presented a case properly calling for the exercise of the discretion given to the court by the latter part of this rule.

Lockwood & Clark, contra.

WILKINS, District Judge. The application is made to the court to set aside and vacate the order of pro confesso obtained in this case, under the 29th rule of practice, on the instance side of the district court. This rule has the force of a statute, having been established for the government of the court by the act of congress of August, 1842. There having been no final hearing and decree, it is within the discretion of the court to set aside the default, treating it as a mere order, which may be vacated on a sufficient showing by the defendant, and "upon the payment of all costs of the suit, up to the time of opening the default." The language of the rule is unequivocal and absolute, and must control the action of the court. All costs must be paid, if the discretion of the court is exercised in granting the request of the respondent.

The sufficiency of the showing embraces two considerations essential to the vacation of the order and granting leave to answer. 1st. The respondent must satisfactorily account for his laches: and 2d, exhibit, either by answer or affidavit, a meritorious defence. The libel was filed on the 29th of September, 1855. The vessel was attached on the 11th of October following, and default entered in November. A motion was made to set aside the default on the 12th of November, on the exhibition of an answer, professing ignorance in regard to the facts of the collision, and specially setting forth a plea to the jurisdiction of the court. It is proper to state, in this relation, that at a session of the court, on the first week of November, the respondent, on making his motion to vacate the order pro confesso, informed the court that the design was simply to raise the question of jurisdiction, and by the direction of the court, presented the answer as a basis for his motion, which the court ordered on file. The court will not, therefore, under these circumstances, consider the present motion as coming within the ruling by Lord Kenyon, in Greatheard v. Bromley, 7 Term R. 455.

The original motion stood unargued until the 4th of February, 1856, neither party pressing its decision; and on the first day of the March term, was denied by the court. Mr. Howard, in his affidavit, states "that he was employed as counsel in October, but was not placed in possession of the facts of the collision, so as to prepare the answer, until the first week in March; and then, for the first time, they were communicated to him by Captain Bancroft, who commanded the propeller at the time of the collision." These circumstances, with the further fact that the respondent was a foreign transportation company, whose agent here was not apprised of the facts attending the alleged collision until March, satisfactorily accounts for the laches. In an instance court, the time in which the first motion was held, under the mutual amicable understanding of counsel, seems too protracted, but the delay is sufficiently explained. But the affidavit of Bancroft, on which the court must rely, does not disclose a meritorious defence.

The libel charges a collision, and damages consequent. The collision is not denied, but fully conceded by the affiant, who states that "the stem of the propeller collided with the stern of the schooner, breaking her taffrail and bruising her counter." The opinion of the affiant, that this collision was not occasioned by the negligent conduct of the captain and his crew, and was an unavoidable accident, is not the assertion of a fact on which an indictment for perjury could be predicated. The affidavit is more specific as to the damages sustained—averring that they did not exceed $50—but, as to this question, it can be settled under the 44th rule of the court, with as much accuracy, and on proofs by both parties; and the ends of justice as certainly attained, as if the court should now open the default, and permit an answer according to the affidavit of Bancroft, to be filed. The report of the commissioner, when confirmed by the court, will constitute the decree. Motion denied.

SCOTT, The THOMAS A. See Cases Nos. 13,920 and 13,921.

Case No. 12,551.

The SCOTTISH BRIDE v. The ANTHONY KELLY.

[28 Leg. Int. 325;[1] 4 Am. Law T. Rep. U. S. Cts. 225; 8 Phila. 151; 1 Leg. Gaz. Rep. 289; 3 Leg. Gaz. 334.]

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

COLLISION—VESSEL AT ANCHOR—FAILURE TO DISPLAY LIGHT.

1. The failure to display the exact statutory light by a vessel at anchor, is not sufficient contributory negligence to prevent recovery of damages for a collision occasioned by the reckless navigation of another vessel.

[2. Cited in The J. W. Everman, Case No. 7,591, to the point that, as a general rule, the presumption of fault is with the moving vessel.]

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

In admiralty.

Morton P. Henry, for the Anthony Kelly.

J. Warren Coulston, for the Scottish Bride.

McKENNAN, Circuit Judge. This is a case of collision in which cross libels have been filed, each party seeking to cast the whole blame of the disaster upon the other. The district court made a decree in favor of the Anthony Kelly and dismissed the libel of the Scottish Bride. I think this decision was right. Presumptively the Scottish Bride was in fault. The collision occurred shortly before daylight in the breakwater harbor in Delaware Bay, where the Anthony Kelly and a number of other vessels were at anchor, and where there was abundant anchorage ground and sea-room for any necessary evolution. A vessel then having the control of her own movements, navigated with ordinary skill and care, it would seem at least—ought to have been able to keep out of the way of a vessel at rest. This presumption is strongly reinforced by the proofs.

Did the Anthony Kelly contribute to the injury complained of? The only ground on which such an imputation can rest is the alleged defectiveness of her signal light. She displayed a white signal light, as required by the act of congress [13 Stat. 59], indicating that she was at anchor; but in the dimensions and condition of her lantern she did not conform to the statutory requirement. In this respect only did she fall short of her duty. Prima facie then she also was in fault and must be adjudged to pay her proper proportion of the damages unless it is apparent from all the circumstances that her delinquency did not co-operate in causing the collision; in other words, that it was altogether due to the unskillful or careless navigation of the moving vessel. The Anthony Kelly was not the only vessel at anchor in the harbor. A number of vessels were near her whose lights were visible. Some of these were confessedly seen by the Scottish Bride, and thus she was sufficiently admonished of the necessity of cautious movement. And yet her course was directed to a place of anchorage among them, and was pursued with a rate of speed from which the danger of collision was inseparable. To this the collision complained of is mainly to be ascribed. At the distance at which the act of congress prescribes that a signal light should be discernible, it is a fair inference that the course or speed of the Scottish Bride were not controlled or influenced by the observation or the failure to observe any signal light. Her place of anchorage must have been selected, and her movements to reach it must have been determined, only when she came near enough to the Anthony Kelly to be able to see her light. And this I am led to the conclusion from the exhibition of the lights at the hearing in court, she could do at the distance of several hundred yards if she had kept a proper lookout. Sufficient space and warning were thus given her to avoid a collision, but heedlessly or wilfully she did not avail herself of them, and so she alone is blamable for the consequences. This culpability is not mitigated by the technical fault of the Anthony Kelly. Practically, then, no contributory delinquency is imputable to the Anthony Kelly, but to the incautious or reckless navigation of the Scottish Bride the injury complained of is altogether to be ascribed. This was the conclusion reached by the district court, and its decree dismissing the libel of the owners of the Scottish Bride against the owners of the Anthony Kelly is affirmed. And in the libel of the owners of the Anthony Kelly against the owners of the Scottish

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

Bride it is now decreed that the libellants recover of the respondents and their stipulators the sum of eighteen hundred and forty-three dollars and two cents, with interest from March 1, 1870, and costs.

SCOTTISH COMMERCIAL INS. CO. (SHAW v.). See Case No. 12,723.

SCOVEL (HALL v.). See Case No. 5,945.

Case No. 12,552.

SCOVILL et al. v. SHAW et al.

[4 Cliff. 549.] [1]

Circuit Court, D. Massachusetts. May Term, 1878.

BANKRUPTCY—ASSIGNEES—METHOD OF APPOINTING—JURISDICTION OF CIRCUIT AND DISTRICT COURTS—LIMITATION OF ACTIONS.

1. Assignees in bankruptcy are appointed by the creditors of the bankrupt, and the provision is, that as soon as the assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, and that such assignment shall relate back to the commencement of proceedings in bankruptcy.

2. Circuit courts have concurrent jurisdiction with the district courts of the same district, of all suits at law or in equity which may be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee touching any property, or rights of property, of said bankrupt, transferable to, or vested in, such assignee, but the same section provides that no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the said property, in any court whatsoever, unless the same is brought within two years from the time the cause of action accrued to or against such assignee.

3. It was held that this claim was barred by the statute of limitations referred to.

The plaintiffs [Gustavus A. Scovill and others] were the assignees in bankruptcy of the Fort Scott Coal & Mining Co. The defendants [Lemuel Shaw and others] were the executors of Samuel Hooper, who died February 14, 1875, and they were appointed on the 15th of March of that year. By the law of Kansas any corporation may increase its capital stock to any amount not exceeding double the amount of its authorized capital. April 19, 1871, the company increased its stock to $200,000. On October 16, 1872, a further increase of $100,000 was made, and another of the same amount December, 1872. Thus the nominal capital was raised to $400,000. April 2, 1874, proceedings in bankruptcy were begun against the corporation, and the plaintiffs chosen assignees April 29, 1874. March 31, 1876, a petition to assess the capital stock was filed in the court, and an order was issued April 5, 1876, to the stockholders, to show cause why the assessment should not be made. June 10, 1876, a decree of assessment was made, by which every stockholder was assessed $76 per share, less the amount paid in on his stock, and in default of payment the assignees were directed to sue. The assignees were directed to make a call and assessment in conformity with the order of court, and return the same before July 21, 1876. They made the assessment and call July 17, 1876. Suits were then brought against the persons appearing to be stockholders on the books at the time of the failure of the company. The stock was all issued as full paid, the company charging to discount, at the times of the issues, the difference between the amounts received by it and the par of the stock.

McComas & McKeighan, C. W. Blair, and A. A. Ranney, for plaintiff.

Does the two years' statute of limitations of Massachusetts, with reference to actions against executors and administrators, apply? We contend that it does not. The section is as follows: Gen. St. Mass. 491, § 5: "No executor or administrator, after having given notice of his appointment as provided in section 1, shall be held to answer to the suit of any creditor of the deceased, unless it is commenced within two years from the time of giving bond as aforesaid, except in the cases hereinafter mentioned." Section 721 of the Revised Statutes of the United States provides that "the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as the rule of decision in trials at common law in the courts of the United States in cases where they apply." In McCluny v. Silliman, 3 Pet. [28 U. S.] 277, it was decided that, under the act of congress cited, the same effect should be given the statutes of limitations of the several states in the federal as in the state courts, where no special provision had been made by congress upon the subject. Congress has made a special provision, and made a statute of limitations upon the subject of actions by and against assignees in bankruptcy. Whether the act which congress passed includes the actions at bar, or not, is not material, as the fact that action has been taken by congress on the subject excludes state statutes. It was for congress to decide what classes of actions should be subject to limitation, and, having chosen, the legislation of congress cannot be supplemented by state legislatures. Congress had power, under the constitution, to pass the bankrupt act [of 1867 (14 Stat. 517)], and the legislation of a state cannot enlarge, control, or modify the legislation of congress in the exercise of an exclusive constitutional right. The statutes of limitations of the states, as the act of congress provides, cease to operate when the adjudica-

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

tion is made, but no right of action already barred is revived. This is the full extent of the recognition of state limitations. Manifestly, on the defendant's theory that the act of congress includes all actions, the state statute has no application. Let us suppose at the date of the assignee's appointment Hooper's executors had been qualified one year eleven months and twenty-nine days, the assignees would have had one day to make their application, obtain their assessment, and to bring their suit. Congress did not intend to permit such absurdities. We maintain, then, that congress selected the class of cases to which there should be a two years' limitation, and that no state statute can be invoked.

It is claimed that the increase of stock from $200,000 to $300,000, and from $300,000 to $400,000, was ultra vires of the corporation. This might have been a good plea against the corporation, but is not admissible here. The doctrine of estoppel is applied in the following cases in favor of assignees: Payson v. Stoever [Case No. 10,863]; Upton v. Hansbrough [Id. 16,801]. If the increase was in fact invalid, it might have been made good by an amendment of their charter or the subsequent ratification by the legislature. Creditors cannot be placed in a worse position than if that had been done which might have been done. Narragansett Bank v. Atlantic Silk Co., 3 Metc. (Mass.) 287. Certificates required by law to be filed as compliance with the law cannot be disputed. Dooley v. Cheshire Glass Co., 15 Gray, 494. The individual members of a corporation cannot set up their own faults or mistakes against creditors. McHose v. Wheeler, 45 Pa. St. 32. Where a stockholder participates in the proceedings for increase of stock, he cannot question the validity of the acts. Kansas City Hotel Co. v. Harris, 51 Mo. 464. It is well established that the state alone can inquire into the validity of acts done by a corporation, since it is the creature of the state. It cannot be done in any collateral proceeding. If the state sees fit to decline the inquiry, the company or its members cannot institute the investigation when sued by creditors. Ang. & A. Corp. 518, 636; Brouwer v. Appleby, 1 Sandf. 168.

The liability of the stockholders to pay the assignees, who represent the creditors, such portion of the unpaid stock as may be necessary to liquidate the bankrupt's indebtedness, cannot be seriously questioned after the numerous decisions by the supreme court of the United States. The capital stock of a corporation is a trust-fund for the payment of its debts, publicly pledged to all who deal with it. Ogilvie v. Insurance Co., 22 How. [63 U. S.] 387. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Upton v. Tribilcock, 91 U. S. 47.

The capital stock is a substitute for the personal liability which subsists in private partnership. Sanger v. Upton, 91 U. S. 56. No subscription or express promise to pay is necessary. The taking and holding the stock raises and implies promise to pay. Webster v. Upton, 91 U. S. 65, and cases before cited. A corporation cannot give away its stock and issue paid-up certificates. Such action is ultra vires, at least as to those who deal with the corporation. Green's Brice, Ultra Vires, p. 142; Sawyer v. Hoag, 17 Wall. [84 U. S.] 610; Tuckerman v. Brown, 33 N. Y. 297; Ogilvie v. Insurance Co., 22 How. [63 U. S.] 380; Osgood v. Laytin, *42 N. Y. 521. Does the plea of the two years' statute of limitations of the bankrupt act constitute a good defence to their action?

Two questions must be passed on: (1) Does the statute apply at all to recover debts, or enforce a mere money liability on a contract? (2) Did the specific right of action to recover the assessments here sued on accrue to the assignees at the date of the deed of assignment, or when the assessments were made and payment refused? Section 2 of the bankrupt act, as it stood before the adoption of the Revised Statutes, was as follows: "Sec. 2. The several circuit courts of the United States, within and for the district courts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions under this act, and, except when special provision is otherwise made, may, upon bill of petition or other proper process of any party aggrieved, hear and determine the case in a court of equity. The powers and jurisdiction hereby granted may be exercised either by said court or by any justice thereof, in term-time or vacation. Said circuit court shall also have concurrent jurisdiction with the district courts of the same district of all suits, at law or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt, transferable to, or vested in, such assignee; but no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property or rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee; provided, that nothing herein contained shall revive a right of action barred at the time such assignee is appointed." The first part of this section is jurisdictional, giving, first, a superintending and supervisory control to the circuit courts over district courts, and from the action of which no appeal or writ of error lies to the supreme court; and, secondly, concurrent plenary jurisdiction, in a distinct and accurately described class of cases, to the circuit courts. It will be conceded that the latter part of the section operates as a limitation only in the

cases to which concurrent jurisdiction is given. "Touching the property or rights of property aforesaid" sufficiently indicates that.

As to what cases the circuit courts had jurisdiction of by this section there have been several decisions by circuit courts, which all concur in denying jurisdiction to actions necessary to recover debts or money due on contracts, and confining the jurisdiction to actions wherein the defendant's claim, whether assignee or claimant, was adverse as to some interest in dispute. The language employed clearly indicates that the action must relate to something the existence of which is not the subject of the controversy, but which is adversely claimed. This is not so in an action to recover money on a debt. The defendants here do not claim the debt alleged, or any interest in it adversely to the assignee. The controversy is not, in whom is the right of property in the debt? but, is there a debt? If it is decided that there is no right of property, the defendants will not succeed as having an adverse and superior right to the debt, or any interest therein. The language of the act is: "Which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee." The "such person" referred to is the same person before described as an adverse claimant,—in one case plaintiff, in the other defendant. This could not be true as to creditor and debtor. The defendants here could not, in the nature of things, have any action to recover any portion of the assessment from the assignees. The bankrupt act, in section 1, had conferred on the district courts jurisdiction for "the collection of all the assets" of the bankrupt. The studied use of different language, not pertinent to the mere collection of debts, in two sections, one immediately following the other, shows that congress meant to distinguish between different subjects of controversy, having reference more particularly, in section 2, to disputes arising under section 35 of the act of 1867. The words used are not apt words to confer a general jurisdiction. They must be distended materially to admit of such a construction. Statutes are not to be so construed. They must receive the meaning which they naturally, and without strain, convey.

The following decisions construe section 2 as it stood in the act of 1867, before revision: Bachman v. Packard [Case No. 709]; Sedgwick v. Casey [Id. 12,610]; Davis v. Anderson [Id. 3,623]; Smith v. Crawford [Id. 13,030]; Stevens v. Hauser, 39 N. Y. 302; Union Canal Co. v. Woodside, 11 Pa. St. 176. The act of June 22, 1874 [18 Stat. 178], amended section 2 by inserting in the place of the word "same," in line 12, the word "any," and, after the words "claiming an adverse interest," the words "or owing any debt to such bankrupt." If the circuit court had jurisdiction to recover debts before the amendment, the amendment performs no office. It will be claimed, however, that since the amendment the limitation clause of section 2 has been enlarged by the increased jurisdiction given to circuit courts by two things: first, by the intimate connection between the different parts of the section, and by the phrase, in the limitation clause, "touching the property or rights of property aforesaid." Even if section 2, at the date of the amendment, was in force as section 2, it would be more plausible than sound to say that the phrase quoted would refer to debts which were only brought into the jurisdictional clause by the amendment. If the decisions cited are correct, then the limitation clause did not apply to debts. The amendment does not profess to amend the limitation clause. It is left untouched. Statutes, like contracts, are to be construed with reference to the objects sought to be attained and the state of things existing at the time of their adoption. Congress, with the same ease and in the same amendment, could have inserted in the limitation clause, after the phrase "touching any property or rights of property," the words "or any debt owed to the bankrupt." It did not see fit to do it, but left the limitation clause to refer to what it did before. But the defendants are not entitled to the apparent advantage given them by considering section 2 still in force. The amendment of June 22, 1874, never did take effect as an amendment to section 2 as it stood before the adoption of the Revised Statutes. The revision went into effect on the same day of the amendment, June 22, 1874. Rev. St. 1091, 1092.

All acts of congress passed prior to December 1, 1873, any portion of which was embraced in any section of the revision, were repealed by express language. The bankrupt act of 1867 was, of course, passed prior to December 1, 1873, and the revision embraced section 2. Without, therefore, the aid of another section of the Revised Statutes, the amendment of June 22d would fall to the ground. And the same result follows whether the amendment is considered as going into effect before, at the same instant, or after the repeal. By the revision the different parts of section 2 were sent into independent and unconnected sections, unaffected by each other. The jurisdiction clause reappeared in section 4979, the limitation in section 5057. This is the only statute of limitations in force in the bankrupt act, and from it is stricken the word "aforesaid," and the language of the section made more emphatic—that it bars only suits "between the assignee and a person claiming an adverse interest." It cannot be claimed that section 5057 has been amended, nor would section 4979 be affected by the amendment of June 22, 1874, were it not for section 5601, p. 1092, of the Revised Statutes. By the terms of this section it is plain that the act of June 22, 1874, can only apply to, and amend, section 4979. It would seem that every pretence is taken away, by the revision, for contending that the amendment enlarging the jurisdiction also enlarges the limitation section. On the

contrary, the views we have insisted on are strengthened by the consideration that section 4979, as it now stands, divides the suits over which circuit courts have jurisdiction into two classes,—one class being where the claims of the assignee and claimant are adverse as to the subject-matter of the controversy, and the other class being actions to recover debts owed to the bankrupt. Section 5057 applies, by using the same language, only to the first class of actions. There may be reasons here for legislation, and there may not; but there is no ground for judicial intervention. Section 8 of the bankrupt law of 1841 [5 Stat. 446] is, in effect, the same as section 2 of 1867. In the cases of Stevens v. Hauser, 39 N. Y. 302, Union Canal Co. v. Woodside, 11 Pa. St. 176, Carr v. Lord, 29 Me. 54, and In re Conant [Case No. 3,086], it was decided that section 8 of the act of 1841 both as to jurisdiction and limitation applied only to actions where the interest in the subject-matter was adverse.

Against cases cited, construing the eighth section, will be produced only two cases: Mitchell v. Great Works Milling & Manuf'g Co. [Case No. 9,662]; Pritchard v. Chandler [Id. 11,436]. We will be referred to the opinion of Judge Miller, in Bailey v. Glover, 21 Wall. [88 U. S.] 345, in which the strong language of the judge is supposed to favor the construction of the defendants. That decision, however, must be taken in connection with the case itself, which was a suit brought to set aside a conveyance to a fraudulent grantee. In that case the assignee was allowed to maintain his action, although begun more than two years from his appointment, the court holding that the statute did not run until the fraud was discovered by the assignee. In Clark v. Clark, 17 How. [58 U. S.] 315, in which the statute of limitations was pleaded, the supreme court said: "The interest adversely claimed, and which the statute protects, is an interest in a claimant other than a bankrupt."

The second question for the court to decide is when the right to recover the specific amount of money sued for accrued to the assignee. We claim that when the deed of assignment was made to the assignees their right of action against the stockholders depended upon a contingency, viz., whether the other assets of the company would be sufficient to pay its debts; and the amount which they would have a right to sue for depended upon what the difference between the assets and liabilities should turn out to be. The assignees, representing the creditors only in these suits, have no other legal or equitable right than that of recovering such assessment as the bankrupt court may determine necessary to discharge the company's indebtedness. Adler v. Milwaukee Patent Brick Co., 13 Wis. 57; Myers v. Seeley [Case No. 9,994]; Kennedy v. Gibson, 8 Wall. [75 U. S.] 505. This was held by Judge Treat, in Myers v. Seeley [supra]; and also in Chandler v. Keith, 42 Iowa, 99, and Payson v. Stoever [Case No. 10,863]. In both the first two cases the assignee and receiver brought suit with an assessment, and their bills were dismissed, and they remanded the proceedings for an assessment. In both cases the reasons for the necessity of an assessment are ably given, and no court has held otherwise. In the case of Chandler v. Siddle [Case No. 2,594], circuit court of Iowa, a receiver had brought suit. The defendants demurred. Justice Miller, of the United States supreme court, sustained the demurrer, and dismissed the suit for want of an assessment. A cause of action does not accrue until the existence of such a state of things as will enable a person having the proper relations to the property or persons concerned to bring the action. 5 Barn. & C. 269; 8 Dowl. & R. 346. It will be claimed that the right of action of the assignees is like a note payable on demand, on which suit may be brought at once, the suit being held a sufficient demand. There is no analogy. There is more analogy in the case of a note payable at a certain time after demand, in which case a demand is necessary before suit. Little v. Blunt, 9 Pick. 488; Wenman v. Mohawk Ins. Co., 13 Wend. 267.

There must be an assessment by the court, and a failure to pay as ordered by the court, before the statute begins to run. Even as against a corporation, the statute of limitations does not begin to run until a call or assessment is made. Gibson v. Columbia & N. R. Co., 18 Ohio St. 396; Bigelow v. Libby, 117 Mass. 359. Howland v. Edmonds, 24 N. Y. 307, holds that a deposit note given to an insurance company was due when made, but the decision is put upon the express ground that, by the peculiar terms of the act of incorporation, the deposit notes did not represent shares of stock, but were funds upon which the company transacted its business; but intimated that, if the notes "were to be assimilated to the capital stock of other corporations in the quality of permanency, to be kept on foot during the life of the corporation, then it would be necessary to show losses in order to determine what portion of the note should be collected." We also claim that the plea of the statute of limitations is not good, because these suits are brought to enforce a trust. The statute does not run against an express trust until after the trustee has been called upon to execute his trust and he has refused or disavowed the trust. The trustee does not hold adversely to the cestui que trust until this refusal or disavowal. Ball. Lim. 369; Prevost v. Gratz, 6 Wheat. [19 U. S.] 481. In 3 Swanst. 585, Lord Nottingham defines an express trust as a "trust raised or created by the acts of the parties, which are declared either by word or writing, and these declarations are established either by direct or manifest proof or violent and necessary presumption." Tested by this rule there is no difficulty in reaching the conclusion that the defendants, as members of the corporation, are trustees of an express trust, and they did not hold adversely until after the call was made and they refused to pay.

In Payne v. Bullard, 23 Miss. 88, it is held directly that the stockholders could not interpose the plea of the statute of limitations, as the unpaid stock was a trust fund.

Sidney Bartlett, W. G. Russell, and Geo. Putnam, for defendants.

In the case of the executors of Samuel Hooper there is the defence that the action was not brought within two years from the date of the filing their official bond. Gen. St. Mass. c. 97, § 5. The state statute of limitations applies in the national courts equally as in the courts of the state. Brown v. Hiatts, 15 Wall. [82 U. S.] 177–183; Ross v. Jones, 22 Wall. [89 U. S.] 576. The actions are all barred by the statute of limitations (Rev. St. § 5057), which provides that no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, unless brought within two years from the time when the cause of action accrued for or against such assignee. It is settled that this section applies to all judicial controversies between the assignee and any person whose interest is adverse to his, including actions like these now before the court. Bailey v. Glover, 21 Wall. [88 U. S.] 342; Walker v. Towner [Case No. 17,089]. The present actions against all the defendants were brought more than two years after the appointment of the assignee; and the question therefore is whether the cause of action then accrued to him or arose at a later period. We contend that it accrued immediately on his appointment. The cause of action is the obligation of the defendants to pay up for the benefit of creditors the amounts unpaid upon stock held by them and issued as full paid. It is not the assessment by order of the bankrupt court. At any time after the failure of the corporation any creditor could have brought a bill in equity against the corporation and its stockholders to enforce the payment of the capital stock, so far as it remained unpaid. Hall v. U. S. Ins. Co., 5 Gill, 484; Henry v. Vermillion, etc., R. Co., 17 Ohio, 187; Ogilvie v. Knox Ins. Co., 22 How. [63 U. S.] 380; Adler v. Milwaukee Patent Brick Manuf'g Co., 13 Wis. 61; Mann v. Pentz, 2 Sandf. Ch. 257. All the decisions recognize that the stockholders who have not paid for their stock in full are debtors of the corporation; and it has been held that, upon the failure of the corporation, their liability becomes absolute without any call or assessment. Henry v. Vermillion, etc., R. Co., 17 Ohio, 187; Terry v. Anderson, 95 U. S. 628. So delinquent stockholders of an insolvent corporation may be proceeded against by the corporation or by those stockholders who have paid in full for their stock. Society v. Abbott, 2 Beav. 559; Wallworth v. Holt, 4 Mylne & C. 619; Nathan v. Whitlock, 9 Paige, 152. And, upon the bankruptcy of the corporation, the suit, which up to that time might have been brought by any creditor, may be brought by the assignee, who represents all the creditors. Sanger v. Upton, 91 U. S. 56, 62; Wilkins v. Davis [Case No. 17,664].

Probably the practice of making an assessment under the direction of the court of bankruptcy has arisen from the following considerations or some of them: The fact that, in all the cases in which assessments have heretofore been made in bankruptcy, the stock was, and upon its face appeared to be, only partially paid and subject to assessment only by regular calls or some substitute therefor. The subscriber's contract was thought to entitle him to a call. Chandler v. Siddle [supra]. The importance to the assignee of obtaining in advance the sanction of the court before entering upon litigation so complicated and expensive as proceedings to collect subscriptions of numerous and scattered stockholders. The convenience in litigation in various jurisdictions of having the preliminary questions of the deficiency of assets, the necessity of an assessment and the amount to be raised settled in advance and once for all. But in the present case the stock was originally issued as full paid. No calls could have been made or were necessary. The subscribers became bound, upon taking full-paid shares, to pay for them in full, and no agreement on the part of the corporation to treat the unpaid portion as paid could be set up in any suit brought for the benefit of creditors. Upton v. Tribilcock, supra. The defendants, therefore, so far as liable at all, were debtors to the corporation for payment of its debts to the amount unpaid on their shares, and those amounts could, immediately upon his appointment, have been sued for by the assignee, in equity, and probably at law, as debts absolutely due. Henry v. Vermillion, etc., R. Co., 17 Ohio, 187; Terry v. Anderson, 95 U. S. 628.

The first of the reasons above assigned for an assessment, therefore, does not apply to the present case. There was no contract to pay upon assessment and call, and no need of either. But whatever reasons may have led to assessments by the bankruptcy court, instead of bringing bills in equity, without previous assessment, it is obvious that the difference between the two methods of procedure is one of remedy and not of right, and that the cause of action in both methods is the same, viz., the obligation of the stockholders and not the assessment by the court. It will accordingly be found that in all the actions which have been brought against stockholders by assignees, including those now before the court, the facts deemed necessary to establish the original liability have been alleged and established without relying on the order of the bankrupt court as merging the old cause of action or creating a new one. And in most of the cases, after the assessment by the bankrupt court, a trial has been had upon the original merits, and the courts have dealt with all the defences as open, notwithstanding the assessments. Moreover, it is plain that the assessment of the bankruptcy court is not such a distinct, specific decree against each

stockholder separately for the payment of a definite sum of money, as to merge the original cause of action, or to become in itself a new cause of action against the stockholders severally. Sadler v. Robins, 1 Camp. 253; Pennington v. Gibson, 16 How. [57 U. S.] 65; Seligman v. Kalkman, 17 Cal. 153. In suits of an analogous description brought for the benefit of creditors, upon a statutory liability of stockholders to make good the impaired capital stock of the corporation, it was expressly decided in Massachusetts that the liability attached and the statute of limitations began to run immediately upon the commencement of proceedings against the corporation, and not at the time when, in the course of the winding-up, the amount of the deficiency had been determined. It was held that if the liability of stockholders to a bill in equity or any other process for the benefit of the billholders existed, the statute of limitations began to run from the time when such liability accrued, and would bar an action to enforce a remedy founded upon an assessment made in the cause, although that remedy had not existed for the statute period. It was contended that the statute began to run when the plaintiff's title to the relief prayed for accrued. It was held that it began to run when the defendant's liability in any form accrued. It was further contended that the statute did not begin to run until the amount of the defendant's liability was ascertained in the winding-up process; but it was held that proceedings against stockholders might begin without waiting for the amount of their liability to be so determined, and might go on pari passu with the winding-up proceedings. It was further held that, if it was otherwise, it followed that the proceedings for ascertaining the amount must be completed and the action be brought within the statutory period. Baker v. Atlas Bank, 9 Metc. (Mass.) 182; Com. v. Cochituate Bank, 3 Allen, 42.

The reasoning of these cases is decisive of the present case. But recent decisions of the supreme court of the United States have a still closer application as well as a binding force. In Terry v. Tubman, 92 U. S. 156, the court held that the liability of a stockholder of a bank, under a statute providing that the individual property of the stockholders should be bound for the ultimate redemption of the bills of the bank, accrued, and the statute of limitations began to run, immediately upon the notorious insolvency of the bank, and not when the deficiency in the assets of the bank had been ascertained; and in Terry v. Anderson, 95 U. S. 628, which was a bill brought by a creditor against assignees and stockholders of an insolvent bank, to compel the former to collect and the latter to pay the amounts remaining unpaid upon their shares, it was held that such unpaid amounts were debts due to the bank, and might, in the absence of any provision in the charter of the corporation requiring assessments and calls as a condition precedent to liability, have been collected by the bank at any time, and were therefore barred by the lapse of the time limiting actions since the failure of the bank. In the present case there is no charter or statute entitling subscribers to stock to a call before suit; and if there were it would be inapplicable, because such a provision applies only where the stock has been issued as partially paid, and not where it has been issued as fully paid. In the latter case there is no right to make or to insist upon a call, because the stock is immediately payable. If, then, the company had gone into bankruptcy after the limitation of actions by the corporation against the stockholder had expired, Terry v. Anderson is decisive that no right of action would have accrued to the assignees and no assessment could have been made. Upon the same reasoning, the right of action remaining in the corporation did accrue to the assignees immediately on their appointment, and is barred by the subsequent lapse of two years before bringing suit.

It may be urged that, although the assignee might have brought his bill in equity against all the stockholders on his appointment, he could not have brought his several actions at law until after an assessment, and that therefore the assessment is the foundation of the present actions, which for that reason are not barred. To this we answer: According to the reasoning of the authorities just cited, an action at law accrued at once to the assignee, upon his appointment, against each stockholder for the amount unpaid upon his stock without any call, because the stock was issued as fully paid, and therefore raised a liability in the taker to pay it at once without assessment or call. If a stockholder were sued, he could not set up that, by the by-laws of the corporation or the terms of his subscription, he was only bound to pay for his stock as calls were made, either by the directors or by some tribunal having in charge the liquidation of the company, as in the case of holders of stock which was issued as only partly paid. The answer would be that, having taken the stock as fully paid, he became bound to pay the whole, and that calls were only necessary where the agreement between the stockholder and the corporation provided for them, either expressly or by the nature of the contract involved in the issue of stock as and for partly paid stock. No case has arisen before in which an assignee has proceeded to enforce payment of stock improperly issued as fully paid; but it is submitted that upon principle and authority he might have proceeded directly as upon a debt already due. If this were otherwise, it is nevertheless a sufficient objection to his maintaining this action that he might have maintained his bill in equity without waiting for the assessment by the bankrupt court. He had his election either to proceed in equity at once, or to make an assessment under order of the bankrupt court, and then proceed at law. He might, with proper diligence, have obtained his assessment in

season to have brought his actions within the two years; for it cannot be necessary that the precise condition of the estate should be ascertained before making an assessment. On the contrary, the proper course is to make an assessment at once upon an approximate estimate of the condition of the estate. Kennedy v. Gibson, 8 Wall. [75 U. S.] 505; Com. v. Cochituate Bank, 3 Allen, 42, 50; Baker v. Atlas Bank, 9 Metc. (Mass.) 197, 198. And even if this were not so, and the actions at law could not with due diligence have been brought within two years, then it was the duty of the assignee to have elected the remedy which could be availed of within the time of limitation. He should have brought his bill in equity. It is not the action, but the cause of action, the accruing of which causes the statute to begin to run; and the assignee cannot gain time to prosecute a claim by electing a remedy which cannot be made available till after the claim is barred.

The policy of the statute which calls for speedy settlement of bankrupt estates favors the construction for which we contend. Bailey v. Glover, 21 Wall. [88 U. S.] 342. And considerations of general equity and public policy are equally strong in our favor. It would be a serious grievance if the stockholders of an insolvent corporation could be called upon at any time, however remote, at which the assignee might choose to procure an order of assessment, and when the obligations of those who should then be living and solvent should be enhanced by the insolvency, or the death, and the operation of special statutes of limitation upon the estates, of others. In the present case, the contribution of Mr. Hooper's estate is lost by the operation of the state statute of limitations in favor of his executors, and upon the theory of the plaintiffs another assessment may have to be made to make good the deficiency thus caused. It cannot be that congress intended that there should be no limitation to suits by assignees against stockholders; but that is the result if these actions are maintained. It cannot be contended that the application for an assessment is the proceeding which must be brought within two years. That application is not a suit. It is not even necessary that the stockholders should be parties to it. Upton v. Hansbrough [Case No. 16,801]; Sanger v. Upton, 91 U. S. 56. It is only a summary proceeding in the administration of the estate of the bankrupt corporation, and not an action either in law or equity, within the meaning of section 5057. The actions in this court are the first suits which have been brought against these defendants on their liability as stockholders, and afford them the first opportunity they have had for pleading the statute of limitations.

CLIFFORD, Circuit Justice. Assignees in bankruptcy are appointed by the creditors of the bankrupt, and the provision is, that as soon as the assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, and that such assignment shall relate back to the commencement of the proceedings in bankruptcy. 14 Stat. 522.

Circuit courts have concurrent jurisdiction with the district courts of the same district, of all suits at law or in equity which may be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt, transferable to or vested in such assignee; but the same section provides that no suit at law or in equity shall, in any case, be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee. 1 Stat. 518. Certain other cases of like character are also described in the transcript as pending in the same court, but it is stated in the agreed statement that the case above mentioned is submitted to the court upon the statement of facts signed by the attorneys of the parties.

Sufficient appears to show that the complainants are the assignees in bankruptcy of the coal and mining company which was incorporated November 25, 1870, and was adjudged bankrupt April 11, 1874, as appears by the record of the bankrupt proceedings. On the other hand it appears that the respondents are the executors of Samuel Hooper, who died February 14, 1875, and that they were duly appointed as such executors on the 15th of March in the same year; that the coal and mining company was incorporated with a capital of $100,000, divided into shares of $100 each; that on the 19th of April of the next year the capital stock was increased from $100,000 to $200,000. Two additional issues of stock were made by the corporation: one, October 16, 1872, of $100,000, the other, December 27th, in the same year, of a like amount. But the respondents deny that the corporation had any powers to issue any such additional stock, and claim that the certificates are ultra vires, and absolutely null and void.

It is agreed that the testator, at the time the company was adjudged bankrupt, then being in full life, held one hundred and fifty shares of the first two issues, upon which he had paid to the company $40 per share; that he also held of the third issue seventy-five other shares, on which he had paid to the company $50 per share. Proxies were executed by him September 24, 1872, and December 21st, in the same year. By the terms of the first proxy he authorized the

person therein named to vote at a meeting of the stockholders, to be held at the office of the company at the time therein mentioned; but there is no evidence that the person named attended the meeting or gave any vote. Whether he voted for the third issue of the stock, therefore, does not appear; but it does appear that he held at the time mentioned seventy-five shares of the additional stock created at that meeting. None of the stock constituting the fourth issue was held by the decedent, but it appears that his proxy gave two hundred and twenty-five votes for the increase authorized at the meeting which increased the stock to $400,000.

Taken as a whole, the complainants insist that the evidence contained in the agreed statement is sufficient to show that the testator of the respondents was and is estopped to set up the defence that the last issue of the stock was without authority and invalid.

Difficulty would attend the solution of that question, but the court is of the opinion that it is not necessary to decide the question, for the reason given in Foreman v. Bigelow [Case No. 4,934], that the claim is barred by the statute of limitations. Authorities referred to in that case will not, with one or two exceptions, be reproduced, nor will the reasons there given in support of the conclusion be repeated. Suffice it to say that it is now settled that the statute of limitations is as applicable in the national as in the state courts (Brown v. Hiatts, 15 Wall. [82 U. S.] 183; Ross v. Jones, 22 Wall. [89 U. S.] 576); and that the section of the bankrupt act referred to applies to all judicial controversies between the assignee and any person whose interest is adverse to his, in behalf of the bankrupt's estate, including actions like the one now before the court (Bailey v. Glover, 21 Wall. [88 U. S.] 342; Walker v. Towner [Case No. 17,089]).

Creditors, after the failure of the corporation, could have brought a bill in equity against the corporation, and joined the stockholders to enforce the payment; and it is equally clear that the assignee might have sued, the moment the title to the estate of the bankrupt was duly conveyed to him as such assignee. Hall v. U. S. Ins. Co., 5 Gill, 484; Henry v. Vermillion, etc., R. Co., 17 Ohio, 187; Ogilvie v. Insurance Co., 22 How. [63 U. S.] 380; Adler v. Milwaukee Patent Brick Manuf'g Co., 13 Wis. 61; Mann v. Pentz, 2 Sandf. Ch. 257. Stockholders, under such circumstances, are debtors to the corporation; consequently, as Chief Justice Waite held, the claim against them passed to the assignee as part of the property, estate, and credits of the bankrupt. Terry v. Anderson, 95 U. S. 636. Since that decision it seems to be unnecessary to argue in support of the proposition, as it is established by the highest authority known to our law.

Judgment for the defendants.

Case No. 12,553.

SCOVILLE v. TOLAND et al.

[6 West. Law J. 84; Cox, Manual Trade-Mark Cas. 51.]

Circuit Court, D. Ohio. Sept., 1848.

COPY-RIGHT—MATTER EMBRACED—LABELS—FEDERAL JURISDICTION.

1. The copy-right act [of 1831 (4 Stat. 436)] embraces not only a book in its popular acceptation, but one or more sheets which contain original matter. Even one page may contain matter which required much mental effort.

[Cited in Higgins v. Keuffel, 140 U. S. 428, 11 Sup. Ct. 732; Littleton v. Oliver Ditson Co., 62 Fed. 599.]

2. But labels used on vials and bottles to designate certain medicines, and the diseases cured by their use, are not books, within the meaning of the copy-right act. They are of no value except as labels for which they are designed. Their publication could, by no possibility, injure the writer or author of the labels.

[Cited in Higgins v. Keuffel, 140 U. S. 428, 11 Sup. Ct. 732.]

3. If falsely applied to medicine, with the view to impose upon the public, and injure the inventor of the medicine, chancery will enjoin.

4. The circuit court cannot inquire in such a case, when both parties live in the same state.

5. Under the new patent law, the new medicine may be protected.

[This was an application by A. L. Scoville for an injunction against Toland and Clinton.]

Mr. Norton, for complainant.

Mr. Mitchell, for defendants.

McLEAN, Circuit Justice. This is an application for an injunction in a case of copy-right. The complainant represents that he is the author of a certain book termed a label, entitled and containing the words "Doctor Rodgers' Compound Syrup of Liverwort and Tar. A safe and certain cure for consumption of the lungs, spitting of blood, coughs, colds, asthma, pain in the side, bronchitis, whooping-cough, and all pulmonary affections. The genuine is signed Andrew Rodgers," which he entered in 1847 in the clerk's office of the district court of the United States for the district of Ohio, and in every other respect complied with the requirements of the law. That he had a large number of labels printed and used on bottles containing said medicinal preparation, from which he might and would have derived to himself great profit, but for the combined and illegal acts of the defendants, who, without his assent, caused to be published labels exactly similar to that which is above stated, except the omission of A. L. Scoville, which they have affixed to bottles containing a certain medicinal preparation, which they induce the public falsely to believe is the same as that prepared by the plaintiff. The medicine prepared by the plaintiff is proved to be efficacious in diseases, by the affidavits of several persons. No answer has been filed by the defendants. They insist that the label, the whole of which is above stated, is not a subject of copy-right.

The first section of the copy-right act of 1831 provides that, "the author or authors of any

book or books, &c., shall have the sole right and liberty of printing, re-printing, publishing and vending, such book or books," &c. In the sixth section it is declared that "if any person shall, after the title of any book is recorded, &c., within the term of the right granted, print, publish or import a copy of any such book or books, without the consent of the author, he shall forfeit and pay," &c. Is this label a book within the meaning of the statute? It clearly is not within the ordinary acceptation of the term "book." And the argument is not without force that the word as used in the statute must be taken in its popular signification, rather than according to its original meaning. A book, in its popular sense, is understood to be a volume bound or unbound, written or printed. The term is derived from the Saxon word "boc," a beech tree. The Latin word "liber," book, signifies primarily bark, the bark being used to write on, before paper was invented. But the true meaning of the word "book" must be found, in the language and policy of the statute, and the judicial construction which has been given to it. The English statute is similar to ours. That a printed volume, whether it contain many or few pages, is a book no one denies. But in Clementi v. Goulding, 2 Camp. 25, 32, and 11 East, 244, it was held that a composition on a single sheet might well be a book within the meaning of the legislature. Any other construction than this, it is said, would not embrace the papers of the "Spectator," or "Gray's Elegy in a Country Church Yard," they having been published in sheets. The Horn Book, known so extensively as the Infant's Book, consists of one small page. Lord Eldon in the case of Hogg v. Kirby, 8 Ves. 220, said "As to copy-right, I do not see why, if a person collects an account of natural curiosities, and such articles, and employs the labor of his mind by giving a description of them, that is not as much a literary work as many others, that are protected by injunction and by action." By St. 5 & 6 Vict. (1842) c. 45, it is provided, that the word "book" "shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press," &c. But it seems that prior to this statute the act had been so construed. If a single page shall constitute a book within the statute, it is difficult to say that such page must contain a certain number of lines or sentences. A few lines or many thrown together without an object, and without the expression of a distinct idea, could not be called a book within the statute. Much mental labor may be concentrated on a single page, and it is supposed that no page which does not contain mental effort can be within the statute. It must be complete in itself, where a page is held to be a book, disconnected with other pages. The label which the complainant claims to be a book, refers to a certain medicinal preparation and was designed to be an accompaniment of it. Like other labels, it was intended for no other use than to be pasted on the vials or bottles which contained the medicine. As a composition distinct from the medicine it can be of no value. It asserts a fact that "Doctor Rodgers' Compound Syrup of Liverwort and Tar," is a certain cure for many diseases, but it does not inform us how the compound is made. In no respect does this label differ from the almost numberless labels attached to bottles and vials containing medicines, and directions how they shall be taken. Now these are only valuable when connected with the medicine. As labels they are useful, but as mere compositions, distinct from the medicine, they are never used or designed to be used. This is not the case with other compositions which are intended to instruct and amuse the reader, though limited to a single sheet or page. Of this character would be lunar tables, sonata, music, and other mental labors concentrated on a single page.

The complainant says that the label is falsely applied to a certain medicine, which induces the public to purchase it as the genuine syrup of Doctor Rodgers, which must not only lessen the sale of the genuine medicine, but bring it into discredit and destroy its value. If the label is thus used to practise a fraud upon the public to the injury of the plaintiff, there can be no doubt, that a court of chancery exercising a general jurisdiction, would restrain the aggressor. The injury to the party, in bringing into disrepute the genuine medicine, would be irremediable, and would therefore be a proper case for an injunction. But the circuit court of the United States cannot take jurisdiction on this ground, where both the parties live in the same state. It is the application made of the label, and not its re-publication, which constitutes the injury. As a label, without the application, it could be of no value to the defendant, as no one would purchase it. It might, if circulated, possibly attract the attention of the public to the medicine, and in that respect might be beneficial to the plaintiff. In fact the medicine is so inseparably connected with the label, that the latter is only valuable to identify the former. If the compound syrup be a new invention and is valuable, under the patent law, the rights of the inventor can be amply secured. But if the defendants were enjoined from using the label, it would not restrict them, no patent having been obtained by the plaintiff, from the use of the medicine. And if the compound be the same they would have a right to use it, until patented, and to describe it as the same compound as the plaintiff's. Still if the label be a book within the statute, the plaintiff is entitled to an injunction. Every label identifies the medicine, and when it is of modern invention, the remarkable cures performed by its use are stated. Are all such labels books, and are they the proper subjects of copy-right? If the principle be applied to one label, it must embrace all similar in character. It appears to me that the statute will not bear this construction. The injunction is refused.

SCOW NUMBER FOUR, The. See Case No. 7,192.

Case No. 12,554.

SCOW WITHOUT A NAME.

[7 Ben. 384.] [1]

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

COLLISION AT PIER—NEGLIGENCE.

A scow, loaded with a deck-load of stone, was moored alongside a sloop at a pier. She took a lurch towards the sloop and cast off a small part of her load, then took a more violent lurch outward and dumped the whole of it, and rebounding violently, fell on the sloop and injured her. The owner of the sloop filed a libel against the scow to recover the damages, claiming that the rolling of the scow was caused by her being leaky and overloaded. The master of the scow contradicted this, and testified that it was caused by swells from a passing steamer, and by the scow's striking the ground when she first rolled towards the sloop: *Held*, that, in either event, the master of the scow was negligent, for he was chargeable with knowledge of the depth of the water and the liability of swells from passing steamboats; and if the accident arose from the shallowness of the water, it was a fault to moor the scow there.

In admiralty.

Beebe, Wilcox & Hobbs, for libellant.

Benedict, Taft & Benedict, for respondents.

BENEDICT, District Judge. This action arises out of a singular occurrence, which took place at a bulkhead at the foot of 63d street, in New York City. On that day the scow proceeded against, which was being loaded with stone upon her deck at the foot of 65th street, sprang a leak, and was hauled from the foot of 65th street to the foot of 63d street, and there moored alongside of the sloop Nancy Anna. Shortly after she was made fast, she took a sudden lurch toward the bulkhead, and threw about twenty tons of the stone from her deck into the water between her and the sloop. She then took a still heavier lurch the other way, and rolled off on the outside of her all the remaining load, when, being thus suddenly relieved of a great weight, she rebounded with such violence as to throw her out of the water and upon the sloop alongside. The sloop's fore rigging kept the scow off forward, but aft she dropped upon the sloop so as to crush the sloop's rail and break her down aft for a considerable distance. This action is brought to recover for the damages thus occasioned to the sloop.

These facts are not disputed. Some others are in dispute, and among them the quantity of water in the scow when she came alongside the sloop, and also whether the lurch of the scow arose from swells caused by passing steamers. Without determining these questions, I find in the evidence of the master of the scow clear proofs that the accident arose from negligence on his part. For he says that what threw his vessel out of the water in such an extraordinary manner was because of her striking the bottom when she made the last lurch.

This statement, if taken to be correct, shows clear neglect, in that the scow was placed where she would strike the bottom. The master was not only chargeable with knowledge of the depth of water where he placed his vessel, but he had actual knowledge, for he lay in the same place the day before. He also says that he knew that waves caused by the Harlem boats often rolled in there, and that they had rolled upon him.

If, then, the accident is to be attributed to the shallowness of the water where the scow was moored, it was a fault to moor her there.

If, on the other hand, the scow rolled off her load because she was waterlogged, it was fault to place such a vessel alongside another vessel, where she could do such injury. Let a decree be entered for libellant, with an order of reference.

[NOTE. The commissioner reported the damages to be more than the value of the vessel at the time of the collision. This was accounted for by the fact that extensive repairs had been made. Upon a hearing on exceptions to the commissioner's report it was held that the repairs were imprudently made, and that the libelants could only recover for the value of their vessel at the time of the collision. The report of the commission was therefore overruled. Case No. 12,555.]

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

Case No. 12,555.

SCOW WITHOUT A NAME.

[8 Ben. 181.] [1]

District Court, E. D. New York. June, 1875.

COLLISION — DAMAGES — REPAIRS IMPRUDENTLY MADE—TOTAL LOSS.

Where a sloop was injured by collision, and her owner recovered a decree against the vessel which did the injury, and, upon a reference to ascertain the damages sustained, it appeared that the cost of the repairs that were actually made—which included the alteration of the vessel from a poop-decked to a flush-decked vessel—were more than the value of her, so that the ship carpenter had libelled her to recover his bill, and bought her in at the marshal's sale under that libel. *Held*, that the repairs were imprudently made, there being no examination and estimate in advance by competent persons, and that the libellant could only recover the value of his vessel at the time of the accident, with the cost of five days' pumping, necessary to ascertain the extent of her injuries and the cost of repair, and with the damage to his personal property on board at the time.

[Cited in The Havilah, 50 Fed. 334.]

[This was a libel to recover damages for a collision. There was a decree for the libelants, with an order of reference. Case No.

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

12,554. The cause is now heard on exceptions to the commissioner's report.]

Beebe, Wilcox & Hobbs, for libellant.

Benedict, Taft & Benedict, for respondent.

BENEDICT, District Judge. Upon a careful examination of the proofs in this case, I am satisfied that the libellant should be allowed to recover no more than the value of his vessel at the time of the accident, together with the damage to his property on board, and the necessary cost of pumping her for a period of time sufficient to enable him to ascertain the extent of the injuries the boat had sustained, and to learn the cost of repairing such injuries.

Under the circumstances proved, common prudence would have dictated an abandonment of the vessel; instead of which she was placed in the hands of a ship carpenter, who put extensive repairs upon her, including changing her from a poop-decked to a flush-decked vessel. His bill was not paid by the owner, but the vessel was libelled by the carpenter, and she was bought in by him because no one would bid more than the amount of his bill. This circumstance, with others that appear in the evidence, indicate that justice will be done by applying here the rule that money imprudently expended for the raising and repairing a vessel injured by a collision, and exceeding her value at the time of the accident, cannot be collected of the wrong-doers. The Empress Eugenie, 1 Lush. 138; Williams & B. Adm. Jur. 79.

The libellant's recovery will, therefore, be limited to the value of his vessel at the time of the accident, which, upon the evidence, was nine hundred dollars. To this is to be added the sum found by the commissioner as the damage to property on board, $58, and also the sum expended for pumping the vessel for five days, as that period of time would doubtless be abundant to ascertain the extent of the injuries and the cost of repairing them. In making this determination I have not overlooked a suggestion that it does not necessarily follow, from the fact that in the end the cost of repairs proved to exceed the value of the vessel, that, therefore, it was imprudent to undertake to repair. But the facts proven here indicate that in this case it was imprudent, and if any doubt existed as to the prudent course, it could easily have been removed by the precaution of having careful and detailed estimates made at the time by competent persons. The boat was an old one. She was not only repaired, but altered in form and made better than before. It was certainly open to question whether she was worth repairing at all. Under such circumstances the owner should have fortified his determination to repair by the opinion of experts formed at the time, after due examination.

The report of the commissioner is therefore set aside, and a decree will be entered in accordance with this opinion.

Case No. 12,556.

In re SCRAFFORD.

[4 Dill. 376; 15 N. B. R. 104; 3 Month. Jur. 614; 3 N. Y. Wkly. Dig. 552.] [1]

Circuit Court, D. Kansas. Jan., 1877. [2]

BANKRUPT ACT—NUMBER AND VALUE OF CREDITORS—ATTACHING CREDITORS.

Creditors who have obtained liens by attachment within four months before the commencement of proceedings in bankruptcy, are not to be reckoned in computing the proportion of creditors who must unite in an involuntary petition.

[Cited in Hatfield v. Moller, 4 Fed. 719.]

[In review of the action of the district court of the United States for the district of Kansas.]

In bankruptcy.

Judson & Motter, for petitioning creditors.

J. E. Taylor, A. Wells, and Doniphan & Reed, contra.

DILLON, Circuit Judge (orally). This case is before me on a petition to review the action of the district court, and the facts are as follows: Isaac T. Hosea filed his petition for adjudication of bankruptcy against Charles G. Scrafford, alleging, among other things, that he constituted one-fourth in number of the creditors, and that his claim was one-third in amount of the indebtedness of the alleged bankrupt. This was denied by Scrafford, who appeared by attorney and filed a list of his creditors, with a statement of his indebtedness. Certain other creditors then appeared, alleging that they had levied attachments on the debtor's property within four months before the commencement of the proceedings, and asked leave to oppose the adjudication. This leave was granted them, and the court proceeded to inquire into the number of creditors, and the amounts of their respective claims; whereupon it was moved, on the part of the petitioning creditors, that all persons who held such attachments be excluded from the count as to the number of creditors and amount of indebtedness necessary to be joined in the petition. This motion was overruled by the district court [Case No. 12,557], and notice being given of the proposed filing of a petition for review, the case was stayed at this point, and no further proceedings have since been had.

One object of the bankrupt law is to secure an equal distribution of the estate of the bankrupt amongst all of his unsecured creditors, and in order the more effectually to accomplish this, creditors who have obtained preferences are excluded from participation in the proceedings until after the election of an assignee. I can see no reason why attaching creditors should not be governed by

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 3 N. Y. Wkly. Dig. 552, contains only a partial report.]

[2] [Reversing Case No. 12,557.]

the same rules which apply to other creditors, whose debts are secured by preferences which the adjudication will defeat. Indeed, as all attachments levied within four months before the filing of the petition in bankruptcy would be dissolved, ipso facto, by an assignment under the bankruptcy proceedings, persons holding liens by such attachments would seem to have a peculiar interest in defeating an adjudication, and for this reason should not be reckoned, for the purposes of those proceedings, as creditors of the alleged bankrupt. Of course, they could not be counted if the attachments were sued out with a view of obtaining a preference over other creditors; and as, in most cases, a ground of attachment is also an act of bankruptcy, the presumption would be strong that such was the object of an attaching creditor. A person with a knowledge that his debtor has committed an act of bankruptcy, should not be permitted to obtain by attachment and hold a preference over other creditors. I do not think that creditors, any more than the debtor, should be permitted thus to defeat the object of the bankrupt law. A secured creditor cannot vote for assignee, nor can he have his debtor adjudged a bankrupt. If he cannot be counted in favor of the proceedings to put the debtor into bankruptcy because he is secured, there is no principle upon which he could be counted against them.'

My conclusion, therefore, is, that when a creditor of an alleged bankrupt, either by an arrangement with the bankrupt, or by an attachment, obtains a security or lien for his claim, in fraud of the bankrupt act, or which would be avoided by that act if the debtor is adjudged a bankrupt, he cannot be counted, nor can his claim be estimated in computing the number and value necessary to be represented in the petition. Reversed.

NOTE. This case overrules [Case No. 12,557]; contra, In re Hatje [Id. 6,215]. See In re Broich [Id. 1,921]; In re Frost [Id. 5,134]; In re Green Pond R. Co. [Id. 5,786]. As to dissolution of attachment by bankruptcy proceedings, Bracken v. Johnston [Id. 1,761]; McCord v. McNeil [Id. 8,714]. Attachment creditor cannot force debtor into bankruptcy. In re Hazens [Id. 6,285].

Case No. 12,557.

In re SCRAFFORD.

[14 N. B. R. 184;[1] 3 Cent. Law J. 252.]

District Court, D. Kansas. April, 1876.[2]

BANKRUPTCY—OPPOSITION TO ADJUDICATION—ATTACHING CREDITOR—PETITION—PROPORTION OF CREDITORS.

1. An attaching creditor may intervene, and oppose an adjudication of bankruptcy.

[Cited in Re Jonas, Case No. 7,442.]

2. A creditor who has issued an attachment within four months before the commencement of the proceedings in bankruptcy is to be reckoned in computing the proportion of creditors who must unite in an involuntary petition.

[Disapproved in Re Jewett, Case No. 7,305; Cited in Re Broich, Id. 1,921.]

In bankruptcy.

Judson & Motter, for petitioning creditor.

A. Well, J. E. Taylor, and John Doniphan, in opposition.

FOSTER, District Judge. Isaac T. Hosea filed his petition in bankruptcy against C. G. Scrafford. On the return day of the order to show cause, the respondent being absent from the state, his attorney appeared for him and filed a denial in writing that the petitioning creditors constituted one-fourth in number of the creditors, and whose debts aggregate one-third in amount of the debts provable under the bankrupt act, and also filed a list of creditors, and the amounts due each; which denial and list were sworn to by the attorney of the respondent. The petitioning creditor moved to strike out the said denial and list of creditors, because the same are not verified by the oath of the respondent. Pending said motion, certain other creditors of the respondent, who hold attachments on the property of respondent, on proceedings pending in the state court, asked leave to intervene in opposition to said petition, and alleged that the requisite number and amount of creditors had not joined in the bankruptcy proceedings. These questions have been argued together, and, so far as this case is concerned, if either the debtor or the attaching creditors are in a position to contest the question as to the number and amount of creditors, it matters but little under which party the inquiry is made. There is no doubt but attaching creditors have such an interest in the proceedings that they may intervene and oppose the adjudication, and they may contest the question as to the number and amount of creditors, as well as any other material fact in the case. In re Boston, H. & E. R. Co. [Case No. 1,677]; In re Bergeron [Id. 1,342]; In re Mendelsohn [Id. 9,420]; In re Hatje [Id. 6,215]; In re Jack [Id. 7,119].

The law evidently intends that the court shall be satisfied that the proper quorum of creditors have united in the proceedings. Even the written admission of the respondent on this point is not conclusive, but the court must be satisfied it is made in good faith, and without collusion. Supposing the respondent made no appearance on the return day, or he should make out a list omitting certain creditors, in either case a collusive judgment might be obtained, as well as by the written admission of the debtor. The law provides, if the respondent shall deny that the necessary quorum of creditors have joined, he shall then be required to file a list of the creditors; "and the court shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount as aforesaid have petitioned. * * *" This provision of the law brings before the court

[1] [Reprinted from 14 N. B. R. 184, by permission.]

[2] [Reversed in Case No. 12,556.]

other creditors having provable claims, and they may then be heard on the inquiry, although there is no charge of collusion or fraud. In this case, I think the application of the attaching creditors to intervene should be allowed, and that is sufficient to throw the duty on the court of making the investigation, and it is not necessary to determine whether an attorney may verify the denial and list of creditors, or whether any verification at all is necessary. The petitioning creditor asks to have excluded from the number such creditors as have secured a lien on the debtor's property by attachment proceedings. This is a very material point in this case, as it is probably decisive of the question under investigation. If the attaching creditors are excluded from the list, it would seem that the requisite number and amount have signed the petition. If they are not excluded then the reverse is true. The discussion that has been had of this question, and the investigation and thought I have given it, have convinced me that it is not as easily answered as at first blush might appear.

From the best comprehension I have been able to give the subject, it is my opinion the attaching creditors should not be excluded, in computing the number and amount. The law says: "shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof at least in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable." The question, then, primarily is simply this, What debts are provable under this act? It has been repeatedly decided that a secured creditor, or one holding a lien within the meaning of section 5075, is not a creditor holding a provable debt. The doctrine is concisely stated by Judge Blodgett, in Re Frost [Case No. 5,134]. He says: "It therefore seems evident to me that by the term 'Debts provable under this act,' congress meant debts unconditionally provable, without any release or other preliminary action, either by the court or assignee, being necessary." Section 5084 prohibits a creditor, who has received a preference, from proving his debt until he shall have surrendered the property, money, or benefit so received. Under the act of June, 1874, in case of actual fraud, he can then only prove a moiety of his debt. Section 5021 also prohibits the preferred creditor from proving his debt. There, then, are two classes of creditors whose debts are not provable, under this act, within the technical meaning of these words: the secured creditor and the preferred creditor. It is contended that a creditor who has obtained a lien by attachment proceedings, comes within the provision of section 5075; that he has a lien for securing the payment of his debt. By the provisions of section 5044, all attachments obtained on the debtor's property, within four months next preceding the commencement of the bankruptcy proceeding, are dissolved by the transfer to the assignee. Now, it seems apparent that the mortgage, pledge, or lien mentioned in section 5075 refers to a mortgage, pledge, or lien, not only in esse, but one that continues to exist, notwithstanding the bankruptcy—a lien that is vested and absolute. It makes provision for ascertaining the value of the security, and applying it to the payment of the debt after the adjudication, and the election of an assignee. It provides that the holder of the security shall be admitted as a creditor only for the balance of the debt after deducting the value of the property, to be ascertained by agreement between the assignee and the creditor, or by a sale under the order of the court. Thus the holder of the security may be admitted as a creditor, or he may not be; depending on the value of the security, to be determined thereafter in the manner provided by the law.

It is urged that the same reason which would prevent a preferred creditor from proving his debt applies with equal force to an attaching creditor. Supposing that to be true, the answer is that the preferred creditor is excluded by the explicit provision of the law, while the attaching creditor is not. Again, supposing section 5084, or the prohibitory clause of section 5021 was not in existence, is there anything in the law to prevent a preferred creditor from proving his debt? If there is, why the necessity of a special provision for the exclusion of such creditors? It shows that the legislative mind did not understand that section 5075 prevented the preferred creditor proving his debt, and they therefore made provision in express terms for such cases. As to whether an attaching creditor has a provable debt, let us draw a deduction from the decided cases before referred to. In re Bergeron; In re Mendelsohn; In re Hatje. It is there held, as we hold here, that attaching creditors may intervene and oppose an adjudication in bankruptcy. Now, if an attaching creditor has not a provable debt, then the courts have in those cases established a precedent that a creditor who has not a provable debt, a secured creditor, if you please, may intervene and control the proceedings in bankruptcy, and defeat the adjudication. I think no case can be found where the court has permitted secured creditors to interfere with the proceedings for an adjudication. In Re Frost [supra], speaking of this matter, the court says: "Any other construction would make it practically impossible to put a very large proportion of debtors into bankruptcy, as it would leave unsecured creditors entirely at the mercy of those who had by diligence or otherwise obtained security." In re Green Pond R. Co. [Case No. 5,786]. In Re Hatje [supra], the claim of the attaching creditor was counted in the list without objection. The court says: "Treating the demands in favor of the attaching creditors and of H. P. Hatje as subsisting provable debts, it resulted that the requisite amount of debts was not represented by the petitioning cred-

itors." In that case it seems to have been material to determine whether or not the attaching creditors' claims should be included, and yet the petitioning creditors permitted it to be done without objection, so far as appears from the opinion of the court.

It is argued, and with much reason, that if attaching creditors are included, other creditors are very much at their mercy. The fact is, that under any circumstances, any one or more creditors less than one-fourth in number, and one-third in amount, is and are very much at the mercy of other creditors, whether they have or have not attached. It is true that a creditor who has seized sufficient property by attachment to secure his debt is less likely to join in bankruptcy proceedings than he otherwise would. On the other hand, he labors under some disadvantage. If he attaches, his labor and expense may be all for naught, by reason of subsequent bankruptcy proceedings; and if he does not attach, the debtor may squander his property, and the creditor lose his debt in toto. In most cases a creditor is not sufficiently conversant with the debtor's affairs to know the names and evidences of any considerable number of the creditors, and so it is often no easy task to get bankruptcy proceedings started, and then the moving creditors take the chances of getting the requisite number and amount of creditors to join, or of having the cost to pay on a dismissal of the petition. The hardship of the law, however, in particular cases, is not a reason for interpreting its meaning different from its apparent intent and purpose.

[NOTE. This cause was carried to the circuit court on petition of review, and the judgment of this court reversed. Case No. 12,556.]

Case No. 12,558.

The SCRANTON et al.

[5 Blatchf. 400.] [1]

Circuit Court, S. D. New York. June 6, 1867.

COLLISION—TUG AND TOW—STEAMER—RESPONSIBILITY FOR PERIL—SIGNALS.

1. A steam-tug, with a heavy tow on her port side, was coming up along the Brooklyn shore, in an eddy, the tide being half ebb and strong in the river. A steamboat was coming down the river, and, when near the tug, their combined speed being ten or eleven miles an hour, starboarded her helm and sheered across the track of the tug, and then blew two whistles, and the tug ported her helm and slowed, and a collision ensued between the tow and the steamboat: *Held*, in a suit brought by the tow against the tug and the steamboat, that the latter was in fault, in these respects: (1) The danger of a collision was incurred before the two whistles were blown; (2) the vessels were too near to justify a call on the tug to starboard her helm; (3) the steamboat had no right, in the position of the two vessels, to do otherwise than port her helm, or slow or stop till the tug had passed her.

[Cited in The Express, 46 Fed. 862.]

2. Any error in the movement of the tug at the time was not a fault, as the steamboat was responsible for the perilous condition in which the tug was placed.

[Cited in The H. P. Baldwin, Case No. 6,812.]

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

This was a libel in rem, filed in the district court, by the owners of the canal boat McCord and her cargo, against the steamboat Scranton and the steam propeller William F. Burden to recover damages for a collision which occurred about eleven o'clock a. m., on the 9th of December, 1863, between the canal boat and the Scranton, in the East river, just below the Fulton ferry, on the Brooklyn side. The canal boat, heavily loaded with grain, was lashed to the port side of the propeller Burden, at the Atlantic docks, to be carried to pier No. 44, up the river, on the New York side. The Burden left the docks with her tow, about eleven o'clock a. m., and passed up, hugging the Brooklyn shore, in the eddy, or reflex tide, the tide in the river at that time being about half ebb and strong. The Scranton had started from Corlear's Hook, on the New York side, with two empty coal boats lashed to each side, and was coming down the river, and intending to cross over to the Fulton ferry, to take up another boat lying below the lower slip of the ferry. It was near this point, somewhat lower down, that the collision took place, the Scranton striking, nearly end on, somewhat a slanting blow, on the port side of the canal boat, while lashed to the Burden, breaking it in, and doing considerable damage. The district court condemned the Scranton and the Burden [case unreported], and the claimants of both of them appealed to this court.

Cornelius Van Santvoord, for libellants.
Freeman J. Fithian, for the Scranton.
Erastus C. Benedict, for the Burden.

NELSON, Circuit Justice. It is admitted by the captain of the Scranton, that he did not see the Burden till his boat was opposite the coal dock of Marston & Powers, which is the first dock above the Fulton ferry slips, and that the Burden was then about as far below the ferry slips as the Scranton was above them. The two vessels were, of course, near each other, and approaching at a combined speed of about ten or eleven miles an hour—the Scranton seven miles, and the Burden between three and four. While the two vessels were in this position and relation to each other, the Scranton made a movement to go in below the lower slip of the Fulton ferry, to take up the boat lying there, by fastening a line to the boat and backing, so as to tow her out into the river. As is apparent, in order to accomplish this movement, it became necessary for her to

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

cross the track of the Burden with her tow, the Burden being but a few hundred yards below, and in a stage of the water in the river, the tide being half ebb, that could not fail to endanger an immediate collision. The captain of the Scranton, as if aware that this movement was inexcusable under the circumstances, seeks to avoid the error, and, at the same time, turn it against the Burden, by setting up that he gave notice to the latter, by blowing two whistles, that he intended to pass to the left.

One answer to this is, that the Scranton starboarded her track of the Burden, before she blew her whistles. This is stated in the answer and testified to by Morris, the wheelsman, with whom the captain was at the time. The danger of a collision was incurred by this movement, before the notice was given.

Another answer is, that the boats had approached each other too near to justify a call on the Burden to make the manœuvre, by starboarding her helm, to pass on the left. She had to come out of the eddy into a head tide, with a heavy tow on her port side, which required time and exposed her to danger, from the near proximity of the Scranton.

A third answer is, that, in the position of the two vessels, the Scranton had no right to insist upon a departure from the settled rule of navigation, when two vessels are meeting in opposite directions, that each shall port her helm and pass to the right. In the present case, it was the duty of the Scranton to have slowed or stopped till the Burden had passed her, or to have passed under her stern, instead of across her bow, in order to get at the boat she was after. I think the better opinion is, also, that the Scranton was not in shore, but considerably out in the river, when she undertook, by starboarding her helm, to cross the track of the Burden; that she was, under the circumstances, bound to keep out and pass on the right; and that it was gross error in navigation to make the movement which she admits was made. The weight of the proofs is, that the captain of the Burden did not hear the two whistles; and, if he had heard them, no time was given for the answer, as the change of course was taken by the Scranton before the whistles were blown. I think the Burden was justified, under the circumstances, in keeping her course, and that she adopted the only movement practicable for her at the time, to avoid the collision, namely, to port her helm and slow. Even if she erred, in the impending danger, it is not to be attributed as a fault, as the Scranton was responsible for the critical and perilous condition in which she was placed.

The decree below is affirmed as to the Scranton, and reversed as to the Burden.

SCRANTON, The E. C. See Cases Nos. 4,270–4,273.

Case No. 12,559.

SCRIBA et al. v. DEANE et al.

KUNKALL et al. v. SAME.

[1 Brock. 166.] [1]

Circuit Court, D. Virginia. Nov. Term, 1810.

JUDGMENTS—PRIORITIES—DECREE—EXECUTION ISSUED—STAY OF EXECUTION.

1. A creditor obtained a judgment against his debtor, on the 15th of November, 1800, with a stay of execution, till the 1st of June, 1801. Another creditor obtained three judgments, on the 1st of December, 1800, and other creditors obtained a decree, on the 20th of March, 1801, against the same debtor. The second creditor, issued fi. fa.'s on two of his judgments, on the 13th of March, 1801, which were levied, and a fi. fa. was issued on the third and largest judgment on the 1st of April, 1801. The debtor executed a mortgage of his land, to secure the second creditor, on the 27th of April, 1801, which was recorded on the 25th of May following; and the officer returned the fi. fa.'s on the 30th of April, 1801, with different endorsements, that is, that he had levied two of them, and the property was released by order of the plaintiff, and on the third, that "proceedings were stopped by order of the plaintiff." The second creditor covenanted with the mortgagor, that he would not proceed further on the judgments, till the property conveyed by the mortgage was regularly disposed of, and to return the property taken, under the three executions in the officer's hands. On suits in chancery brought by the decree creditors, against the judgment creditors and their mutual debtor, for the purpose of ascertaining the order in which the several liens of these respective creditors were chargeable upon the real estate of the debtor, and for a distribution amongst them accordingly, (the land having been sold by order of court, and the proceeds brought into court by the commissioners), it was *held*, that the fund in the hands of the commissioner was properly chargeable, in the first instance, with all the costs incurred by the parties creditors, whether plaintiffs or defendants.

2. A decree in chancery, equally with a judgment at law, creates a lien on lands.

3. A judgment, with a stay of execution, creates no lien on land, until the plaintiff has a right to issue execution thereon.

[Cited in Bank of U. S. v. Winston, Case No. 944.]

[Cited in Enders v. Board of Public Works, 1 Grat. 378. Distinguished in Lisle v. Cheney, 36 Kan. 585, 13 Pac. 820. Cited in Reed v. Austin's Heirs, 9 Mo. 729.]

4. The return of the marshal on the two first executions, determined the force of the judgments on which they were issued, and destroyed the lien thereby created on the debtor's lands.

5. Equity will not connect the deed of mortgage with the judgments, so as to preserve the original lien.

6. The language of the return on the third execution, imports, that it had not been levied, and the implied averment of service in the covenant to suspend proceedings on the judgments, (the fact, whether it was levied or not being wholly immaterial in the view of the covenantor,) does not conclude the party.

7. The covenant to suspend, &c., not being perpetual, did not amount to a release, nor discharge the lien created by the third judgment on the land.

[Cited in Mendenhall v. Lenwell, 5 Blackf. 126.]

[1] [Reported by John W. Brockenbrough, Esq.]

8. The third fi. fa., having come to the hands of the officer, when he had property of the debtor in his possession, under former executions, was not levied, ipso facto, by mere operation of law: there must be an actual, and not a mere constructive levy.

9. The lien on land, created by judgment, depends upon the right of the plaintiff to sue out an elegit, and it is not essential to the existence of the lien, that the elegit shall have actually issued.

10. The lien of the largest judgment, in favour of the second creditor, not being lost by the covenant to suspend, and being preserved by the failure to levy the fi. fa., sued out upon it, judgment must first be satisfied, the decrees of the plaintiffs next, the decree creditors, and the other creditors, whether by judgment, decree, deed of trust, or mortgage, to rank according to their dates respectively.

These suits were brought by the plaintiffs on the chancery side of this court against James, Thomas, and Francis Deane, and others, their creditors, for the purpose of enforcing their liens on the estate of James and Thomas Deane, created by two several decrees of the court of chancery of the state, pronounced in their favour, respectively, on the 20th of March, 1801. The plaintiffs prayed that the other creditors of the Deanes, defendants, might be compelled to make a discovery of their several liens, and claimed a priority over them all. The material facts in these causes were as follows: On the 15th of November, 1800, a judgment was rendered in the county court of Henrico in favour of John Allan against the debtor defendants, with a stay of execution till the 1st of June, 1801. On the 1st of December, 1800, Henry S. Shore and Thomas Reeves, surviving partners of William Anderson & Co., obtained three several judgments on the law side of this court against the same defendants; and on the 5th of May, 1801, they obtained a fourth judgment: and on the 20th of March, 1801, the plaintiffs, Scriba, Scroppal & Sturman, and Kunkall & Co., each obtained a decree in the state court of chancery against two of the debtor defendants, James and Thomas Deane. There were various other creditors by judgments, mortgages, and trust deeds of a later date, claiming liens on the real estate of the Deanes, all of whom were made defendants in the present suits. Shore sued out writs of fi. fa. on his two smaller judgments on the 13th of March, 1801, and on the third judgment another writ of fi. fa. on the 1st of April, 1801. After these writs were in the hands of the officer, James and Thomas Deane, by deed bearing date the 27th of April, and recorded the 25th of May, 1801, mortgaged their real estate for the purpose of securing all the debts due by judgment to William Anderson & Co. To that deed Henry S. Shore, as agent for, and surviving partner of, William Anderson & Co. appended a memorandum by which he covenanted, "that no farther proceeding shall be had at law on any of the judgments which William Anderson & Co. have, or may have, against the said Deanes, until all the property conveyed by them in trust shall be regularly disposed of, and then only in case of a balance unsatisfied. And, moreover, to return all the property lately taken by the marshal on account of executions on three of the debts mentioned in this deed." On the 3d of April, 1801, the marshal returned all three of the writs of fi. fa., on the two of which that were first issued, he endorsed, "Executed on sundry property of the defendants, which hath been released by direction of Henry S. Shore, agent and co-partner of the above concern, he having compromised with the said defendants;" and on the third execution, issued on the 1st of April, 1801, was the following endorsement, "Proceedings on this execution stopped by direction of Henry S. Shore, agent and co-partner of the above concern, by reason of the compromise having taken place between the said Shore and the defendants." The lands of the three Deanes having been sold under a previous order of this court, and the proceeds of sale having been brought into court by the commissioner, the question now submitted to the court respected the order in which the various creditors were entitled to rank in charging this fund.

MARSHALL, Circuit Justice. These suits are brought for the purpose of distributing the estate of the defendants, James, Thomas, and Francis Deane, among their creditors; some of whom have liens on the estate by judgment, and others by mortgage or deeds of trust. As the parties, creditors, are necessarily brought before the court for the purpose of ascertaining their respective claims, it is deemed just that the fund should be charged, in the first instance, with all the costs incurred by them in this suit. Although some of these liens are upon the estate of all three of the Deanes, some on the estate of James and Thomas Deane, and others on the estate of James and Francis Deane, the court is not required to make, at least for the present, those particular discriminations which will ultimately be necessary. For the present, the fund has been considered as a joint fund liable to the claims of all the creditors, and the court is required only to settle their priority.

John Allan, William Anderson & Co., and the plaintiffs, Scriba, Scroppal & Sturman, and Kunkall & Co., each claim the preference. A preference is also claimed by the estate of Thomas Gilliat. John Allan obtained a judgment in the county court of Henrico, on the 15th of November, 1800, with a stay of execution till the 1st June, 1801. William Anderson & Co. obtained three judgments in this court, on the 1st of December, 1800. The plaintiffs, Kunkall & Co., and Scriba, Scroppal & Sturman, each obtained a decree in the high court of chancery, on the 20th of March, 1801. On the former argument it was decided, that in Virginia, a decree in chancery is equally a lien on lands

with a judgment at law. The judgments and decrees, therefore, class together. The judgment in favour of John Allan having been first rendered, would constitute the first lien, had there been no stay of execution. The rank of that judgment depends on the question, whether the lien takes place at its rendition or at the time when execution may issue on it. It must be admitted, that a judgment at common law did not bind lands, and that there has been no statute which, in direct terms, creates the lien. But courts have so construed the statute which gives the elegit as to infer a lien from the power to take the lands in execution. The lien, then, grows out of the right to issue the elegit, and is, consequently, inseparably connected with that right. It would seem to follow, irresistibly, from these premises, that Allan's judgment constituted no lien on the lands until it was in his power to issue execution thereon. This was on the 1st of June, 1801.

The judgments of William Anderson & Co. come next to be considered. Three of these were rendered on the 1st of December, 1800, and the fourth, on the 5th of May, 1801. On all these judgments executions were issued; but as the returns on these executions were different, they must be separately considered. On two executions, the return of the officer is, that they were executed and the property released by order of the plaintiff, in consequence of a compromise between the parties. That this return determined the legal force of these judgments, is admitted. Of course they no longer constitute a lien at law on the lands of the debtor. But it is contended, that deeds executed on the lands bound by these judgments being executed for the same debt while the judgments were in force, and being the consideration for which the judgments were released, may be connected with these judgments in equity so as to continue the original lien.

The real object of this suit is to adjust legal priorities, and this court, if not directed by express authorities, would not be inclined to interfere with those priorities, in any other case than in one in which a preference had been improperly obtained, and in which that impropriety had been made the particular subject of inquiry. At law, it is clear, that no lien can commence at a time anterior to its own existence. The common case of mortgages not recorded and renewed, appears to be directly in point. It has never been conjectured, that a subsequent mortgage, for the same property, could be connected with a prior mortgage not recorded, or recorded and reconveyed, in such manner as to defeat creditors or purchasers without notice, claiming under a deed made previous to the existing conveyance. The cases of Eppes v. Randolph, 2 Call, 125, and Tinsley v. Anderson, 3 Call, 329, are, however, cited as authorities to prove, that this may be done in equity. Neither of those cases connect a prior with a subsequent lien. They keep alive, in equity, a lien which was extinguished, at law, in favour of a person who is invested with all the equity of the original holder of the judgment. Those cases, in my opinion, go a great way. I shall respect them in a case precisely similar, but shall not extend their application. The judges have not stated the grounds of those decisions, but they were pronounced in favor of sureties who had discharged judgments against their principals and themselves, and I shall not consider them as extending to cases of a different description. Under these two judgments, then, William Anderson & Co. can claim nothing.

On the executions issued on the remaining two judgments, the return on each is, that proceedings on the execution were stopped by order of the plaintiffs in consequence of a compromise between the plaintiffs and the defendant. It has been contended, that the words of this return are equivalent to an express declaration, that the execution was levied, because proceedings, it is said, could not be stopped, unless they had commenced. This criticism appears to the court to be overstrained. The person who is stopped from proceeding, might very naturally say, "the proceedings are stopped." Where the attention is not particularly directed to the construction which may be put upon words not cautiously guarded, human language is susceptible of different constructions. But these expressions ought always to be received in the sense in which all the circumstances attending them prove that they were used. The execution of process is a positive fact, which it is the duty and the practice of the officer to return expressly, and never to leave to implication. The circumstance of his not having returned it, is full evidence that he did not consider the execution as levied. This is, in this case, the more apparent from the returns made on the other executions in the same case, by the same officer. Of three executions in his hands at the same time, he has returned on two, that they were executed, and that property was released; on the third, that proceedings were stopped. Why has he not returned, that the third was executed, as well as the second, if in fact it was executed? The fourth, unquestionably, was not executed. It was placed in the hands of the officer, after the compromise, and after the property was released. The return on the fourth execution is substantially in the words of the return on the third. Why, if the expression, "proceedings are stopped," means on the third execution that it was levied, is it used on the fourth, which most certainly was not levied?

Upon the return alone, I should feel no difficulty in deciding, that the execution did not appear to be levied, but the deed of compromise is introduced for the purpose of showing, that the execution was levied in fact. The fact, whether all three executions, or only two of them were levied, was so to-

tally unimportant to the parties in the view taken at that time, of the affair, as to render it improbable, that any inquiry was made respecting it. Mr. Shore knew that he had placed three executions in the hands of the officer. Mr. Deane knew that his property was executed at the suit of Mr. Shore. A compromise is entered into, by which the property is discharged from execution. Mr. Shore trusts to a new lien given him on lands, and agrees to suspend proceedings on the judgments. In the view of the parties, it is perfectly immaterial, whether the executions be all levied or not, and, consequently, the phrase used in the deed, does not include the party. The real fact may be proved, and, in my opinion, the return of the marshal is much more satisfactory evidence of a fact within his own particular knowledge, than the loose unguarded expression of the party, respecting a fact not within his knowledge, and which he then deemed entirely unimportant.

As this covenant not to resort to the judgment is not perpetual, it does not amount to a release, and, consequently, does not discharge the lien created by the judgment. But it is alleged that the execution, having come to the hands of the officer, while property belonging to the debtor was in his possession, under a former execution, was levied without any act of the officer by the mere operation of law. The inconveniences of this principle are so obvious, that it would be useless to enumerate them. It would require a positive statute, or express decisions, to induce this court to adopt it. Neither are adduced. The case of a detainer under a capias, is not in point. The sole object of that process is, the body, and when the body is in custody, the full effect of the execution is obtained. Nothing further is to be done by the officer. On a fieri facias it is otherwise.

It is next contended, that the lien created by a judgment does not take place, until a writ of elegit shall have actually issued on that judgment. This principle, in such direct opposition to the doctrine of the books, and to the reason of the principle on which the lien depends, is supported by an expression used in the opinion of the court of appeals, in the case of Eppes v. Randolph. This particular point was not stirred at the bar, and was not considered as belonging to the cause. To consider the judge (Pendleton), in such a case, as laying down a new and important principle, contrary to uniform decisions, on vague and general expressions, would be doing injustice both to the judge and to the subject. It would require expressions, which could not be deemed careless, but which were obviously considered, and intended to have the effect now given them. But the case itself shows, that the judge did not mean to lay down the rule which is ascribed to him. He says, that previous to the act of 1772, the judgment of a county court could not bind lands lying out of the county, because an elegit could not run into another county. But when this law was changed, the lien was extended. His position would have been differently stated, if he intended to lay down the principle contended for. The judgment could not have bound the lands. It would have been the elegit itself. The expression, too, on the very point, shows his opinion. "We are then to inquire," says the judge, "what he ought to do, in order to preserve the lien." These words plainly imply, that there was a lien to be preserved. Having discussed Hansberry's judgment, he says, "the other judgments are liable to the same objections, of not having kept their liens alive," by the means before stated. He certainly did not mean to say, they had no lien to keep alive. If the opinion was, that it was not the judgment, but the actual issuing of the elegit which commenced the lien, that opinion would at once have terminated the cause, for the conveyances were prior to any elegit. The principle laid down afterwards, by the same court, in the case of Tinsley v. Anderson, proves, that the construction here given to the case of Epps v. Randolph is correct. In that case, the court admitted the lien created by judgments on which executions, other than an elegit, had issued.

NOTE. The following extract from the interlocutory decree rendered in these causes, presents, in a condensed form, the various interesting points decided by the chief justice, in the above opinion:

"The court being of opinion, that as the judgments, decrees, and deeds of trust and mortgages, are not chargeable upon the whole fund, some of them being against all, others against two of the defendants, Deanes only, and the deed of trust to John Henry, from Thomas Deane only, that the several creditors are entitled to rank upon such proportions of the fund, as belonged to the persons against whom the judgments or decrees were pronounced, when the lien is claimed thereby, and against such of the defendants Deanes, where it is claimed under deeds of trust, or mortgage, as executed such deed: And being also, of opinion, that the several plaintiffs and defendants, except the defendants Deanes, ought to be reimbursed all costs expended by them respectively, in these suits, out of monies now in the hands of the said commissioner, who is directed to pay the same, doth adjudge, order, and decree, that Charles Copland, Esq., who, with his consent, is appointed a commissioner for that purpose, do report the amounts to which the parties respectively are entitled out of the fund, according to the foregoing opinion, giving Henry S. Shore, and Thomas Reeves, surviving partners of William Anderson & Co, priority on their largest judgment obtained in this court, against the three defendants Deanes, on the 1st day of December, 1800: and the plaintiffs in these suits, to stand next in priority, Allan's judgment being postponed, to the incumbrances by deed, prior to the 1st of June, 1801, and the creditors secured by the deeds to take priority according to their respective dates, &c."

Case No. 12,560.

SCRIBA v. INSURANCE CO. OF NORTH AMERICA.

[2 Wash. C. C. 107;[1] 1 Hall, Law J. 36.]

Circuit Court, D. Pennsylvania. Oct. Term, 1807.

MARINE INSURANCE—ACTION FOR RETURN PREMIUM—MEMORANDUM—MISTAKE—SEAWORTHINESS.

1. Every valid contract must have a subject matter to operate upon. If insurance has been made on cargo, there must have been such a cargo, and the risk insured must have commenced.

[Cited in Waller v. Northern Assur. Co., 64 Iowa, 104, 19 N. W. 866; Schroeder v. Stock & Mutual Ins. Co., 46 Mo. 175.]

2. A memorandum endorsed on a policy, if there never was a subject upon which the policy acted, will not constitute a contract.

3. No precise form of words is required to raise up a contract of insurance; and if the words used express it, with the intention of the parties, it will be sufficient.

4. Where parties to a contract of insurance, ignorant of the facts, made an agreement by a memorandum on the policy, which was intended as an indulgence to the assured, the mistake will not prejudice either of them.

5. If a vessel was not seaworthy when the risk insured commenced, and therefore neither party bound by the contract of the insurance, the premium, if paid, could not be retained.

This was an action for a return of premium, paid upon an insurance on goods, laden or to be laden on board the Alert, at and from La Vera Cruz to New-York, with liberty to touch and trade at New-Orleans, or Havana, on the return voyage; beginning the adventure from and immediately after the loading of said goods on board the vessel, at La Vera Cruz. The policy was dated the 9th of October, 1801. This vessel sailed from New-York for La Vera Cruz, in August 1801, with a valuable cargo, which was insured in part by other underwriters, out and home; and other insurances were also effected on the return voyage; some prior, and some subsequent to that in question. The vessel, while on her voyage, was taken by a British cruiser and carried into Jamaica, where she was examined, and then discharged. She had been previously stopped, her hatches broken, the cargo examined, packages opened, &c., but nothing was taken; and all was afterwards put to rights. Between Jamaica and La Vera Cruz she suffered much injury in a gale; but she arrived at La Vera Cruz, where the governor would not permit her to land her cargo, or even to remain for the purpose of repairing and getting water. In this situation she left that port, intending to call at the first she could reach. She afterwards got to New-Orleans, from whence, on the 4th of January, 1802, the supercargo wrote to the plaintiff, informing him that he could not dispose of his cargo at New-Orleans, and should therefore go to Havana and sell it. He referred to a letter of the 24th of December, (not produced at the trial, or called for,) but did not expressly mention the circumstances which had occurred at La Vera Cruz; though he speaks of the injury the vessel had suffered on her voyage thither, and states his intention to have her repaired at New-Orleans. On the 18th of January he mentions, that Havana being, as he has just understood, shut against foreigners, he shall endeavour to sell his cargo at New-Orleans. On receiving this letter of the 4th, the plaintiff went to the office of the defendants on the 11th of February, and prevailed on the defendants to endorse on the policy of the 9th of October, a memorandum, which states, "that it being represented to them by the plaintiff, that the vessel had arrived at New-Orleans, and would go to Havana, it is agreed, that in consideration of a half per cent. additional, the said vessel may go to Havana, and thence to New-York, without prejudice to the insurance. The cargo was in fact landed at New-Orleans, where a cargo of cotton was taken in, with which the vessel sailed and arrived in safety at New-York.

Meredith & Tilghman, for plaintiff, contended:

First. That the risk never attached under this policy, since no cargo was taken in at La Vera Cruz. They referred to 2 Caines, 339, being an action on a similar policy on this cargo, effected at New-York.

Second. That the case is not altered by the memorandum, which was entered under a mistake of the law, that the risk had attached.

Third. That the vessel is proved not to have been seaworthy when the risk was to commence, and of course the property, if a cargo had been taken in at La Vera Cruz, never was at the risk of the defendants. They cited 2 Marsh. Ins. 548; 1 Marsh. Ins. 228; Park, Ins. 220.

Hopkinson & Ingersoll, for defendants.

The outward voyage ended on the arrival of the vessel at La Vera Cruz, and the refusal of the governor to let her land her cargo. If the vessel arrive at her port, and is prevented from landing by a peril not insured against, the freight is earned; and consequently the voyage is ended. Morgan v. Insurance Co. of North America, 4 Dall. [4 U. S.] 455. And this was a case where the policy was in common form. The risk was to continue till the goods were landed. Park, Ins. 37, 38; 1 Marsh. 169. They admitted that it does not necessarily follow, that because the outward voyage ended then, that the risk under this policy commenced at the same time; though conversely, the latter could not commence if the former had not then ended. But, as it could not be intended that the property should ever be at the

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

risk of the insured, this is evidence of their intent to commence the latter risk when the first should end.

Second. The memorandum on the policy is a renovation of, and ratifies the original policy. It amounts to an acknowledgment that it is still a subsisting contract, and it is now too late, after the voyage has ended, to say that the risk never commenced. It is like a landlord's receiving rent after a forfeiture, which gives new life to the lease.

As to the third point, they contend that if the vessel was not seaworthy, it was known to the plaintiff when the memorandum was made; and it will not do now for him to make this a ground for demand of a return of premium.

WASHINGTON, Circuit Justice (charging jury). We doubt whether the underwriters will not, upon reflection, be pleased to know that the doctrine contended for by them on this occasion, is not founded in law. The adoption of it would lose them pounds, where they would gain dollars. This, however, forms no part of our consideration; whether it work to their benefit or injury, we have nothing to do but to pronounce the law, without considering how it may affect the parties on either side. The first point made at the bar is so extremely plain, that it is difficult to frame an argument which can throw additional light upon it. To the validity of every contract, there must not only be an agreement of parties, but there must be a subject matter for that agreement to operate upon. A policy effected upon a particular cargo, constitutes an agreement to that extent. But if no such cargo is shipped, or if the risk agreed to be insured never commences, there is not a subject matter to which this agreement can apply; and of course there never was a valid contract—one of the essential requisites to all contracts being wanted. Apply this principle to the present case. The original agreement between these parties, was for an indemnity upon goods laden, or to be laden at La Vera Cruz; the adventure or risk to commence from, and immediately after the loading of said goods on board the Alert, at La Vera Cruz. But no goods were laden at La Vera Cruz, on board of this vessel. The subject matter, therefore, of the agreement never existed, and consequently there never was, at any time, a valid and complete contract between the parties. This is plain, not only upon the words of the agreement, but upon the intention of the parties, which corresponds with their expressions; for it is absurd to suppose that either of them contemplated an insurance of goods sent from New-York to La Vera Cruz, and intended of course to be sold there. The memorandum of the 11th of February, endorsed upon the policy, has furnished the only plausible ground for an argument by the defendants' counsel. But, it is obvious that the decision upon the first point, is conclusive as to this; for if there never was a contract between the parties, as to the subject matter of this policy, this memorandum, which relates to another subject, and is merely superadded to the policy, cannot constitute a contract. The defendants' counsel, through the whole of their argument, have treated this memorandum as a new contract; and to a certain extent it is so. It is an agreement to permit the vessel to touch at Havana, on paying a half per cent. for the indulgence; but it is a very great mistake to consider it as a new contract of indemnity, the reverse of which it professes to be. It is true, that if the parties, being both fully apprized of all that had occurred, had in this memorandum agreed, in express terms, or such as plainly indicated this to be their meaning, that the original policy should attach to the cargo brought from La Vera Cruz, the cargo in such case would be considered as covered by the policy. No particular form of words was necessary, if the intention, upon a full knowledge of all material facts, was plainly expressed. But such a knowledge of facts was not possessed by the parties. Both of them, it is plain, acted under a mistake in point of law; and the defendants, (if not the plaintiff,) under an ignorance also of facts, that the policy did attach upon, and did cover the cargo brought from La Vera Cruz. But such mistake cannot prejudice either party, and the memorandum, instead of indicating a design in the parties to cover, by a new agreement, this cargo, by the original policy, is plainly inapplicable to that subject; is confined to a new one, or subsidiary altogether to the original agreement, which never at any moment took effect. The parties treated the first agreement, on the 11th of February, as a subsisting contract; but this could not make it a valid one, if in point of law, it never had existence.

The case put at the bar, of a forfeited lease, and subsequent receipt of rent by the landlord, is good law; but there the contract was once valid, though forfeited at the option of the landlord. Yet it was in his power to waive the forfeiture if he pleased; and the receipt of rent, he being fully apprized of all circumstances, amounts to an implied waiver of it. A case of insurance may be mentioned, apposite to this. If the risk in this case had once commenced, but the right to claim an indemnity in case a loss had happened, had been forfeited by a deviation or the like, the defendants being informed of the fact, might have waived the forfeiture, and possibly a memorandum of this kind might have had such an effect; certainly if such had appeared to have been their intention, it might have been so construed. But, if, as in this case, there never was at any time a valid contract, no implied ratification could make it a subsisting contract in this case, any more than payment of rent for white acre, where only black acre had been leased, would constitute a lease for white acre. The truth is, that this cargo never was covered, any more than if the policy had been made, and specifically, upon a cargo of rum, and a cargo of cocoa had been taken; no posterior

act therefore could cover it, but a new contract going to that extent.

As to the third point, little need be said about it, as the plaintiff is clearly entitled to recover upon the first ground. But if it were necessary to decide it, it would be sufficient to say, that if in your opinion the vessel was not seaworthy at the time the risk commenced, if it ever had commenced, neither party was bound; and of course the defendant could not retain the premium in case of safe arrival; nor could the plaintiff have recovered a loss, if one had occurred.

Verdict for plaintiff.

Case No. 12,561.

SCRIBNER v. STODDART et al.

[19 Reporter, 137; [1] 19 Am. Law Reg. (N. S.) 433; 8 Wkly. Notes Cas. 61.]

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

PRELIMINARY INJUNCTION—JURISDICTION—INJURY—EQUITY PLEADING AND PRACTICE—COPYRIGHTS AND PATENTS—OTHER SUITS—COPYRIGHT—ENCYCLOPÆDIA—USE OF ARTICLES THEREIN PUBLISHED SEPARATELY—REPRINT—INFRINGEMENT—PREPONDERANCE OF DAMAGE.

1. A preliminary injunction should issue only when the complaint is a proper subject of equitable cognizance, the plaintiff's right and the defendant's violation thereof are clear, and there are no special facts which would render the use of the process unjust.

2. There is no material difference between the principles and rules applicable to equity proceedings in copyright or patent-right cases and those applicable to other suits in equity.

[Cited in Hanson v. Jaccard Jewelry Co., 32 Fed. 204.]

3. When an author having copyrighted a work subsequently permits it to appear in a foreign encyclopædia, there is sufficient doubt, as to his right to use the copyright to prevent the publication of a domestic reprint of said encyclopædia, to determine a chancellor against issuing a preliminary injunction.

4. Where the complaint was that the defendant was about to use, in a reprint of a foreign work, articles copyrighted and published separately in this country, and it appeared that the damage to the defendant from the issuance of an injunction would be far greater than that which could be suffered by the plaintiff through the refusal thereof, a preliminary injunction restraining the defendant from the use of said articles was refused.

[Cited in Hanson v. Jaccard Jewelry Co., 32 Fed. 204.]

Motion for preliminary injunction.

The facts in these cases, as they appeared by the bills and affidavits, were as follows: A. T. Black and others, trading as A. & C. Black, of Edinburgh, Scotland, were the proprietors of a certain publication known as the Encyclopædia Britannica, and in 1875 they began the publication of the ninth edition of their work, which was imported into the United States and sold at $9 per volume, the work to be completed in twenty-one volumes. Shortly after its appearance Stoddart & Co. of Philadelphia announced an American reprint of the Encyclopædia, and obtained subscriptions therefor at $5 per volume; the subscriptions were very numerous, and to compete with the American edition, the Scotch publishers sent over a cheap edition of their work to be sold at $5 per volume, and appointed Scribner, of New York, their American agent. When volume 9 of the foreign edition was published it contained a notice that certain articles therein had been entered for copyright, and were the property of Little, Brown & Co., of Boston, agents for the expensive edition of the encyclopædia. This volume was reprinted by Stoddart & Co. and the notice of the copyright appeared therein. When volume 10 was issued it contained notices of copyright of certain articles therein, one of which was written by Lodge. When the reprint of volume 10 was about to be issued, containing the said articles, bills were filed to prevent the publication of the articles, alleging that the articles referred to had been published in this country before their publication abroad as part of the encyclopædia. The plaintiffs moved for a preliminary injunction. The defence set up, inter alia, that they had been at very great expense in the preparation of the reprint.

T. H. Edsall and J. K. Valentine, for the motion.

We make this motion under Rev. St. §§ 4952, 4956, and Act June 18, 1874, § 1 [18 Stat. 78]. The articles were duly registered and published as books and are now incorporated in the defendant's tenth volume. A foreign assignee of a copyright can sue; the only limitation as to citizenship has reference to the author. As to Lodge's case, that is the case of an American author who has published and copyrighted his book, and afterwards consented to its use in an English encyclopædia. As the foreign publisher could publish the book without the author's consent, does the author lose his rights at home by giving his consent? There is a difference between the case of an invention and a writing. Bartlette v. Crittenden [Case No. 1,082]. The republication in England is not a dedication to public use. The defendants, of course, could not republish Lodge's work in the same form as that in which he published it, neither can they publish it by joining it with other works. The form is immaterial. Gray v. Russell [Id. 5,728]; Mawman v. Tegg, 2 Russ. 385. See, also, Keene v. Wheatley [Case No. 7,644]. Where a copyright has been granted, and there is no question as to the right or the piracy, a preliminary injunction will issue. Curt. Copyr. 321.

J. R. Sypher and S. C. Perkins, contra.

These cases cannot be considered as involving only a discussion of abstract legal propositions; the court must consider whether the application is made bonâ fide, and whether the plaintiff's acts are not merely

[1] [Reprinted by permission.]

evasions of the copyright laws and an attempt to obtain possession of the canvassing field for business purposes. A copyright cannot be taken out in the middle of a work,—the encyclopædia is an entire work,—therefore the absence of any notice of copyright in the early volumes is a dedication to the public. An injunction will not be granted where there is an ample remedy at law; where the injury sought to be relieved against does not involve irreparable damage; where there will be greater damage to the defendant from granting than to the plaintiff from refusing the injunction; where title is not clear: where there is a doubt in the mind of the chancellor arising from any cause; where there has been any acquiescence or encouragement by the plaintiff in or to the acts complained of. Saunders v. Smith, 3 Mylne & C. 711; Babcock v. New Jersey Stock Yard Co., 5 C. E. Green [20 N. J. Eq.] 298; Richard's Appeal, 7 P. F. Smith [57 Pa. St.] 105. Here the remedy at law is ample, viz. an action for damages for the unlawful use of the copyrighted articles. The damage to plaintiff is almost inappreciable, while an injunction would prevent the defendants from fulfilling their contract with their subscribers for a full reprint of the English edition. There are doubts as to the title in Black's case. The plaintiff's have acquiesced and given encouragement to the publication of the American reprint, by not giving notice of copyright until the publication of the ninth volume.

BUTLER, District Judge. A preliminary injunction should issue whenever the complaint is a proper subject of equitable cognizance, the plaintiff's right involved, and the defendant's violation of it are clear, and the case exhibits no special facts which would render the use of the process unjust; and it should not issue under any other circumstances. Judge Story (2 Eq. Jur. 290, 291) in substance says the propriety in granting an injunction rests solely in the sound discretion of the court; and that the writ will not, therefore, be granted where it would operate oppressively, inequitably, or contrary to the real justice of the case. The courts decline to lay down any rule which shall limit their discretion to grant or withhold the writ, as respects particular cases. The exercise of the discretion is attended with no small danger, from the summary nature of the proceeding, and the consequent liability to mistake. The writ ought, therefore, as this author says, to be granted with extreme caution, and only in very clear cases; otherwise, instead of being an instrument to promote the public as well as private welfare, it will become a means of extensive and perhaps irreparable injustice. Judge Baldwin, in Bonaparte v. Railroad Co. [Case No. 1,617], says: "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing a preliminary injunction."

It is a mistake to suppose that there is any material difference between the principles and rules applicable to equity proceedings in patent right or copyright cases, and any other cases of which courts of equity take cognizance. Mr. Curtis, in his work on Patent Rights (page 400), says: "The grounds of equitable jurisdiction in patent cases are the prevention of irreparable mischief, the suppression of multiplicity of suits, and the more complete discovery of facts than can be had at law." The act of congress has simply applied equitable remedies to patent cases, to be administered according to the rules and principles governing equity proceedings elsewhere. These remedies, in all proper cases, would doubtless have been applied without the statute. To entitle a complainant to preliminary injunction where a patent right is involved, the existence of the right, and the evidence of infringement, must be clear, and, as in all other instances where the writ issues, the case must exhibit no circumstances which would make the remedy unjust. As Mr. Curtis further says, at page 549: "Courts of equity are loth to grant the writ unless the plaintiff's right is very clear, and especially where an account by the defendant will answer all reasonable purposes." He further says, at page 560, in substance, that the effect on the defendant's business or interests, must also be considered; for inasmuch as the granting of the writ depends upon the sound discretion of the court, exercised upon all the circumstances of the case, and the object being to prevent mischief, the writ will not be issued where very great injury would be likely to ensue to the defendant from granting it, and little or none to the plaintiff from withholding it. Judge Curtis, in Forbush v. Bradford [Case No. 4,930], says: "In acting on applications for temporary injunctions to restrain the infringement of letters patent, there is much latitude for discretion. The application may be granted or refused unconditionally, or terms may be imposed on either party for making or refusing the order. The state of the litigation, the nature of the improvement (or other thing patented), the character and extent of the infringement, and the comparative loss which will be occasioned to the respective parties, by allowing or denying the motion, must all be considered in determining whether it should be allowed or refused." Drone, in his work on Copyrights, at page 524, says: "When the piracy is important, and the consequent injury to the plaintiff material, an injunction is usually granted, notwithstanding serious consequences to the defendant, unless there is perhaps an inequitable disproportion between the injury complained of and the remedy asked." And further says, in substance, that where the objectionable matter forms but a small part of the defendant's publication, the court will compare the damage done thereby to the plaintiff

with that which the defendant will sustain if the injunction be granted; and will hesitate to destroy the entire work in order to redress a slight injury; that the court must sometimes incur the hazard of causing some injurious consequences to one party or the other, and the aim should be to take that course which seems to be most equitable under all the circumstances. This author also says, at page 517: "If the court is not reasonably satisfied that the plaintiff had a valid copyright, or that piracy has been committed, an injunction will not be granted." And at page 516 he says: "The question of granting a temporary injunction is affected by many considerations. It depends chiefly on the extent of doubt as to the validity of the copyright, whether it has been infringed; the damages which the plaintiff will sustain if it is withheld, and the defendant suffer if it is granted."

In Keene v. Wheatley, cited by the complainant in this case, Judge Cadwalader refused the preliminary writ, although he was satisfied of the plaintiff's right, and the defendant's infringement; because he believed the extent of the plaintiff's injury (to be sustained prior to the final hearing) could readily be measured, and be compensated in money, and the danger of loss to the defendant be thus avoided. I am not satisfied of the validity of the copyright granted to the Messers. Black. I do not think anybody in the cause is fully satisfied. I think it may safely be said that the question is open to very serious doubt. I do not propose to say more respecting it at this time. That of the other plaintiff, as respects the copyright itself, is freer from doubt. There is certainly, however, room for considerable doubt about the right to use it to prevent the reprint and publication of the encyclopædia in which he has allowed it to appear. I entertain such doubt. It does not make any odds whether the doubt which the court entertains upon an application such as this, arises upon consideration of the facts presented independently of the right upon which the claim is based, or whether it arises as a matter of law respecting the right. The doubt in my mind as respects both of these cases, is such that, without more, I should feel it to be my duty to deny this motion and decline the issuing of an injunction until the questions thus involved are fully, carefully, and deliberately considered and settled. Were I to issue the process in advance of this I would incur the danger of doing serious injustice to the defendants.

In addition to this, I believe that the injury likely to result to these plaintiffs, from a denial of this motion, will be very much less than that which would be suffered by the defendants, if it was granted. In considering the injury likely to ensue to the plaintiffs, it must be borne in mind that we are to look simply at the profits or advantages likely to be obtained by the plaintiffs from the publication and sale of these copyrighted works, independently of this encyclopædia. They do not relate to subjects of very great general interest. It is not probable the demand for them would be extensive. Thus far there is no evidence before the court of any demand. I do not remember that there is any evidence that any considerable number of either has been published for circulation. I think, with the information the court now has, I am justified in inferring that they were prepared for use in this encyclopædia, and with no very serious purpose to print them separately for circulation. Then again, I am to consider the loss likely to ensue to the plaintiffs from these defendants' work supplying the demand for these copyrighted works as separate publications. And only in that view am I to consider it. Now will this encyclopædia at all affect that demand? Is it probable that a single individual purchaser who desires these articles or works as separate publications will be lost to the owners? Is it probable that the opportunity of selling to any individual will be lost to the owners of these copyrights—the plaintiffs—by reason of the publication of these articles in the encyclopædia? Then again, is it probable that the reprinting of these articles in the defendants' book will increase the circulation of the encyclopædia itself to any considerable extent? It must be borne in mind in this respect, that these plaintiffs have consented to the publication of these articles in the encyclopædia. Now, is it probable that the defendants' publication will increase the circulation of the encyclopædia at all? In other words, if the reprint were not published and circulated, may it not be inferred, reasonably, that the great number of those who will purchase the reprint, would have purchased the original work? In other words, is not this contest between the British publisher and these defendants, a contest for the field, for the encyclopædia, and if the defendants' work were not printed, would not the field be covered by the foreign publisher? I have said enough to indicate the thought already, probably, that the defendants' publication will not increase the circulation of these articles through the means of the encyclopædia at all. If it does increase it, in my judgment it will be but to a very limited extent. The defendants' publication is said to be cheaper. A few persons may be induced to buy it who would not buy the other for that cause; but the character of these publications, and the character of the individuals who subscribe for or buy them, is such as precludes the idea that the circumstances would make any material diffierence in the circulation of the work. Looking at the subject in all its aspects, I am inclined to think that the injury to be sustained by the plaintiffs from the republication of these articles in the reprint of the encyclopædia, between this, at all events, and the final decree in this case, must be very small indeed.

On the other hand, the injury to the defendants from the issuing of this writ at this time must be serious. There can be no room for doubt about that and the seriousness of it does not arise from the importance of these articles of themselves, for they do not strike the court as being very important. But an earnest contest has arisen between the foreign publisher and his agents and these defendants,—a contest for the field for this work,—which has led to anger, ill-will—probably to a resort to means on the one side and the other that should have been avoided. Now if the court at this time was to interfere in such way that the defendants could not reproduce the foreign edition (it makes no odds that they might have added an occasional article), but if it could be said by the publisher of a foreign edition and his agents that this is not a reprint, that these defendants are forbidden and prohibited from reprinting a part of the matter found in the foreign edition, it would, in my judgment, virtually drive the reprint out, and leave the field to the other side and it would be occupied and harvested probably before this case was concluded.

The defendants are not to be looked upon simply in the light of ordinary wrongdoers. This is not an ordinary case. At the time they commenced this publication there was nothing unlawful in what they did. To reproduce a foreign publication is not wrong. There may be differences of opinion about the morality of republishing here a work that is copyrighted abroad; but the public policy of this country, as respects the subject, is in favor of such republication. It is supposed to have an influence upon the advance of learning and intelligence. The defendants at the beginning could not know that before this work was completed and fully issued it would contain articles which were copyrighted. They had seen previous editions of this work published, one after another, without any such obstacles being cast in the way of a reprint. There was nothing, therefore, to warn them of the insertion of such matter. Indeed, they had every reason to believe that there would be nothing of the kind. They are not to be blamed, therefore, for what they did up to this time. Whether they are wrong now depends altogether upon how the questions to which I have adverted are decided. But to interfere with them at this time would, in my judgment, be almost, if not quite, disastrous. I will not enlarge upon the subject.

There is another question involved here that I will not consider; that which affects the bona fides of the application for these writs; the question whether or not they are really intended for the protection of these copyrights, or for the purpose of giving to the publisher of the foreign edition of this encyclopædia an advantage in the contest for this field. That question I will not consider. I will say nothing about it. It is not necessary for the purposes of this motion. For the reasons indicated the writ is refused. Writ refused.

Case No. 12,562.

SCRIPPS v. CAMPBELL et al.

[22 Int. Rev. Rec. 250; 1 Mich. Lawy. 10; 3 Cent. Law J. 521.] [1]

District Court, E. D. Michigan. 1876.

REMOVAL OF CAUSES—COSTS—HOW DETERMINED.

1. In suits commenced in the state court and removed to this court the right to costs is not determined by Rev. St. § 968, but by the statute of the state.

2. Where plaintiff, in an action of trespass on the case commenced in a state court and removed here, recovered less than one hundred dollars, defendant is entitled to costs under Comp. Laws, § 7390, as matter of right.

[Cited in Trinidad Asphalt Paving Co. v. Robinson, 52 Fed. 348.]

Plaintiff [William A. Scripps] brought an action of trespass on the case in the superior court of Detroit to recover damages for being unlawfully put off a steamboat belonging to the defendants [George Campbell and others], upon which he had taken passage from Detroit to Duluth. Defendants, who were aliens, having removed the cause to this court, a trial was had and a verdict rendered in favor of the plaintiff for thirty dollars. Both parties now move for costs.

H. M. Cheever, for plaintiff.

F. H. Canfield, for defendants.

BROWN, District Judge. Section 968 of the Revised Statutes provides that "when in a circuit court a plaintiff in an action at law originally brought there, recovers less than the sum or value of five hundred dollars, exclusive of costs, in a case which cannot be brought there unless the amount in dispute, exclusive of costs, exceeds said sum or value, he shall not be allowed, but, at the discretion of the court, may be adjudged to pay costs." I am satisfied this provision has no application to ordinary cases commenced in the state court and removed to this court. It was so held by Mr. Justice Story in the case of Ellis v. Jarvis [Case No. 4,403]; and I am satisfied that such is the correct reading of the section. In the case of Coggill v. Lawrence [Id. 2,957] there are some expressions which indicate that a different view of the law was taken by the circuit court of southern New York. This was an action commenced in a state court against a collector to recover back an excess of duties paid on the importation of foreign merchandise, and the plaintiff obtained a verdict for $9.50. It was held that the case was not governed by the state law, for two reasons: First, because costs were not given by the act authorizing the removal of the cause, nor were they given upon a verdict of like amount by

[1] [3 Cent. Law J. 521, contains only a partial report.]

any other act; second, because it must have been the purpose of congress to place all actions against revenue officers, for acts done in relation to the collection of imposts and duties, upon the footing of causes originally commenced in the circuit. The decision might have been placed on the latter ground, although the court seems to have proceeded upon the theory that as the act of congress respecting removals provides that cases removed shall thereafter be proceeded in as a case originally commenced in that court, the act of congress and not the state law must control in determining the right to costs. I am satisfied, however, this construction cannot be maintained, and the case is apparently overruled by that of Field v. Schell [Id. 4,771] in the same district, where Mr. Justice Nelson, in delivering the opinion in a suit brought in a state court to recover back an excess of duties and removed to the circuit court, held, that although the amount recovered was under five hundred dollars, the plaintiff was entitled to costs, for the reason that the defendant recovered an amount sufficient to entitle him to costs in the state court. In his opinion, he observes, that the clerk was doubtless controlled by the case of Coggill v. Lawrence, "and it must be admitted that some expressions in the opinion would lead to a denial of costs in the present case. But in that case the plaintiff would not have been entitled to costs in the state court, if the suit had not been removed, which distinguishes it from this one." The case of Wolf v. Connecticut Mut. Life Ins. Co. [Case No. 17,924], decided by the late Judge Longyear, merely held, that where plaintiff discontinued in this court a suit originally commenced in the state court, defendant was entitled to costs accrued in the state court before removal, and has no application to this case.

The right to costs being governed by the state law, I am satisfied that under section 7390 the defendant is entitled to them as matter of right. This provides that "in all actions in which the plaintiff would be entitled to costs upon a judgment rendered in his favor, if plaintiff recover judgment, but not enough to entitle him to costs, the defendant shall have judgment and recover against such plaintiff his full costs, which shall have the like effect as all other judgments."

Plaintiff claims his right to costs under subdivision 4, § 7387, which provides, that "in all actions of replevin, and in all actions for the recovery of any debt or damages, or for the recovery of penalties or forfeitures, in all cases where the court has exclusive or concurrent jurisdiction," the plaintiff shall be entitled to costs. Section 9249 provides that "every justice of the peace shall have original jurisdiction of all civil actions wherein the debt or damages do not exceed the sum of one hundred dollars, and concurrent jurisdiction in all civil actions upon contract where the debt or damages do not exceed the sum of three hundred dollars." The argument is that as the damages claimed in the declaration in this case exceeded the sum of three hundred dollars, the superior court had exclusive jurisdiction, and therefore, under the subdivision above cited, plaintiff is entitled to recover costs. It is freely conceded that the jurisdiction of the court is determined by the sum claimed in the declaration. At the same time, it is equally well settled that where plaintiff claims an amount sufficient to give the superior court jurisdiction, and recovers a sum within the exclusive jurisdiction of a justice, costs will be given to the defendant. Both these questions were determined in Strong v. Daniels, 3 Mich. 466. It is true the statute has been in some particulars changed since that decision was rendered, but I see nothing which would affect the right to costs in this case. Subdivision 4 standing alone would seem to entitle the plaintiff to costs, as the superior court had exclusive jurisdiction of the case, the damages being over three hundred dollars. But taken in connection with subdivision 5 of the same section it evidently appears that such was not the intention of the legislature. That section provides that "in all cases where the plaintiff shall recover less than one hundred dollars, if it appear that his claim, as established at the trial, exceeded one hundred dollars and the same was reduced by set off," he shall still be entitled to costs. So in actions of trespass, where the court shall certify if the jury shall find that the trespass was wilful and malicious, he may still be entitled to costs. As observed by the supreme court, in the case of Strong v. Daniels, "to give subdivision 4 the construction contended for by the plaintiff, and one which its literal import unconnected with other provisions would demand, would render of no force or effect the other provisions cited." This decision was subsequently approved in the case of Inkster v. Carver, 16 Mich. 484, in which the court held that the law of '67 was not to be understood as changing the pre-existing law in regard to the party entitled to recover costs in suits commenced in the circuit court, but as regulating the amount of costs recoverable in the cases specified. The act of 1871 made no material change in the Revised Statutes of 1846 in regard to the party entitled to costs. In the 4th subdivision, instead of the words "in cases where such actions are not cognizable before a justice of the peace," the amended act uses the words "in all cases where the court has exclusive or concurrent jurisdiction." I do not perceive that this difference in phraseology is material in this case. The case of Merrill v. Butler, 18 Mich. 294, has no application. This was an action of replevin. The value of the property was not

assessed, and the jury rendered a verdict for ten dollars. The statute giving a successful plaintiff costs in all actions of replevin was held obligatory.

The amount claimed in the declaration being held to be the test of jurisdiction, I consider the case of Strong v. Daniels as decisive of the case at bar. I am informed by the learned judge of the superior court that in a recent action of trespass on the case, where the plaintiff recovered exactly one hundred dollars, he held the defendant entitled to costs as a matter of right. Were this simply a matter of discretion, I should be disposed to refuse costs to either party. Judgment will be in favor of defendants, with costs.

SCROGGINS (UNITED STATES v.). See Cases Nos. 16,243 and 16,244.

Case No. 12,563.

In re SCUDDER et al.

[1 N. Y. Leg. Obs. 325.]

District Court, S. D. New York. 1843.

BANKRUPTCY—PETITION—DENIAL OF BANKRUPTCY —PROOFS.

Where a petition for a decree in invitum was formally answered by the parties against whom it was sought by a denial of the material facts, although an order of reference was taken out by them on objections filed, they were not bound to go on with their proofs. It was incumbent on the creditors (they being the affirmative parties) to support their petition.

This was a proceeding in invitum. The petition was formally answered under oath by the bankrupts [Scudder, Wilcox & Ogden], who alleged that no act of bankruptcy had been committed by them, and an order of reference to Commissioner Campbell was taken out by them on their objections. At the meeting before the commissioner, the counsel for the creditors contended that the parties sought to be declared bankrupts, having filed their objections to the petition for a decree, and having taken out an order of reference on their own behalf, were bound to go on with the proofs. The commissioner decided that the petitioners must first introduce proof to support their proceedings; but, at the instance of counsel, he adjourned the point to the court for direction.

R. M. K. Strong, for bankrupt.
Nash & Noble, for creditors.

BETTS, District Judge. This question was settled, in substance, in the Case of John Harper Smith,—November 12, 1842 [Case No. 12,994],—in which the court ruled that the proceedings before the commissioner on an issue were to accord substantially with those in similar cases in chancery suits. The English practice in bankruptcy is clearly to the same effect. The creditors' petition is enough to obtain a fiat in the first instance, but when answered, and brought to hearing, the creditors are bound to support it by testimony, and even, it seems, that if they answer a petition of the debtor to vacate the fiat, the respondents hold the affirmative, and must be the actors in maintaining the issue. Archb. Bankr. (Last Ed.) 367–370; cases cited Com. Dig. "Bankruptcy," D, 1, notes; Petersd. Abr. "Bankruptcy." Our act, like the English statutes of Elizabeth and James, authorizes the proceedings on the petition of a creditor without requiring it to be under oath. But in England the practice is to require the petition to be sworn. Com. Dig. "Bankruptcy," D, 1, note. And now the affidavit of the creditor is required by the act of 3 & 4 William IV. c. 41, § 12. It was accordingly incumbent in this case on the creditors to produce proofs in support of their petition, and it must be certified to the commissioner, that he proceed and take the proofs, the creditors being the affirmative parties thereto.

Case No. 12,564.

SCUDDER v. ANDREWS et al.

[2 McLean, 464.] [1]

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

NOTES — FAILURE OF CONSIDERATION — PARTIAL FAILURE—CONTRACTS AGAINST PUBLIC POLICY.

1. Where the action is on a promissory note, a failure of the consideration is a good defence. And it is immaterial whether the consideration was land, or other property.

2. A partial failure of consideration can not be set up as matter of defence.

3. On this point there is a confliction in the decided cases, but the weight of authority requires a total failure of the consideration.

4. Where the defendants gave their note for a tract of land, which belonged to the United States, and to which the plaintiff could have no title, the defendants may plead the fact, to an action on the note.

5. A contract in violation of law, or against public policy, can not be enforced.

[Cited in Elminger v. Drew, Case No. 4,416; Tufts v. Tufts, Id. 14,233.]

At law.

D'Wolf & Chickering, for plaintiff.
Mr. Logan, for defendants.

OPINION OF THE COURT. This action is brought for the consideration of a certain tract of land, sold by the plaintiff to the defendants, situated in Missouri. Defendants pleaded a failure of consideration, by a defect of title. And, also, that the land sold was a part of the public domain, and had never been sold, or offered for sale, by the United States, and that the contract was against the law, and the policy of the law.

To these pleas the plaintiff demurred. In support of the demurrer, it is contended that the remedy of the defendant, for any defect of title, is on his contract, or deed, if he re-

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

ceived one, and not in this form; that, if there was a covenant of warranty, that constituted a consideration, no fraud being alledged. And, as it regards the other ground, that the purchase may be considered as a chancing bargain, to which the rule of caveat emptor applies, the case of Moggridge v. Jones, 14 East, 486, 3 Camp. 38, are cited. The action was brought by the drawer against the acceptor. The plaintiff agreed to let a house to the defendant for twenty one years; and, in consideration of £500, to be paid by three bills, to be drawn by the plaintiff, and accepted by the defendant, agreed to execute a lease for that term. The bill in question, and two others, were drawn and accepted, accordingly, and the defendant was immediately let into possession; but the plaintiff refused to execute the lease. It was urged, therefore, that the consideration had failed. But Lord Ellenborough, and, afterwards, the court, on a motion for a new trial, held that this was no defence to the action; that the defendant was bound to pay the bills, and might have his remedy on the agreement, for nonexecution of the lease. That was a case in which there was only a partial failure of consideration. The defendant was in possession of the premises; and the decision was made upon the ground, that the failure of the consideration was partial, and not total. On this point there is some conflict in the authorities, in this country and in England.

Mr. Chitty, in his treatise on Bills (Ed. 1839, p. 86), says a subsequent failure of the consideration for which a bill or note has been given, either in the whole or in part, when of definite amount, such as the nonperformance of a condition precedent, frequently, between the original parties or their representatives, affords a defence, entirely or partially. And this doctrine is sustained in the case of Lewis v. Cosgrave, 2 Taunt. 2; Weston v. Downes, 1 Doug. 23; Power v. Wells, Cowp. 818; Towers v. Barrett, 1 Term R. 133; Peake, 38; Spalding v. Vandercook, 2 Wend. 431. But the weight of authority, and especially the modern decisions, is, that unless there has been fraud, a partial failure of consideration can not be set up as a defence. Morgan v. Richardson, 1 Camp. 40, note; 7 East, 483; Solomon v. Turner, 1 Starkie, 51; Tye v. Gwynne, 2 Camp. 346; Basten v. Butter, 7 East, 479; Obbard v. Betham, Moody & M. 483; Gray v. Cox, 4 Barn. & C. 108; Laing v. Fidgeon, 6 Taunt. 108; Washburn v. Picot, 3 Dev. 390; Harlan v. Read, Ohio Cond. R. 578. The plaintiff's counsel also cited, to sustain the demurrer, Bree v. Holbech, 2 Doug. 655, 3 Pick. 452; Young v. Triplett, 5 Litt. (Ky.) 247, and, also, Sugd. Vend. 1–8. The note, having been given in Missouri, constitutes no objection to an inquiry into its consideration.

The plea sets up a total, and not a partial, failure of the consideration, for which the note was given. And, whether this was land or personal property, can make no difference. Nor is it perceived, in such a case, that it can be important whether the instrument given by the plaintiff to the defendant, as evidence of title, was a deed of conveyance, or an agreement to convey. If the plaintiff had no title or claim to the land, which is asserted in the plea, and admitted by the demurrer, the defendant has a right to set up that fact, as a defence to an action on the note. Why should he be driven to his action on the warranty, if a warranty deed were given? of which, however, there is no evidence. This would require the defendant to pay the money, and then sue the plaintiff, on his warranty, for the same money, and recover it back again, if the plaintiff should be solvent. Such a course would defeat the ends of justice, and, at best, would be dilatory and expensive. If the defendant had entered into the possession of the premises, and enjoyed them, it would be clear that this defence could not be set up; for, then, there would be only a partial failure of consideration, which would not be a matter of defence.

In the case of Tillotson v. Grapes, 4 N. H. 444, where the consideration of a promissory note was a tract of land, which was to be conveyed, but the promisee dying before the conveyance, and being insolvent, it was held that the maker had a right to treat the note as a nullity. Where a note was given for the purchase money of land, the title to which fails, the note can not be recovered. Rice v. Goddard, 14 Pick. 293; Hartwell v. McBeth, 1 Har. (Del.) 363; Bowles v. Newby, 2 Blackf. 364; Loffland v. Russell, Wright, N. P. 438.

If the plea alledged, as the ground of failure of consideration, that the plaintiff had failed to convey, merely, it would be clearly bad, as was ruled in the case of Freligh v. Platt, 5 Cow. 494. In the case of Catlett v. McDowell, 4 Blackf. 556, which was an action on a promissory note, the third plea stated that the note was given for a part of the consideration of a tract of land, which the plaintiff was to convey to the defendant free from incumbrances, which he had not conveyed. And the fourth plea was similar, except that it stated that the land was to be conveyed in fee simple, by a good and sufficient deed of conveyance, with the usual covenant of warranty, and that it had not been so conveyed. Replication to the second plea, which was similar to the third, admitting the consideration of the note, as alledged, and stating that, on the 9th March, 1836, the plaintiff had fully complied with his agreement, by executing, and delivering to the defendant, a good and sufficient warranty deed for the land. Held, on general demurrer, that the third and fourth pleas, and the replication to the second plea, were sufficient.

In Archer v. Bamford, 3 Starkie, 175, the bill was given in part consideration for real estate—plea of fraud, and failure of consideration, &c. Abbott, C. J., was of opinion that, inasmuch as the defendant had not repudiated the contract, but had retained pos-

session of part of the premises, and, as consequently, the consideration had not wholly failed, it was impossible to say the bill was utterly void. To the same effect was the decision in the case of Alloway v. Sibert, 3 Blackf. 401; Spiller v. Westlake, 2 Barn. & Adol. 155.

In the case of Greenleaf v. Cook, 2 Wheat. [15 U. S.] 13, the court say, on the first exception it has been argued, that there is a failure of consideration, which constitutes a good defence to this action. Without deciding whether, after receiving a deed, the defendant could avail himself of even a total failure of consideration, the court is of opinion that, to make it a good defence, in any case, the failure must be total. The prior mortgage of the premises, and the decree of foreclosure, do not produce a total failure of consideration. The equity of redemption may be worth something—this court can not say how much; nor is the inquiry a proper one in a court of law, in an action on the note.

Upon the whole, we think the plea is good, and the demurrer must, therefore, be overruled. As this decides the case, it is unnecessary to examine the other plea, which sets up, that the contract was in violation of law and public policy. If the facts sustain this plea, there can be no doubt that it is a good defence. No contract is valid which is made in contravention of the law, or of public policy. Entries upon the public land for settlement, or as trespassers, have been forbidden, by act of congress, under severe penalties. But whether this law has not been modified, or abrogated by subsequent acts, giving preemptive rights, and encouraging such settlements, is a question which we deem it unnecessary to examine in this case.

Case No. 12,565.

SCUDDER v. CALAIS STEAMBOAT CO.

[1 Cliff. 370.] [1]

Circuit Court, D. Maine. April Term, 1860.[2]

SALE—BUILDING SHIP—WHEN TITLE PASSES—POSSESSION AND SALE BY AGENT—REGISTER.

1. Under a contract for building an entire vessel, no property vests in the party for whom the vessel is built, until she is ready for delivery, and has been approved or accepted by such party; but that general rule does not prevail where the vessel is constructed under the superintendence of the party for whom she is built, or his agent, and payments for her, based upon the progress of the work, are to be made by instalments as the work is done. In such cases the person for whom the vessel is built is regarded as the real owner.

[Cited in Clarkson v. Stevens, 106 U. S. 505, 1 Sup. Ct. 207.]

[Cited in Jones v. Wilder, 28 Minn. 245, 9 N. W. 711; Stevens v. Shippen, 28 N. J. Eq. 528.]

2. Delivery of a vessel by the builders of the hull thereof to one as agent of the real owners, of itself vests no title in such agent, although the builders had no knowledge of the capacity in which the vessel was received by him. Unaccompanied by a written conveyance, such delivery must be understood as vesting the title in the real owners, and the taking of a bill of sale by such agent four months afterwards could not have the effect to divest the owners' title, and vest it in the agent.

3. In the United States the title to a vessel may pass by delivery under a parol contract.

4. Of itself, the register is not evidence of property, unless confirmed by auxiliary circumstances to show that it was made by the authority or with the assent of the person named in it, and who is subject to be charged as owner.

5. A purchaser of a vessel from a person holding the same in trust for the real owners, having notice of the trust, is in no better situation than the seller.

This was a bill in equity, brought by the complainant [Charles Scudder] as administrator of the estate of John Van Pelt, formerly of San Francisco, in the state of California, deceased, to compel the corporation respondents to convey to him, as such administrator, all such title as they might have acquired, or claimed to have acquired, in thirteen-twentieth parts of a certain steamboat called the Adelaide, and to account to him for the same proportion of the net profits of the steamer during all the time she had been in their employ. John Van Pelt died in San Francisco on the 29th of September, 1853; and in the month of October following, Horace P. Janes, Richard Chenery, and Frank Johnson were duly appointed administrators of his goods and estate, by the court of probate for the county of San Francisco. Having fully administered the estate, they were discharged from the trust, October 30, 1854. During this period the steamer in question was in the process of construction in New York; and the complainant alleged that the administrators appointed in California never assumed any control over her, or in any way made themselves liable for her, and never authorized any person to make sale of her. The complainant, as administrator appointed in the county of Cumberland, in the state of Maine, alleged that the intestate in his lifetime, during the month of May, 1853, at San Francisco, employed one William W. Vanderbilt to make a draft for a steamer of this description; to proceed to the state of New York as his agent, and there to contract for and superintend the building of the same; that being then concerned with others in navigation on the waters of California, he did not wish it to be publicly known that he was building a steamer to be used on those waters, and therefore instructed his agent that the contracts for the hull and engines should be made in the agent's name, and that the steamer, when completed, should be so enrolled at the custom-house. When completed, she was to be sent to California, and there wholly transferred to the principal, unless the agent should become interested in

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

[2] [Reversed in 2 Black (67 U. S.) 372.]

her to the extent of two-twentieth parts. Pursuant to this arrangement the decedent, in the month of September, 1853, agreed with one Richard Chenery of San Francisco, that he should become the owner of seven-twentieth parts of the steamer, four twentieths for himself and three twentieths for one Richard M. Jessup, who also lived in San Francisco. Chenery accordingly paid him seven twentieths of twenty thousand dollars first advanced; and to provide further funds for the construction of the vessel, they made a mortgage of certain other steamers to certain bankers, as a security for letters of credit to the amount of sixty thousand dollars. Forty thousand dollars were thus raised, and the money expended in building the steamer. Thirteen twentieths of the amount were paid by the administrators of the decedent, and the residue by the other party to the arrangement. Other drafts were afterwards made for the same purpose, so that the administrators paid out of the decedent's estate forty-eight thousand one hundred and twenty-six dollars and twenty four cents, which, with what had been before advanced, fully paid for thirteen twentieths of the steamer when completed.

To the bill as originally framed respondents demurred, and the court sustained the demurrer, but gave the complainant leave to amend upon payment of costs. [Case No. 12,566.] In the amendment the complainant alleged that Chenery and Jessup were citizens of California. He also alleged that the respondents had in some way extinguished their equitable title to the steamer; and those parties, having acquiesced in her sale, were no longer tenants in common with him in the steamer. The respondents alleged that in July, 1854, being in want of a steamer to run between Boston and St. John, they employed one William Denning to purchase one for them; that their agent proceeded to New York and entered into a contract with William Vanderbilt, who represented himself as the owner of the steamer, that said Vanderbilt should fit, furnish, and convey the steamer to them. When the steamer was completed Vanderbilt took out a builder's certificate and conveyed the steamer to Denning, who paid for her eighty-eight thousand dollars, money furnished him by the respondents. Conveyance was made to the agent because respondents had not passed the vote authorizing the purchase of the steamer when the conveyance was executed. The steamer was afterwards conveyed to the respondents, September 20, 1854. Respondents alleged that the agent, at the time of the purchase, was wholly ignorant of any claims of decedent on the steamer, and had good reason to believe and supposed that Vanderbilt was her true owner.

Shepley & Dana, for complainant.

The title to thirteen twentieths of the Adelaide, as belonging to the estate of J. Van Pelt, may be established without proof of any bill of sale or written document. And a registry and bill of sale are not conclusive. Title may be acquired by building or purchase. Abb. Shipp. (5th Am. Ed.) 1–6; 3 Kent, Comm. 150; Story, Partn. § 417; Colson v. Bonzey, 6 Greenl. 474; Badger v. Bank of Cumberland, 26 Me. 428; Richardson v. Kimball, 28 Me. 463; Holmes v. Sprowl, 31 Me. 75; Barnes v. Taylor, Id. 334; Mitchell v. Taylor, 32 Me. 437; Bixby v. Franklin Ins. Co., 8 Pick. 86; Lord v. Ferguson, 9 N. H. 380; Weston v. Penniman [Case No. 17,455]; D'Wolf v. Harris [Id. 4,221]. No legal title of thirteen twentieths of the Adelaide has passed from the estate of John Van Pelt to the defendants. "The general rule is, that no person can convey who has no title; and the mere fact of possession by the vendor is not of itself sufficient to give title." 3 Kent, Comm. 130, 131; Williams v. Merle, 11 Wend. 80. The general rule is not denied, that under a contract for building an entire vessel, no property vests in the party for whom she is built, until she is ready for delivery, and has been approved or accepted by him. Mucklow v. Mangles, 1 Taunt. 318; Stringer v. Murray, 2 Barn. & Ald. 248; Merritt v. Johnson, 7 Johns. 473; Abb. Shipp. (5th Am. Ed.) pp. 1–6. This general rule does not prevail when a vessel is built under superintendence from the party for whom she is built, and payments for her are made by instalments as the work progresses. In such case the person for whom she is built is the owner. Woods v. Russell, 5 Barn & Ald. 942; Atkinson v. Bell, 8 Barn. & C. 277; Clarke v. Spence, 4 Adol. & E. 448; Laidler v. Burlinson, 2 Mees. & W. 602; Chit. Cont. (6th Am. Ed.) 378, 379. A written agreement that one shall have a part of a vessel then building when completed passes no title. Bonsey v. Amee, 8 Pick. 236. If the court should consider that the defendants have acquired a legal title to the thirteen twentieths of the Adelaide, that title was held by the vendor in trust; and it continues to be chargeable with the same trust as held by the defendants, they not being purchasers for value, without notice. Vanderbilt held whatever title he had in trust. The legal title to a vessel may be in one person and the equitable interest in another. Weston v. Penniman [Case No. 17,455]. Notice to an agent is notice to his principal. Com. Dig. tit. "Chancery," p. 719, 4 C 5; Maddox v. Maddox, 1 Ves. Sr. 62; Fulton Bank v. Canal Co., 4 Paige, 127; Bank of Alexandria v. Seton, 1 Pet. [26 U. S.] 309. A purchaser with notice is bound in all respects as his vendor was. Taylor v. Stibbert, 2 Ves. Jr. 437. Whatever puts a party on further inquiry is sufficient notice in equity. Com. Dig. tit. "Chancery," p. 717, 4 C 2; Smith v. Low, 1 Atk. 489; 2 Sugd. Vend. (10th Eng. Ed.) 471, 472; Jackson v. Rowe, 2 Sim. & S. 472; Kennedy v. Green, 3 Mylne & K. 719, 721, 722; Jones v. Smith, 1 Hare, 43; Booth v. Barnum, 9 Conn.

286; Pitney v. Leonard, 1 Paige, 461; Hawley v. Cramer, 4 Cow. 717; Carr v. Hilton [Case No. 2,437]; Williamson v. Brown [15 N. Y. 354].

B. R. Curtis and H. C. Hutchins, for respondents.

The respondents purchased the steamboat of Vanderbilt, and paid her fair and full value. Vanderbilt had possession and the record title. Respondents therefore took the legal title. This bill can be maintained on this ground only, otherwise complainant's remedy is at law. If Vanderbilt held his title subject to a trust, the complainant, to maintain this bill, must affect respondents with notice of that trust. No express notice will be claimed, and no implied notice is proved by the testimony. To constitute implied notice of a trust of this character, the evidence must be sufficient to show fraud on the part of the respondents. Jones v. Smith, 1 Hare, 43. Van Pelt's interest, if any, was to be kept secret; and since his death, no one has changed this arrangement. Having thus clothed Vanderbilt with title, Van Pelt and his representatives are estopped from setting up any claim to the vessel. Pepper v. Haight, 20 Barb. 429.

Shepley, in reply.

Ordinary prudence is required of the purchaser respecting the title of the seller. Hill v. Simpson, 7 Ves. 170. The purchaser must in equity be fixed with all the knowledge which it was reasonable that he should acquire, and he is bound to use due diligence in the investigation of the title. Jackson v. Rowe, 2 Sim. & S. 472. Whatever notice is enough to excite attention, and put the party upon his guard, and call for further inquiry, is notice of everything to which such inquiry might have led. Kennedy v. Green, 3 Mylne & K. 719; Carr v. Hilton [supra]. When it appears that a purchaser must have had a suspicion of the truth, and that he designedly avoided to receive actual notice, he is to be regarded as having notice. Jones v. Smith, 1 Hare, 43. When a trust is established, equity will follow the legal title, and decree that those in whom it is vested shall execute the trust. "An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him." Taylor v. Plumer, 3 Maule & S. 574. Notice of a trust makes a person a privy. Com. Dig. tit. "Chancery," p. 716, 4 C 1. As to the general proposition. Id. p. 748, 4 I 4; Bovey v. Smith, 1 Vern. 149; Adair v. Shaw, 1 Schoales & L. 243; Bank of Alexandria v. Seton, 1 Pet. [26 U. S.] 299; 2 Story, Eq. Jur. §§ 976, 1257.

CLIFFORD, Circuit Justice. Most of the facts respecting the title of the complainant as alleged in the bill of complaint are substantially and satisfactorily established by the evidence. Thirteen-twentieth parts of the steamer were built from moneys furnished by the decedent or procured from credits provided by him in his lifetime, and were adjusted and paid by his administrators as legal debts against his estate. Full proof is exhibited that the draft of the steamer was prepared by Vanderbilt as the agent of the decedent, and as such he went to New York to make the contracts for the building of the same and to superintend her construction. Twenty thousand dollars were advanced by the decedent towards the enterprise in his lifetime, and he and Chenery procured a letter of credit from Page Bacon & Co. for fifty thousand dollars for the same purpose. Forty-eight thousand one hundred and ninety-four dollars and fifty-seven cents were obtained on the letter of credit; and the accounts settled in the probate court show that the whole amount was paid by the administrators of the decedent to redeem the property pledged as security for the letter of credit. When Chenery agreed to take seven-twentieth parts of the steamer, he assumed that proportion of the moneys first advanced, so that the whole amount paid by the decedent and by his administrators from his estate was sixty-one thousand one hundred and ninety-four dollars and fifty-seven cents; and the evidence satisfactorily shows that the amount thus advanced fully paid for thirteen-twentieth parts of the steamer when completed and furnished. Vanderbilt had no interest in the steamer, and never made any advances toward her construction, except what had been adjusted and refunded to him by David P. Vail, the agent of the owners, long before the steamer was completed. He left certain bonds and notes with the decedent in his lifetime for collection, amounting to the sum of four thousand dollars, but they proved to be worthless, and remained with the papers of the estate for his benefit. All the contracts for building the steamer were made by him in his own name, but the evidence clearly shows that in all these transactions he was in point of fact the agent of the decedent, from whom or from whose estate all the funds were received, except what was advanced by the owner or owners of the other seven-twentieth parts of the steamer which is not claimed by the complainant. After the arrangement was made with Chenery, as alleged in the bill of complaint, he and the decedent sent David P. Vail to New York to superintend the completion and furnishing of the steamer, and to close up the concern, pay the accounts, and navigate her to California. That arrangement was made at Sonoma in the state of California, where the decedent was then sick, and was to the effect that Chenery should take seven-twentieth parts of the steamer for himself and Jessup, as stated in the bill of complaint, and that he should have the agency of the whole matter. He

adjusted and paid Vanderbilt for all of his services and advances in the premises, and the latter wrote to one of the heirs of the estate that his claims in that behalf were all paid, and that he had passed everything over to the new agent, and had "nothing more to say about the boat." That communication was dated on the 5th of July, 1854, and from that time to the time when the steamer was completed, it is clear, from all the evidence, that whatever he did in the premises was done in subordination to the new agent. Without entering more into detail, suffice it to say that the evidence is full and clear that thirteen-twentieth parts of the steamer were built from moneys and credits furnished by the decedent in his lifetime, and that both Vanderbilt and Vail were mere agents of the party or parties interested in the completion of the work. According to the statement of Vanderbilt, his agreement with the decedent was made at San Francisco, about the 1st of May, 1853, but the evidence tends to show that it was made somewhat later. He made contracts in his own name for the building of the hull and engine, and for the carpenter and joiner work, and for the painting of the vessel. All of the contracts, except that for the building of the hull, provided for performance to his satisfaction; and the payments were to be made at different times, as the work was done. By the terms of the first-named contract, the hull was to be completed in four months from the 7th of July, 1853; and the evidence shows that the vessel was launched and delivered to Vanderbilt in December following. After being delivered, she was taken to New York, and in a few days subsequently to her arrival there the proper contractors commenced to put in her engines. Vanderbilt states expressly that she was delivered to him on the day she was launched, and that she was ready for sea and made a trial trip in April or May, 1854, but was not then finished. More than fifty-six thousand dollars were expended in her construction and equipment, in addition to the sum of twenty thousand dollars paid to the builders of the hull. On the 7th of April, 1854, four months after the builders of the hull had delivered her to Vanderbilt, without reservation or condition, he took from them a bill of sale of the whole steamer, in consideration of twenty thousand dollars as therein expressed, with covenants of general warranty applicable to the whole interest and value of the steamer. When that bill of sale was given no builder's certificate had been filed in the custom-house, but on the 22d of May following the builders of the hull filed in that office a certificate in the usual form, certifying that the steamer had been built by them at Greenport, in 1854, and that she was owned by William W. Vanderbilt. At whose request that certificate was made does not appear, but on the 9th of September following Vanderbilt had the steamer enrolled in his own name, and on the same day he and Vail made the conveyance to the agent of the respondents in pursuance of a prior contract, as alleged in the bill of complaint. On this state of facts, and by virtue of the instruments above mentioned, it is insisted by the respondents that William W. Vanderbilt was the sole owner of the steamer, and that their agent acquired a full and perfect title to the whole of the interest now claimed by the complainant. To that proposition I cannot assent, for several reasons.

It is clear that the builders of the hull, at the time they conveyed to Vanderbilt, had no title or interest in the steamer. By the contract under which they built the hull, they were to be paid by instalments as follows, to wit, five thousand dollars when the keel was laid, five thousand dollars when the vessel was in frame, five thousand dollars when she was planked and her deck laid, twenty-five hundred dollars when she was ready to be launched, and the balance of twenty-five hundred dollars when the carpenter work was finished. Having received those several sums at the times they respectively fell due, in full compensation for their services, and delivered the steamer without reservation or condition, it is quite evident that they retained no interest whatever in the vessel which they could convey to any one. They built the hull only, and never had any title or claim in the entire vessel. Fifty-six thousand dollars in addition to the contract price of the hull had been expended upon the vessel before the sale to the respondents. Nothing can be plainer from the evidence than the proposition that the builders of the hull never owned the entire vessel. Beyond question, the general rule of law is, that under a contract for building an entire vessel no property vests in the party for whom she is built until she is ready for delivery, and has been accepted or approved by such party. Mucklow v. Mangles, 1 Taunt. 318; Stringer v. Murray, 2 Barn. & Ald. 248; Merritt v. Johnson, 7 Johns. 473; Abb. Shipp. 5. But that general rule does not prevail where the vessel is constructed under the superintendence of the party for whom she is built, or his agent; and payments for her, based upon the progress of the work, are to be made by instalments as the work is done. In such cases the person for whom the vessel is built is regarded as the real owner by all the well-considered decisions upon the subject. Woods v. Russell, 5 Barn. & Ald. 942; Atkinson v. Bell, 8 Barn. & C. 277; Clarke v. Spence, 4 Adol. & E. 448; Laidler v. Burlinson, 2 Mees. & W. 602. Mr. Chitty says, where the contract provides that the article shall be manufactured under the superintendence of a person appointed by the purchaser, and also fixes the payments by instalments regulated by particular stages in the progress of the work, the general property in the materials vests in the purchaser at the time when they are used, or

at all events as soon as the first instalment is paid. Chit. Cont. (7th Am. Ed.) 378, 379. All the cases agree that where the contract has been completed, and the vessel has been finished and delivered to the party for whom she was built, and has been approved by him, the property vests in such party. Andrews v. Durant, 1 Kern. [11 N. Y.] 40. Assume the more restricted rule, as last stated, to be the more correct one, still it is broad enough to show that the builders of the hull in this case had parted with all claim of title four months before the date of their bill of sale to Vanderbilt.

By that delivery Vanderbilt acquired no interest in the steamer for the reason that in accepting it he acted as the agent of the party or parties who furnished the means to pay the consideration. He took no written conveyance at the time, and the whole case shows that he did not then contemplate any fraud upon the rights of those he represented in accepting the delivery. His services and claims were all subsequently paid by the new agent, and in July, 1854, he expressly declared that he had nothing more to say about the boat. Delivery to him as agent of the real owners could not of itself vest any title in him, although the builders of the hull had no knowledge as to the capacity in which he was acting. Unaccompanied by any written conveyance, and with no intent on his part to appropriate the property to his own use, such delivery of the vessel to him as agent of the party or parties for whom it was in fact built must be understood as vesting the title in the real owners, and his subsequent act in taking the bill of sale from the builders four months afterwards could not have the effect to divest such owners of the title and vest it in him as their agent. In the opinion delivered by Mr. Justice Curtis at the hearing on the bill of complaint, he proceeded upon the ground that the legal title was in Vanderbilt, and that it passed to the agent of the respondents under the bill of sale executed by him and Vail. But that opinion was given upon the case as then exhibited in the bill of complaint, without any knowledge of the facts since disclosed in the evidence. Unlike what was then exhibited, it now appears that the claims of Vanderbilt had been fully settled and satisfied, and that he had expressly disclaimed all interest in the steamer. He and Vail combined together, took out the builder's certificate in the name of the former, obtained the enrolment in his name as sole owner, and jointly conveyed the steamer to the agent of the respondents. Instructions undoubtedly were at one time given to Vanderbilt by the decedent to have the steamer enrolled in his name; and it is equally certain that other instructions were subsequently given designating other parties as part owners, but all of those instructions were superseded when the new agent was sent to New York to close the accounts and navigate the steamer to California. No such instructions were ever given to the new agent, and if those previously given to Vanderbilt were not expressly superseded, it must be considered that they were terminated at the death of the decedent. At most, the builder's certificate and the enrolment are only evidence of title, but under the circumstances of this case they are not conclusive evidence. Title may be acquired by building or by purchase, and it may be established, especially when acquired in the former mode, without the exhibition of any bill of sale or other written evidence. In the United States it is well settled that at common law the title of a vessel may pass by delivery under a parol contract. Bixby v. Franklin Ins. Co., 8 Pick. 86; U. S. v. Willings, 4 Cranch [8 U. S.] 55; Badger v. Bank of Cumberland, 26 Me. 428; Wendover v. Hogeboom, 7 Johns. 308; Vinal v. Burrill, 16 Pick. 401; Leonard v. Huntington, 15 Johns. 298; Thorn v. Hicks, 7 Cow. 699; Fontaine v. Beers, 19 Ala. 722; Pars. Merc. Law, 329; Colson v. Bonzey, 6 Me. 474; Richardson v. Kimball, 28 Me. 463; Holmes v. Sprowl, 31 Me. 75; Barnes v. Taylor, Id. 334; Mitchell v. Taylor, 32 Me. 437; Stacy v. Graham, 3 Duer, 452; Lord v. Ferguson, 9 N. H. 380; Weston v. Penniman [Case No. 17,455]. Registry acts are to be considered as forms of local or municipal institutions for purposes of public policy. They are imperative only, says Chancellor Kent, upon voluntary transfers of the parties, and do not in general apply to transfers by act or operation of law. 3 Kent, Comm. (9th Ed.) 208. Of itself, the register, it is said, is not evidence of property, unless it be confirmed by some auxiliary circumstance, to show that it was made by the authority or the assent of the person named in it, and who is sought to be charged as owner. Without such proof, doubts have been expressed whether it is even prima facie evidence of ownership. U. S. v. Brune [Case No. 14,677]; Tinkler v. Walpole, 14 East, 226; M'Iver v. Humble, 16 East, 169; Fraser v. Hopkins, 2 Taunt. 5; Sharp v. United Ins. Co., 14 Johns. 381; 1 Greenl. Ev. § 494; Ring v. Franklin, 2 Hall, 1. Upon the same ground and for the same reasons it is competent for the real owner, who claims as builder, to show by parol evidence that his claim is well founded, and that the builder's certificate and registry or enrolment have been fraudulently made and issued in the name of another. Such fraudulent acts cannot confer any interest in the vessel, and if not, a claimant whose title has no other foundation for support cannot convey a good title as against the real owner or his legal representatives, even to a purchaser without notice. Williams v. Merle, 11 Wend. 80; Everett v. Coffin, 6 Wend. 609; Prescott v. De Forest, 16 Johns. 169. But suppose it were otherwise, and that the legal title to the steamer was in Vanderbilt at the time he and Vail gave the bill of sale to the agent of the respondents, still the complainant in this case is entitled to recover, as Vanderbilt, in that view of the case, held the title in trust for the real owners. A purchaser with notice of the trust stands in no better situa-

tion than the seller. By the well-settled rules of law, the legal title to a vessel may be in one person and the equitable interest in another. 3 Kent, Comm. (9th Ed.) 151; Weston v. Penniman [Case No. 17,455]; Ring v. Franklin, 2 Hall, 10; 1 Pars. Merc. Law, 328. Notice to the agent is notice to the principal. That rule of law, as applicable to the facts of this case, is too obvious and too well settled by authority to require any argument in its support. Com. Dig. tit. "Chancery," p. 719, 4 C 5; Maddox v. Maddox, 1 Ves. Sr. 62; Fulton Bank v. New York & S. Canal Co., 4 Paige, 127; Bank of Alexandria v. Seton, 1 Pet. [26 U. S.] 309. Purchasers with notice are bound in all respects as their vendors were, and have no greater right. Taylor v. Stibbert, 2 Ves. Jr. 437.

Ordinary prudence is required of the purchaser, and whatever fairly puts a party on further inquiry is in general sufficient notice in equity. Jones v. Smith, 1 Hare, 43; Hill v. Simpson, 7 Ves. 170; Smith v. Low, 1 Atk. 489; 2 Sugd. Vend. 471; Booth v. Barnum, 9 Conn. 286; Pitney v. Leonard, 1 Paige, 461. Notwithstanding that principle is well settled, still it is unnecessary in this case to invoke its aid, for the reason that the facts and circumstances in proof show, to the entire satisfaction of this court, that the agents of the respondents had full knowledge at the time of the sale that the steamer was built for parties in California; and I am also of the opinion that they were informed that the steamer was about to be claimed by those to whom she belonged, and that they hastened her departure from New York so that such claim might not be successfully made.

One other question only remains to be considered. It was insisted by the opening counsel for the respondents, that, in this view of the case, the remedy of the complainant was at law, and not in equity. That suggestion was based upon the assumption that one tenant in common may maintain an action at law against the purchaser of the common property from his cotenant, in the absence of any conversion of the property or proof of its destruction. But the senior counsel very properly conceded that the law is otherwise, and that under such circumstances the action at law could not be maintained. Considering the law to be well settled as conceded by the senior counsel, further examination of the point is deemed unnecessary. Lord v. Tyler, 14 Pick. 163; Wills v. Noyes, 12 Pick. 326; Dain v. Cowing, 22 Me. 347. In view of the whole case, I am of the opinion that the complainant is entitled to a decree to compel the respondents to make the conveyance as prayed in the bill of complaint, and for an account of the net earnings of the steamer since the purchase. In order to ascertain the amount of the net earnings, the cause must be referred to a master.

[The decree entered in this case was, upon appeal by the defendants to the supreme court, reversed. 2 Black (67 U. S.) 372.]

Case No. 12,566.

SCUDDER v. CALAIS STEAMBOAT CO.

[20 Law Rep. 498.]

Circuit Court, D. Maine. April Term, 1857.

SHIPPING — REGISTER — EQUITABLE TITLE — PRACTICE IN EQUITY — PARTIES.

1. The registry acts of the United States do not require a disclosure of the equitable title of the vessel registered or enrolled, unless that title is in the subject of a foreign state.

2. Where an agent is employed to procure a vessel to be built in his own name, and to transfer the title eventually to his employer, and he fraudulently transfers the title to a stranger, with notice, the transaction creates a trust properly cognizable in equity.

3. In a suit in equity to enforce such a trust, all the equitable owners should be joined as parties, but if one is out of the jurisdiction and will not join in the suit, the court has power to proceed in his absence.

[This was a bill in equity by Charles Scudder, administrator of John Van Pelt, against the Calais Steamboat Company.]

CURTIS, Circuit Justice. This case has been argued in writing during the vacation on a demurrer to the bill. The material allegations of the bill are, that the plaintiff's intestate, residing in California, employed one William W. Vanderbilt, to act as his agent in procuring a steamboat to be built in the city of New York. That Vanderbilt was originally instructed to contract for the building of the boat in his own name, and have it enrolled in his own name when completed, and send it to California, when the entire title was to be transferred to the intestate, unless it should be agreed that Vanderbilt might become owner of two undivided twentieth parts thereof. That subsequently these instructions were so far changed as to direct Vanderbilt to have the boat enrolled in the names of four other persons besides himself, as owners of certain specified parts, respectively. That afterwards the deceased agreed with one Richard Cheenery, that he should own seven twentieths of the boat, and the deceased was to own the residue. That Cheenery and the deceased, and his representatives in California after his decease, furnished respectively thirteen twentieths, and seven twentieths of the moneys expended in building the boat. That one Vail was employed, either by the intestate alone or by him in conjunction with Cheenery, to go to New York, take charge of the boat, fit out and navigate her to California. That Vail and Vanderbilt, combining together, took the builder's certificate in the name of Vanderbilt, obtained an enrollment in his name as sole owner, and, in fraud of the intestate, sold the boat to an agent of the defendants, who had notice of the intestate's rights; and the defendants' agent afterwards transferred the title to the defendants.

The principal ground taken in support of the demurrer is, that the employment of Vanderbilt to have this boat built and enrolled in his name as the sole owner, or in the names

of himself and three other persons, as owners, when in truth the intestate alone, or he and Cheenery, were the owners, was an attempt to commit a fraud on the registry acts of the United States; and that this purpose so taints the whole transaction that a court of equity will not aid the administrator to vindicate rights of the intestate growing out of such a contract. But this objection is founded on a misapprehension of the effect of the registry acts. By the act of February 18, 1793, § 2 [1 Stat. 305], the same proceedings are to be had in enrolling as in registering vessels. The act of December 31, 1792, § 4 [1 Stat. 289], requires the owner applying for a register to make oath that he is the sole owner of the vessel, or an owner jointly with others, whom he names, and that he or they are citizens of the United States, and that there is no subject of any foreign state, directly, or indirectly, by way of trust or confidence, or otherwise, interested in such vessel or the profits thereof. The act of July 29, 1850, § 5 [9 Stat. 441], has changed this only so far as to require the particular proportions owned by each person to be specified. But there is nothing in either of these acts which prevents the legal title from being in one person while the equitable title is in another, or which requires a disclosure of the equitable title unless its owner be a subject of a foreign state. The ownership referred to in the oath is a legal, in contradistinction to an equitable ownership. This was so held by this court, in Weston v. Penniman [Case No. 17,455]. I am not aware that the correctness of this decision has been doubted; and it is matter of every-day practice for vessels to be held in trust for citizens of the United States not named in the register or enrollment. Upon this ground the demurrer cannot stand.

Another ground is, that there is a plain, adequate, and complete remedy at law, and so no jurisdiction in equity. But the employment of Vanderbilt to go to New York, contract for building a boat, and take the title in his own name, and pay for it out of the funds of the intestate, and then transfer the title to the intestate, or such person or persons as he might appoint, created a trust; and the subsequent fraudulent violation of that trust by selling and conveying the boat to a third person, who purchased with notice of the fraud, makes a clear case for the interposition of a court of equity. It is true the bill avers that the defendants got no legal title, or if they did it was affected with notice of the complainant's equity. But, besides being in the alternative, this allegation is merely a conclusion of law drawn by the pleader from the substantive facts stated; and these facts show that the last alternative is the correct one, and that the defendants did get a legal title charged with the same trust as existed while Vanderbilt held that title.

It is further objected that Cheenery, the other part owner, should have been joined as a party, or some excuse for not joining him assigned in the bill. To this it is answered that it does not appear by the bill that Cheenery was defrauded; and that, non constat but his equitable title was properly sold by Vail, who professed to be his agent for that purpose. But the difficulty is, that it is not distinctly averred whether it was or was not rightfully sold. This is a bill for an account, and for the transfer of title to thirteen twentieths of the boat. If Vail was jointly employed by the intestate and Cheenery, to take possession of the boat, and colluded with Vanderbilt to defraud both his employers by a sale to a third person, and such sale was made, I think Cheenery should be a party to a bill to set aside the sale, and for an account. Brookes v. Burt, 1 Beav. 106. And the bill should either explicitly aver that Cheenery is no longer a tenant in common with the complainant, because his equitable interest was extinguished, or he should join, as a party complainant, or, if he refuses, he should be joined as a party defendant, or his absence from the jurisdiction should be averred. In the latter case, I think, the court may proceed in his absence; for though he is a necessary party, he is not an indispensable party under the act of February 28, 1839 (5 Stat. 321). Shields v. Barrows, 17 How. [58 U. S.] 130.

Upon this last ground the demurrer must be sustained, with leave to amend the bill.

[NOTE. Subsequently there was a hearing upon the amended bill. A decree was entered for complainant, with an order of reference. Case No. 12,365. An appeal from that decree was taken to the supreme court, where the decree was reversed. 2 Black (67 U. S.) 372.]

Case No. 12,567.

SCUDDER v. THOMAS.

[35 Ga. 364.]

Circuit Court, D. Georgia. April 16, 1868.

NOTES—FAILURE OF CONSIDERATION—LOAN OF CONFEDERATE MONEY.

A note given for the loan of Confederate money was illegal, without consideration, and void; so, also, was a note or duebill given in renewal of such original note.

Assumpsit [by John Scudder against Joseph A. Thomas] for the recovery of four thousand five hundred dollars, on a duebill, of which the following is a copy: "Burke County, March 3, 1866. Due John Scudder the sum of four thousand five hundred dollars, for value received, with interest from January 11th, 1866. (Signed) Joseph A. Thomas."

To the declaration defendant pleaded the general issue, and a special plea that the said duebill, or promissory note, was without consideration, inasmuch as it was given in settlement and renewal of a note, the consideration of which was the loan of treasury notes issued by the so-called Confederate States, which were issued contrary to law and were of no value.

To this plea, plaintiff replied that on the

16th of April, 1862, defendant borrowed of him seven thousand five hundred dollars in Confederate treasury notes, to secure the payment of which he gave his promissory note for said sum, with interest, and that at that time these treasury notes were of great value. That on the 3d day of March, 1866, plaintiff held the said note for seventy-five hundred dollars, and also a promissory note made by one Robert Thomas, for five hundred dollars, and that in compromise, and in consideration of the surrender of these two notes, defendant gave his duebill or promissory note for forty-five hundred dollars, now sued on. To this replication defendant demurred.

Mr. Guerard, for plaintiff.
Mr. Lloyd, for defendant.

ERSKINE, District Judge. The promissory note given by the defendant to the plaintiff, April 16, 1862, for the loan of treasury notes issued by the so-called Confederate States, was without consideration and void, the contract being illegal in its inception. And the duebill made March 3, 1866, and delivered to the plaintiff in compromise and settlement of the original note, and the further supposed consideration of the surrender to the defendant of the note of Robert Thomas, inherits the taint of the note of April, 1862, and is likewise invalid. For when a contract, in whole or in part only, grows immediately out of, and is connected with, an illegal transaction, notwithstanding it may be a new contract, it is equally contaminated. This case falls directly within the principle of Toler v. Armstrong [Case No. 14,078], and the Case of Milner (lately decided in the United States district court, Northern district of Georgia) 35 Ga. 330. The demurrer must be sustained. Judgment, nil capiat.

SCUDDER (VAN HOOK v.). See Case No. 16,853.

Case No. 12,568.

In re SCULL.

[7 Ben. 371; [1] 10 N. B. R. 165; 10 Alb. Law J. 214; 1 Am. Law T. Rep. 416; 20 Int. Rev. Rec. 80; 22 Pittsb. Leg. J. 34.]

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

BANKRUPTCY—PETITION—ACT OF 1874—NUMBER OF PETITIONING CREDITORS—ACT OF BANKRUPTCY.

1. A petition in involuntary bankruptcy was filed on June 4, 1874, on which an order to show cause was made returnable June 13th. On the return day proof of service was filed, and, the bankrupt not appearing, the matter was, at the request of the creditor, adjourned from time to time till after the passage of the bankruptcy amendment act of June 22, 1874 [18 Stat. 178], after which the creditor asked for an adjudication. The petition stated facts sufficient to authorize an adjudication when it was filed, but it did not state that the petitioning creditors constituted one-fourth in number of the creditors, or that their debts amounted to one-third of the debts provable, as required by the act of June 22, 1874, and, in stating the act of bankruptcy it alleged that the bankrupt "suffered" his property to be taken on legal process, but did not allege that he "procured" it to be so taken, as required by that amendment: *Held*, that the petition must be taken, as it stood, as showing that the requisite number of creditors had not joined in the petition.

[Cited in Re McKibben, Case No. 8,859; Re Mann, Id. 9,033; Re Duncan, Id. 4,131; Re Austin, Id. 662.]

2. As the petition was filed before June 22, 1874, the petitioners might have an order allowing them to amend it so as to make it conform to the requirements of the amendment of June 22, 1874, both as to the number and amount of the creditors joining in the petition and as to the act of bankruptcy.

[In the matter of Isaac Scull, a bankrupt.]

Meade & Rockwell, for petitioning creditors.

BLATCHFORD, District Judge. This is a petition in involuntary bankruptcy, filed on the 4th of June, 1874. The order to show cause was returnable on the 13th of June, and was duly personally served on the alleged bankrupt on the 5th of June. On the return day, proof of service was filed, but the alleged bankrupt did not appear, and, at the request of the petitioning creditors, the matter was adjourned from time to time until after the approval of the amendatory act of June 22, 1874, no adjudication being directed to be entered, and, of course, no order of adjudication being entered. The petitioning creditors now ask for the entry of an order of adjudication, as on a default for want of appearance. The papers are in due form under the statute as it stood prior to its amendment by the act of 1874, and, but for the provisions of the latter act, the right to an adjudication would be clear.

[2] [The 12th section of the act of 1874, amending the 39th section of the former act [of 1867 (14 Stat. 536)], provides that an adjudication in involuntary bankruptcy can be made only on the petition of one or more of the creditors of a debtor, "who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable * * * and the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy, commenced since the 1st day of December, 1873, as well as to those commenced hereafter. And in all cases commenced since the 1st day of December, 1873, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number and amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of resi-

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

[2] [From 10 N. B. R. 165.]

dence and the sums due them respectively; and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court, if satisfied that the admission was made in good faith, shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And, if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and in cases hereafter commenced ten days, within which other creditors may join in such petition. And if, at the expiration of such time, so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and in cases hereafter commenced, with costs." The 13th section of the act of 1874, amending the 40th section of the former act, provides, that if, on the return-day of the order to show cause, "the court shall be satisfied that the requirement of section 39 of said act as to the number and amount of petitioning creditors has been complied with, or if, within the time provided for in section 39 of this act, creditors sufficient in number and amount shall sign such petition, so as to make a total of one-fourth in number of the creditors and one-third in amount of the provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise, it shall dismiss the proceedings, and in cases hereafter commenced, with costs."] [3]

The provision of that act in respect to all cases commenced since the 1st of December, 1873, and prior to the passage of the act of 1874, as well as those commenced after such passage, is (section 12) that the debtor is to be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth at least in number of his creditors, and the aggregate of whose debts provable under the act amounts to at least one-third of the debts so provable. It is suggested that this does not require that the petition shall show that the petitioning creditors constitute the prescribed number and amount; that it is for the debtor to come in, in the first instance and assert that the petitioning creditors do not constitute the prescribed number and amount; and that, if he does not, there need be no inquiry into the matter. I cannot concur in this view, for several reasons.

(1.) The reasonable construction of the provision that the petition is to be the petition of one or more of the creditors, who shall constitute a given proportion, in number, of creditors, and whose provable debts shall constitute a given proportion, in amount, of provable debts, is, that the petition shall not only show that the petitioners are creditors, and how, and to what amount severally, but shall also show that they constitute a body who have a right to invoke relief which can be given only to those who do constitute such body. Such construction was given to the 39th section as it formerly read, of which this 12th section is an amendment; and the forms of petition prescribed by the supreme court required that the petition should contain, on its face, affirmative allegations of the existence of all the facts which were necessary prerequisites to the right to ask for an adjudication—such as, the residence or carrying on of business by the debtor in the proper district, for the requisite period of time; the owing by him of debts exceeding $300; the provability of the petitioner's demand; the fact that the petitioner's demand exceeded $250, and its nature and character; and particulars showing the commission of some act of bankruptcy specified in the statute. The petition must, undoubtedly, be such as to show, on its face, a proper case, on comparing it with the statute, for entering an adjudication, if there be no appearance to it by the debtor. It cannot do this unless it shows, on its face, that the petitioners constitute the prescribed number and amount.

(2.) In addition to this, the provision is, that, "if such allegation as to the number or amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect," the court shall require him to file a list of his creditors, &c. It is suggested that this provision is satisfied by calling on the debtor to assert that the petitioning creditors do not constitute the requisite number and amount. But the statute says, that "such allegation" is to be "denied" by the debtor. The use of the phrase "such allegation" clearly implies that the allegation to be denied is one made by the petitioning creditor, and one made in the petition; and it is an allegation "as to the number or amount of petitioning creditors" that is to be denied. A denial implies a contradiction of an assertion. The assertion must precede the denial.

It is suggested that, inasmuch as the debtor was in default on the 13th of June, and the petitioning creditors were then entitled to have an adjudication, and the debtor has not appeared, the adjudication ought now to be made. The petition contains no allegation that the petitioning creditors constitute the prescribed number and amount. The debtor has not been adjudged bankrupt, and the provisions of the act of 1874 apply, therefore, to this case, it having been commenced since the 1st of December, 1873. But, the statute

[3] [From 10 N. B. R. 165.]

is very marked in requiring that the court shall have affirmative evidence, in the papers on which it makes an adjudication, that the provisions of the statute, as to the number and amount of creditors petitioning, are being complied with, and shall not necessarily repose on an admission by the debtor to that effect, much less on his failure to assert the contrary of what is not alleged. Such admission by the debtor, if made, must be made in writing, and then the court must be satisfied that it is made in good faith. This is undoubtedly in order to prevent collusion, and because of the provision of section 9 of the act of 1874, that, in cases of involuntary bankruptcy, the bankrupt may receive a discharge, if otherwise entitled thereto, without paying any proportion of his debts, and without procuring the assent of any portion of his creditors, as a condition of his discharge, while, in cases of voluntary bankruptcy, no discharge can be granted to a debtor whose assets are not equal to 30 per centum of the claims proved against his estate, upon which he is liable as principal debtor, without the assent of at least one-fourth of his creditors in number and one-third in value. The view seems to be, that, if one-fourth in number and one-third in value of the creditors petition in involuntary bankruptcy, they shall be regarded, under the provisions of the statute, as assenting to the discharge of the bankrupt, in like manner as one-fourth in number and one-third in value assent, in voluntary bankruptcy. Again, section 13 of the act of 1874 requires, that the court must, on the return day of the order to show cause, be satisfied that the requirement as to the number and amount of petitioning creditors has been complied with, or must have evidence that, within the time provided for, creditors sufficient in number and amount have signed the petition, so as to make a total of one-fourth in number and one-third in value, before it can make an adjudication to that effect; and that, otherwise, the court must dismiss the proceedings. This imposes on the court the duty of dismissing the petition, unless it appears affirmatively that such requirement has been complied with, or that, within the time provided for, the proper number and amount of creditors sign the petition. This, again, shows that a part, at least, of the evidence that the petition is joined in by the proper number and amount of creditors, must be the fact that creditors sufficient in number and amount sign the petition within the time provided for, if it has appeared that a sufficient number and amount did not petition in the first instance. Now, it would be unreasonable to suppose that it was intended that the proper number and amount should sign the petition, without its appearing, in the body of the petition, not only that the signers were, by name and description, petitioners, but that they constituted the requisite number and amount; and, if these things are required in regard to the petition, after time is granted for other creditors to join in it, it is reasonable to hold that the statute intends that the requirement as to the number and amount of petitioning creditors is not complied with, in the presentation of the petition in the first instance, unless it appears, in the body of the petition, by name and description, who are the petitioners, and that they constitute the requisite number and amount, and unless the persons so named as petitioners sign the petition. The petition "may be sufficiently verified by the oaths of the first five signers thereof, if so many there be." This means, that, if there are five or less signers, all must verify the petition by oath; but that, if there are more than five signers, it will be sufficient if the first five of them so verify it. This necessarily implies that there may be more signers than those who verify the petition by oath, and implies, also, that those who are petitioners must sign the petition.

As, in the present case, the petition does not state that the petitioners constitute the requisite number and amount of creditors, it must be held that it appears that the requisite number and amount of creditors have not petitioned. As the case was commenced before June 22, 1874, an order will be entered herein by the clerk, if the petitioning creditors desire, granting twenty days from the formal entry of such order, as the time within which the petition may be amended so as to show a compliance with the requirement of the statute as to the number and amount of petitioning creditors, and providing that, at the expiration of that time, or when such amendment shall be filed, if before the expiration of that time, the clerk shall present to the court all papers which shall have been filed herein, including those filed with a view to such amendment of the petition, to the end that the matter in bankruptcy may proceed, or the proceedings may be dismissed, as the case may be.

The only act of bankruptcy alleged in the petition is, that the debtor, being insolvent, suffered his property to be taken on legal process, with the intent to give a preference to a creditor, and to defeat the operation of the act. This was an act of bankruptcy when the petition was filed. By the act of 1874 it is no longer made an act of bankruptcy. The debtor, being insolvent, must "procure" his property to be taken on legal process, with the intent to give a preference, or to defeat or delay the operation of the act; and all the provisions of the section of the act of 1874 which specify what are acts of bankruptcy on which a person can be adjudged an involuntary bankrupt, are by it made applicable to the present case, commenced since December 1, 1873. Therefore, if the present petition is to be proceeded with at all, it must, in respect to the matters alleged in it as constituting the act of bankruptcy set forth, be amended by averring that the debtor "procured" his property to be taken. An amendment to that effect will be allowed to be made

within the twenty days before provided for.

The provisions of the statute have been carefully considered in the above observations, because the number of the petitions in involuntary bankruptcy filed in this district, between December 1, 1873, and June 22, 1874, was 346. Of this number, 98 were discontinued, and in 118 others adjudications have been entered. This leaves 130 in which no adjudication has been entered, and which come under the provisions of the act of 1874. In all of these 130, which are in the same situation as the present case of Isaac Scull, and in all of them in which the petition was filed before June 22, 1874, and no order of adjudication was formally filed and entered before June 22, 1874, the clerk will enter a like order, if either party desires it.

Case No. 12,569.

SCULL v. BRIDDLE.

[2 Wash. C. C. 150.] [1]

Circuit Court, D. Pennsylvania. April Term, 1808.

SHIPPING—MASTER—AUTHORITY TO SELL—ACTION BY OWNER TO RECOVER—MEASURE OF DAMAGES.

1. In cases of extreme necessity, the master may, in a foreign country, sell the vessel and tackle to prevent the property from perishing; but he cannot do this in the country where the owner lives.

[Criticised in The Sarah Ann, Case No. 12,342; The Tilton, Id. 14,054; New England Ins. Co. v. The Sarah Ann, 13 Pet. (38 U. S.) 402.]

[Cited in Bryant v. Commonwealth Ins. Co., 30 Mass. 554.]

2. A sale of the vessel and her tackle in Maryland, at auction, by the master, who, by misconduct, had got the vessel on shore, gives no title to the purchaser; and in an action of trover and conversion, for the articles purchased, the measure of damages is the real value of the property, and not what they were sold for.

[Cited in Indianapolis Ins. Co. v. Mason, 11 Ind. 192.]

This was an action of trover and conversion, brought for certain sails, rigging, masts, &c., which had belonged to a vessel of the plaintiff, wrecked on the coast of Maryland; and being got on shore, the vessel and tackle were sold at public sale, by the captain, upon notice, and were purchased by the defendant. The plaintiff had hired the vessel to the captain for seventy-five dollars a month, for as long a time as both parties should please. The captain took a freight to Virginia, and on his return, by his misconduct, got her on shore; and having removed all these articles and others to the shore, sold them as above. There was some contradiction in the evidence, as to their safety, in the place to which the captain had removed them.

The defence was, that the captain had a legal power to sell; for which were cited, 1 Rob. 70, 71, 127; 3 Rob. 208, 210, 217; Doug. 219. If not so, that the defendant was liable, only, for what the property sold for.

WASHINGTON, Circuit Justice (charging jury). In cases of extreme necessity, the master may sell in a foreign country, rather than let the property perish; but not in the country where his owner lives; and no case of the sort can, it is believed, be shown. Mischievous would be the consequence, if such doctrines were tolerated. In this case, there was, in fact, no necessity for the sale; for the captain might have got these articles into a place of safety, and ought to have done so; and informed his owner, or rather the owner of the vessel, of her situation; he, the owner, living in Philadelphia. But what makes this case stronger, is, that the master was not the servant of the plaintiff, but the hirer of the vessel; and of course not even an implied authority can be presumed, to warrant the exercise of so extraordinary a step, as selling this property. As to the damages, the real value of the property, and not what the defendant gave, must be the measure of the damages.

Verdict for the plaintiff.

[For hearing on motion in arrest of judgment, in which the motion was overruled, see Case No. 12,570.]

Case No. 12,570.

SCULL v. BRIDDLE.

[2 Wash. C. C. 200.] [1]

Circuit Court, D. Pennsylvania. April Term, 1808.

PRACTICE AT LAW—MOTION IN ARREST OF JUDGMENT—MISNOMER—AMENDMENT.

1. After bail given, and plea pleaded, the defendant cannot arrest the judgment on the ground of misnomer.

2. By the provisions of the act of congress, a variance, which is merely matter of form, may be amended at any time.

3. The proceedings were amended by the recognisance of bail, and the name of the defendant, in the recognisance, inserted in the declaration.

Motion in arrest of judgment, because the writ was against Edward Briddle, and the declaration against Edward Biddle. The defendant gave special bail by the name of Edward Briddle. Cases cited by defendant's counsel: 2 Wils. 394; 3 Term R. 611.

WASHINGTON, Circuit Justice. It was competent for the defendant to have pleaded in abatement, that he was sued by the name of Edward Biddle, whereas his name was Edward Briddle. But instead of this, he

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

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gives bail by his right name, and pleads in bar of the action. The variance is mere form, and the act of congress, in such a case, permits the court to amend at any time. Let the proceedings be amended, conformably to the recognisance of bail.

Motion overruled.

Case No. 12,570a.

SCULL v. HIGGINS.

[Hempst. 90.] [1]

Superior Court, Territory of Arkansas. Nov., 1829.

CONTRACTS—MATERIALITY OF TIME OF MAKING—PRACTICE AT LAW—ARREST OF JUDGMENT.

1. In an action on the case for failure to perform a parol contract, the time of making it is not material, and hence, where it was alleged to be made on the 19th of September, 1828, to take effect in 40 days, and the breach of it was assigned to have occurred the next day, it will be presumed, after verdict, that it was proven that the breach occurred after the expiration of 40 days; and it is error to arrest the judgment.

2. The contract shows a cause of action.

Appeal from Hempstead circuit court.

[This was an action by Hewes Scull against Joseph Higgins.]

Before JOHNSON, ESKRIDGE, BATES, and TRIMBLE, JJ.

OPINION OF THE COURT. This was an action on the case, brought by Scull for the breach of a parol contract to deliver a keel boat. The declaration charged, that on the 19th day of September, 1828, the defendant, in consideration, etc., promised to deliver the said boat 40 days from the date, and assigns for breach, that the defendant, on the 20th day of September, sold the said boat to Rafelle and Notrebe. The suit was brought on the 20th of September, 1828, the day after the contract is charged to have been made. A trial was had, and the jury found for Scull, and a motion to arrest the judgment was sustained, from which the plaintiff took an appeal. The errors assigned for arresting the judgment, were: (1) There was no cause of action; (2) the action was premature; (3) there is no sufficient breach. The second objection was mostly relied on in the argument, namely, that the action was premature. The contract was laid to be on the 19th of September, 1828, to take effect 40 days thereafter, and were this an action on a specialty, the objection would be valid; but in this form of action the time is not material, and the plaintiff might, and we are bound to presume did, prove the contract to have been made at a prior date to the day laid, and that the time given to deliver the boat had expired. 1 Chit. 288. This is equally applicable to the third objection, since we will presume that a sufficient breach had been proven on the trial. As to the first objection, that there was no cause of action, we think there was a cause of action, and the damages which the plaintiff sustained by reason of a breach, a proper subject of inquiry by the jury. Reversed.

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

Case No. 12,570b.

SCULL v. KUYKENDALL.

[Hempst. 9.] [1]

Superior Court, Territory of Arkansas. June, 1821.

WRITS—CAPIAS—ERROR—CORRECT ALIAS.

A suit should not be dismissed because a capias not served was erroneous when an alias capias executed on the defendant is correct, as the court should not look beyond the last writ.

Error to Arkansas circuit court.

[This was an action by Hewes Scull against Joseph Kuykendall.]

Before JOHNSON and SCOTT, JJ.

OPINION OF THE COURT. The court below dismissed this suit because there was an error in the original writ, although it was not served, but an alias had been regularly obtained and served on the defendant. We can see no reason for dismissing the suit for an error in a writ which was never served. It can only be considered as a clerical misprision, by which the defendant could not possibly be prejudiced. The alias capias which was served on the defendant is in every respect correct, and the court ought not to have looked beyond it. Reversed.

Case No. 12,570c.

SCULL v. ROANE.

[Hempst. 103.] [1]

Superior Court, Territory of Arkansas. Jan., 1831.

APPEAL—BAD COUNT IN DECLARATION—EVIDENCE—NOTES—WHEN PAYABLE.

1. Where there is a good and bad count in a declaration, and it appears that the evidence was applied solely to the bad count, the judgment must be reversed.

2. Where a note was payable when E. shall settle her accounts with S., *held*, that S. was bound to coerce a settlement by suit or otherwise, and that the cause of action accrued to the payee after the lapse of one year, that being a reasonable time.

Appeal from Arkansas circuit court.

[This was an action by Hewes Scull against Samuel C. Roane.]

Before JOHNSON and ESKRIDGE, JJ.

ESKRIDGE, J. This is an action of assumpsit, brought by the appellee against the appellant. The declaration contains three counts. The first, upon a note for the payment of money, in the following words: "Due Samuel C. Roane, $160.05, value received. N. B.

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

This note to be paid when Mrs. Sarah Embree shall settle her accounts with H. Scull. March 7, 1828. (Signed) H. Scull." The second count is for money advanced and paid to the defendant; and the third count is for money assumed and paid at the request of defendant. The only breach contained in the declaration, is in the following words: "Yet the said plaintiff saith he has often requested the defendant to pay and discharge the above demanded sum of $160.05, namely, at the Port of Arkansas, on the 17th of January, 1829, before the issuing of this writ; but the said defendant has hitherto wholly refused to pay the said sum of $160.05 to the plaintiff." To each of these counts the defendant, in the court below, filed a general demurrer, which was overruled, and he then plead the general issue upon which the cause was tried, and judgment rendered in favor of the plaintiff; from which Scull has appealed to this court.

The first point relied on for reversing the judgment is, that the breach assigned in the whole declaration is applicable by its terms to the last count only. This, we think, must be conceded. It results, therefore, that the first two counts being without any breach, must be considered as totally defective. But the last count, containing the requisite breach, is a good and valid count; and although at common law where the declaration contains a faulty and defective count, and a general verdict with entire damages is given, the judgment will be arrested or reversed on a writ of error or appeal. Yet this principle of the common law is changed. Geyer, Dig. p. 260, § 47. Our statute provides, "That where there are several counts in a declaration, one or more of which are faulty, and entire damages given, the verdict shall be good; but the defendant may apply to the court to instruct the jury to disregard such count or counts as are faulty."

But the counsel for the appellant contends, that as it appears by the bill of exceptions that the only evidence offered at the trial was the note declared upon in the first count, and as the first count is fatally defective, the judgment given in this case must be reversed, not withstanding the declaration contains one good count. It is well settled, that the plaintiff in an action like the present may elect the count on which he will give the note in evidence. Tuttle v. Mayo, 7 Johns. 132; Burdick v. Green, 18 Johns. 14. Had the appellee in the case now under consideration, elected to give the note in evidence under the last count in the declaration, it was entirely competent for him to have done so, and the judgment in that event, as well by the decisions referred to as by our statute, would have been valid; but instead of this, the whole evidence was applied to a faulty and defective count, and the judgment, on that account, must be reversed.

Another question has been made and argued in this case, and as it may arise again in the court below, it may not be improper to express our opinion. It grows out of the instructions given to the jury. The judge of that court instructed the jury, "that from the face of the note declared upon, the defendant was bound to have coerced a settlement of his accounts against Mrs. Embree by suit or otherwise, and that from the lapse of time from the date of the note to the commencement of the suit, the defendant should be liable for the amount of the note." We think the instructions given were in accordance with the law. By a reference to the note, it will be seen, that it was made payable "when Mrs. Embree shall settle her accounts with H. Scull," the obligor in the note. It will hardly be contended that the note would never become due, upon the refusal of Mrs. Embree to make the settlement. This could not have been the intention of the parties, and contracts are to be so construed as to effectuate their intention. It was manifestly the intention of the parties, that Scull should be allowed a reasonable time to make a settlement of his accounts with the person named, and after that period his liability on the note would arise. To permit Scull to take advantage of his own neglect in failing to coerce a settlement of his accounts in a reasonable time would violate every principle of justice. This court accords in opinion with the court below, that after the lapse of one year a cause of action accrued to the appellee upon the note described.

Judgment reversed.

Case No. 12,571.

SCULLY v. The GREAT REPUBLIC.

[1 Sawy. 31.] [1]

District Court, D. California. Feb. 8, 1870.

SEAMEN — FAILURE TO JOIN SHIP — RIGHT TO BE REINSTATED — WAGES — FORFEITURE.

Where a seaman fails by his own fault to rejoin the ship at an intermediate port, at which she has touched in the course of the voyage, and she sails away without him, the master is not bound to reinstate him upon the return of the vessel to the same port in the course of her voyage.

[Cited in The Ericson, Case No. 4,510.]

[This was a libel for wages by Thomas Scully against the steamer Great Republic.]

Sullivan & Ellsworth, for libellant.

Cutler McAllister, for claimant.

HOFFMAN, District Judge. The above vessel is one of the line of mail steamers plying between this port and Hongkong, in China, touching at the port of Yokohama, both on the outward and return voyages.

The libellant shipped at this port for the round voyage, as assistant in the steward's department. The vessel arrived at Yokohama on the twenty-seventh April, 1869, and on the twenty-ninth the libellant went on shore by permission, as he says, of the stew-

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

ard. By some accident not clearly explained, but probably owing to an indulgence in liquor, he did not return to the landing until after the vessel had sailed.

He therefore remained at Yokohama until the vessel, having made her voyage to Hongkong, touched at Yokohama on her return. The libellant thereupon went on board and claimed to be received again into the service. This the master declined, and took him, with another person similarly situated, before the consul. The latter, on hearing the circumstances, decided that the men were deserters and forfeited their wages and all right to be reinstated in their positions, and an entry to that effect was made on the articles.

The libellant still continued his importunities to be received on board, and the master consented to allow him to resume his position, but on condition that he would relinquish all claim upon the ship for his past or future services until the end of the voyage. The libellant declined to accede to these conditions, and went on shore, where he remained about a month, when he succeeded in obtaining leave to work his passage to this port on board the Japan.

He now claims his wages up to the time he first left the vessel, his expenses at Yokohama from the time he offered his services to the master, and his wages from that time until his arrival at this port.

In arriving at a determination as to the rights of the seaman and the duties of the master under these circumstances, I have not thought it material to decide whether the libellant left the ship in the first instance with or without permission. Assuming that he had leave to go ashore, that leave was necessarily restricted to a short absence, and subject to the paramount duty of returning before the vessel sailed.

The nature of the service in which the vessel was engaged required punctuality and despatch. Her days of departure and arrival were announced in a schedule published in advance, and it was the duty of every seaman, or even passenger, who might desire to go ashore, to ascertain the hour at which she would sail, and to be punctual in returning to the ship. As the libellant neglected this duty, his fault is as great as if he had originally gone ashore without permission. But his absence, though culpable, did not amount to a desertion. There is no reason to believe that he left the ship animo derelinquendi, or with the intention of finally quitting the service. His clothes were left on board, and he endeavored, though too late, to rejoin her.

Neither does it appear that any entry on the log book was made, such as is necessary to fix upon him the consequences of a statutory desertion. As therefore the seaman did not commit the offense, or incur the penalties of a desertion, the only question to be considered is whether he had a right, under the circumstances, to require the master to reinstate him on the return of the vessel to Yokohama.

The duty of the master to receive on board, and to condone the offense of a repentant seaman, is enjoined by the earlier maritime codes, and enforced by numerous judgments of modern admiralty tribunals.

He is entitled to be received on board even after an intentional desertion if he tenders amends at a proper time and manner, and before another person has been employed in his stead; unless his prior conduct has been so flagrantly wrong as to justify his discharge. As observed by Judge Peters, "public policy and private justice, as it is fit they should, here move together." Whitton v. The Commerce [Case No. 17,604]; Lois d'Oleron, art. 14; Laws Wisbuy. art. 25; Cloutman v. Tunison [Case No. 2,907]; Curtis, Merch. Seam. p. 132.

It does not appear in this case that any one had been employed in the place of the libellant.

It may, however, be presumed that if the service for which he was engaged was necessary to the ship, the master, who could have had no certain assurance of finding him at Yokohama on his return, would naturally have provided for its performance by the employment of a substitute.

It is not contended that he had been guilty of any previous offense, such as would have justified his discharge. The question then is, was his offer to return to duty and his tender of amends made under such circumstances as imposed on the master the obligation of receiving him back? Hongkong is distant from Yokohama some sixteen hundred miles. The vessel had performed this voyage and returned to Yokohama—in all thirty-two hundred miles—while the libellant, by his own fault, was not on board. The usual duration of the round voyage for which he shipped is two and a half months. The time that elapsed from her departure from Yokohama until her return was thirty days. The libellant had thus been out of the service for considerably more than one third of the whole period for which he shipped.

And this failure to perform so important a part of the duties for which he contracted was caused by his own fault. When he committed that fault he knew that its inevitable consequence was to deprive him of the ability to perform his contract during nearly one half of the term of his service.

If he had been a mate, or an engineer, or even a cook or a fireman, the loss of his services might have occasioned great inconvenience, or even peril to the ship. In such case, if the master had, as would have been indispensably necessary, employed another person in his stead, he would have been without the pretense of right to be received on board. The circumstance that it is not proved that another was so employed, ought not, in my judgment, to impair the master's right to treat the con-

tract as broken, and himself as discharged from its obligations.

If the master was bound to receive the libellant back after an interval of thirty days, and when a voyage of 3,200 miles had, in the meantime, been performed, when should this obligation be deemed at an end—at the expiration of six months, or as might occur in the case of a whaling vessel, at the end of a year?

Pothier in his treatise, de Louage Matelots, p. 174 (cited in Curtis, Merch. Seam. p. 135, in note), considers that when the mariner, by an accident or vis major, such as sickness, is prevented from fulfilling his obligations, and from going in the ship for which he has been hired, although he incurs no penalties, yet the master may claim to be discharged from the hiring of services which the mariner has not been able to render, and to demand the restitution of his advances.

But where the seaman has been prevented from embarking by his own fault, as by an arrest for a crime which he has committed, then the breach of his obligation being the consequence of his own act and fault, he would be liable to damages—as, for example, if the master had given higher wages to one hired in his place—notwithstanding the fact that his absence not being voluntary, would not subject him to the penalties of desertion.

Although Pothier does not in this passage directly treat of the right of the seaman, who, by his own fault, fails to rejoin the ship, to be reinstated on subsequent repentance and offer of amends, yet it may clearly be inferred that, in his opinion, the effect of a failure on the part of the mariner to render himself on board the ship, in consequence of which she departs without him, is to discharge the master from the obligations of the contract, and this whether the failure be caused by vis major, or by the seaman's fault. He certainly does not intimate that in the latter case, the seaman has a right to demand to be received on board at any subsequent period of the voyage and wherever he may find the ship.

On grounds of policy, also, this privilege should not be accorded.

The degree to which, in cases of this kind, the conduct of the seaman is the result of volition or design, it is not easy always to determine. In some instances, his failure to rejoin his ship may be caused by mere accident.

In others, it may arise from a reckless indifference to, or contempt of, his duty, nearly allied to a willful intention to violate it—as when, by indulgence in drink, he has incapacitated himself from reaching the place of embarkation.

Even where he has determined to be left behind he can readily, by arriving just in time to be too late, give to his fault the appearance of accident or unpremeditated neglect. If in such cases his right to be reinstated at any subsequent period be recognized whenever the master is unable to show a voluntary desertion, or that he has employed another person in his place, an encouragement would be held out to the mariner to avoid the performance of his duty for perhaps the most important or the most arduous part of the voyage, with the assurance that when the vessel touches again at the port he must be received on board with rights unimpaired, except as to the wages which he would have earned during his absence, and as to such other charge as may indemnify the ship for the damage his absence has caused.

A fault of this kind on the part of a mate or engineer would justly be regarded as a grave offense.

I think the seaman's conduct should be viewed in the same light, and he should be apprised that when he commits it and the vessel leaves port without him, his contract is broken—his rights under it lost and his connection with the vessel severed, except at the master's discretion.

I have treated this case more at length than its difficulty demanded, because it was intimated at the hearing that the masters and owners of the steamers of this line desired to be informed what their rights and duties are in cases like the present, which are said to be not infrequent.

Under the proofs in this case the libellant has not incurred the penalties of desertion. He is therefore entitled to receive the wages earned by him up to the time he left the vessel, no evidence having been offered to show any special damage to the ship caused by the loss of his services.

SCUPPS v. CAMPBELL. See Case No. 12,562.

Case No. 12,572.

The SEA BIRD.

[Cited in The Alpena, 8 Fed. 280. Nowhere reported; opinion not now accessible.]

Case No. 12,572a.

The SEA BREEZE.

[2 Hask. 510.] [1]

District Court, D. Maine. July, 1881.

TOWAGE—DAMAGE TO TOW—LOOKOUT—DUTY OF TOW—COLLISION—MUTUAL FAULT.

1. A tug with a tow is in fault from attempting a dangerous course when a safe one is equally convenient.

2. The master of a tug, when aware of danger to the tow, is not excused by calling to the master of the tow to change her course; but, if possible, is required to promptly change the course of the tug under full head of steam to thereby avoid the threatened peril of the tow.

3. A tug with a tow is required to have a lookout beside the master, acting as pilot in the wheelhouse and at the wheel.

4. The master of the tow is required to follow the guidance of the tug; and, when directed to follow in the wake of the tug, is in fault in not

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

having a lookout forward, charged with the duty to observe whether the tow does so follow.

5. In cases of collision, when both vessels are in fault, the damages are divided.

In admiralty. Libel in rem by the owners of the schooner Sea Breeze against the steam tug Ellen, to recover the value of the schooner, sunk in Saco river from the alleged fault of the tug while having her in tow. The owners of the tug filed their claim and answer and denied all fault on the part of the tug, but alleged the disaster occurred from the fault of the master of the schooner, in not following in the wake of the tug as he was directed to do.

Geo. F. Holmes, A. A. Strout, and J. C. Dodge, for libelants.

Hanno W. Gage, Wilbur F. Lunt, and S. C. Strout, for claimants.

FOX, District Judge. This schooner was sunk in the Saco river, whilst in tow of the tug, by reason of striking against the government pier on the evening of April 10th; and this libel is prosecuted for the recovery of the value of the schooner. The accident occurred about eight o'clock; the tide was nearly full with about a foot freshet; the evening was clear, the moon shining. It is not claimed by either party that the accident was inevitable; and it is manifest that one or both parties were in fault. The schooner is 142 tons burden, was loaded with coal, consigned to York Manufacturing Company, to be delivered at Island wharf, Saco. She arrived April 9th, at Wood Island, and came to anchor there about a mile distant from the bar at the mouth of the Saco river. The tug that evening attempted to take her over the bar, but did not succeed, and the schooner was taken to her anchorage. The next evening, about six, the tug returned, and her master, having measured, reported the schooner was drawing eleven feet and four inches; he again took her in tow and proceeded toward the bar. The master of the schooner says she in fact then drew but eleven feet two inches; but this discrepancy is not very material. The schooner was fastened to the tug by a hawser or tow line of about thirty fathoms, and the captain of the tug informed the master of the schooner that, after they were over the bar, he would set a light on the flag staff of the tug for the schooner to steer by, which was done. Having crossed the bar without difficulty, they proceeded up river at the rate of about four knots per hour. The distance from the mouth of the river to Saco is seven or eight miles. The river is very circuitous and variable, sometimes quite narrow and then again, in a short distance, it doubles its width. The channel also varies very much, being sometimes on the Saco shore, and in a short distance, crossing to the Biddeford side. The main channel ordinarily is from 150 to 200 feet wide, and has at high tide a depth of twenty-five feet or more. The pier on which the schooner struck is on the Saco side, about a mile below that village, and was built by the government upon a point of rocks which projected into the river. The pier is made of logs, is about ten or twelve feet in width at the end, and extends into the river sixty-five or seventy feet from the shore. From the end of the pier to the Biddeford shore is a little more than 400 feet. Just above the pier, the river makes a quick turn to the eastward, widening to the extent of 700 feet. Nearly in the middle of the river, above the pier, is a spit which projects down river in the direction of the pier; but at the time of the accident, there was a depth of at least twelve feet of water in all directions for a distance of more than 200 feet from the pier, and there was no part of the spit over which the tug at the time could not have passed without difficulty. This pier had fallen into decay, was covered by water, with the exception of a small part of its shore end, which, as one of the witnesses described it, appeared at that time like a raft of logs. The master of the tug had, for many years, been sailing upon the river, and was well acquainted with it; none of those on board the schooner had ever before been on the Saco. Shortly after passing the stone wharf, which is on the Biddeford side down river about 1,000 feet distant from the pier, the channel makes a sharp turn across the river, close to the pier, and so continues its course up river, well into the eastern bend, setting over toward the Saco shore, between the spit and river bank. On this occasion, the tug and schooner were near to the stone wharf, and the tug then undertook to cross in the channel over by the pier. The master says he slowed down to two and one-half miles per hour after he had completed his turn from the stone wharf, and he steadied his wheel, and, as he looked behind from his wheel house, he saw the schooner, instead of following the tug, first swing to port, and soon after, on looking from the side window, he found she was swinging fast to starboard; that at this time he had passed the end of the pier, at a distance of fifty-seven feet; that, finding the schooner did not follow the tug, he cried out to those on board the schooner to starboard; but the order was not obeyed, and the schooner struck almost immediately against the pier; that he did nothing to prevent her striking, after he found the schooner was in danger, as it would have been of no avail. It is claimed that, under these circumstances, the tug was in fault in various particulars, for which she should be held chargeable for the damages.

1. It is said that the tug was too close into the pier; that knowing the pier was there submerged, and its dangerous proximity, it was the duty of the tug to have passed the pier at a greater distance, and by not so doing her master is chargeable with negligence. The master of the tug says that ordinarily he

passed about thirty feet distant from the pier, but that on this occasion he was fifty-seven feet off; and there is testimony from experts that it was customary to pass within thirty feet of the pier. It is merely matter of opinion, of the master of the tug, how far off he was when he passed the pier; he is an owner of a portion of the tug, and personally accountable for his neglect, is deeply interested in this controversy, and his judgment, therefore, must be received with great allowance, under the circumstances. He is contradicted by the master of the schooner, who says that the schooner followed the tug, which passed in safety, but could not have been fifty-seven feet off, for, if she had been, the schooner, although somewhat wider than the tug, would have gone thirty or forty feet outside of the pier. The result shows, I think, that the master is in error as to how far he passed from the pier, and that, in all probability, he was not more than some twenty feet off, instead of fifty-seven, as he would have us believe. There was no occasion for the tug to pass even within fifty-seven feet of the pier; as it drew but seven or eight feet of water, it could have gone up into the upper end of the spit, if necessary, in making the turn, and could certainly have found no difficulty in giving the pier a berth of one hundred fifty feet, instead of fifty-seven, if the master had chosen so to do, as the channel was at least twelve feet deep for over two hundred feet from the pier. The tug, therefore, was under no necessity of taking a course so near the pier as to expose the schooner to danger. It could with equal safety have gone much farther off, and thereby ensured a safe course for the tug; it not having done so, was guilty of negligence and want of care, and must, therefore, be held chargeable for the damages resulting therefrom; having chosen a path of peril and danger when one of safety was at hand, it must abide the consequences. It is said that, in the opinion of experts, it was safe to run within twenty or thirty feet of the pier, and that this had been usual and customary. The answer to this suggestion is, that these parties may have reason to congratulate themselves on their good fortune in so passing without injury; but the result affords no justification for attempting a dangerous course, when a safe one is equally convenient.

2. In another respect, I hold the tug was in great fault. The master of the tug admits that some short time prior to the accident, about one-fourth of a minute as he says, he perceived that the schooner was setting over towards the pier, and gave orders to her, to starboard. Those on board the schooner had no knowledge that the pier was there, or that they were in danger; but the master of the tug, from his long experience upon the Saco, must have been fully conscious of her peril; about all that he did to avert it was a simple order to the schooner to change her helm. The tug was at a slow speed; it had sufficient room in any direction to withdraw the schooner from her threatened peril, but nothing was done by the master of the tug in this behalf. If he had put on full steam and swung his boat sharply to port, he would, in all probability, have controlled the direction of the schooner and prevented the accident. It was certainly a very great error on his part not to have made the attempt.

3. There was no lookout on the tug; her crew consisted of her master, engineer and a boy. The engineer, of course, was below, and his attention was given to his engine. What duties the boy discharged are not shown; but it is not claimed that he acted as a lookout. The master was in the wheel-house, acting as pilot, wheelsman, and a lookout, as far forth as was practicable; but it is manifest that one man could not discharge all these duties; he could not, at the same moment, properly attend to the steering of the tug, giving directions to the engineer, and discover all that could be seen by him, if he had been on duty merely as a lookout. It is not improbable that, if his sole attention had been given to this duty, he would have found that he was much nearer the bank than he intended to be, and could have seen that the schooner did not follow the course of the tug, and thus the injury would have been prevented. In the evening, although it may be moonlight, one is apt upon a river to be deceived as to distance by the mist and the shadows of the trees on the river bank; and prudence required that there should be some person on board the tug, other than the wheelsman, to attend to the duties of a lookout.

4. In other respects, it is claimed that the tug was in fault; but it is unnecessary for the court here to pass upon these, as, for the causes above detailed, the tug is held accountable.

5. It remains to be determined whether the schooner was also negligent; for, if she was in fault, the damages must be divided. The master of the schooner was at the helm at the time, and had been there for nearly an hour; his orders from the tug were to follow the light; and "it was the duty of the schooner to follow the guidance of the tug, to keep as far as possible in her wake, and to conform to her directions." In my opinion, the schooner failed to comply with these requirements. It is shown that, after crossing the bar, there is a narrow passage of only seventy-five feet between some small islands, and that, when going through this passage, the master of the schooner, instead of following the light of the tug, attempted to cut across her course, thereby exposing the schooner to the danger of running ashore, which was only prevented by obeying an order from the tug to change her course. The master of the schooner says that, after they passed the stone wharf, he followed the light of the tug as near as practicable. This is denied by the master of the tug, who swears that he first saw the schooner over on his port side, and then swinging quickly to starboard, and that she went so far to star-

board, that he saw from the tug the port side of the schooner. The master of the schooner is also a part owner, and testifies under an equal interest with the master of the tug, and the court, therefore, must examine the testimony from other sources for corroboration of the witness. Bennett, one of the crew of the schooner, was sent forward by the master to keep a lookout for logs and ice, and he testifies that the schooner followed in the wake of the tug as near as he could judge; his attention does not appear to have been called to the course of the schooner; he had no orders to observe her course and notice whether she followed the wake of the tug, and the court does not find any very decided corroboration of the master's statement, either in his testimony or that of Frank B. Douty, who had but little idea of the course of the schooner, as he was not aware that they came up on the western shore, and did not notice that the tug had slackened her speed. Various witnesses of intelligence and respectability have been called, who testify to declarations made at various times by the master of the schooner, which, if made by him, are quite inconsistent with his evidence. The court cannot doubt that the substance of these statements is fairly represented. Taking all this testimony as to the declarations of the master, all of which are denied by him, it would appear that, for some time after the accident, he made no claim against the tug, did not charge her as being in fault by keeping too near the pier, but he rather acknowledged that he did not follow the tug, but attempted to cut across her course. The court is well aware that, in admiralty causes, the admissions of the crews of the respective vessels are not of the most satisfactory and reliable nature; but, in the present instance, they are shown to have been made by an intelligent ship-master, who was also a part owner of his vessel; and they relate to his own conduct at the time of the disaster. Under the circumstances, there being this conflict in the testimony of the masters of the respective vessels, the evidence of the master of the tug, that the schooner did not follow the tug, is sustained by the admissions of the master of the schooner, so that, on this branch of the case, the balance of testimony is against the schooner, and I, therefore, find that, by the neglect of her master to follow the tug, he also contributed to the disaster.

6. In another respect, the schooner was in fault. Bennett was put on the lookout with directions to watch the logs and ice, but no instructions were given him to attend to the vessel's course, and see that she followed the tug, and to notify the master if he failed to keep her on her proper course. If Bennett had been directed so to act as lookout, such would have been his duty; his attention would have been called to the course of the tug, and the necessity of following it: and, in case of any failure so to do, he should at once have informed the wheelsman, who would put her on her true course. In the opinion of the court, a suitable lookout, attentive to his duties, would have prevented the disaster.

Both parties in fault. Damages divided.

SEABRING (WARD v.). See Case No. 17,160.

SEABRY (WARD v.). See Case No. 17,161.

Case No. 12,573.

In re SEABURY.

[10 N. B. R. (1874) 90.] [1]

District Court, D. New Jersey.

BANKRUPTCY—DISCHARGE—OBJECTIONS BY CREDITOR—APPEARANCE—SPECIFICATIONS.

1. An appearance for a creditor in opposition to the discharge of a bankrupt, entered on an adjourned day of the hearing on the order to show cause, after several adjournments have been had, is not too late.

[Cited in Re Houghton, Case No. 6,730.]

2. An appearance is sufficient if entered on the clerk's docket on that day, but, under general order 24, written specifications must be filed within ten days thereafter, to entitle such creditor to be heard.

In bankruptcy.

Frederick Kingman, for bankrupt.

James Buchanan, for creditors.

NIXON, District Judge. The case is briefly this: A voluntary petition in bankruptcy was filed by James M. Seabury, Jr., October 8, 1873, upon which he was adjudged a bankrupt on October 18th. On the 6th day of January following, a petition for his final discharge was presented to the court, on which the usual order was made that his creditors should show cause, before the court, on the 3d day of February, why the prayer of his petition should not be granted. On the return day of the order it appeared that the bankrupt's oath of conformity had not been taken, that the register had filed no certificate, that the assignee had not made return that there were no assets. As these were all essential prerequisites to the discharge, the last being a jurisdictional fact enabling the bankrupt to make his application for a discharge before six months, and after sixty days from the date of the adjudication, the case was continued on application of the counsel of the bankrupt, to February 17th. On that day, the papers being still wanting, another adjournment was had until February 24th, on a like application, and a peremptory rule was taken on the assignee, to make and file his report on or before that date, certifying whether any assets of the bankrupt had come into his hands for distribution. The oath of conformity, the register's certificate of conformity, and the assignee's return to the rule of no assets, were all filed on the 24th. The case had been placed on the calendar for that day, and when called, and be-

[1] [Reprinted by permission.]

fore any motion had been made, the clerk presented to the court a letter from Judge Buchanan, stating that he desired to oppose the discharge as counsel for opposing creditors, that he was confined to his bed by sickness, and asking for a postponement until he was able to attend the hearing. The reasons being deemed sufficient, an adjournment was ordered by the court, and, in consequence of the continuing illness of counsel of the opposing creditors, the hearing was postponed from time to time to March 31, when Mr. Buchanan being in court, and the case called, the counsel for the bankrupt made the usual motion for the bankrupt's discharge, limiting his application, however, to the debts contracted prior to January 1, 1869. The counsel for the opposing creditors interposed a verbal objection to the jurisdiction of the court, and moved to dismiss the proceedings on the ground that the court had refused the discharge of the bankrupt in previous proceedings upon specifications filed under the 29th section of the act, and going to the merits of the case, and that there was no authority conferred on the court by the bankrupt law, on any new proceedings, to grant a discharge. The motion was opposed by the counsel of the bankrupt, alleging that the court could take no notice of any motion in the case made by Mr. Buchanan, because, 1st, no appearance had been entered in behalf of any opposing creditor; 2d, no entry had been made upon the clerk's docket of any opposition to the discharge; and, 3d, no specifications had been filed against the discharge, and that it was too late for the court to authorize these necessary affirmative things to be done. The counsel for the bankrupt expressing a desire for time to submit his views on the questions presented, and the counsel on behalf of the opposing creditors acceding thereto, the court directed the clerk to enter an adjournment of all proceedings for two weeks. On the adjourned day the parties were heard upon these questions alone, and, as the court desired time for consideration, another order was made continuing the proceedings until to-day.

I have given attention to the case because it involves matter of correct practice under the act [of 1867, 14 Stat. 517], and the general orders in bankruptcy, and I am quite satisfied that the counsel for the bankrupt is right in his three propositions. There should be an appearance, an entry of the same on the clerk's docket, and specifications put on file, within the prescribed time. The 24th general order requires that the creditor opposing the application of the bankrupt for his discharge, shall enter his appearance in opposition thereto on the day when the creditors are summoned to show cause. The 3d general order specifies how this appearance is effected. So far as the attorney and counsellor is concerned, it may be verbally or in writing. But it is not completed until the clerk enters his name and place of business upon the docket, with the date of the entry. Until this is done the creditor has no standing in court, and cannot be heard in opposition to the discharge. When it is done within the time required by the law, then, under the 24th rule, he has ten days only in which to file his specifications against the discharge, unless the time shall be enlarged by order of the court. And the position of the counsel in behalf of the opposing creditors, that it is not necessary to file any specifications in opposition to the discharge, except those enumerated in the 29th section of the act, is not maintainable. All grounds against the discharge, to be relied upon by opposing creditors—except those that appear upon the face of the proceedings, which the court is bound to notice even where no creditors oppose—must be assigned in writing as specifications. In short, the act clearly contemplates a suit arising in the course of the bankruptcy proceedings in which there should be an appearance entered and specifications filed which make up the issues to be tried; and nothing can be produced in evidence on the trial except such matters as are included in and tend to prove the issues made.

The only remaining question is, whether it is now too late for the opposing creditors to cause an entry of their appearance in the clerk's docket, and to file their specifications. The 29th general order, above referred to, prescribes that the creditors shall file their appearance on the day on which they are required to show cause against the discharge. Has that day, in legal contemplation, passed? I think not. Very early in the bankruptcy practice the question was raised, whether the 29th section of the act and the 24th general order required the opposing creditors to enter their appearance on the return day of the rule to show cause, or, in case of an adjournment, whether they should be permitted to wait until the adjourned day, before entering such appearance. An examination of the cases of In re Mawson [Case No. 9,320], In re Thompson [Id. 13,935], In re Tallman [Id. 13,740], and In re Seckendorf [Id. 12,600], will reveal the gradual steps by which the practice was established, and in which there has been no interruption, that the rights of the creditors upon the adjourned day are the same, in all respects, as upon the return day. In this case the return day was February 3d. If the needful papers had been on file, the bankrupt would then have been entitled to his motion for his discharge, and it would have devolved upon opposing creditors to have appeared and to cause an entry of their opposition to be made in the docket of the clerk. But no motion was made or could be in the absence of material certificates and affidavits, and adjournments from week to week were ordered, either on the application of the bankrupt or on behalf of the creditors, until March 31st. Then the counsel of both parties were in court, as they had been on the first return day, and the motion was made for the discharge. The

time had now arrived for the creditors to take affirmative action, and their counsel interposed the above stated verbal plea to the jurisdiction of the court. Upon which the counsel of the bankrupt raised the point that they had lost their right to be heard in opposition to the discharge, and that the only mode of raising issues for trial was by written specifications. If a further adjournment had not been asked for by one party and assented to by the other, pending these questions, I should have decided them then, holding, 1st, that it was competent for the opposing creditors to appear on that day by counsel and file their specifications; and, 2d, that the objection of the counsel of the bankrupt to the verbal plea was well taken, and that whatever questions the creditors desired to raise against the discharge should be by written specifications, duly filed, unless the matter appeared on the face of the bankruptcy proceedings in the case. If such decisions had been then made, I should have allowed the creditors, if they still wished to oppose the discharge, to cause their appearance to be entered, and the 24th rule would have given them ten days in which to prepare and file their specifications. This right had not been taken from them by the previous adjournments, and they have not lost it since, because two other adjournments have been had, one at the instance of the counsel of the bankrupt, to afford an opportunity to argue the questions then raised, and the other by order of the court, after argument, to hold the questions under advisement. I might rest here, but there is more in the case which calls for consideration. It appears, upon the proceedings, that the bankrupt filed his voluntary petition October 8th, 1873; that it was referred to the register in due course; that he was adjudicated a bankrupt and the first meeting of creditors was called for the appointment of an assignee. On the day designated by the register, a number of the creditors appeared, and, before proving their claims, filed with the register a written protest against his proceeding further in the case, assigning, substantially, the same objections which their counsel now desires to raise against the jurisdiction of the court.

Five grounds are stated in the paper in opposition to the validity of the proceedings: First. That a second petition for adjudication of bankruptcy filed by the bankrupt was illegal and of no effect, for the reason that he has before filed a similar petition. Second. That the adjudication was illegal because he had before been adjudged a bankrupt. Third. That their debts against the bankrupt had once been proven, and they ought not to be required to prove a second time. Fourth. That Frederick Voorhees had already been appointed assignee; that the schedules filed with the second petition disclosed no other estate than had been disclosed by the schedules with the first petition, and to elect another assignee would be to devolve the same duties upon two individuals. Fifth. And that the present proceeding, in which they were noticed to appear before the register, was contrary to the provisions of the bankrupt act, and therefore void. They further state, in conclusion, that if the register overruled their objections they should prove their claims under protest, and should reserve the right to contest the validity of the present proceedings in the district court, at a future time. The register's certificate shows that he did overrule them and went on with the election, and that the creditors proved their claims, and participated in the election under protest. The paper was filed, however, by the register, and returned by him to the court, with others, on the 24th day of February last, and it now appears as a part of the proceedings.

Unless it be held that the decision of the register on the points presented in the protest is final, the questions are before the court for adjudication on the face of the bankruptcy proceedings, without any further action by the opposing creditors. But, so far from his decision being final, it is more than doubtful whether he was authorized to do anything, after the protest was presented, except to adjourn the meeting to a future day and to certify to the court the legal questions raised by the opposing parties. The proviso to the 4th section of the bankrupt act, in which the powers and duties of the register are defined and enumerated, require that "in all matters where an issue of fact or of law is raised or contested by any party to the proceedings before him, it shall be his (the register's) duty to cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge." It is suggested that if the register had pursued this course, a decision of the court in limine would have been had upon the questions which are now raised on the final discharge, and if it had been adverse to jurisdiction, the parties would have been saved the costs, expenses, and delay incident to the subsequent proceedings.

In conclusion, the result is, that it is competent for the opposing creditors to have their appearance entered and to file their specifications against the discharge, or, if that is not asked for, it is the duty of the court, whether any creditor appears or not, to consider the reasons set up in the protest against its authority and jurisdiction over the case. As the former method is the orderly and regular proceeding in opposing the discharge, and as the court is not disposed to confine the opposing creditors to the single questions presented in the protest or to the form in which they are stated, the order of the court is that they be allowed to enter their appearance against the discharge, and to file their specifications under the rule within ten days; that, if either party wish to take testimony, an order of reference be made to Mr. Register Johnson for the purpose, and that the case be set down for final hearing upon the specifications and testimony, in four weeks.

SEABURY (BATES v.). See Case No. 1,104.

SEABURY (CUTTING v.). See Case No. 3,521.

Case No. 12,574.

SEABURY et al. v. FIELD et al.

[1 McAll. 1.] [1]

Circuit Court, N. D. California. July Term, 1855.[2]

TREATY—TITLE TO LAND IN BAY OF SAN FRANCISCO—ADMISSION OF CALIFORNIA—VOID GRANT—EJECTMENT—PLAINTIFF'S TITLE.

1. On the ratification of the treaty of Guadalupe Hidalgo, property below low-water mark, in the bay of San Francisco, passed from Mexico to the United States. Intermediate the date of the treaty and the admission of California into the Union, the title remained in the government of the United States. During that period, no deed or transfer by any officer of this government, unauthorized by an act of congress, could alienate any portion of the public domain. Such conveyance was a mere nullity.

2. On the admission of California into the Union, she became subrogated to the rights over the disputed premises which had been vested in the United States, subject only to any cession of them by that provision of the constitution which surrenders to the general government the power to regulate commerce with foreign nations, and among the several states, and with Indian tribes.

3. Although a void grant cannot be confirmed by subsequent acts between individuals, it is otherwise as to confirmation by statute.

4. Plaintiffs cannot recover in ejectment, unless on a better title than defendants.

This is an action of ejectment [by Pardon G. Seabury and others against Edward Field] instituted for the recovery of a lot of land forming a portion of property known as the "Beach and Water Lots," situate in front of the city of San Francisco, intermediate low-water mark and the ship-channel of the bay and between Rincon and Fort Montgomery Points. The plea filed was a general denial, equivalent to a plea of not guilty at common law. The facts of the case arose mainly out of the documentary title of the respective parties.

Holliday & Saunders, for plaintiffs.

Lockwood, Tyler & Wallace, for defendants.

McALLISTER, Circuit Judge (charging jury). The plaintiffs trace their title to one Thomas Sprague, to whom a grant to the lot in controversy was made on January 3, 1850, by John W. Geary, alcalde of the city of San Francisco. The power of said alcalde is predicated upon the proclamation of General Kearney, issued on the 10th of March, 1847, as military commander in California at the time. By that proclamation, the power to grant was assumed by virtue of alleged powers vested in him by the president of the United States. In the exercise of those powers, all the property known as the "Beach and Water Lots," was granted with certain reservations to the city of San Francisco. The court instructs you, on this point, that the proclamation of General Kearney, and the grant under it, passed no greater interest in the property than it would have done if signed by a private, unofficial person. During the period California was subject to the American arms, the military and municipal officers in the service of the United States government exercised their functions in subordination to it. Whatever may have been their powers during that anomalous condition of things, the power to grant was not one of them. They could do no act to affect the rights of the government of the United States to the public property; rights to be determined in their extent and character by the issue of the pending contest. On the ratification of the treaty of Guadalupe Hidalgo, the rights political and proprietary over the property in dispute, passed from the government of Mexico, where it had been, to that of the United States. There was no officer in the service of the government who could for any purpose, or at any period, make a valid alienation to any person, natural or artificial, of any portion of the public property in land. The constitution of the United States confides to congress the exclusive power of disposing, and making all needful rules and regulations respecting the public property of the government. No interest, therefore, having passed under the proclamation of General Kearney to the city of San Francisco, it could transmit none to Sprague, by means of the grant made by their alcalde, Geary. As title, it gives no standing in this court to the plaintiffs. How far the documents they have produced in evidence may be available to them, considered in another aspect of this case, will be brought to your consideration hereafter.

The documentary title of the defendants next claims attention. They claim under a grant from Alcalde Leavenworth, under date of September 28, 1848. This title is as invalid as the one under which the plaintiffs claim. No interest proprietary or political over the property in the bay of San Francisco, below low-water mark, was vested in the pueblo of San Francisco, under the Mexican government; if it be admitted that such pueblo ever had an organized existence. No such interest having ever vested in the Mexican ayuntamiento, none such could have been transferred to its successor, the American town council. But if it be admitted that the power did exist in the former to grant this water property, it by no means follows that such power, the delegation of sovereignty from the Mexican government, survived after the sovereignty of which it had formed a part, had ceased to exist. No officer, Mexican or American, could exercise

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

[2] [Reversed in 19 How. (60 U. S.) 323.]

the granting power over public property of the United States. Nothing but an act of congress could authorize the exercise of such power. The court, therefore, charges you, that the two grants under which the parties in this case respectively claim, are mere nullities, neither of which conveyed a valid title to the land it assumed to transfer. Thus far, as to documentary title, the parties stand on an equal footing.

It becomes necessary now, that you fix the attitude of the parties as it is ascertained by the evidence in this case as to the possession of the premises in dispute at the time of the passing of the act of the legislature of this state, on March 26, 1851 [Comp. Laws, 764], the origin of the title of both parties, as also, at the date of the commencement of this suit. The witnesses are few in number, and the facts to which they testify are not complicated. It is your especial province to decide on them, limited in your inquiries only by the boundaries of truth. Having fixed in your minds the position of the respective parties at the date of the said act of the legislature, known as the "Beach and Water-Lot Bill," it becomes the duty of the court to instruct you as to the legal effect of that act upon the rights of the parties. They both claim under this act. What was the interest of this state in the property in dispute at the time it was passed, is the first question. Reference has been made to Case of Pollard's Lessee [3 How. (44 U. S.) 212] as settling the question of ownership by this state in the said property by her annexation to the Union. The court does not consider that case as directly deciding the point, inasmuch as the decision turned to some extent on the fiduciary character imposed on the government of the United States, under the cession made to them in 1802, by the state of Georgia. But in view of the general reasoning, in that case, of the constitution of this state, embodying her boundaries, and the terms of the act of congress admitting her into the Union, the court instructs you that this state, on her accession to this confederacy, became subrogated to all the rights, political and territorial, in this water-property, which had been theretofore in the United States government after the treaty of Guadalupe Hidalgo. Those rights were consequently in this state at the time of the passing of the act of the legislature under consideration. It is entitled, "An act to provide for the disposition of certain property of the state of California." Comp. Laws, 764. By its second section, the use and occupation of the property is granted to the city of San Francisco, for the term of ninety-nine years from its date, except all the lands being a portion of said property, which had been "sold by the authority of the ayuntamiento, town or city council, or any alcalde of the said town or city, or by any alcalde of the said town or city at public auction, in accordance with the terms of the grant known as 'Kearney's Grant to the City of San Francisco,' and confirmed by the ayuntamiento—town or city council—thereof, and also registered and recorded in some book of record now in the office, custody, or control of the recorder of the county of San Francisco, on or before the 3d day of April, 1850." All such lands as had been sold in the manner described, were granted to the respective purchasers thereof for the term of ninety-nine years. It is contended that this act is a confirmation of the grants under which the parties claim. The court does not so consider. Those profess to convey a fee; the act of the legislature transfers a chattel-interest, a term of years only; an estate differing in quantity and degree from that in the grants. It cannot be deemed the confirmation of a pre-existing estate, but the creation of a new one. The court considers this act a legislative grant of land for a term of years, and the reference therein made to lands which had been purchased and held under the prescribed form, as a "designatio personarum," to designate the classes of persons who were to take as grantees. The inquiry is, do the parties, or either, or both of them, belong to the class of grantees designated by the statute? Both claim to be so comprehended. On this point, the court instructs you that if you are satisfied from the evidence that the plaintiffs are purchasers of the lot in controversy, comprehended within the boundaries mentioned in said act, which lot was sold at public auction by the authority of the town-council of San Francisco, in accordance with the terms of the grant known as Kearney's grant to the city of San Francisco, then, in such case, the plaintiffs are to be deemed as comprehended within one of the classes of grantees designated by the statute. And the court further instructs you, that, if you are satisfied from the evidence that the defendants hold the lot in controversy as purchasers under the grant of an alcalde of the city of San Francisco, which was confirmed by an ayuntamiento, or town or city council thereof, and also registered and recorded in some book or record in the office, custody, or control of the recorder of the county of San Francisco, on the 20th day of March, 1851, and which registry or record was made on or before the 3d day of April, 1850, then, in such case, the court instructs you that the defendants are also among those designated as the other class of grantees under said act. The mode and manner in which the confirmation of the town-council is to be given are not prescribed, and any form in which it may have been given, if it satisfies you of the fact, will be sufficient in this case. Should you be satisfied from the evidence of the authority or confirmation of the ayuntamiento, or town-council, to both the grants under which the parties respectively claim, then the court instructs you that the parties stand in equali jure, as to documentary title, and their rights must be adjusted by the parol testimony and the principles of law ap-

plicable to the facts elicited. These will be found in the instructions prayed for by the respective counsel, which the court will now give.

The plaintiffs' counsel ask me to instruct you: "(1) If the jury believe that the lot in controversy was sold to Sprague, by Alcalde Geary, at public auction, in accordance with the terms of the grant known as "Kearney's Grant" to the city of San Francisco, then the second section of the act of the California legislature, approved March 26, 1851, operates as a valid grant of the same lot, for the space of 99 years from the date thereof, to the said Sprague. (2) No title passed to Parker by the grant from Leavenworth, of September 25, 1848." The court has given you, and now reiterates, the principles embodied in the foregoing instructions.

The counsel for defendants have asked the following instructions, which I give you: "(1) Although a void grant cannot be confirmed by a subsequent act between individuals, yet it is otherwise as to confirmation by statute, and the legislature may, by statute, confirm a deed or grant which was absolutely void at the time of confirmation." The court gives this instruction with the addition,—"So that vested rights of third persons are not divested." "(2) The lot in question being covered with tide-water, vested in the state of California, upon the admission of the state into the Union. (3) The state having thus been the owner of the property in question, it was competent for the state to dispose of it by statute operating as a conveyance. (4) The act of March 20, 1851, operated as a legislative grant in the cases therein specified, and if the lot in question was sold or granted on September 25, 1848, by Leavenworth, as alcalde of San Francisco, and afterwards confirmed by the ayuntamiento, or town or city council, and registered on or before the 3d day of April, 1850, in some book of record in the office, custody, or control of the recorder of the county of San Francisco, at the date of the passage of the act, the said statute operated as a grant of the said lot to the said Parker, his heirs and assigns, and any person holding under him or them, for the term of ninety-nine years from the date of the act. (5) In case of equal rights, or equities, the maxim, 'Prior in tempore, potior in jure,' will prevail. (6) In ejectment, the plaintiff cannot recover without showing a better title than the defendants; and unless the plaintiffs have shown in themselves a better title, the verdict must be for the defendants." The plaintiffs must recover on their legal title, as distinguished from the equitable title of the defendants.

Verdict for plaintiffs.

[NOTE. At this term a motion was made for a new trial, which was overruled. Case No. 12,575. This cause was carried, on writ of error, to the supreme court, where the judgment of this court was reversed. 19 How. (60 U. S.) 323.]

Case No. 12,575.

SEABURY et al. v. FIELD et al.

[1 McAll. 60.] [1]

Circuit Court, N. D. California. July Term, 1855.

GRANTS—FRAUD—COURTS—CONCURRENT JURISDICTION—TRIAL—INSTRUCTIONS TO JURY.

1. Fraud is not admissible in a court of law, to impeach a patent or legislative grant; but where a party, in order to bring himself within a class of legislative grantees, must exhibit his muniments of title, fraud is admissible to prove that they have been dishonestly obtained.

2. Courts of law and equity have concurrent jurisdiction of fraud in many cases.

3. This court is not bound to notice in its charge any matters, if it thinks it not proper to do so, unless its attention is called to them, and it is asked to instruct the jury in regard to them.

[This was an action of ejectment by Pardon G. Seabury and others against Edward Field and others.]

A verdict was rendered at the present term of this court in favor of the plaintiffs [Case No. 12,574], and a motion is made for a new trial upon three grounds, all of which are enumerated in the opinion of the court.

Holliday & Saunders, for plaintiffs.

Lockwood, Tyler & Wallace, for defendants.

McALLISTER, Circuit Judge. The last ground on which this motion is predicated will be considered first. It is in these words: "That the course pursued by the plaintiffs' counsel in withholding the pretended resolution of the council, of October 3, 1849, until after the testimony was closed, and then suddenly introducing it, operated as a surprise on the defendant's counsel, and tended to mislead the jury." Under the impression there had been such irregularity as might have operated a surprise on the defendants' counsel, this court determined to set aside the verdict of the jury, and in order to satisfy itself as to the fact, required an affidavit to be filed as to the truth of the statement made on this ground of the motion. This requirement was made in the exercise of the discretion reposed in this court on motions like the present; and in analogy to the practice of our state courts as regulated by the act of the legislature of this state (articles 928, 929, Wood, Dig. 192), which declares, that where a motion for a new trial is moved on the ground of irregularity or surprise, it shall be made upon affidavit. The attorney for defendants having declined to file any affidavit, it becomes the duty of the court to limit itself to the consideration of the other grounds taken.

The first is, "because the verdict is contrary to evidence;" and the second, "that it is contrary to the instructions of the court upon the facts proved." These may be appropriately considered together. The evidence in the case was mainly directed to the

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

fact of fraud in the grant made by Alcalde Leavenworth, to one Parker, and arose out of the following circumstances: The plaintiffs and defendants alike claimed the premises in dispute, under an act of the legislature of this state, passed March 26, 1851, entitled "An act to provide for the disposition of certain property of the state of California," which conveyed a certain interest in lands, including the premises in dispute, to two distinct classes of persons. Comp. Laws 1850–1853, p. 764. The first included those who had purchased the land in dispute by the authority of the town-council of the city of San Francisco, or of an alcalde of said city at public auction, in accordance with the terms of the grant known as the "Kearney Grant" to the city of San Francisco, the grant of which land had been recorded in the office of the recorder of San Francisco, within a period of time specified by law. The plaintiffs claimed to be comprehended in this first class, as purchasers at public auction under the Kearney grant. The defendants claimed to be included in the second class, as deriving title from the fact that they held through a grant from Alcalde Leavenworth confirmed by the ayuntamiento of San Francisco, and recorded as required by the act of the legislature. To exclude the defendants from the second class, the plaintiffs offered evidence to show that one of the steps taken by defendants which placed them in the class of grantees, to wit, the obtainment of the alcalde's grant, was fraudulent, and, that the grant was recorded by the perpetration of a fraud, and the confirmation of the grant was also obtained by fraud. Such evidence, it is to be observed, was not adduced to prove fraud in the legislative grant; but simply to show that the defendants had, by the perpetration of a fraud obtained a position which enabled them to deceive the legislature, and defeat its true policy by bringing themselves within the letter of the law.

The court considered the case not unlike that where the legislature had granted certain lands to persons who held bonds of a certain description, and some of them presented bonds which were forged, or possession of which had been fraudulently obtained. In such case, proof of those facts would have been admissible; for it was not reasonable to suppose that the legislature could have intended to include the holders of both the genuine and fraudulent bonds. The alcalde grant was not the source of title; it gave no title whatever. The only source of title was the act of the legislature, and the only use of the alcalde grant was to prove that defendants had taken the proper step so as to have applied to them the description given by the legislature as to who were to take under the statute; and the evidence was admitted to prove that such step had been fraudulently taken. The court could see no difference between the forged bonds and the fraudulent grant, when viewed not as the source of title, but as proof to identify the grantees. The court therefore permitted the defendants to give proof of fraud, in this case, to the jury; and this is made an additional ground for a new trial, which it is proper to dispose of at this time. To have excluded all evidence from the jury as to fraud, would have been in substance to instruct them that the legislature intended to include the honest and dishonest purchaser in the same category—the holder of the genuine and the forged bond—the bona fide purchaser and him who had contrived by fraud, covin, or perjury, to obtain the earmarks described by the act. To consider otherwise, this court must attribute to the legislature an intention to include those who could not bring themselves honestly within the class of grantees designated.

The counsel for defendants have urged with characteristic ability, that plaintiffs must recover on the strength of their title; and such recovery could not be affected by any equities of the adverse party; and that the authorities cited by the plaintiffs' counsel were inapplicable to this case, being those in which bills had been exhibited in chancery to fix constructive frauds upon persons standing in fiduciary relations to complainants. But it is to be observed, that the case at bar is not one in which it is sought to set aside a conveyance or other instrument for fraud; but one where a party in a court of law is to make out by evidence that he answers to a certain description given in a statute, so as to take as grantee; and the question is, can he be met with evidence of fraud, perjury, or forgery in the obtainment of that evidence? Again, the proof offered in this case is not to prove any equities set up; but simply to disprove plaintiffs' case, viz. that they are not the parties they describe themselves to be. The former is a class of cases in which fraud is solely cognizable in a court of equity. This is not one of them.

It is an admitted principle, that a court of law has concurrent jurisdiction with a court of equity in some cases of fraud. Such doctrine is enunciated by the supreme court of the United States in the case of Gregg v. Lessee of Sayre, 8 Pet. [33 U. S.] 244, which was an action of ejectment; and this doctrine is reasserted in kindred cases. This is founded upon a legislative grant which was not assailed by the evidence offered. The evidence admitted went only to prove that one of the steps defendants had taken, and which it was necessary for them to prove, to entitle them to take under the legislative grant, in fact had never been in good faith taken. The court cannot perceive error in the ruling in of evidence of fraud in this case. When "matters alleged to be fraudulent are investigated in a court of law, it is the province of the jury to find the facts and determine their character." In this case

the facts were left to the jury, and the court charged them that "it was their province to judge of them independently of the court, limited only in their inquiries by the boundaries of truth." Upon the facts, and under that charge, the jury have returned a verdict, which the court is asked to reverse.

It is urged, that a motion for a new trial is an appeal to the discretion of the court. But that discretion is controlled by as well settled principles as is the judgment of the court in any other case. No one of those principles is more clearly settled than that which inculcates that the verdict of a jury will not be set aside as against evidence where there has been evidence on both sides, even where such verdict, in the opinion of the court, has been given against the preponderance of evidence, unless some known principle of law has been violated, or manifest injustice has been done. Now, in the protracted trial of this cause, evidence was given on both sides. The plaintiffs, to disprove the fact that defendants came within the description of the grantees described by the statute, introduced testimony, not to impugn the legislative grant, but the acts of defendants which they alleged gave them a right to claim under that legislative grant. The evidence was introduced to prove that defendants never had obtained a grant from Alcalde Leavenworth which was a valid one. With that view the evidence was used to show that, unlike all other alcalde grants, no consideration passed between the grantee and the alcalde; that on the day following the date of the grant issued by Leavenworth as alcalde, Parker, the grantee, reconveyed the lot to Leavenworth as an individual; that the four persons at that time composing the ayuntamiento who confirmed the grant made by Leavenworth, at one and the same time, and by one and the same instrument, confirmed numerous grants made to themselves individually by the same Alcalde Leavenworth, and under the same circumstances; that on the 3d October, 1849, the ayuntamiento who had succeeded to the one who had confirmed the grant, denounced the transactions of Alcalde Leavenworth in granting lands under the circumstances he did, and publicity to such denunciation was given at the time; that the character of the transaction was notoriously known; and, finally, such confirmation, if not fraudulent, did not include the lot in dispute, but referred to other lots granted by Alcalde Leavenworth under different circumstances, and that the grant on its face bears date in 1848, and is recorded as bearing date in 1849. Evidence was introduced to explain the variance which existed between the dates of the grant and the record. A witness was sworn who testified that the date on the face of the grant was correct, and that he (the witness) had carried the document in 1848 to be recorded. Now, all this is testimony upon which the jury should pass. They have done so, and under the rule stated, did this court even consider that the evidence preponderated against the verdict, it would be, it conceives, an aggression on the rights of the jury to nullify their verdict, unless satisfied some principle of law had been violated, or manifest injustice had been done. The court cannot arrive at such conclusion in this case.

The remaining ground taken is, in these words, "Because the court should have instructed the jury as matter of law that the resolution of the council of October 11, 1848, was a confirmation of the grant by Leavenworth to Parker, within the meaning of the act of 26 March, 1851." To have so instructed them would have been to charge them to dismiss from their minds all the evidence which tended to prove that there had been no confirmation, it having been procured by fraud, and which under the previous ruling of the court had been permitted to go to the jury. If there be error in that ruling, it was in the power of the party to have excepted to it. A second reply is to be found in the fact that the court was not asked so to instruct the jury; as will be seen by the seven instructions asked by defendants' counsel. Had they been asked they would have been given, with a qualification.

As this point is of great practical importance in this court, it may be well to express explicitly its views upon the subject. To every legal proposition applicable to a case, a party has the right to ask from the court an instruction to the jury; to the ruling on which the party has the right to except, in the manner and at the time prescribed by the rules of this court; but this court is not bound to notice, in its charge to the jury, any matters of law if it thinks it proper not to do so, unless its attention is called to them, and it is asked to instruct the jury in regard to them. In U. S. v. Fourteen Packages of Pins [Case No. 15,151], Judge Hopkinson, arguendo, says: "If the counsel in a cause desire to have the opinion of the court given to the jury upon any point or matter of law, it is their duty to state it implicitly, and to ask the opinion of the court, or they cannot make the silence of the court, or an omission to instruct the jury upon that point, a ground for a new trial. Misdirection is always a good ground; but not, an omission to direct when no direction is required. When a charge or opinion is wanted on a particular ground, it must be particularly stated and asked for. Such is the practice, and such it ought to be, or verdicts would be perpetually in danger from concealed objections." The third clause of the 43d rule of this court declares, "All exceptions to the charge of the court to the jury shall be specified in writing, immediately on the conclusion of the charge, and handed to the court before the jury leave the box; and the bill must be prepared in form and presented to the judge within two weeks after the verdict." The 32d rule of this court further provides, "that

all instructions required by counsel to be given to the jury shall be presented in writing, and argued to the court before opening the argument to the jury."

Upon a review, therefore, of all the grounds taken, the court is unwilling to disturb the verdict of the jury. The motion for a new trial is overruled.

[This cause was subsequently carried, on writ of error, to the supreme court, where the judgment of this court, rendered in Case No. 12,574, was reversed. 19 How. (60 U. S.) 323.]

Case No. 12,576.

SEABURY et al. v. GROSVENOR.

[14 Blatchf. 262; 14 O. G. 679; Cox, Manual Trade-Mark Cas. 316; 53 How. Prac. 192.] [1]

Circuit Court, S. D. New York. June 16, 1877.

TRADE-MARK—FRAUDULENT REPRESENTATIONS.

Where a person who claimed property in a trade-mark, had acquired it, if at all, by the use, in circulars, of fraudulent and deceptive and untrue language as to the origin and qualities of the article in respect of which the trade-mark was claimed, *held*, that he had lost his right to claim the assistance of a court of equity to protect his trade-mark.

[Cited in Manhattan Medicine Co. v. Wood, 108 U. S. 227, 2 Sup. Ct. 443; Cleveland Stone Co. v. Wallace, 52 Fed. 437.]

[Cited in Simmons Medicine Co. v. Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 169.]

[This was a bill by George J. Seabury and Robert W. Johnson against John M. Grosvenor to restrain the infringement of a trade-mark.]

Rowland Cox, for plaintiffs.

Joseph W. Howe, for defendant.

BLATCHFORD, District Judge. The evidence is clear that the plaintiffs were systematically and knowingly carrying on a fraudulent trade. Although they may have omitted the fraudulent and deceptive and untrue language from their circulars before this suit was commenced, yet if they have any property in the trade-mark which they claim the title to, they acquired such property by the use, for a considerable time, of such language in the circulars which accompanied the articles they sold, and in respect of which the trade-mark is claimed. Such language was to the effect, that a celebrated chemist had recently discovered a vegetable principle of great value, and, prior to making it generally known, had introduced it into hospitals, and had generously extended its use to the most successful physicians; that the flattering and astonishing results which characterized its action at once stamped it as the most remarkable principle ever discovered; that the powerful remedy was named "Capcine"; and that it was used in plasters prepared by the plaintiffs, and called "Benson's Capcine Plasters." A registered trade-mark is claimed in the word "Capcine." Courts of equity refuse to interfere in behalf of persons who claim property in a trade-mark, acquired by advertising their wares under such representations as those above cited, if they are false. It is shown that there is no such article as capcine, known in chemistry or medicine, or otherwise. The authorities are clear, that, in a case of this description, a plaintiff loses his right to claim the assistance of a court of equity. Lee v. Haley, 5 App. Cas. 159; Leather Cloth Co. v. American Leather Cloth Co., 4 De Gex, J. & S. 142.

The motion for an injunction is denied.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. Cox, Manual Trade-Mark Cas. 316, contains only a partial report.]

SEABURY (SISSON v.). See Case No. 12,913.

Case No. 12,577.

The SEA FLOWER.

[1 Blatchf. 361.] [1]

Circuit Court, S. D. New York. Oct. Term, 1848.[2]

MARITIME LIEN—EXCLUSIVE CREDIT TO OWNERS.

1. A vessel was wrecked and abandoned to the underwriters. They authorized an agent to draw on them for her repairs. He did so, and A. advanced the money on the draft. The underwriters sold the vessel, when repaired, to the insured, in satisfaction of their policy, and afterwards failed in business and did not pay the draft, which they had accepted. A. having filed a libel in rem against the vessel to recover the advance, *held*, that exclusive credit for the advance was given to the underwriters and that no lien existed on the vessel for its repayment.

[Cited in The James Farrell, 36 Fed. 501.]

2. *Held*, also, especially, that the lien could not, under the circumstances, be set up against the title of a bona fide purchaser.

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

John Davenport filed a libel in rem against the brig Sea Flower, in the district court, to recover the sum of $1,381 45 advanced for repairs to and other necessaries for the brig Sea Flower in the island of Bermuda. The vessel had been wrecked and abandoned to the underwriters, who sent an agent from New York to the island, with authority to pay the salvage, repair the vessel, and bring her to New York. For the purpose of enabling him to raise the necessary means they gave him a letter of credit, authorizing him to draw on them for the amount at thirty days' sight. The libellant advanced the above amount, on a draft drawn by the agent, which the drawees accepted. On the arrival of the vessel at New York the underwriters sold her to the insured in satisfaction of their policy, and soon afterwards failed in business, and the draft was not paid. The district court decreed in favor of the claimant [Case No. 3,589], and the libellants appealed to this court.

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

[2] [Affirming Case No. 3,589.]

THE COURT held that exclusive credit for the advance was given to the underwriters, that no lien existed on the vessel for its repayment, and, especially, that the lien could not, under the circumstances, be set up against the title of a bona fide purchaser. Decree affirmed.

SEA FLOWER, The (DAVENPORT v.). See Case No. 3,589.

SEAGRAVE (SARGENT v.). See Case No. 12,365.

SEAGRAVES (COMSTOCK v.). See Case No. 6,593.

SEAGRAVES (HOLBROOK v.). See Case No. 6,593.

SEAGRIST (UNITED STATES v.). See Case No. 16,245.

Case No. 12,578.

The SEA GULL.

[Chase, 145;[1] 2 Am. Law T. Rep. U. S. Cts. 15; 2 Balt. Law Trans. 955.]

Circuit Court, D. Maryland. 1865.

ACTIONS—PERSONAL—DEATH OF PLAINTIFF—RULE IN ADMIRALTY—MARITIME TORTS—PLEADING—JUDICIAL DISCRETION.

1. The rule that personal actions die with the person is peculiar to common law, traceable to the feudal system and its forfeitures, and does not obtain in admiralty.

[Cited in Towanda, Case No. 14,109; Holmes v. O. & C. Ry. Co., 5 Fed. 80; The Garland, Id. 926; The E. B. Ward, 17 Fed. 458; The Harrisburg v. Rickards, 119 U. S. 206, 7 Sup. Ct. 144.]

2. The process to enforce the remedy for a wrong done or injury incurred by the death of a person, may be either in personam or in rem.

[Cited in The Harrisburg v. Pickards, 119 U. S. 210, 7 Sup. Ct. 143; The A. Heaton, 43 Fed. 596.]

[See Armstrong v. Beadle, Case No. 541.]

3. A husband can recover by a proceeding in rem, against the vessel which caused the death of his wife, for the injury suffered by him thereby.

[Cited in The Epsilon, Case No. 4,506; The Highland Light, Id. 6,477; The Charles Morgan, Id. 2,618; Hollyday v. The David Reeves, Id. 6,625; The Clatsop Chief, 8 Fed. 166; The E. B. Ward, 16 Fed. 258; The Manhasset, 18 Fed. 925; The Columbia, 27 Fed. 720.]

4. A plea to a libel which sets up no matter in defense, is substantially a demurrer.

5. When such a plea is overruled, it is in the discretion of the court to allow an answer to be filed, or to enter a decree at once for the damages claimed.

6. It not having been suggested on the hearing that the facts set forth in the libel were untruly stated, and from other circumstances the court refused to allow an answer to be filed, on its overruling the plea, and entered a decree for the damages.

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

The steamers Sea Gull and Leary, plying out of the port of Baltimore in the trade of the Chesapeake, came in collision, whereby the Sea Gull injured the Leary, and caused the death of the wife of the libellant in this case, who was stewardess on the Leary. Whereupon the husband filed his libel in the district court against the Sea Gull, charging that the collision was caused by the fault of that steamer, that it had caused the death of his wife, and claiming damages for the loss so done to him. The respondents plead to the libel that there was no cause of action to the husband for the death of his wife, and that if there was, his remedy was in a court of common law, and not in a court of admiralty. On this plea the libel was dismissed [case unreported], and the cause came to this court by appeal.

Wm. M. Addison and Richard R. Battel, for libellants.

Brown & Brune, for respondents.

CHASE, Circuit Justice. The libel in this case seeks redress for injuries to the wife of the libellant, terminating in her death. It alleges that the wrongs complained of were occasioned by the collision of the steamer Sea Gull with the steamer Leary, and that the collision occurred through the fault of the Sea Gull. The owners of the Sea Gull responded to the libel by a plea, that the matters alleged were not within the cognizance of the court; that the libellant had no right to sue for the alleged wrong, and the court had no jurisdiction in the premises; and that if it had jurisdiction, the proceedings should be in personam, and not in rem. Upon the hearing, the libel was dismissed by the district court, and the case comes here by appeal.

The last question presented by the plea will be considered first. It is not easy to see upon what principle wrongs to persons can be distinguished in respect to relief in admiralty, from injuries to things. Both cause damages to parties, to be compensated in money; and both are occasioned by similar wrongful acts. There is, in the second volume of Wynne's "Life of Sir Leoline Jenkins," a collection of his official letters on admiralty questions, submitted to him from time to time by the lords commissioners and the other functionaries of the government, in one of which—at page 774—he says, that "the freighters, owners, and masters of certain English vessels have a good action of spoil and damages against a Dutch caper (privateer) that detained and robbed them, and might maintain the action in the court of admiralty by process against the offending ship and her commander, for damages occasioned by the loss of goods and of time, and by the violence they had suffered." This is, perhaps, the earliest instance in which the right of action in admiralty against a ship or master, for personal injuries to individuals on another ship, was asserted. It might be going too far if we were to give much weight to so ancient an authority, even of so great a judge, if there were anything in the doctrine contrary to

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

sound reason. But the same point has been lately determined by a decision of a very enlightened and able judge (Judge Sprague, of the district court of Massachusetts). In the case of The Maverick, it was held by him that a steamer colliding with a vessel, and in fault, was liable for the personal injuries occasioned by the collision to the libellant, who was mate upon the other vessel. This case is in point upon the question of remedy, and I accept this authority as sufficient for the case before us upon that question.

The objection to jurisdiction, made by the plea, rests upon the propositions that a husband can not recover for injuries to his wife, after her death. It was urged in support of this objection that personal actions die with the person. But this maxim does not seem to apply to the case before us. The suit is not prosecuted by an administrator, but by the husband of the deceased, and redress is sought for damages to him through injuries to her. There are cases, indeed, in which it has been held that in a suit at law, no redress can be had by the surviving representative for injuries occasioned by the death of one through the wrong of another; but these are all common-law cases, and the common law has its peculiar rules in relation to this subject, traceable to the feudal system and its forfeitures. The case of Baker v. Bolton, 1 Camp. 493, is the leading English decision, followed in Massachusetts by the case of Carey v. Berkshire R. R. Co., 1 Cush. 475. The English parliament has corrected the English law, and supplied a remedy. The Massachusetts legislature has done the same thing for the Massachusetts law. In other states, the English precedent has not been followed. In Ford v. Monroe, 20 Wend. 210, a father recovered damages for the death of his son, killed by the negligence of the defendant's servants; and in James v. Christy, 18 Mo. 162, an action was maintained against the owner of a boat, brought by a father to recover damages for the death of his son, occasioned by a defect in the machinery. These latter authorities were approved of by Judge Sprague, in the case of Cutting v. Seabury. He observes that "the weight of authority in common-law courts seems to be against the action, but natural equity and the general principles of law are in favor of it." He adds: "It is not controverted that if a father be willfully and wrongfully deprived of the services, society, and control of his minor son, he may maintain an action against the wrong-doer if the son survive. Why, then, if the same wrong be done and aggravated by the death of the child, should his right of action be lost?" It is difficult to answer this question, and certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.

These considerations require that the plea be overruled. It sets up no matter in defense. It is, in substance, a demurrer to the libel. It avoids, indeed, by protestation, the confession of the truth of the allegations, but this is common to all demurrers. The question whether the respondent shall be permitted to answer the allegations of the libel is, therefore, one of discretion with the court. And this question would be resolved by permitting the answer to be filed, if the fact that the Sea Gull was in fault in the collision had not been fully considered and determined in another case, or if there were any reason to suppose that the facts stated in the libel in relation to the injuries caused to the libellant were untruly stated. When the cause was heard, however, there was no suggestion of this sort. Upon the whole, therefore, I shall overrule the plea, and render a decree taking the facts stated in the libel as true, without allowing an answer to be filed.

A decre will be entered in favor of the libellant for twenty-one hundred dollars. Decree entered accordingly.

Case No. 12,578a.

The SEA GULL.

[16 Pittsb. Leg. J. (O. S.) 194.]

Circuit Court, D. Maryland.

SHIPPING—CARE IN NAVIGATION—MARITIME TORT — DAMAGES FOR WRONGFUL KILLING.

1. A steamer, leaving a crowded port, is bound to use special diligence and care in navigation; otherwise she will be held responsible for damages occurring to sailing vessels, in consequence of collision, in the default of clear proof of fault on their part.

2. A wife, whose husband is engaged in navigating a row boat in the harbor of Baltimore, and is killed by collision with a departing steamer, navigating the waters of the harbor without sufficient caution, is entitled to recover damages in an action against the steamer.

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

CHASE, Circuit Justice. I have given a careful consideration to the case of Mary Brannick v. The Sea Gull. In this class of cases, it is almost always extremely difficult to come to a satisfactory conclusion. The conflict of evidence is usually great, and the judge is much embarrassed by the diversities and contradictions of statements, coming from witnesses apparently of equal credit. In a large number the result is determined by a slight preponderance of testimony. In this case the steamer Sea Gull was going out of the port of Baltimore. There is a good deal of difference among the witnesses on the question, whether or not she was moving with greater or less than ordinary speed. For the purposes of this case, I will take it, as proved, that she was moving with no more, if not with less, than common swiftness. But she was going out of a crowded harbor, where very great caution and very great care were necessary; and it is a reasonable rule that, if collision occurs with a sailing vessel, or any smaller craft, which causes injury to person or property, the

steamer, being much the strongest vessel, and having almost always the best and most experienced officers, and being usually under the best control, must make a clear case of freedom from fault in order to escape responsibility for the loss. In this case it seems that the steamer was going out of the harbor, and that a small boat, with a crew of two men, towing some small piece of timber called by one of the witnesses a scow-oar, was pulling across the harbor almost in front of the steamer. Some of the witnesses say that she was pulling directly towards the steamer, but that can hardly be possible. The weight of the evidence is, that the boat was crossing from one side of the harbor to the other, and it has not been claimed that she was where she had no right to be. Some of the witnesses say that, if she had kept ahead instead of turning round no collision would have occurred. Others assert the contrary. My own judgment is, that escape had become impossible when she was observed from the steamer. Whether this be so or not, it is clear enough that the men in the boat were pursuing their ordinary business in the harbor, and, if the imminence of the peril was produced by the fault of the steamer, and, in the alarm occasioned by it, an error was ignorantly committed, which increased the danger to a small boat, that error will not excuse the steamer. It is true that the steamer seems to have been engaged in her regular and proper business. The captain and most of the officers seem to have been competent, and to have been doing their duty, but somehow or other the steamer did run directly afoul of this little craft, and why? I am obliged to come to the conclusion, upon a pretty careful examination, that it was because there was not sufficient lookout on the steamer.

The testimony for the appellees, in this case, is contradictory. There is some of it which indicates there was a lookout, and some of it which indicates there was none. I think the weight of the testimony is that there was no alarm given by anybody, in respect to this particular boat, except by Vernon, a hand on the steamer, who, I understand, was on the portside, and gave the alarm of "boat ahead." He says, and his son says, (and they were both together, and both saw the same thing,) that they heard no other cry than that the ringing of the bell by the captain, attempting to stop the vessel, immediately succeeded upon the alarm which they gave. On the other hand, it is said that a Mr. Leary was on the lookout. He says that he himself gave the alarm. It is certain that he did give an alarm, but there was a tug-boat also in the way, and with every disposition to reconcile all the testimony together, and not desiring to attribute false swearing or misrepresentation to anybody, I am induced to think that he confounds an alarm which he gave in respect to the tug-boat with the alarm which he supposes himself to have given concerning the small boat. These alarms might easily be confounded together, but so far as this particular little vessel is concerned, nothing seems really certain except that an alarm was given by Vernon, or his son, when she was immediately under the steamer and when there was no sufficient opportunity for her to escape. She tried to get away, but failed.

It is quite possible, it seems to me, that the attention of the captain was drawn to the tug, and afterwards, when too late, he found that the accident had occurred to the row boat. He could not see her, nor could any body, from the pilot house. It would have been very difficult, indeed, for any body to see her, except from the bow, where the lookout ought to have been, but was not. The men in the tow boat escaped, and the men who were in another row boat near by say that the captain was fully advised; that he was alarmed in time to prevent the accident. I do not think he was. His attention was probably engrossed by the larger vessel, while this little boat was suffered to get immediately under the bow of the steamer before it was noticed by him. Under these circumstances I think the steamer was in fault, and is responsible for the damage that occurred. One of the men in the row boat was killed or drowned. At first, I doubted whether this man did not himself leap into the water, in anticipation of the collision, and whether damages could be claimed of the steamer for that, but I am satisfied, upon the whole testimony, and especially from that of the men who witnessed what occurred from the other row boat—men who were entirely disinterested, and not connected with any of those parties—that the man was knocked out, rather than that he jumped out, of the boat.

I shall, therefore, decree against the steamer for damages to the libelant for the loss of her husband. It is not very easy to assess the damages. They must not be determined by sympathy; and it is hard to say what the actual damage to the wife was, but I have given the best construction I could to the matter, and will enter a decree for $1,000 against the steamer. I ought to say that a good deal of this testimony, which was taken during the past week, was not before my brother, the district judge, when this case was decided below.

SEA GULL, The (WILLIAMS v.). See Case No. 17,736.

Case No. 12,579.

The SEA LARK.

[1 Spr. 571.] [1]

District Court, D. Massachusetts. May, 1860.

MARITIME LIENS—SUPPLIES—CREDIT OF OWNER—LACHES.

1. When a ship, at the Chincha Islands, was in want of a chain and anchor, and they were furnished by another vessel, and the credit of the

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

owner of the ship, at the place of his residence, was not good at the time the chain and anchor were purchased, and had not been good for two years previous, and there were no persons resident at the islands, whose business it was to lend money, or furnish supplies, to any owners: *held*, that it sufficiently appeared that those supplies could not have been obtained upon the personal credit of the owner, and that a lien therefor attached upon the vessel.

[Cited in The James Guy, Case No. 7,195; The Lulu, 10 Wall. (77 U. S.) 203.]

2. A lien would arise, without an express agreement therefor.

3. There is nothing in the case of Pratt v. Reed [19 How. (60 U. S.) 359], to disturb the old doctrine, that a tacit lien arises when the circumstances necessary to create it exist.

[Cited in The A. R. Dunlap, Case No. 513.]

4. The chain and anchor were furnished at the Chincha Islands, in September, 1857, the libel was not filed until September, 1859: *Held*, that the lien had not been lost by this delay, it appearing that the ship had not been within the United States, and that there was no reasonable opportunity to enforce the lien, before the suit was commenced.

This was a libel in admiralty, by the owners of the ship Jabez Snow, to recover the value of a chain and anchor, furnished to the ship Sea Lark, in September, 1857, at the Chincha Islands. Both vessels were of Boston, and met at the Chincha Islands. The Sea Lark, before her arrival there, had lost a chain and anchor, by a collision with another vessel, and the master of the Jabez Snow furnished the chain and anchor sued for, from his own vessel, to supply the place of those that had been lost. In June, 1858, the owner of the Sea Lark gave the libellants his note for the amount, (about $900,) and took from them a receipt for the note, containing the statement, that, when paid, it was to be in full settlement of the claim for the chain and anchor. The claimant of the Sea Lark held her under a mortgage made before the chain and anchor were furnished, and a purchase of the right of redemption after they were furnished, and after he had notice of it. The libel was filed, and the ship arrested, in September, 1859, but she had not before been in the United States, since the articles were furnished. The answer alleged that the chain and anchor were furnished on the credit of the owner only, and not on that of the ship; that they were not necessary for the ship, and if they were, there was no necessity that her credit should be pledged to procure them, and there was, therefore, no lien upon the ship for the payment; and finally, if there ever was a lien upon the ship, it had been lost by the neglect of the libellants to collect the debt, of the owner of the ship. It appeared in evidence, that the master of the Sea Lark was authorized to draw upon his charterer, to a limited amount, but that this amount was not sufficient to meet his ordinary disbursements; that he drew upon the owner in Boston twice, while at the islands, and readily sold the drafts at a premium; one of them at Callao, a place about one hundred miles from the islands, and the other to the master of a vessel, temporarily at the islands. It also appeared, that when the articles were purchased, there was nothing said, as to whether or not the sale was to be on the credit of the ship; and there was evidence, tending to show that the credit of the owner of the ship, at the time of the sale, was not good in Boston, where he resided.

John C. Dodge, for libellants.
F. C. Loring, for claimant.

SPRAGUE, District Judge. Two questions are raised in this case. First, was the ship Sea Lark ever subjected to a lien for the chain and anchor; and second, if she was, has the lien been lost. It is admitted, that as the law was understood, prior to the case of Pratt v. Reed, 19 How. [60 U. S.] 359, the sale of these articles, under the circumstances, would have created a lien upon the ship. By the law, as laid down in that case, it is incumbent on the libellants, in order to sustain their action, to prove, not only that the articles furnished were necessary for the ship, but also that they could not have been procured upon the credit of the owner. It appears that there are no mercantile houses established at the islands, whose business it is to furnish either supplies or money. One draft, drawn by the master of the Sea Lark, was sold to a master of a ship, temporarily at the islands, and another at Callao, but it does not appear that credit was given, or the drafts taken, without a lien upon the ship. If the credit of the owner was known at the islands or Callao, as it in fact existed in Boston, it seems clear the purchase could not have been made upon it. Two years before, he had failed to pay a large debt that became due from him, and it remained unpaid, until he went into insolvency. He testified that he got credit after these articles were furnished, but it appears that it was only for premiums of insurance.

The master of the Sea Lark stated, in his deposition, in the first instance, that he bought the articles on the credit of the owners. He does not say exclusively upon their credit; and if that was what he meant, it must have been an inference only, for he subsequently says, there was nothing said, one way or the other, as to whether the ship would be liable for the payment. It is not necessary that the ship should be, in terms, made liable for the payment. There is nothing in the recent case, to disturb the old doctrine, that a tacit lien arises, when the circumstances necessary to create it exist.

It appearing that the credit of the owner, at the place of his residence, was not good, at the time the chain and anchor were purchased, and had not been for two years prior to that time, and that there were no mercantile houses, or persons resident at the Chincha Islands, whose business or practice it was to lend money, or furnish supplies to any owners, I think it is sufficiently proved, that these necessary supplies could not have been obtained upon

the personal credit of the owner, and that a lien therefor attached upon the vessel.

There is no good ground for holding the lien to be lost. There has been no neglect in enforcing it against the ship. This process was commenced against her as soon as was reasonably practicable, after the articles were furnished. It is said there has been neglect to enforce the payment of the debt from the owner. It is not necessary to decide what would be the effect of such neglect, as none has been proved. Every effort to enforce the payment, except commencing a suit, seems to have been made. And, moreover, the claimant does not stand in the position of a bona fide purchaser, without notice. Judgment for the libellants.

SEAL-SKINS (DAVISON v.). See Case No. 3,661.

Case No. 12,580.

In re SEAMAN.

[19 N. B. R. (1879) 332.] [1]

District Court, D. Indiana.

BANKRUPTCY—PETITION FOR DISCHARGE—CASE ON RETURN DAY—ASSENT OF CREDITORS.

An unopposed petition for discharge is to be submitted upon the state of case that exists on the return day. If a discharge is subsequently granted upon the assent of creditors, it must be upon the assent of such creditors as have proved their debts on or before the return day.

[In the matter of Conrad Seaman, a bankrupt.]

GRESHAM, District Judge. In this case the usual petition and affidavit for discharge were filed, and the 25th day of April, 1879, was appointed for the creditors to appear and show cause why the prayer of the petition should not be granted. On the day thus appointed the assets of the bankrupt did not equal thirty per cent. of the proven debts; no assent of any portion of the creditors to his discharge was then filed, and the court suspended its action upon the petition in order to afford the bankrupt further opportunity to procure and file the assent aforesaid. Subsequently the bankrupt asks leave to file proofs of debt by other creditors, with their assent to his discharge, making the assent of one-fourth in number and one-third in value of all creditors who have proved their debts, and it is for the court to determine whether this leave shall be granted.

Section 5112 of the bankrupt law requires that the assent to discharge shall be filed at or before the hearing of the petition therefor, which is the return day of the show-cause order, unless further proceedings are necessary; and the general orders of the supreme court (No. 24) provide that any creditor who wishes to oppose the petition for discharge must "enter his appearance in opposition thereto on the day when the creditors are required to show cause." The law does not explicitly designate the precise time when the status of the estate in bankruptcy shall be considered in determining whether the bankrupt is entitled to a discharge; it does not say just when the assets shall equal a certain proportion of the debts, or just when the assent of a certain proportion of the creditors shall entitle him to a discharge. But it is plain that under the rule no opposition to the discharge can be made unless an appearance for the purpose of making it is entered on the return day, and no appearance can be entered unless it is by a creditor who has proved his debt on or before that day. If this be true, it would be unfair to permit the subsequent appearance and proof by creditors for the purpose of aiding the bankrupt in getting a discharge, when the strict language of the rule denies the right of subsequent appearance and proof by creditors for the purpose of resisting it. If on the return day the record shows that the bankrupt is not entitled to a discharge by reason of a deficiency of assets, or the failure or refusal of enough creditors to assent thereto, the creditors are not apt to enter their appearance in opposition to the petition, for it would be unnecessary to oppose what is denied by the record, and cannot be granted without their consent. And if the status of the case, as it exists on that day, may be afterward modified by the admission of other creditors who favor the discharge, it would seem proper that all the creditors should be again notified, and have another opportunity to show cause, and so on ad infinitum.

The proceeding of the bankrupt for discharge is one instituted by himself; the creditors who have proved their debts are made parties; and the bankrupt's right to the relief asked by him in cases where there is no appearance in opposition thereto, depends upon the showing he is able to make on the day that the creditors are required to respond in his petition. He can select his own time, under the limitations imposed by the statute, for filing his petition, and if he is not able on the return day of the order that is made thereon, and in default of any opposition thereto, to show that he is entitled to the relief that he asks, he ought not to be permitted to come in afterward and obtain it without further notice, and upon an entirely different showing. If a discharge is subsequently granted upon the assent of creditors, it must be upon the assent of such creditors as have proved their debts on or before the return day. It seems to be the meaning of the law and rules that an unopposed petition for discharge is to be submitted upon the state of case that exists on the return day, and the leave to file the assent of creditors who have proved their debts since that time is accordingly refused.

[1] [Reprinted by permission.]

Case No. 12,581.

SEAMAN et al. v. The CRESCENT CITY.

[1 Bond, 105.] [1]

District Court, S. D. Ohio. April Term, 1857.

COLLISION—PRESUMPTION OF FAULT—DAMAGES—SALE OF DAMAGED CARGO—LOSS—AFFREIGHTMENT.

1. In a case charging a collision by a steamboat on a flat-boat heavily laden, if there is doubt on the question of fault, by reason of a conflict in the evidence, the presumption of wrong will be against the steamboat.

2. After a cargo is shipped, the shippers can not demand it short of the port of destination without payment of full freight for the voyage.

3. In this case, the flat-boat was laden with flour in barrels, destined for New Orleans; as the result of the collision, the flour was submerged in water for several hours, and injured thereby; the master of the flat-boat, having repaired his boat, reshipped the flour on the same boat for New Orleans, where it arrived after a passage of three weeks, and was there sold at a great loss from its damaged condition; and as the collision occurred only sixty miles below Cincinnati, to which place the flour could readily have been shipped, and where it would have sold with little loss: *Held*, that the master of the flat-boat should have sent the flour to Cincinnati for sale, that being the nearest and best market; and that the owners of the steamboat, adjudged guilty of fault in the collision, are liable only for the actual loss that would have occurred, if the flour had been shipped to and sold at that place, and not for the loss sustained by the sale at New Orleans.

[This was a libel by Seaman and Gillespie against the steamboat Crescent City, to recover damages for a collision.]

Lincoln, Smith & Warnock, for libellants.

Charles Fox, for respondent.

OPINION OF THE COURT: The facts averred in the libel in this case may be summarily stated as follows: That on January 18, 1854, at Malta, on the Muskingum river, the libellants shipped on a barge or flat called the "Falls City No. 5," of which J. R. Bell was master and pilot, twelve hundred and ten barrels of flour, to be conveyed to New Orleans; that on the 20th of February, about two o'clock p. m., at a place on the Ohio river, about two miles below Sugar creek, and about sixty miles below Cincinnati, and at the distance of about two hundred and fifty yards from the Kentucky shore, the river being broad, and without any obstruction to navigation, the steamboat Crescent City came up the river and made a landing on that shore, and took a wood-flat on its larboard side and thence came quartering out from shore, across the stern of the Falls City, and caused the flat in tow of said steamboat to strike the flour-barge on its larboard side, about twelve feet from the stern, tearing out the side from that point to the center of its stern, and causing it to sink so far that the cargo floated out into the river, and the flour was thereby greatly damaged by water; that most of the floating flour was caught and taken to New Orleans, and sold for the benefit of whom it might concern. The libellants allege that the loss on the sale of the damaged flour at New Orleans was $3,384.70, for which, with expenses amounting to $43.50, and interest from March 20, 1854, they claim a decree. The Crescent City having been attached at the port of Cincinnati, under process issued from this court, George Leslie intervened as the owner of the boat, and filed his answer, averring in substance that said boat, in coming up the Ohio river, crossed from the Indiana side to Powell's wood-yard, two miles below Sugar creek, on the Kentucky side, and there caused a wood-boat to be attached on either side of the steamboat, intending to take them in tow; and that while lying close to the shore, the stern aground, or nearly so, and the gunnel of the starboard wood-boat held fast by a tree, the steamboat being kept in that position by going forward with the larboard engine, and backing with the starboard engine, two flour-barges, lashed together, floated down within from one hundred to one hundred and fifty feet of the Kentucky shore; and by reason of the failure of the crew to lay the barges out into the river, the larboard side of the inner barge struck the wood-boat attached to the larboard side of the steamboat, thereby knocking a hole in its side, and causing the injury complained of by the libellants. The answer avers that the collision was not occasioned by any fault in the management of the steamboat, but wholly through the negligence and misconduct of the crews of the flat-boats.

These are the allegations of the parties presenting the points involved in this controversy. The case made by each is in direct conflict with that made by the other, and each, it is insisted, is sustained by the evidence. The duty, never pleasant, and not wholly free from difficulty, when the proofs are so seemingly contradictory and discrepant, is thrown upon the court of fixing on some satisfactory basis for a decree. There are fortunately some facts which are not controverted in the case. The collision happened between one and two o'clock in the afternoon of the 20th of February, 1854, in what is known as "Sugar Creek Bend," on the Kentucky side of the Ohio river, some two miles below the mouth of Sugar creek, and about sixty miles below Cincinnati. The river at the time was high, being, in the boatman's parlance, at an eighteen or twenty foot stage. The river is wide there, and the water, even close in to the Kentucky shore, of sufficient depth to float a steamboat of large size. Although there is a considerable bend in the river on that side, there is nothing to obstruct the view up and down for a distance of several miles. The weather, on the day named, was clear and calm. The current, at the place of collision, at the stage of water before stated, is about four miles and a half to the hour, setting in toward the Kentucky shore, and being strongest from two hundred to two hundred and fifty yards from that shore. These

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

facts warrant the inference that the collision in question could not have occurred without culpable negligence or want of skill in the management, either of the steamboat or the flour boat; and that one or both must be held responsible for the injury which resulted from it.

Before stating the views entertained by the court, upon the evidence adduced, it may be proper to remark, that in a controversy involving a collision between a steamboat and a flat-boat, so far as presumptions are allowable, they must be strongly against the former. A steamboat, especially one having side-wheels and powerful engines, as is the fact in relation to the Crescent City, has entire control of its movements, and, by the aid of its machinery, can change its direction or position with rapidity and ease, under ordinary circumstances. On the other hand, a flat-boat, heavily laden, being wholly dependent on the use of human strength and effort to effect a change in its direction or position, is moved slowly and with difficulty. The object of those having such a craft in charge, is to keep it in the strongest water, where its descent will be most rapid. It is obvious that a flat-boat can do little in avoidance of a collision; and that in competition with a steamboat, the latter will be held to stringent rules, in case of injury to the former. This, however, does not admit the conclusion that there may not be such negligence and want of skill in the navigation of a flat-boat, as to create a liability for an injury resulting from a collision. In stating the conclusions of the court, I do not regard it as necessary to present a critical analysis of the evidence offered by the parties. The right of the libellants to a decree in their favor depends wholly on the credit due to their witnesses. If the facts proved by them are credible, it is clear that no culpability attaches to the management of their flat-boat, and that the fault rests wholly on the steamboat. And the main fact in question relates to the position of the two boats, at the time of the collision. If, as the libellants allege, their boat was descending in the channel, at a proper distance from the shore, and the steamer, going forward, struck the flat, and thus caused the injury to the cargo, there can be no doubt as to which boat was in fault. The libellants have proved, by some seventeen or eighteen witnesses, the circumstances under which the collision happened. A number of these witnesses, including the master of the flat-boat which was injured, were employed on that boat at the time, and, as they state, saw the collision. Others were employed on the boat which was lashed to the injured flat, and had equally favorable opportunities of noticing the position and movements, both of the flat and the steamer. Several others were on another pair of flat-boats, some four or five hundred yards in advance of the one which was struck, but in clear view of the transaction. One witness was in a skiff, just above, but near the boats when they came together. Two witnesses were on a store-boat, between seven and eight hundred yards above the wood-yard at which the Crescent City took the wood-flats in tow, prior to the collision, who swear they saw the boats, and state distinctly their position and movements.

Without stating minutely the facts sworn to by each of these witnesses, it is sufficient to remark that there is a substantial agreement in their testimony as to the important facts relating to the collision. These facts may be comprehensively stated as follows: That the Crescent City, in its progress up the river, crossed over from the Indiana side and made a landing at a wood-yard on the opposite side. The steamer, having taken a wood-flat in tow on either side, after a detention of a few minutes, left the landing, and had proceeded upward some two or three hundred yards, the bow then quartering up stream, and at a distance of not less than two hundred yards from the shore, when the corner of the wood-flat on the larboard side of the steamboat struck the larboard side of the flour boat, which was next to the Kentucky shore, about twelve feet from its stern, carrying away the side of the flour boat from that point, including the stanchions, to the middle of the stern. As the result, the boat began immediately to sink, and a part of the flour, constituting its cargo, floated in the river. The crew of the flour boat succeeded in landing it a considerable distance below the place where the collision occurred. In relation to the distance from the Kentucky shore to the place of collision, the witnesses referred to vary somewhat in their testimony. None estimate it at less than one hundred yards, and much the larger number at from two hundred to two hundred and fifty yards. The mean of their estimates is about two hundred yards. In corroboration of their testimony as to this distance, several of the witnesses who were employed on the flour boats, and who assisted in landing the injured boat, swear that immediately after the collision they attempted to carry out a line, which, it is in proof, was about two hundred yards in length, and which would not reach the shore.

The remark is proper here that the witnesses for the libellants are in no case otherwise impeached than as they are contradicted by those of the respondent. No direct evidence is offered impugning their credit as persons deficient in character for truthfulness. They are before the court, therefore, with a just claim to credibility, unless the facts stated by them are contradicted by the testimony of more reliable witnesses. And, if credible, they clearly establish the position, that no fault is imputable to those in charge of the flour boat, and that the steamboat must be held responsible for the injury sustained by the collision. It is insisted, however, on the part of the respondent, that the evidence adduced by him relieves the steamboat from the charge of negligence or misconduct, and that the fault is wholly on the other side. A number of witnesses have been examined by the respondent

to sustain this view. They consist of the master of the steamer, one of the mates, an engineer and his assistant, together with some of the deck-hands, and several persons who were at the wood-yard when the steamboat landed and at the time of the collision. I shall not attempt critically to examine the statements of these witnesses. They coincide in saying that after the steamboat took the wood-flats in tow, and up to the time of the collision, there had been no forward motion of the boat; and that at that time the boat was lying with its stern near, or on the shore, and the bow quartering up stream, and not more than thirty yards from shore; and, that while in this position and kept there by the reversed action of the starboard and the forward action of the larboard engines, the flour boat being out of its place, and much too near the Kentucky shore, came against the steamer and thus sustained injury. It is further insisted, and there is the evidence of several of the respondent's witnesses to establish the fact, that the gunnel of the inner wood-boat attached to the steamer was entangled with a tree standing in the river near the shore in such a way as to prevent it from being moved upward, and that being aground at the stern, or very near the shore, there was no possibility of backing so as to avoid the descending flour boat. If this view is to be sustained, it follows that the flour boat was within thirty yards of the Kentucky shore, and also that the steamer was in a position rendering it impossible to get out of the way of the flour boat, and can not, therefore, be held responsible for the injury which resulted.

The sanction of the view thus urged by the respondent necessarily involves the repudiation of the testimony of nearly all the witnesses for the libellants. Considering the number of these witnesses, their opportunities of seeing the transactions of which they testify, and the clear and explicit statements they make, in relation to the main facts of the case, in the absence of any extrinsic evidence impairing their claim to credit, I do not see on what ground I can arbitrarily set them aside as unworthy of belief. To suppose that such a number of persons, without any apparent motive, could willfully have falsified the truth, is a conclusion which I should most reluctantly adopt. Nor do I think, that in crediting their statements, it follows, necessarily, that the witnesses for the respondent have testified corruptly. It seems to me that the apparent discrepancy between the witnesses for these parties, may, to a great extent, be explained and reconciled by the very reasonable assumption that the witnesses for the respondent, in their statements as to the movements of the steamer, its position and distance from the shore at the time the collision is supposed to have occurred, had reference to a state of things existing but a few minutes prior to that occurrence. It is doubtless true that the steamer, when the wood-boats were first taken in tow, was very nearly in the situation the witnesses describe. Its stern was probably on or very near the shore, and its bow thirty or forty yards, or less, out from the shore, and there was a forward and a backward action of the engines to enable it to maintain that position. But is it not reasonable to suppose these witnesses are under a mistake in saying—as some of them do—that there was not afterward a forward motion by both engines, which carried the boat outward into the stream, till it was two hundred yards from the shore, and had attained the position and place described by the libellants' witnesses, at the time the collision took place? It would require but two or three minutes to produce this state of things; and it might readily happen that the witnesses, not considering what change of position might take place in so brief a space, have stated the impressions made on their minds from facts observed at a prior time. I adopt this conclusion as reasonable, and as tending to harmonize the evidence and avoid the otherwise inevitable conclusion that some of the witnesses have corruptly stated that which is untrue. There is one fact, which, in my judgment, greatly strengthens the inference that the witnesses for the libellant are correct in saying the steamer was under headway, when the collision happened, and that those for the respondent, who testify that it had no forward motion then, are mistaken. I refer to the great force with which the flour boat was stricken. The result of the collision on the flat-boat has been stated. It seems improbable that such an injury could have been inflicted, upon any other supposition than that the steamboat had a forward motion at the time. The mere force of the current, carrying the flour boat against the corner of the wood-boat, while at rest, is not sufficient to account for the injury sustained by the former. But, without pursuing this investigation further, I have but little hesitancy in reaching a conclusion, from a careful consideration of the whole case, that the responsibility for the injury resulting from this collision must rest on the Crescent City.

I will now state briefly the principles on which the damages are to be estimated.

It appears that after a detention of four days at Sugar Creek bend, the injured boat was repaired, and the flour, with the exception of five barrels which were lost, was reshipped on the same boat and reached New Orleans about March 18, 1854. It was consigned for sale to the firm of Graham & Buckingham, commission merchants of that city; one of the members of which house testifies that the flour was badly damaged by water. Its value at New Orleans, if in good condition, at that time, would have been $6.75 per barrel. It was sold at public auction on the 22d of March, after due notice given, at an average of about four dollars the barrel. It is claimed by the libellants, that the difference between the price for which the flour sold and the market value of the article, if not damaged, adding thereto the charges and expenses at New

Orleans, furnish the rule for the assessment of the damages in this action. Adopting this rule as the basis of a decree, the damages amount to $3,231.50, for which, with interest from March 22, 1854, a decree is asked. On the subject of damages, in cases of collision, the supreme court, in the case of Smith v. Condry, 1 How. [42 U. S.] 28, say: "It has been repeatedly decided in cases of insurance that the insured can not recover for the loss of probable profits at the port of destination, and that the value of the goods at the place of shipment is the measure of compensation. There can be no good reason for establishing a different rule in cases of loss by collision. It is the actual damage sustained by the party at the time and place of the injury that is the measure of damages." In the case before the court, this rule can not apply, for the reason that there was no market for flour at Sugar creek, where this collision occurred. And it is obviously proper, therefore, to estimate the damages according to the peculiar circumstances of the case, having due regard to the spirit of the rule sanctioned by the supreme court. It is conceded, and such is the proof, that there is no market for flour below the place where the injury occurred short of New Orleans; and that Cincinnati, sixty miles above the place of collision, is one of the best markets in the West for flour generally, and especially for flour damaged by water, where it is always in demand and meets with ready sale, at a good price, for making starch and for other purposes. It is also in evidence that, at the time of this occurrence, there was but a slight difference in the market rates of flour at New Orleans and Cincinnati.

The inquiry arises, was it proper for the owners or supercargo of the flour which was injured by water, to reship it for New Orleans, the place of its original destination, to be conveyed there at the slow rate at which a flat-boat must necessarily descend the river? On this subject, the obvious rule of justice is, that the owner or supercargo should act in good faith, and with the prudence and discretion which would be expected of men in their ordinary transactions. Now, it would seem from the evidence, that while parts of this flour were in the water but a few hours, other parts of it were submerged some portion of three days. It could not be otherwise than that the injury to the flour was considerable. Some unsuccessful efforts were made to procure the transportation of the flour to New Orleans by steamboat. This mode of conveyance would have insured its conveyance to that city, in a few days from the occurrence of the accident; and such a shipment of it would, doubtless, have been proper, under the circumstances. But failing in this, the course dictated by prudence was its conveyance to Cincinnati, which would have insured its being in market within a short period of time. This was entirely practicable; for the evidence is, that boats were running daily between Louisville and Cincinnati. It appears, however, that no attempt was made, looking to this disposition of the flour. It is the testimony of witnesses, of great experience in the flour trade, that the injury to flour which has been wet is increased in proportion to the length of time it remains in that condition. In warm weather it soon becomes sour; in cold weather, this effect is not produced. It could not be otherwise than that the damage to this flour would be materially enhanced by the time occupied in getting it to New Orleans in a flat-boat. It was between three and four weeks in reaching that place, during the latter part at least of that time, embracing a part of the month of March, the weather was probably warm, and the liability to injury therefore greater.

In view of all the facts of this case, I have not been able to perceive that any principle of justice requires that the respondent should be accountable for the increased loss on the cargo, resulting from the obvious error committed in shipping the flour to New Orleans instead of Cincinnati. It is in evidence by experts on this subject, that the damage to flour which has been wet ranges from fifty cents a barrel to one-half the market value of the article, if uninjured. The extent of the damage depends something on the length of time it is exposed to the water, and the length of time it remains wet, before being used. The injury is greater or less, also, according to the construction and quality of the barrels. One witness states, that where flour has been under water but an hour, or something more, it will sell at a loss not exceeding one dollar on the barrel—and another witness states that the loss would not exceed fifty cents the barrel. These witnesses have reference to the Cincinnati market. As to this cargo, if the price for which the flour was sold at New Orleans is adopted as fixing the ratio of injury, it would be nearly two dollars and seventy-five cents the barrel. This is obviously greatly beyond the loss which would have accrued if it had been brought to Cincinnati and sold there. And the fact first stated clearly shows the impropriety of its shipment to New Orleans. The evidence affords no precise data, by which to estimate the loss that would have accrued, if the flour had been sent to Cincinnati for sale. It may be fairly assumed from the evidence, that it would not have been less than one dollar and fifty cents on the barrel. This estimate has not the certainty that is desirable, but it doubtless approximates the real loss that the libellants would have sustained, if the course indicated as proper had been followed in the disposal of the injured flour. If it were possible to attain greater certainty in this respect, by a reference to a commissioner, I would willingly make an order to that effect. But I do not see that this object can be effected by such a course.

In addition to the direct loss from the injury to the flour, the libellants claim, as a part of the loss resulting from the collision, the freight agreed to be paid, and which it appears was paid, to the owner and master of the

barge, for its conveyance to New Orleans. The price agreed on by the parties, and stated in the bill of lading, was sixty-two and a half cents the barrel. If the court is right in its conclusion, that the rule of damages in the case is the market value of the damaged flour at Cincinnati, it is clear the libellants are entitled to recover the freight paid to the place of destination. The evidence proves that after the collision the master of the barge repaired his craft, and after a detention of between three and four days, proceeded forward with the cargo on board. This he had an unquestionable right to do, under the circumstances of the case, and was, of course, entitled to full freight. If the owner had appeared at the place of the accident, and had demanded the possession of the cargo, there would have been no obligation on the freighter to have delivered it to him, without payment of full freight. The law on this point is stated to be: "After the shipment of the cargo on the voyage, the shippers have no right to demand it at any intermediate port, short of the port of destination, without payment of full freight for the voyage, whether the cargo arrive in a damaged or undamaged state." Fland. Shipp. 250. The reason of this is stated by the same writer to be, that unless the ship is so wholly disabled as to be incapable of carrying the cargo to the place of its destination, the master has a right to insist upon the contract, and to a full opportunity of earning the freight agreed to be paid. In this view, the libellants derived no benefit from the delivery of the damaged flour at New Orleans, and are the actual losers of the amount of freight paid to that place. This loss is, therefore, to be regarded as resulting from the collision, and constitutes a proper item in estimating the damages for which the owners of the steamboat are responsible.

A decree will, therefore, be entered for the libellants, on the basis of a loss of one dollar and fifty cents on the 1,205 barrels of damaged flour, delivered at New Orleans, to which will be added the value of five barrels which were lost at the time of the accident, to be estimated at six dollars and seventy-five cents the barrel; and also the freight paid by the libellants, being sixty-two and a half cents the barrel, on the entire cargo.

Case No. 12,582.

SEAMAN v. ERIE RY. CO.

[2 Ben. 128.] [1]

District Court, E. D. New York. Jan., 1868.

SALVAGE—ICE—COMMON CARRIER—LIABILITY OF OWNERS FOR SALVAGE OF CARGO.

1. Where a railway company received freight in New York, which must be carried to New Jersey to be put on the railroad trains, and had made a contract with one A. to carry such freight from a dock in the East river to the station in Jersey City, A. agreeing to assume the risk of the transportation across the river, and a barge belonging to the company, loaded with such freight, was transporting it across the river, under the direction of A. or his employees, the barge, with another barge, being towed by a steamboat, and the hawser parted, and the one barge was left to drift, while the steamboat took care of the other; and while she was so drifting, a large field of ice came up the river, and carried her along with it in such a direction that the barge was in imminent danger of being crushed between the ice and a pier above, and thereupon a steamtug, on the call of those on board the barge, went to her, and pulled her out of the ice, and got her into one of the slips, till the field drifted by, the value of the barge and cargo being from $30,000 to $45,000, and of the tug $10,000, and the service occupying about half an hour, *held*, that the service was a salvage service.

2. The railway company were personally liable for the salvage.

3. $500 was a reasonable salvage, besides $50 for injury to a hawser.

[This was a libel for salvage by Lawrence Seaman against the Erie Railway Company.]

John F. Baker, for libellant.

Eaton, Tailer & Newell, for respondents.

BENEDICT, District Judge. This is an action in personam to recover salvage compensation for services performed by the steamtug J. S. Underhill, in this port, in rescuing the barge H. Suydam and her cargo from the ice. The evidence discloses the following state of facts:

On the 23d of January, 1867, the steamtug Van Houghten, while engaged in towing two barges in the East river, parted her hawser, and was compelled to leave one of them, the H. Suydam, adrift, while she towed the other into a pier. While the Suydam was so adrift, and while the Van Houghten was engaged in landing the other barge at the pier, a large field of ice came into the East river upon the flood tide, which caught the Suydam, and carried her along with it up the river, the barge lying at right angles to the shore, with her stern to the New York side, and her bow imbedded in ice. The river narrows above the South ferry, and the flood tide sets over to the New York shore, so that the floe as it moved up was constantly approaching the New York piers, and when off pier 9 was from one hundred to three hundred feet from the piers. It was, moreover, large enough to fill the river in the narrow part above, and so firm that later in the day numbers of persons crossed the river upon it, after it had jammed in at the Fulton ferry. The Underhill was lying at pier 9, and as the barge was carried by her, the master of the Underhill hailed those on board of the barge, and called attention to their danger. No answer was immediately returned, but shortly those on the barge hailed the Underhill to come to their aid. The Underhill at once pushed out, backed down to the barge, threw her a line, pulled her out of the ice, and started with her for the slips. By this time the vessels had been carried up as far as pier 16, the upper pier of the Wall Street fer-

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

ry slip. On reaching the piers, the tug swung the barge into the slip above the ferry, and herself into the ferry slip, the ice being then close upon the vessels, and in fact pushing against the tug as she moved into the slip. So placed, with her hawser still fast to the barge, but around the end of pier 16, the tug held the barge until the ice moved off, when she took her to her destination at Jersey City, no injury having been sustained by either vessel, except the chafing of the hawser by the strain around the pier.

These facts present all the elements of a salvage service. That there was imminent danger of great damage, if not of the total loss of the barge and her cargo, can hardly be doubted. Upon the whole evidence, no other means of rescue was at hand but the Underhill, although there is some testimony going to show that the Van Houghten could have reached the barge, and would have rescued her, had not the Underhill gone out. The Van Houghten, it is true, was coming up the river, in hopes to get hold of the barge, but the evidence shows that the ice was closing on the piers so fast that she herself was compelled to take refuge in the ferry slip, and was already there when the Underhill got in; and if the Van Houghten could have reached the barge under the circumstances, all she could have done was to have passed up the river, and by casting a line to the barge endeavored to tow her up the river ahead of the ice before it should shut in. But a large part of the floe was already above the barge; and upon the evidence, I consider the success of such an attempt, had it been made, as extremely doubtful. So it must have appeared to the men on the barge, for they saw the Van Houghten coming up, and heard the hail of the Underhill as they passed her, but called only when it was apparent that the Van Houghten could not reach them in time. The service rendered was not without risk to the Underhill, for the floe was heavy ice, extending to the Brooklyn shore, and had it caught the tug against a pier, she could not have escaped without serious damage. She had barely time to save herself, without any allowance for accident or misjudgment.

The aid thus furnished was voluntary; it was rendered promptly, and resulted in success. Such a service the maritime law, out of considerations of public policy, is careful to reward with liberality. As bearing upon the question of the amount proper to be awarded in this case, it is worthy of remark, and, under the circumstances, of commendation, that the master of the tug, while he watched the barge, and in time called her attention to her danger, did not obtrude his services, but allowed the persons on the barge to decide as to the possibility of being rescued by their own tug; and when called, although no other aid was present, he made no attempt to make a hard bargain, but, relying upon the maritime law to give him due compensation in case of success, at once assumed the risk.

The value of the tug was about $10,000; the value of the barge and cargo from $30,000 to $45,000. The time occupied, however, did not exceed thirty minutes, not including the time used in taking the barge to the railway dock in Jersey City. No loss of business or injury to property was sustained beyond the chafing of the hawser. The ordinary price charged by tugs about the harbor on this day was $15 per hour. In view of all these circumstances, I deem $500 a proper reward, to which I add $50 for the damage to the hawser.

A remaining question in the case is, whether the defendants, the Erie Railway Company, can be held personally liable for this amount, in an action in personam. The facts material to the disposal of this question are not in dispute. It appears that the barge belonged to the Erie Railway Company, and was laden with merchandise which had been delivered to that company in New York City, to be transported by them West.

Being common carriers by land, the exception of perils of the seas formed no part of the contract between the railway company and the shippers of the goods. The trains of this railway start from the railway dock at Jersey City, but the company have a station for the receipt of freights at the East river, in New York City, and by a general contract made between them and one Archer, the latter for a consideration paid him by the railway company, had agreed to provide suitable conveniences for, and to receive all freight offered at the East River station, for the West via the railway, and to deliver such freight at the railway dock in Jersey City, Archer also agreeing to assume all the risk of the transportation across the river. This barge, when she was caught in the ice, was transporting her cargo to Jersey City, under the direction of Archer or his employees, in pursuance of this contract. I see nothing in these facts to relieve the railway company from liability for this salvage. The nineteenth rule of the supreme court gives the right to proceed in personam for salvage against the party at whose request and for whose benefit the service is performed. That party, in this case, was the Erie Railway Company, for they were the owners of the barge, and held the relation of carriers to the merchandise on board. In case loss or damage had occurred to the merchandise by the ice, the railway company would have been personally liable to the owners of the merchandise, and that liability they escaped through the services of this salvor. Moreover, the libellants had a lien upon the barge and her cargo for this salvage, which they could have enforced, and which, had it been enforced, the defendants would have been compelled to discharge. Having received this property from the hand of the salvor, they thereby became liable to pay the amount of the lien. The Emblem [Case No. 4,434]. The maritime law, while it is careful to secure to salvors their compensation, by giving them a

lien upon the property saved, does not compel them in all cases to proceed against the property to secure the benefits of the lien. Such a rule would cause unnecessary expense, and in many cases serious embarrassment to commerce, to avoid which the salvor is permitted to surrender the property to its owner, and to the extent of its value hold him personally liable for a proper salvage compensation for the benefit received.

A decree must accordingly be entered in favor of the libellant for the sum of $550, with costs.

Case No. 12,583.

SEAMANS v. LORING et al.

[1 Mason, 127.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1816.

MARINE INSURANCE — TIME POLICY ATTACHES — PRIOR INSURANCES—CHANGE OF NATIONAL CHARACTER—DELAY.

1. In a policy at and from a port, the construction of it, as to the time when the policy attaches, depends on circumstances. If the vessel be in a foreign port, in the course of a voyage, it attaches from her first arrival there. If in a domestic port, then from the date of the policy. If the vessel has been long lying in port, without reference to any particular voyage, there it attaches from the time preparations are begun to be made for the voyage insured. If the assured becomes owner while the vessel is lying in port, the policy does not attach until after his ownership commences.

[Cited in Henshaw v. Mutual Safety Ins. Co., Case No. 6,387; Merchants' Mut. Ins. Co. v. Baring, 20 Wall. (87 U. S.) 163.]

2. If a policy be for A B, or whom it may concern, and made by an agent without any warranty, or representation of national character, it will cover the interest of any person, whether an American or foreigner, who has authorized the insurance. By a policy on vessel and cargo, a party having a lien for advances, or a special ownership and possession, may protect his interest in the vessel and cargo, to the extent of his advances and lien. By the usual clause in policies, as to prior insurances, the underwriter is exonerated, if prior insurances to the full value of the vessel and cargo, have been actually made by the assured on the same voyage, and in full force at the time, although by a subsequent agreement between the assured and such prior underwriters, before the risk is commenced, the prior policies are cancelled.

[Cited in Hancox v. Fishing Ins. Co., Case No. 6,013; Aldrich v. Equitable Safety Ins. Co., Id. 155.]

[Cited in Grant v. Wood, 1 Zabr. (21 N. J. Law) 292; Ryder v. Phœnix Ins. Co., 98 Mass. 192; Kent v. Manufacturers' Ins. Co., 35 Mass. (18 Pick.) 22.]

3. It seems that if a vessel be described in the policy to be a prize vessel, and afterwards her national character be changed, so as to increase the risk, this discharges the underwriters.

4. If, in a policy "at and from," the assured unreasonably delay to commence the risk, or the voyage, the underwriter is discharged. It amounts to a non-inception of the voyage insured.

[Cited in Snyder v. Atlantic Mut. Ins. Co., 95 N. Y. 202.]

[5. Cited in Folsom v. Merchants' Mut. Mar. Ins. Co., 38 Me. 417, and in Jordan v. James, 5 Ohio, 99, to the point that a lien may be acquired for advances by a mere possession under a contract for that purpose, but that it is of the very essence of the lien that possession accompanies it.]

This was an action brought by the plaintiff [Young Seamans], as indorsee of the executors, &c. of Amos M. Atwell, an insurance broker, to recover a premium note signed by the defendants [Caleb Loring and others], and dated the 7th of February, 1814, for the sum of $1,401, payable to the said Atwell, or order, in ninety days after date. The cause was tried upon the general issue, when the following facts appeared:—The policy, for which the premium note was given, was underwritten in the office kept by Mr. Atwell, at Providence, in Rhode Island, on the 7th day of February, 1814. By the policy, "Messrs. Loring and Curtis, of Boston, for Leonard Jarvis, the 3d, or whom it may concern, do make insurance, and cause him or them to be insured, lost or not lost, arrived or not arrived, the sum of $2,800, on the brig Fame and appurtenances, and on her cargo on board, at and from Bergen, in Norway, to Boston, or a port of discharge in the United States, and until the cargo is safely landed. The brig Fame was an English vessel, captured by a privateer and sent into Norway, and it is not known whether she has been condemned as prize or not; in case of loss, payable to said Loring and Curtis only, or their order, whereof is master for this present voyage Justus B. Lockwood, or whoever else shall go master in the said vessel, &c. beginning the adventure upon the said brig Fame, appurtenances, and cargo, at Bergen as aforesaid, &c." In the margin, the insurance was declared to be on vessel $600, and on cargo $2,200. The premium fifty per cent. At the close of the policy was the following clause: "And it is the express condition of this policy, that the subscribers hereto shall be discharged from every risk, in case the same property should be wholly assured by any policy, or policies, actually prior to this. But should any part of the same property remain unassured by such prior policy, or policies, or if the sum, assured by this policy, should exceed the true value of the property at risk, then the first subscribers hereto, and those next in succession, shall be held to bear and take the risk of the sum written by each respectively, until the real amount of the property at risk shall be fully assured, and the subsequent subscribers to this, and policies of a later date, shall be discharged from every risk. But every subscriber, though discharged from the risk, shall be entitled to one half per centum on the sum written by him. But in all cases of return premium, one half per cent. to be retained by the assurers."

The insurance was effected under the following circumstances:—Mr. Leonard Jarvis had, in his hands, funds belonging to the defendants, which he was desirous of remitting to the United States, but not finding any con-

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

venient mode, he entered into a negotiation with Mr. Preble, of Paris, whereby he agreed to advance him 100,000 francs, and take his bills of exchange, endorsed by Mr. Daniel Parker, of Paris, and drawn on the defendants, for the amount. Mr. Preble was, at that time, owner of the privateer True-Blooded Yankee, which had sent several prizes into Bergen, in Norway, and among others, the brig Fame and cargo; and it was agreed, that the said brig and cargo should be sent to Boston, under the control of Jarvis, and in his name consigned to the defendants, who were, out of the proceeds, to pay the amount of the bills so drawn on them. Mr. Jarvis, by a letter dated Paris, November 10th, 1813, wrote the defendants, giving them information of this negotiation, and in his letter are the following paragraphs:—"Mr. Preble has, in Norway, at his disposition, about 150,000 yards of Irish linen, and 1,200 yards of table linen, together with a fine brig of 200 tons, prize to the privateer, to which he is agent. I have agreed to advance him 100,000 francs, upon the following conditions:—1st. That I should have the entire control over it, and expedite it to Boston in my name, as security for the advance I made, consigning it to you, and giving you orders for the insurance, covering the amount. At foot you will find note for insurance, that you will not fail to have effected, as Preble would by no means be uncovered." Note for insurance: "Thirty thousand dollars, covering the premium, on brig Fame and cargo, at and from the port of Bergen in Norway, to that of Boston in America, warranted to sail during the winter, for account and risk of Leonard Jarvis, 3d. If you can leave out the warranty, without much affecting the rate of premium, it would be better." The defendants applied to Mr. Atwell to procure the insurance, by a letter dated on the 1st of February, 1814, and in that letter they stated the commendations, bestowed by Mr. Jarvis upon Captain Justus Lockwood, who was to be the master for the voyage, and upon the vessel; and among other things, that it "is expected she will sail about the 1st of January, so that we may look for her in all February. Her cargo will consist of linens; the vessel was captured, we believe, by the True-Blooded Yankee." The letter further stated the form of the policies underwritten upon the same vessel and cargo, for the same voyage, in Boston, and then adds: "We have effected upwards of $37,000, at the public and private offices;" and afterwards: "We may wish to have $23,000 done, instead of $15,000, if you can effect it." In another letter of the defendants to Mr. Atwell, dated the 5th of February, they state, (and give the particulars) that $41,000, had then been underwritten in Boston and Salem. Between the date of this letter, and the effecting of the policy at Providence, there was an additional sum underwritten on the prior policies, so that on the 7th of February, 1814, those policies, which were on the same voyage, and precisely in the same terms with the Providence policy, covered, in the aggregate, the sum of $43,700, on vessel and cargo, viz. $9,190, on the vessel, and $34,510, on the cargo.

The brig Fame arrived at Bergen, in Norway, in March, 1813, and her cargo was immediately taken out and put into the government stores. As soon as the negotiation between Messrs. Jarvis and Preble was completed, in November, 1813, Captain Lockwood was despatched by them from Paris to Bergen, and he received orders, before his departure, from Mr. Preble, to sell the brig and cargo at public sale, payable in undoubted bills on Paris, and that if Mr. Jarvis should instruct him to purchase the brig, and about 151,000 yards of linen, he (Lockwood) might draw on Mr. Preble for the amount. Accordingly Mr. Jarvis did so instruct Lockwood to purchase the brig and linens, and draw on Mr. Preble, as had in fact been previously arranged between himself and Mr. Preble. Mr. Lockwood was farther instructed, that if he purchased the brig and linens for Mr. Jarvis, to put her under American colors, take the command of her as master, ship said linen on board, with a sufficient quantity of iron to ballast her, and proceed to Boston, and there deliver the vessel and cargo to the defendants. Mr. Lockwood did not arrive in Bergen until April, 1814, when he found the brig stripped, and moored in one of the outer harbours of Bergen. The linens were then in Mr. Janson's store, under the seal of the government, who refused to permit the brig to leave the port, and either the brig or linens to be sold. Some time afterwards liberty was obtained from the government to sell the white linens, and accordingly they were sold by public auction, and generally bought in by Captain Lockwood, for the account of Mr. Jarvis; and finding the prices good, he proceeded to sell the same linens by retail. The government, however, still withheld the brown linens, asserting that they were wanted for the use of their soldiers. Mr. Jarvis, having received information of these facts, in the autumn of 1814 made a direct contract with Mr. Preble for the sale of the vessel and cargo, and determined immediately to proceed to Bergen. Accordingly Mr. Preble, in October, 1814, executed a bill of sale of the brig to Mr. Jarvis; and sent directions to his agents, at Bergen, to deliver over the cargo to him, and to account with him for the proceeds already sold. In November, 1814, Mr. Jarvis arrived in Bergen, and there found Captain Lockwood selling the white linens by retail at a good price, and engaged in negotiation with the government respecting the price to be paid by them for the brown linens, which were still in the stores, under the government seals. Mr. Jarvis, being about to return to Paris, gave instructions to Captain Lockwood, to have the brown linens sold by public auction, and bought in on his account, in the same manner that the white linens had been (which, it was stated, could have been procured to be done, by a little management with the officers of the

government); and to sell the same by retail, unless the whole could be sold at an advantageous price. But, just on the eve of his departure, the negotiation with the government was completed; and they agreed to purchase the brown linens at a great price; and Mr. Jarvis ratified the sale. At this time, all further thoughts of performing the original voyage to Boston, were laid aside. Mr. Jarvis returned to Paris, and again returned to Bergen, in March, 1815. In the mean time the government had, by the intervening peace, become dissatisfied with their bargain, and finally agreed to return the brown linens to Mr. Jarvis, and to pay him £1,000 sterling, as a remuneration for his loss. The proposal was accepted; and the brown linens were accordingly restored. Mr. Jarvis then directed the brig and brown linens to be sold by public auction, with a view to change the apparent property, and they were accordingly sold; and the brig, and a great part of the linens, were purchased upon his account, by a Mr. Hans Reimer of Bergen. The brig was then put under Swedish colors, her name changed to the Waren, and she had a Norwegian register and other documents, and a Norwegian master and crew. Mr. Jarvis, at first, intended to send the brig, with the residue of the linens, to France; but the return of Bonaparte from Elba, induced him to give up this voyage. He next projected a voyage to the West Indies, and finally determined to send the vessel to the United States. Accordingly the remaining linens were, in the latter part of May, 1815, put on board of the brig, documented as a Swedish vessel. She sailed on the voyage about the 22d of June, and arrived in Boston in August, 1815. The cargo was stated, in the invoice, to be shipped by Mr. Jarvis, on account and risk of Messrs. Loring and Curtis, and consigned to them. The invoice value of the cargo, (which was sworn to be the true value) was $16,258.16, and the value of the vessel $2,862, to cover which, at fifty per cent. premium, would require double the amount, viz. $5,724 on the vessel, and $32,516 on the cargo, in the whole $38,240.32.

In consequence of information received, by the defendants from Mr. Jarvis, of the state of the property, the defendants, between the 20th and 24th of December, 1814, procured a memorandum to be underwritten upon eight of the policies, which covered the sum of $28,300, in substance as follows: "It is agreed, that the delay in the sailing of the Fame from Bergen, shall not be considered as a deviation, the assured warranting, that she shall sail for the United States on or before the first day of February, 1815. The assured also warrant, that the goods were sound at the time of the shipment. If the Fame does not sail before the second day of February, and the risk ends without a loss, the whole premium is to be returned, excepting a reasonable compensation for the risk which shall have accrued." These policies were afterwards cancelled upon payment of one half per cent. All the other policies were also cancelled in March and April, 1815, except the Providence policy, upon the payment of one half per cent. The underwriters on the policy, at Providence, were applied to for the purpose of agreeing to a like memorandum; but they declined inserting it.

Upon this evidence, the following points were made by Hubbard & Prescott, for defendants: 1st. That by the policies, prior to the Providence policy, there was an insurance to a greater amount, than the whole property at risk. 2dly. That the policy never attached; because there never was any fitting out of the vessel upon the voyage originally insured, the delay amounting to a deviation from the voyage. 3dly. That the policy never attached; because the insured had no interest in the vessel or cargo, at the time of underwriting the policy, but acquired it afterwards, in October, 1814, and not before. 4thly. That the policy never attached on the vessel; because she was altered from a prize vessel to a Norwegian, before the risk began, which materially increased the risk.

Mr. Townsend, for plaintiff, on the other hand, contended, that there was no over-insurance; the property being grossly undervalued in the evidence offered by the defendants, and the markets at Bergen affording no standard of its real value. 2dly. That if the value were as stated by the defendants, still as the prior policies were, by the memorandum and agreement of the parties, cancelled or varied, so that they never attached upon the property insured, they were to be considered as if they never had existed, and, consequently, there was sufficient property to be covered by the Providence policy. 3dly. That the policy, in this case, being "for whom it may concern," covered not only the property of Mr. Jarvis, but also that of Mr. Preble, who, as prize owner and prize agent, had a right to cause insurance to be made. 1 Marsh. Ins. (Condy's Ed.) 97, 108, 112, 113; Hill v. Secretan, 1 Bos. & P. 315. 4thly. That Mr. Jarvis had a complete property in the vessel and cargo, by virtue of the contract with Preble, in October, 1813, and that the subsequent sale was but a ratification of it. 5thly. That the policy being "at and from," attached upon the Fame and cargo at her first arrival at Bergen, in March, 1813; and that the subsequent seizure and detention thereof by the government would have justified an abandonment for a total loss. 1 Marsh. Ins. 288, 262, 289; Hull v. Cooper, 14 East, 479; Bell v. Bell, 2 Camp. 475; Smith v. Steinback, 2 Caines, Cas. 158.

In reply to the plaintiff's points, Prescott & Hubbard contended: 1st. That a prize agent had not, as such, any right to insure; and, they said, it had never been so adjudged, and that the opinion in 3 Bos. & P. 75, was a mere obiter dictum. 2dly. That the defendants had no authority to insure for Preble, but only for Jarvis. 3dly. That if an agent insure, he must insure as such, in the policy. French v. Backhouse, 5 Burrows, 2727; 1 Marsh. Ins. (Condy's

Ed.) 297. 4thly. That Jarvis had no insurable interest under the contract, in November, 1813, and that he had not even a lien on the property, for it was not then put into his possession. 5thly. That by the words "at and from," the policy did not attach upon the first arrival of the Fame at Bergen, but only from the time that some act was done towards fitting her for the voyage to Boston. 1 Marsh. Ins. (Condy's Ed.) 261; Kemble v. Bowne, 1 Caines, 75, 79.

STORY, Circuit Justice (after stating the facts). The first question is, whose interest is assured by the terms of the policy? The policy was effected by Messrs. Loring and Curtis, for Leonard Jarvis, 3d, or whom the same "may concern." It will, therefore, by its terms cover the interest of L. Jarvis, or any other person, having an interest in the vessel and cargo, who has given an authority for such insurance. There is no warranty or representation of an American character, and the insurance may avail for any foreigner, who has authorized it to be made on his own account. Hodgson v. Marine Ins. Co., 5 Cranch [9 U. S.] 100. But the insurance cannot enure in favor of any person, who had an interest in the cargo, unless Messrs. Loring and Curtis had an authority from him for that purpose. Steinback v. Rhinelander, 3 Johns. Cas. 269. The letter of instructions, under which this insurance was effected, is now before us, and the construction of it is a question of law. I am of opinion, that it authorized an insurance to be made for L. Jarvis only; and that an insurance for the captors, or for Mr. Preble, was not authorized by it. There is nothing in the letter, which imports, that L. Jarvis is acting as agent for the captors, or for Mr. Preble, in making the insurance. On the contrary, he speaks in reference to an interest, which he had acquired in the vessel and cargo, by virtue of advances, made upon the credit of that fund. And the language in the close of the letter is perfectly satisfied by the obvious interest, that Mr. Preble had, in having an insurance made by Jarvis to the amount of his interest, without supposing that he authorized any insurance directly on his own account. And in respect of proof of an authority to make insurance, I think, that it should not be gathered from loose expressions or inferences in letters of third persons; but it should distinctly appear in some communication between the parties, or their indisputable agents. Assuming, therefore, that a mere prize agent, as such, has, without any special authority for that purpose, a right to insure for the benefit of the captors (Le Cras v. Hughes, 1 Marsh. Ins. 84, 108; Craufurd v. Hunter, 8 Term R. 13; Lucena v. Craufurd, 3 Bos. & P. 75, 2 Bos. & P. N. R. 323, and 1 Taunt. 325; Stirling v. Vaughan, 2 Camp. 225; Routh v. Thompson, 11 East, 428), still as that insurance does not appear to have been authorized by such agent, it cannot avail for the captors.

It is argued, that the words "whom it may concern" have no effect, unless they are made to recover the interest of Mr. Preble. If that were true, and they were thus to be deemed mere surplusage, it would not vary the legal result. But, in this policy, the words seem to me to have an appropriate use. Under all the circumstances of this case, as the advances were made to Mr. Preble out of the funds of Messrs. Loring and Curtis, by Jarvis, as their agent, by adopting his acts, and making the insurance, it might be, that thereby the interest, whatever it was, that was acquired under the contract, between Preble and Jarvis, might be deemed to be theirs and not Jarvis's. In this view, it might have been a moot point (if the policy had been for Jarvis only) whether he had an interest, to which it could attach; and therefore the words "for whom it may concern" were properly added to cure a doubt; and they are sufficient to cover any interest of Messrs. Loring and Curtis in the vessel and cargo.

The next consideration respects the nature of the interest, covered by the policy. It is on "the brig Fame and her cargo on board." It can, therefore, cover no interest except in the vessel and cargo; and the question is, whether Jarvis, or Messrs. Loring and Curtis, were the owners of the vessel and cargo, or of any interest therein. The original contract between Preble and Jarvis certainly was not intended to convey the general ownership, even admitting that Preble was the entire owner of the vessel and cargo; which is certainly not in proof, but, for the purposes of this trial, seems conceded by the parties. That contract was, that the vessel should be put under the control and management of Jarvis, and consigned to Loring and Curtis; and out of the proceeds of the sale, after her arrival in the United States, they were to pay a bill of exchange, drawn upon them, for their own use. The surplus was to be for the benefit of Preble, or the captors. The utmost interest then, intended in the first instance to be conveyed, was a lien on the vessel and cargo, to the extent of the advances made by Jarvis. To pass the title to a vessel, it is indispensable, that there should be some written transfer of the vessel. This is required by the law of nations, as well as the municipal law of this country. A vessel will not pass by a mere delivery, without a document of sale. The latter is considered as an indispensable muniment of title. The Sisters, 5 C. Rob. Adm. 155; Abb. Shipp. p. 1, c. 1. And I think, that a lien for general advances cannot be acquired, unless by an hypothecation or other conveyance in writing for this purpose. And if it were otherwise, it is clear, that the lien could not be complete, having a situs in re, until possession was acquired under the contract. I should hold, therefore, that no ownership in the vessel was acquired, until the bill of sale to Jarvis in October, 1814, if it were necessary to rest this cause on that point. But it may well be disposed of, even assuming the more

favorable position for the plaintiff, that an interest was acquired, as soon as the contract for advances was consummated by an actual possession by Captain Lockwood, in April, 1814.

As to the cargo, a different consideration may, in some respects, prevail. The title may pass by mere delivery of the goods under a contract of sale; or a lien may be acquired for advances by mere possession under a contract for that purpose. But it is of the very essence of a lien on goods, that possession accompanies it. The contract in October, 1813, was clearly executory, both as to vessel and cargo. It was contemplated by the parties, that the interest of Jarvis was to be acquired under a public sale at Bergen of the vessel and cargo, which were to be bought in on his account, and conveyances were to be made to him. Until such conveyances, he was not deemed to be the ostensible owner, nor his control of the vessel complete. And the subsequent agreement and sale, in November, 1814, is perfectly consistent with this construction of the original contract. If, therefore, Jarvis did acquire a lien on the vessel and cargo under the contract for advances, followed up by possession, I think, that he may be rightfully considered as the special owner of them to the extent of these advances; and as such might protect himself by an insurance to that extent. Russel v. Union Ins. Co., 4 Dall. [4 U. S.] 421.

The next question is, at what time, if ever, did the policy attach? The insurance is, "at and from," &c. What is the true construction of these words in policies, must, in some measure, depend upon the state of things, and the situation of the parties, at the time of underwriting the policy. If at that time the vessel is abroad in a foreign port, or expected to arrive at such port in the course of a voyage, the policy by the word "at" will attach upon the vessel and cargo from the time of her arrival at such port. Smith v. Steinback, 2 Caines, Cas. 158; Garrigues v. Coxe, 1 Bin. 592; Chitty v. Selwyn, 2 Atk. 359; Camden v. Cowley, 1 W. Bl. 417; 1 Marsh. Ins. 262; Bird v. Appleton, 8 Term R. 562; Bell v. Bell, 2 Camp. 475; Hull v. Cooper, 14 East, 479; Horneyer v. Lushington, 15 East, 46; Annen v. Woodman, 3 Taunt. 299; Patrick v. Ludlow, 3 Johns. Cas. 10. If, on the other hand, the vessel has been a long time in such port without reference to any particular voyage, the policy will attach only from the time, that preparations are begun to be made with reference to the voyage insured. Kemble v. Bowne, 1 Caines, 75, 79; Chitty v. Selwyn, 2 Atk. 359; Gladstone v. Clay, 1 Maule & S. 418. And if the party insured acquired the ownership subsequent to such time, and before the date of his policy, then the policy will attach only from the time of his acquiring such ownership. If, on the other hand, the ship is at a home port at the time of effecting such insurance, the policy seems generally to be deemed to attach only from the date of the policy. Forbes v. Wilson, 1 Marsh. Ins. 155, 261; Smith v. Steinback, 2 Caines, Cas. 158. In all these cases, the law looks to the known and admitted predicament of the parties at the time of the insurance, and construes the contract with reference to such facts. And a uniform construction of the words, without reference to such circumstances, would often produce the most incongruous and mischievous results.

In the present case, the vessel was in a foreign port, not in the course of a voyage, but moored and stripped, without any destination for any particular voyage. She arrived at that port in March, 1813, and her cargo was about that time unladen. The captors, or their agents, had not, at that time, nor at any other time before the contract with Mr. Jarvis in December, 1813, the slightest intention of undertaking a voyage to Boston. If this policy then were construed to attach from the moment of the first arrival of the Fame at Bergen, it would wholly defeat the intention of all the parties to this insurance. The captors or their agents never authorized any such insurance upon their own account; and it would, therefore, be a mere nullity. Neither Mr. Jarvis, nor Messrs. Loring and Curtis had, at that time, acquired any interest in the property; and the assured must have a subsisting interest at the time when the policy, by its terms, would attach, otherwise it will be void for want of an insurable interest. Such an interest, subsequently acquired, would not aid them. And it may be added, that there would have been such a concealment of material facts, whether innocently or otherwise is not important, that the underwriters would have been completely discharged. My opinion is, that under the circumstances, this policy, by its terms, did not attach at the arrival of the Fame at Bergen; that it could not attach on the vessel, earlier than the period, in which the assured acquired the special or general ownership of the vessel; nor, if that was previous to the effecting of the policy, until some act was done, or preparation made, with reference to the voyage. If the ownership was acquired subsequently to the date of the insurance, and before preparations for a voyage, the same rule will apply. If while preparations were making for the voyage, the policy will attach only from the time of acquiring the ownership. And in these cases it is always an important inquiry, whether there has been a concealment of facts material to the risk, or a delay in acquiring the ownership, or in preparing for, and sailing on, the voyage, which ought to discharge the underwriter. As to the cargo, it is clear from the terms of the policy, that the policy could not attach on it, until it was actually put on board for the voyage. The word "cargo," ex vi termini, means goods on board of the vessel; and in this policy, it is not even on "cargo" generally, but on "cargo on board."

We may now apply these principles to the facts of this case. Assuming that the ownership of the vessel was acquired in April, 1814,

by the possession of Captain Lockwood, the policy did not immediately attach on the vessel, but only from the time when preparations were made for the voyage. It is clear from the evidence, that no such preparations were made by Captain Lockwood on his arrival at Bergen. He then found the cargo under the seals of the government; and they refused to allow the cargo to be put on board the vessel, or the vessel to depart from the port. No sale of the vessel was ever made by him, by public auction, so as to constitute Mr. Jarvis the ostensible owner; and, in the autumn of 1814, having obtained leave, he sold the white linens by public auction, and bought them in for Mr. Jarvis, and then proceeded to sell them on his account by retail. When Mr. Jarvis arrived at Bergen, in November, 1814, he confirmed these acts of Lockwood, ratified the sale of the brown linens to the government, and totally abandoned all further thoughts of the voyage. The very substratum of the voyage, the whole cargo of linens, was voluntarily disposed of; and it was not until his second return to Bergen, in March, 1815, when the brown linens were returned by the government, and after having two other voyages in view, that Mr. Jarvis concluded to resume the original voyage to Boston. Preparations for this purpose were made in May, 1815, and the cargo was then, for the first time, put on board. Under these circumstances, the policy did not attach on vessel, or cargo, until that time. There is no pretence, that this delay was justified by necessity; and therefore the underwriters could not have been held under the policy. In fact, as to them, there was a complete non-inception of the voyage insured. It was not a deviation, for that supposes the voyage to have commenced. But there was a delay, which, to all intents and purposes, made the voyage a new one, which they never had insured. The very representation, under which they had underwritten, was of a voyage immediately to be performed, and not of a voyage to commence in futuro, at any period when it might suit the convenience of the assured to prosecute it.

But there is another point, which, if the evidence be believed, and it is exceedingly strong, and, as far as I recollect, perfectly uncontradicted, completely disposes of the cause, let the other points be as they may. It is the point, that there was an over-insurance before the date of the present policy, the whole interest being, as it is asserted, but $38,240.32, and the whole prior insurance being $43,700. If the jury are satisfied, that such is the fact, then it is my opinion, that the present policy never attached, for want of a subject matter, upon which it could operate, notwithstanding the prior policies were cancelled or defunct, before the risk commenced.

The prior policies were all underwritten upon the same voyage, and in the same terms; their priority, therefore, was according to their respective dates, and nothing done by the parties to those policies, after the execution of the present policy, could alter the relative situation of the parties to this policy. The rights of the latter were fixed by the terms of their own contract. The memorandum, therefore, entered upon the prior policies in December, 1814, by which those policies, from non-compliance with the warranty, were discharged on the second day of February, 1815, before the risk commenced, has no effect upon the present policy. And, as between the parties in the present suit, those policies are to be considered in the same manner, as if no such memorandum or cancellation had ever been made. It is not competent for the assured thus to change the legal predicament of the underwriters on a policy. The clause in this policy, referring to the effect of prior policies, is perfectly unambiguous in its terms. When it speaks of the property's being assured by policies "actually prior to this" policy, it speaks with reference to such policies, as subsisted at the real date of this policy. It does not refer to any subsequent acts or agreements between the parties, by which those policies might, or might not, attach upon the subject matter. If the property, which the assured has in the subject matter of insurance, would be completely covered by those policies, supposing them still in existence, it is quite immaterial to the subsequent underwriters, whether the assured choose to hold or release those policies. The language of the clause, as to subsequent insurers, manifestly refers their responsibility to the date of their policies, and confirms the construction, which has been stated. Upon any other construction great inconveniences and even frauds might arise; and in case of a subsequent increase of risk, there would be great temptations for prior underwriters to collude with the assured, and discharge themselves, and charge the subsequent insurers. All that is required by the terms of the contract is, that the property should be wholly assured by a prior insurance for the same voyage. But whether that insurance ultimately protects the party, or not, is a question, with which the contract does not at all intermeddle.

I do not think it necessary, considering the predicament of this case, to press another point, which has been made at the argument. From the terms of the policy, the vessel is warranted to be an English prize vessel; and if, by changing her colors and documents, and giving her a Swedish character, before the policy attached, the risk was materially increased, the underwriters were completely discharged.

The jury found a verdict for the defendants.

After the verdict, Mr. Townsend, for plaintiff, moved for a new trial on account of a misdirection of the court upon the point, as to the effect of the memorandum upon, and cancellation of, the prior policies. He argued, that the prior policies were by the memorandum and subsequent non-compliance with the warranty contained therein, completely removed on the second day of February, 1815, long before this policy, according to the con-

struction given by the court, attached either to vessel or cargo. Under these circumstances, the case was the same, as if those policies had never been underwritten. The clause in the policy, as to prior insurances, refers only to insurances "actually prior," where the risk shall have actually attached, and not to the date of the policy. If the risk has not commenced, the prior policies may at any time be removed, and the subsequent policies will attach, as if there had not been any others in existence. The terms "actually prior" mean, not actually prior in point of time, but in attaching upon the subject matter.

Prescott & Hubbard, for defendants contended, that the construction, put upon the clause by the court, was the correct one. Great inconveniences and frauds would arise upon any other construction. This clause was first introduced about thirty years ago, in consequence of the adoption of the English rule as to contribution, in a case in which Mr. Cabot was a party. The construction has uniformly been, that the priority is from the real dates of the policies; and it would be strange indeed, if the acts of third persons should vary the legal predicament of the parties.

STORY, Circuit Justice. I remain of the same opinion, which was expressed at the trial, upon the point now in question. Every subsequent reflection has confirmed me in the belief of the correctness of that opinion. There is no case in the books, in which this point has come solemnly in judgment; but it seems to have been taken for granted in various discussions of courts of law, that the construction for which we contend, was the true one. Mr. Justice Kent has sufficiently stated the true meaning of the clause. New York Ins. Co. v. Thomas, 3 Johns. Cas. 1. An insurance, prior in date, is to exonerate the underwriter, and entitle the assured to a return of premium; an insurance, subsequent in date, is to have no effect at all upon the present policy. Lee v. Massachusetts F. & M. Ins. Co., 6 Mass. 208; Brown v. Hartford Ins. Co., 3 Day, 58.

On the whole, the district judge concurs with me in the opinion, that the motion for a new trial must be overruled. Motion overruled.

Case No. 12,584.

SEARCY v. PANNELL et al.

[Brunner, Col. Cas. 172; [1] 1 Cooke, 110.]

Circuit Court, D. Tennessee. May Term, 1812.

PLEADING IN EQUITY — ANSWER — EVIDENCE REQUIRED TO CONTRADICT.

An answer, responsive to the bill and denying the allegation, must be taken to be true, unless contradicted by two positive witnesses, or one positive witness and strong corroborating circumstances.

[Reuben] Searcy filed his bill, praying for relief against a judgment obtained at law against him by the defendant Pannell. The bill stated that the complainant, with one Solomon Walker as his security, had executed their bond to a certain Francis Bassier, in his lifetime, for five thousand pounds of tobacco; that after the execution of said bond he paid to the said Bassier fifty-five pounds in part discharge thereof, and took Bassier's receipt; that the complainant then moved to the state of Kentucky, and that afterwards a suit was brought by the defendant Burton, as administrator of Bassier, who had in the mean time died, against the defendant Pannell, who was then the administrator of Solomon Walker, the security, and a judgment was recovered in the Granville county court for the full amount thereof; that after this he returned to North Carolina, where these several transactions happened, and upon being informed thereof, he executed his bond to Pannell for the same, which bond is the foundation of the action at law. The complainant then states that at the time he executed the bond to Pannell he informed Pannell that a part of the money had been paid, whereupon Pannell agreed that he would give a credit on said bond for all that Searcy could produce Bassier's receipt for. The bill then charges a fraud and collusion between Burton and Pannell to defraud Searcy, and that by such means the judgment against Pannell was alone obtained. Burton is made a defendant. Burton, in his answer, denies all fraud and collusion, and avers that the whole amount recovered against Pannell was justly due. He also states that the receipts procured by the complainant from Bassier applied to an open account, and not to the bond for tobacco. Pannell answers that Searcy did represent to him, at the time he executed the bond, that some payments had been made to Bassier, and that he agreed he would give Searcy a credit on the bond for whatever sum he could procure the written assumpsit of Burton to refund; and he positively denies that any other agreement was made. He then denies that he had been guilty of any fraud, and stated he had used every exertion, such as employing counsel, etc., to defend the suit brought by Burton, but without effect. One witness was introduced on the part of the complainant at the hearing of the cause for the purpose of proving that Pannell had been guilty of a fraud in suffering judgment to go against him, when he was sued by Burton, and that if he had fairly and honestly defended the action a judgment would not have been recovered for that part which had before been paid to Bassier; and that Pannell, with a full knowledge upon that subject, had refused to have witnesses summoned who would prove the payment.

B. Searcy, for complainant.

Mr. Dickinson, for defendant Pannell.

McNAIRY, District Judge, admitted the rule, as contended for by Pannell's counsel, viz., that an answer responding to the bill, and

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

denying the allegation, must be taken as true, unless contradicted by two positive witnesses, or one positive witness and strong corroborating circumstances. He added: The reason of the rule is that the complainant, by appealing to the conscience of his adversary, thereby admits his statement is entitled to some weight; otherwise it would be as well to receive the answer without affidavit. Therefore, when the answer is sworn to, and is only contradicted by one witness, it is only oath against oath, and the complainant shall not have a decree. But in this case the bill is also sworn to, which seems to vary the rule. It is not oath against oath which is the reason for the adoption of the rule, but it is the oath of the complainant and one disinterested witness against the oath of the defendant. It seems to me, therefore, that in cases of injunctions, like the present, where the complainant has to swear to his bill, the rule does not apply.

Case No. 12,584a.

SEARCY v. HOGAN.

[Hempst. 20.] [1]

Superior Court, Territory of Arkansas. April, 1823.

APPEALS—EXCEPTIONS TAKEN—COURT NOT OF RECORD.

1. Where it does not appear that exceptions were taken, the appellate court, which tries the case on the record alone, will presume the judgment to be correct.

2. The superior court can only entertain a writ of error issued to, or an appeal from, a court of record.

3. The court of a justice of the peace is not a court of record.

Appeal.

[This was an action by Richard Searcy against Edmund Hogan.]

Before JOHNSON and SCOTT, JJ.

OPINION OF THE COURT. In this case, the court have to be governed exclusively by the record; and as nothing appears on the face of it to show that any exceptions were taken, it is to be presumed that the judgment is regular and correct. The suggestion of counsel, "that this court has exclusive appellate jurisdiction in all cases where the sum in controversy shall amount to one hundred dollars, and that the circuit court cannot take cognizance of such cases," we cannot admit as correct. To adopt that doctrine, would render almost useless an intermediate court between justices of the peace and this tribunal, and would destroy the beneficial effects derivable from an appeal; since we only try upon the record, and the court below upon the merits. This court can only entertain an appeal or writ of error from a court of record, which a justice's court is not. Affirmed.

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

Case No. 12,585.

SEARIGHT v. CALBRAITH et al.

CALBRAITH et al. v. SEARIGHT.

[4 Dall. 325.]

Circuit Court, D. Pennsylvania. April Term, 1796.

CONFLICT OF LAWS—BILL OF EXCHANGE—IN WHAT MONEY PAYABLE—CERTIFICATE OF PROTEST—TENDER—QUESTION FOR JURY.

[1. A notary should certify all the facts that occurred in relation to a protest of commercial paper; but where a tender of payment in French assignats was made, it is doubtful whether the notarial certificate that assignats were the lawful money of France for payment of debts is conclusive; but it is sufficient, with other evidence, to go to the jury.]

[2. Where demand was made for payment in French crowns, and the debtor offered to pay in assignats, *held*, that the character of the demand did not excuse the debtor from proving a tender according to his own understanding of the law and the contract, and hence he was bound to show at least that he actually had the assignats in his possession at the time.]

[Cited in Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 108.]

[3. In 1792 one American citizen purchased of another in this country a bill of exchange for 150,000 livres tournois drawn upon a London firm and payable in Paris. The bill was duly accepted, but when presented in Paris, payment was tendered in assignats, which were refused. Assignats had been made lawful money for payment of debts in France nearly two years before. *Held* that, as no man is bound to know the laws of a foreign country, the question whether the contract was to be governed in respect to the medium of payment by the French law was one of fact for the jury.]

[Cited in The Brantford City, 29 Fed. 385; The Scotia, 35 Fed. 912.]

Searight agreed, in February 1792, to sell to Calbraith and Co. a bill of exchange for 150,000 livres tournois, drawn upon Bourdieu, Chollet, and Bourdieu of London, payable in Paris, six months after sight; for which Calbraith and Co. agreed to pay at the rate of 17 pence the livre, (making in the whole, £10,625. Pennsylvania currency) in their own notes, dated the 1st of May, and payable the 1st of July, 1792. The bill was accordingly drawn and delivered to Calbraith and Co. who indorsed it to George Barclay and Co. of London, by whom it was presented for acceptance; and on the 27th of March, 1792, Bourdieu, Chollet, and Bourdieu accepted the bill, "payable at the domicil of Messrs. Cottin, Jonge, and Girardot, at Paris." George Barclay and Co. afterwards indorsed and forwarded the bill to G. Olivier, who, on the 6th of October, 1792, presented it for payment to Messrs. Cottin, Jonge, and Girardot; and those gentlemen tendered payment in assignats, which, by the then existing laws of France, were made a lawful tender, in payment of debts. Mr. Olivier refused to receive the assignats, by order of George Barclay and Co., declaring, at the same time, that he would receive no other money than French crowns; and thereupon each party protested against the act of the other. The bill being returned under protest

for non-payment, Searight, on the one hand, instituted a suit, to recover the sum which Calbraith and Co. had originally stipulated to pay; and, on the other hand, Calbraith and Co. instituted a suit to recover damages for the protest of the bill. And these suits were agreed to be tried together, by the same jury.

On the trial of the cause, evidence was produced, on both sides, to ascertain and fix the precise terms of the original contract, for the sale and purchase of the bill of exchange; particularly as to the stipulation of a rate for estimating the livre; as to the purchase being made for cash, or on credit; and as to the knowledge and view of the parties, relative to the existence of assignats, or the law of France, making them a legal tender in payment of debts. And the great question of fact for decision, was, whether the parties contracted for a payment in gold and silver; or tacitly left the medium of payment, to the laws of France, where the bill was payable? The law arising from the fact, was discussed at large, according to the different positions of the parties in interest.

For Searight, it was shown, by the decrees of the French government, that assignats were established as a circulating medium for the payment of debts, before, and at the time of, the contract for the bill of exchange. Decree of 16th and 17th April, 1790, § 3; King's Proclamation of 19th April, 1790. And this fact being known, it was contended, that the purchase of a bill payable in France, must in itself import an agreement to receive in satisfaction, the lawful current medium of that country, unless the contract expressly provides against it, which, on the present occasion, was controverted and denied. In support and illustration of the general position, and its incidents, the following authorities were cited: 2 Burrows, 1078–1083; Davis, 26, 7, 8; Dyer, 82, 83; 4 Com. Dig. 556, B, 7, 8; 2 P. Wms. 88, 89; 1 P. Wms. 696; Prec. Ch. 128; 2 Vern. 395; 2 Atk. 382, 465; Skin. 272; 4 Com. Dig. 256, B, 8; 4 Vin. Abr. 258, O, 13; Holt, 465; Davis, 24; 10 Mod. 37; 2 Brown, Ch. 38; 1 Smith, Wealth Nat. 41; [Hollingsworth v. Ogle] 1 Dall. [1 U. S.] 257; 1 Brown, Ch. 376; Esp. N. P. 48, 26; 3 Wils. 211; Esp. N. P. 140, 141; Doug. 628; 3 Term R. 683, 554; 3 Bl. Comm. 435; Salk. 130, 126; 12 Mod. 192; Kyd, Bills, 63.

For Calbraith and Co. it was contended, that an express contract had been proved to pay the bill in specie; that the very terms of the bill import the same understanding of the parties; that however binding the law of France may be on cases between French citizens, or between American and French citizens, it did not affect contracts between Americans; that, in legal contemplation, there has been neither a payment, nor a tender of payment; and that Searight has sustained no damage, nor shown any right to recover. 1 Pow. Cont. 8; 2 Pow. Cont. 158; Cun. Bills, 258; Skin. 272; 3 Wats. Phil. III. 136; 1 Ld. Raym. 735; 1 Lev. 111; Esp. N. P. 169; Bull. N. P. 156; 6 Mod. 305; 3 Burrows, 1353; 2 Bl. Comm. 435, 466; 6 Mod. 306; Davis, 75, 76; Skin. 272.

Before IREDELL, Circuit Justice, and PETERS, District Judge.

IREDELL, Circuit Justice. The contract for the purchase of the bill of exchange is sufficiently proved, as it is laid in the declaration, by the entry made, at the time, in the books of Calbraith and Co. The sole question, therefore, in the cause is, whether the tender of assignats, in payment of the bill, was a compliance with that contract? The notarial protest, not only states the tender, but certifies, that assignats were lawful money of France, in payment of debts. A notary should, indeed, certify all the facts that occur, in relation to the protest (not merely the refusal to pay, according to the demand) but, it is doubtful, whether his assertion would be conclusive, as to the lawfulness of the money tendered. Connected, however, with other evidence, it is proper for the consideration of the jury.

It has been objected that as Olivier's demand was, exclusively, for a payment in French crowns, no proof of a tender in any other mode, is necessary; but I do not concur in this opinion. After such a demand, it was, perhaps, unnecessary for the party to exhibit the assignats to Olivier; but the form of the demand, on one side, cannot dispense with the obligation, on the other side, to make a tender of payment, agreeably to his own sense of the law and the contract. The jury must, therefore, be satisfied, that although the money was not produced and counted, it was actually in the possession of the party making the tender.

On the principal question, I thought, at first, that the risk, as to the mode of payment, must be run by the holder of the bill; but the case in Skin. 272, sanctioned by the high authority of Holt's name, transcribed, without remark, into Comyn's excellent Digest, and uncontradicted by any other adjudication, must be respected in every court of law, and completely effaces the first impressions of my mind. Upon examination, too, the doctrine of that book appears to be founded in just and legal principles. Every man is bound to know the laws of his own country; but no man is bound to know the laws of foreign countries. In two cases, indeed, (and, I believe, only in two cases) can foreign laws affect the contracts of American citizens: 1st. Where they reside, or trade, in a foreign country; and, 2d. Where the contracts, plainly referring to a foreign country for their execution, adopt and recognize the lex loci. The present controversy, therefore, turns upon the fact, whether the parties meant to abide by the law of France? And this fact the jury must decide.

As to the damages, if the verdict should be for Searight, though it is true that in actions for a breach of contract, a jury should, in general, give the whole money contracted for and

interest; yet, in a case like the present, they may modify the demand, and find such damages, as they think adequate to the injury actually sustained. But if the jury should in the first action (Searight v. Calbraith and Co.) find, either wholly or partially for the defendant; in the second action (Calbraith and Co. v. Searight) they should find for the defendant generally.

PETERS, District Judge. The decision depends entirely on the intention of the parties, of which the jury must judge. If a specie payment was meant, a tender in assignats was unavailing. But if the current money of France was in view, the tender in assignats was lawfully made, and is sufficiently proved.

When the jury were at the bar, ready to deliver verdicts, the plaintiff in each action, voluntarily suffered a nonsuit. It was afterwards declared, however, that in Searight v. Calbraith and Co. the verdict would have been, generally, for the defendants; and that in Calbraith and Co. v. Searight, the verdict would have been for the plaintiffs, but with only six pence damages.

Case No. 12,586.

SEARLES et al. v. JACKSONVILLE, P. & M. R. CO. et al.

[2 Woods, 621.] [1]

Circuit Court, N. D. Florida. July 2 and Sept. 25, 1873.

JUDGES — GRANTING INJUNCTIONS — MORTGAGES — RIGHT TO REDEEM — PLEADING IN EQUITY — PARTIES.

1. A justice of the supreme court, prior to the "Act to Further the Administration of Justice," of June 1, 1872,—Rev. St. § 719 [17 Stat. 196],—could grant an injunction at any place, in or out of the circuit in which the suit was instituted.

2. By the seventh section of that act, it is provided that no justice of the supreme court shall grant injunctions except within the circuit to which he is allotted, and in causes pending therein, or in such causes at such place outside of the circuit as the parties may, in writing, stipulate, except in causes where such application cannot be heard by the circuit or district judge.

[Cited in Anderson v. Jacksonville, P. & M. R. Co., Case No. 358.]

3. As the circuit or district judge cannot hear the application when absent from the circuit, the case is then within the exception of the statute as well as when they cannot hear it for any other cause; and the supreme court justice may hear the application at any place where he may be.

4. Where a first mortgage has been foreclosed, and a decree of sale made and execution issued accordingly, a second mortgagee, not made a party to the suit, cannot have an injunction to restrain the sale, as his rights are unaffected.

5. Such second mortgagee may, at any time, redeem the mortgaged premises by tendering the amount due on the first mortgage. If only interest were due, he might redeem by tendering the amount of such interest.

6. A complainant cannot be compelled to add new parties to his bill, if he chooses to take the responsibility of their not being made parties.

[Cited in Re Printup, 87 Ala. 148, 6 South. 419. Cited in brief in Harper v. Union Manuf'g Co., 100 Ill. 229.]

7. When a defendant does not reside in the state where the suit is brought, but is served with process there, he may plead the matter in abatement. If he does not plead it in abatement, he cannot set it up afterwards.

8. The court will not appoint a receiver of property which is in the possession of a person not a party to the suit.

9. An injunction to prevent a sale under execution will not be granted to a person who was not a party to the decree, unless he can show that his rights will be directly affected by the sale. Thus, where property has been sold under a first mortgage by a statutory proceeding, and the purchasers fail to pay the price of sale, although they have obtained a deed for, and possession of the property, and a bill is filed on the vendor's lien to compel payment of the balance, and a decree is obtained to that effect, and execution issued, a second mortgagee cannot have an injunction to prevent the sale, his rights being extinguished by the statutory sale.

10. Effect of proceedings under the Florida internal improvement act of January 6, 1855.

[This was a bill in equity by James E. Searles and others against the Jacksonville, Pensacola & Mobile Railroad Company and others.]

Heard upon application for injunction July 2, 1873, before BRADLEY, Circuit Justice, at chambers, in Washington, upon notice duly given.

A. D. Basnett, for the motion.

H. R. Jackson, contra.

BRADLEY, Circuit Justice. On the 2d of July, 1873, counsel for the parties in this case, E. C. Anderson and others, appeared before me at chambers in Washington, D. C., pursuant to a notice served on Mr. Jackson as solicitor of the said E. C. Anderson and others, complainants in another suit in this court, which notice was to the effect that the complainant had filed his bill, and would apply to me, as associate justice of the supreme court, for an injunction to stay the sale of the Pensacola & Georgia Railroad, which had been levied on by the marshal and advertised for sale under a decree in the said suit of E. C. Anderson and others.

It was objected by the defendants' counsel that the motion could not be entertained at this place by reason of the express prohibition contained in the seventh section of the "Act to Further the Administration of Justice," approved June 1, 1872. By the proviso of the section referred to, it is declared that no justice of the supreme court shall hear or allow any application for an injunction or restraining order, except within the circuit to which he is allotted, or at such place outside of the circuit as the parties may, in writing, stipulate, except in causes where such application

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

cannot be heard by the circuit judge of the circuit or the district judge of the district. The complainants met the objection by alleging that the application could not be heard by the circuit or district judge; that the district judge was in New Jersey, too ill to go to Florida to hear it, and that the circuit judge had left the circuit and could not be communicated with. Sufficient evidence of the district judge's illness and absence was laid before me, and I was satisfied from correspondence with the circuit judge that he had left the circuit, and could not be communicated with. But the counsel for the defendants contended that the disability on the part of the circuit and district judges to hear the application, intended by the statute, was something more than absence or sickness; that it meant an interest in the cause, or some other ground of disqualification by which they were incapacitated to hear the application. On reflection, I think that this would be too narrow a construction; that the convenience of suitors and the exigencies of justice require a liberal construction of the clause, such as would enable parties to apply to a judge of the supreme court when, for any reason, they cannot present their application to the circuit judge nor to the district judge. The object of the exception in the proviso is to prevent a failure of justice; and such a failure would as effectually ensue when the inability of the local judges to hear the application arose from one cause as when it arose from another. It is literally true that they cannot hear such applications when outside of their circuits; whereas, the supreme court judges can hear them anywhere in the United States, or, at least, could do so prior to this statute; and the question is, how far the statute prevents them from doing so now. I think it does not prevent them where the parties cannot, for any cause, present their application to the circuit nor to the district judge. I feel bound, therefore, to entertain the application.[2]

But it seems to me that, in this case, there is no ground whatever for an injunction. The defendant E. C. Anderson, and others, held certain first mortgage bonds of the railroad company. The property was sold under the lien of these bonds by virtue of a statutory proceeding, and the purchasers failed to pay the whole of the purchase money. Anderson and others filed a bill to compel payment and set up the equity of the vendor's lien for a resale of the property. A decree was had and execution issued for this purpose. The complainant holds a number of the second mortgage bonds of the same company, and was not made a party to the suit of Anderson & Co. He filed this bill for an injunction to prohibit the sale. But as he was not a party to the Anderson suit, he cannot be injured by the decree or sale therein. One of his allegations is that the principal of the first mortgage bonds is not due, and that the holders of the second mortgage bonds, as next incumbrancers, ought to have the privilege of redeeming the property, and getting possession of the same, by paying the arrears of interest. But he made no offer to redeem and nothing can be claimed on this ground. The complainant makes various charges of fraud against persons dealing with the property of the company and with its bonds; but he does not show

[2]The following are notes of an opinion prepared by Mr. Circuit Justice Bradley, in another case, prior to the act of 1872, on the power of a justice of the supreme court to hear an application for an injunction outside of the limits of his circuit:

"On this question I never had any doubt. It is to be considered irrespective of the recent creation of circuit judges, and as matters stood when the courts were originally organized. The general jurisdiction of the justices of the supreme court was then regarded as coextensive with the territory of the United States. Prior to the act of April 29, 1802 [2 Stat. 156], there was no allotment of justices to particular circuits. They held the several circuits in rotation, and, at first, two justices went the circuit together. All of them were, in law, judges of all the circuit courts. The mere circumstance of allotment could not affect their general powers, at least as regards cases in their own circuits. As the circuit courts were courts of equity as well as of law, the issuing of injunctions was part of their jurisdiction, and these must often have been issued, and other ex parte orders made in vacation. The justices of the supreme court must have exercised these powers. But it was impossible that there should have been such justices always present in every circuit, much less in every district. Twice a year, at least, they were required to hold sessions of the supreme court at the seat of government; and consequently, they could then be only in one district of the whole thirteen. And absence from a district would have been no less effectual than absence from the circuit in depriving them of jurisdiction over a case pending in the district; for the circuit courts are courts in and for particular districts, and not for the whole circuit. Orders in course were undoubtedly made by the district judges as assistant judges of the circuit courts; but these judges were not authorized to issue injunctions in said courts until the passage of Act Feb. 13, 1807 [2 Stat. 418]. As a matter of necessity, therefore, the justices of the supreme court must have issued injunctions outside of the territorial jurisdictions of the circuit courts in which the cases were pending, unless we adopt the improbable conclusion that they transacted no chamber business in equity whatever, except when they happened to be actually present in the particular district as well as the particular circuit in which the case was pending. It is true that the fourteenth section of the judiciary act [1 Stat. 81], in conferring express power to issue writs, confers it upon the courts and not upon the judges; but, under proper circumstances, the judges exercise the power as incidental to their office. It is the power of the court which they, as its officers, exercise, in the only way in which the power can be exercised in vacation. But whatever doubt may have ever existed on the subject was put at rest by Act March 2, 1793, § 5 [Id. 333], which expressly declared that writs of ne exeat and of injunction might be granted by any judge of the supreme court in cases where they might be granted by the supreme or circuit courts; but that no writ should be granted to stay proceedings in any court of a state, nor in any case without reasonable notice to the adverse party, or his attorney, of the time and place of moving for the same. Under this law the justices have ever since continued to act, and very little practical inconvenience has ensued."

that E. C. Anderson and others who obtained the decree in the former case have been guilty of fraud, or that they are demanding anything but their honest due.

I cannot see any ground for an injunction as prayed, nor how the complainant can be injured by a sale under a decree to which he or those whom he represents were not parties. Application denied.

The above case came on again before BRADLEY, Circuit Justice, September 25, 1873, on an amended bill and further affidavits and answers of the defendants, and an injunction was applied for.

Mr. Jackson moved that the Florida Central Railroad Company be made a party to the suit. This motion, being objected to by the counsel for the complainant, was denied; the circuit justice holding that a complainant cannot be compelled to add parties to his bill, if he choose to take the responsibility of their not being parties.

Mr. Davis filed a plea in abatement for Holland, one of the defendants, on the ground that he was not a citizen of Florida, when the bill was filed, and was not then a citizen of Florida, but a citizen of Georgia. This plea was allowed, the circuit justice holding that by the eleventh section of the judiciary act, which confers jurisdiction upon the circuit court in cases between citizens of different states, the said jurisdiction was limited to suits between a citizen of the state where the suit is brought and a citizen of another state, and that no subsequent statute had enlarged this branch of jurisdiction; but that when a defendant, being served with process or appearing in a suit, fails to plead the matter in abatement, he cannot set it up at a subsequent stage of the proceedings, if all proper jurisdictional allegations are made in the bill or declaration; that the act of 1839,—Rev. St. § 737 [5 Stat. 321],—allowing publication in proceedings on liens against specific property, only put the case in the same condition as if the absent defendant had appeared, but in no better condition.

It appeared from the pleadings and evidence, that D. P. Holland was in possession of the railroad in controversy as purchaser under a judgment in his own favor rendered in this court. As he pleaded in abatement and was no longer a party defendant in the suit, the circuit justice held that no receiver could be appointed to oust his possession. The application for the appointment of a receiver, therefore, was overruled. The circuit justice further held that unless the hearing was had by consent of the parties, he would not appoint a receiver at his chambers in Washington except as incidental to the granting of an injunction; that when parties in possession are enjoined from further intermeddling with property, the appointment of a receiver was often necessary to take care of and preserve it, and such appointment would be made as incidental to the injunction.

W. Call, for the motion for injunction.

H. R. Jackson, J. P. C. Emmons, T. W. Brevard, W. G. M. Davis, and H. Bisbee, Jr., contra.

BRADLEY, Circuit Justice. The only question remaining is, whether an injunction should issue to prevent a sale by the marshal under the decree and execution of E. C. Anderson & Co. That decree was based on first mortgage bonds; the complainant holds and represents second mortgage bonds, and was not, nor was any other person representing the latter bonds, made a party to Anderson's suit. This suit, however, was not a foreclosure suit. The circumstances were peculiar and somewhat complicated. The first mortgage bonds had been issued under the internal improvement act of the state of Florida, passed January 6, 1855, and had been guarantied by the governor and other state officers as trustees of said fund under said act. By the 3d section of the act, it was provided that all railroad bonds issued under it should be a first lien on the railroad, its equipment and franchise, and on failure of the railroad company to provide and pay the interest, and one per cent. per annum for sinking fund, it should be the duty of the trustees, after thirty days from default, to take possession of the road and property, and advertise and sell it to the highest bidder, and apply the proceeds to purchasing and canceling outstanding bonds of the company, or incorporate them with the sinking fund. Such a seizure and sale of the railroad and property in question was made by the trustees on the 20th of March, 1869, and the amount of sale was sufficient to retire the bonds of the company, and about a million of dollars of the bonds were retired. But the purchasers, whilst managing to get a deed for the property, evaded or failed to pay more than four hundred thousand dollars of the purchase money, and the bonds of E. C. Anderson & Co. to that amount were never paid. Their bill was filed, therefore, on the equity of the vendor's lien, against the present holders of the property (who had organized as the Jacksonville, Pensacola & Mobile Railroad Company, and were charged with notice), and against the trustees of the internal improvement fund, to compel payment of the balance of the purchase money out of the property purchased, and to procure a decree for its appropriation to the payment of these unpaid bonds. The bill of Anderson & Co. did not repudiate the sale made by the trustees, but affirmed it, and sought to recover and appropriate the balance of the proceeds arising, or that ought to have arisen from that sale.

It is apparent from this statement, that if the sale made by the trustees was valid, the second mortgage bondholders, and all other parties holding interests subsequent to the first morrgage bonds, had no longer any interest whatever in the property. The sale under the statute made a clear and absolute title except as against the vendor's lien. It is contended

that the sale was illegal, because the road was not completed; and by the twelfth section of the internal improvement act, until the road is completed, no payments are due on the sinking fund, and no delinquency for that cause can occur. But, although the road had not been constructed on the entire length of line or route projected and authorized by its charter, yet the company had stopped construction at Quincy, and the road seems to have been mutually regarded by the company and the trustees as a completed road to that point. Besides, the interest was largely in arrear, and the trustees had advanced interest to a considerable amount. There is no sufficient proof before me to show that the sale was prematurely made by the trustees, and I should be very unwilling to decide that point on a preliminary hearing. I do not think that a sufficient case is made by the complainant to justify me in granting the injunction sought.

The motion is denied, with costs.

Case No. 12,587.

SEARLES et al. v. VAN NEST et al.

[3 Ban. & A. 121;[1] 13 O. G. 772.]

Circuit Court, S. D. New York. Oct., 1877.

PATENTS — WHIP-SOCKETS FOR CARRIAGES — REISSUE.

1. The reissued letters patent, Number 5,400, dated May 6th, 1873, granted to the complainants for "improvements in whip-sockets for carriages," held to be valid, and that the defendants have infringed the same.

2. The reissue is for the same invention described in the original patent.

[This was a bill in equity by Anson Searles and others against Abraham R. Van Nest and others, for an injunction and account.]

J. P. Fitch, for complainants.

C. J. Hunt, for defendants.

WHEELER, District Judge. This cause has been heard on bill, answer, replication, proofs and arguments. The orators are owners of a patent for improvements in whip-sockets for carriages, issued as letters patent No. 70,627, dated November 5, 1867, to the orator Scott, and reissued as letters patent reissue No. 5,400 dated May 6th, 1873, to both orators, and which they claim the defendants are infringing.

The defendants allege that the reissued patent is not for the same invention as the original, and that it is, therefore, void; that what they are doing, and what is claimed to be an infringement, is covered by a patent issued to Henry M. Curtis and Alvah Worden, dated October 22, 1867, prior to the date of Scott's patent, and they deny that what they are so doing is any infringement of the orators' patent.

From the proofs, it appears that Scott is the original and first inventor of the device set forth in his patent. By the statutes, only persons who have "discovered or invented any new and useful art, machine, etc., not known or used by others before his or their discovery or invention thereof," are entitled to patents for their inventions and discoveries, and the fact "that the patentee was not the original and first inventor or discoverer of the thing patented," is a good defence to any suit founded on the patent.

Under these provisions, a patent is not conclusive that the patentee has a right to it, nor that no one else has a right to a patent for the invention described in it; but the right, where there are conflicting patents, is left to be settled by determining who is in fact the first inventor. In this case, settling the fact that Scott was the first inventor, has, accordingly, as between these parties, settled that he was the rightful patentee of that invention.

On looking through his original patent in the light of what was before known, and of the drawings and model, it appears that his invention consists in contriving a whip-socket with its sides curved inwardly toward the bottom, and a lever in one side, pivoted near the middle and weighted on its outside, and curved toward the other side of the socket at each end, and shaped there to fit the whip, so that the weight of the whip would crowd the lower end outward, and thereby move the upper end inward until the whip would be clutched between them and the opposite side of the socket, and held steady until withdrawn, when the upper end would swing outward and the socket remain open, ready to execute it again. In the specification and claim the invention was imperfectly described, and some of its essential features were not mentioned at all. In that condition, the patent was just such a one as the statute provides may be surrendered, and be reissued to cover the actual invention. When reissued, this patent was not for anything outside of what could be found in the original, when looked for in all the parts and accompaniments of it. Nothing appears in the reissue that was not somewhere in the original. The only change made was, that what was there in some shape before, was set forth more methodically and directly in the specification, and more extensively and definitely in the claims. This was precisely what the law authorized, and the validity of the patent was not thereby affected.

The device which the defendants are using is a socket curved inwardly toward the bottom, and one side of it is a lever pivoted near the middle, made heavy on the outside and curved toward the other side at each end, and shaped to fit the whip, so that the weight of the whip will crowd the lower end outward, and thereby throw the upper end inward until the whip is clutched between them and the other side of the socket, and held steady until removed, when the upper end will swing outward and the socket remain open, ready to receive the whip again.

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

A comparison of these devices shows that they accomplish the same result in substantially the same way. In the defendants' contrivance the lever forms one side of the socket, and what there is left without it is only one-half of a socket, and the appearance of the two things is thereby made to be quite different; but in the orators' device, although almost the whole of a socket beside the lever is there, in use, only the side of it opposite the lever is employed, which is the same part as that employed by the defendants, and the part is employed in the same manner, and for the same purpose, and to the same effect as that part of the defendants' is. In that respect the defendants have taken away the superfluous part of the socket that the orators retained without using. The lever of the defendants is weighted outward by metal composing it and its shape, while that of the orators was by the addition appended to its outside; but the difference in the mode of weighting the lever is not material in the use, nor made so in the patent.

In convenience and appearance, the defendants' socket would, in the minds of most persons, probably be an improvement upon the orators', and perhaps it is such an improvement that the patent under which they are operating will cover it; but whether it is so or not, while they employ the patentee's device of the orators in what they use, the use is none the less an infringement.

Let a decree be entered for a reference to a master, an account, and an injunction, according to the prayer of the bill.

[For a rehearing of this cause, in which the decree was the same as above, see Case No. 12,587a.

[For another case involving this patent, see Searls v. Worden, 11 Fed. 501.]

Case No. 12,587a.

SEARLES et al. v. VAN NEST et al.

[5 Ban. & A. 456.] [1]

Circuit Court, S. D. New York. May, 1880.

PATENTS — WHIP-SOCKET — REHEARING — NOVELTY.

The validity of the complainants' patent for a whip-socket, which was sustained by the court in Searles v. Van Nest [Case 12,587], confirmed, upon a rehearing on further evidence attacking the novelty of the invention.

[This was a bill in equity by Anson Searles and others against Abraham R. Van Nest and others for the infringement of letters patent No. 70,627, granted to E. W. Scott November 5, 1867, reissued March 6, 1873, No. 5,400. There was a decree for complainant (Case No. 12,587), and the cause is now before the court on a rehearing.]

J. P. Fitch, for complainants.

C. J. Hunt, for defendants.

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

WHEELER, District Judge. This cause has been reheard upon new evidence, admitted by stipulation, as to novelty. The patent is for a whip-socket having a pivoted lever at one side to hold the stock of the whip against the other side, crooked and adjusted so that the stock, when it descends as it is inserted, will crowd the lower part of the lever outward, bringing the upper part inward, when both ends will hold the stock firmly in its place until it is withdrawn, when, as it is raised, the weight of the lever will carry the upper part outward and the lower inward, opening the socket ready for the whip again.

The new evidence shows, as anticipatory devices, a sewing bird, with jaws formed by a lever and closed by a spring; a turning tube, with a pivoted lever carrying a turning knife at one end, which is brought down to its place for turning bed pins by the pin to be turned pressing, when inserted, against the other end of the lever; a carpenter's-bench clutch made of pivoted levers to clamp the thing inserted at one end of them, by being pressed apart by it at the other, and a paper clamp to be hung on the wall with an index pivoted so as to fall by its weight against the other part, and hold paper placed between them.

If the invention had been merely of a pivoted lever forming a clamp by the force of insertion of the thing to be held, or by its own weight, it might be anticipated and defeated by some of these things; but it is much more than that, the whip-socket must be placed perpendicularly, and be arranged for the ready insertion, firm holding, and easy withdrawal of the whip, to be of the least utility. To do these things by means of the pivoted lever it must be shaped and adjusted so that the weight of the whip will move the lower end of the lever and clamp the stock with the upper end, and the whip be held in place without falling through, and so that the upper part will open by the weight of the lever when the whip is withdrawn. None of the things shown have all these functions, and some of them have hardly any. When all of them were known the exercise of inventive faculties would be required to make the whip-socket. None of them would be an infringement of the patent.

Let the same decree be entered as before.

Case No. 12,588.

The SEARLE W. JACOBS.

[Olc. 502.] [1]

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

SEAMEN — WAGES — PROCEEDS OF VESSEL — PRIMA FACIE CASE.

A claim for wages, set up after the vessel has been sold upon due proceedings instituted upon a claim for supplies furnished her, and sought to be recovered out of the proceeds of

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

the vessel in court, will be disallowed, unless supported by more than prima facie evidence; especially when the rate of wages claimed is unusually high.

This was a suit for seaman's wages. The libellant, H. Williams, alleges that in the month of December, 1845, while the sloop Searle W. Jacobs was at the port of Cherry Stone, in the state of Virginia, destined on a voyage to the port of New-York, David Van Wagner, the master of the vessel, hired the libellant as a mariner, at the rate of twenty dollars per month; that in pursuance of the agreement, on the 26th day of December, 1845, libellant went on board of said vessel, and continued in the service of said vessel until the 29th day of April, 1846, when he was discharged; that by reason of such services there is due him the sum of seventy-two dollars and seventy cents, for which he prays judgment. The claimant answering, says he has no knowledge of the claim set up, and therefore denies any indebtedness. Further answering, he says that he filed his libel in this court on the 8th of September, 1846, for materials furnished to said vessel, on which process was duly issued, and monition, as is usual. Judgment was obtained, and on the 14th day of October the vessel was sold to pay the demands of respondent and his costs, being three hundred and seventy-seven dollars and seventeen cents, besides costs. He further alleges that the vessel was sold, and the proceeds, now in court, amount to three hundred and sixty-eight dollars and fifty-nine cents. He further alleges that the libel in this cause was filed the 7th of October last, without the signature or act of any proctor of this court, and that no publication was made, or act done, or motion made until after the sale of said vessel, and payment of the proceeds into court. Wherefore he prays that the libel be dismissed with costs.

Mr. Hackett, for libellant.
Burr & Benedict, for claimant.

BETTS, District Judge. This was a suit for the recovery of the wages of a seaman. It is alleged by the libellant that he shipped on board the sloop Searle W. Jacobs in December, 1845, in Cherry Stone, in the state of Virginia, on a voyage thence to the port of New-York, at the rate of $20 per month. He claims the sum of $72.70. After due and legal proceedings, the vessel was sued and sold on the 14th of October, under a claim for supplies furnished the vessel to the amount of $368 59, and the proceeds are now in court. In his libel, which is sworn to, the libellant says, "he hired at the rate of $25 per month, as will more fully appear by the shipping articles signed by him, in which the contract is fully set forth, and prays that it may be produced." To make out his claim he produces a nondescript instrument of writing purporting to be signed by David Van Wagner, captain of the vessel, from which it appears that he is to have $20 per month for wages on board of the sloop. He proves by another witness that he was on board the sloop, and that his wages are worth that amount. The evidence is however quite indefinite. Elijah Chace, master of the steamer Henry Clay, introduced by the defence, says he has sailed for seven years from Cherry Stone, in Virginia; that it is quite a small place; that he is well acquainted there, and he never knew the libellant. He also testifies that he knew Van Wagner very well, and thinks he could not write. He further stated that this was a little fishing smack, not over thirty tons. The highest price given at Cherry Stone for first rate men is $12 per month; masters get $18, ordinary hands $10; his vessel, the Henry Clay, is 52 tons; he pays hands from $7 to $12; he himself gets $18 per month; the highest price pilots on the Chesapeake get is from $10 to $12. It is a significant fact that the libel was prepared by a party not a proctor of this court. A claim presented under such suspicious circumstances, the demand grossly exaggerated, and aided by the former master of the vessel, appears in such a questionable shape as to call for the most rigid scrutiny on the part of the court. If allowed, it is to deprive an honest creditor, who had furnished supplies for the vessel, of a portion of the sum that is due. The libellant must make out under the circumstances more than a prima facie case, and having failed to do so, I shall order the libel dismissed with costs.

Case No. 12,589.

SEARS et al. v. FOUR THOUSAND EIGHT HUNDRED AND EIGHTY-FIVE BAGS OF LINSEED.

[1 Cliff. 68.] [1]

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

AFFREIGHTMENT — LIEN — DELIVERY — CHARTER-PARTY.

1. Where a portion of a cargo was delivered to the consignee, to be reshipped, and was accordingly shipped to another port, and the residue delivered to him without qualification, under the circumstances of this case, *held*, that the ship-owners' lien upon the part last delivered was displaced, notwithstanding a clause in the charter-party that "freight should be paid, one half in five, balance in ten days after discharge in Boston; said credit on payment of charter not to impair ship-owners' lien on cargo for freight."

2. A carrier may, if he sees fit, deliver a part of a particular shipment, without impairing his right to hold the residue for the freight upon the whole consignment from which the part so delivered was taken.

3. Inasmuch as the delivery in this case was unconditional, the word "discharge" in the clause above quoted was held to refer to the unlading of the goods.

Appeal in admiralty from a decree of the district court of the United States for the

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

district of Massachusetts. The libel was in the usual form of a libel in rem in a cause of contract civil and maritime, and was filed on the 17th of December, 1857, by Paul Sears, on behalf of himself and the other owners of the ship Bold Hunter, to recover a certain amount of freight earned by the ship on a voyage from Calcutta to Boston. On the 5th of March, 1858, Rufus Wills, as administrator of Augustine Wills, deceased, intervened for his interest in the goods described in the libel, and prayed restitution of the same, with costs. A decree dismissing the libel, with costs for the claimant, was entered in the district court. [Case unreported.] All the material facts of the case were agreed between the parties, and were in substance as follows. In October, 1856, the libellants, owners of the ship before named, chartered her to Tuckerman, Townsend & Co. for a voyage from Calcutta to Boston, at the rate of fifteen dollars and fifty cents for whole packages, and half that rate for loose stowage. The charter-party contained the usual lien claims, and stipulated that freight should be paid, one half in five days and the balance in ten days after discharge in Boston; said credit on payment of charter not to impair ship-owners' lien on cargo for freight. On arrival at Calcutta, the charterers failed to furnish an entire cargo, but procured some shipments, or freight, and among others, one to Augustine Wills of Boston, of a large amount, for which the master signed bills of lading in the usual form, at various rates of freight for different kinds of merchandise, and all less than the rates specified in the charter. The vessel arrived in Boston, October 12, 1857, and soon after commenced discharging. Meanwhile the charterers had passed over the bills of lading of the merchandise to the libellants, in part settlement of the charter-money; and the libellant first named undertook to attend to the collection of the freight. At this time Augustine Wills was sick, and his business was transacted by the claimant, his brother, who acted as his agent. On the 2d of November, 1857, Augustine Wills died, and the claimant was appointed his administrator during the same month. Before the decease of the consignee the ship had commenced, and she completed the discharge of her cargo on the 7th of November. Before the death of the consignee, all the goods consigned to him were taken possession of by the claimant as his agent, and after his death they were retained by the claimant as the representative of the estate of the deceased. The larger portion of the merchandise was discharged at the claimant's request, and without being landed was, with the owner's consent, put into the Cyclone, bound to London, the claimant having informed the owners of the vessel, at the time of the transshipment, of his intention to reship the goods. Such of the cargo as remained was discharged, and delivered to the custody of the claimant or his agent, was by them conveyed to the custom-house stores, and there entered in bond in the name of Augustine Wills. Nothing was at any time said by the owners of the Bold Hunter of their intention to hold the goods, or any part thereof, for the freight, but the goods were all discharged and delivered without qualification. Before the death of Augustine Wills, the claimant, as his agent, at the request of the libellant, Sears, who represented that it would be an accommodation, paid Sears five thousand dollars on account of the freight. After the decease of Augustine Wills, and after the discharge was completed, Sears applied to the claimant for the balance of the freight, and was informed that nothing could be done until administration was taken out, when he hoped it would be satisfactorily adjusted, or words to that effect. Other applications for payment were made after the expiration of the five and ten days, and after administration was taken out, to which the respondent answered that he was not sure how the estate would turn out, and that he could not safely pay while any doubt remained. On one occasion, when applying for payment, the libellant replied, that he had been blamed by the other parties in interest for not holding on to the goods, and supposed he had lost his lien. This statement was not admitted by the libellant, though he consented to have it presented, reserving the right to require proof thereof, if the court should deem it material. It was also agreed that the shippers, Wills & Co. of Calcutta, knew that the ship was under charter, and shipped goods to other parties besides Augustine Wills, the consignee, who was not a member of Wills & Co., but doing business on his own account in Boston. Upon these facts, and the inferences to be drawn therefrom, if the court was of the opinion that the lien was lost, and the libellants were not entitled to hold the goods libelled for freight, then the libel should be dismissed with costs; otherwise, libellants were to have judgment for the balance of freight, with interest and costs.

F. C. Loring, for libellants.
Story and May, for claimant.

CLIFFORD, Circuit Justice. It is insisted by the libellants that the goods consigned to Augustine Wills were discharged from the vessel and delivered to his agent without any intention on either side that the lien or privilege of the carrier should thereby be waived or impaired. On the part of the respondent, it is insisted that by the delivery of the goods under the circumstances of this case the libellants waived their right to any lien thereon, and must rely upon the personal responsibility of the consignee. Some ground of inference that it was the intention of the libellants to waive the lien on the delivery of the goods, is afforded from the admitted fact that they

consented, without reservation, after the vessel arrived at her port of destination, to allow the consignee or his agent to reship a large portion of the consignment to the London market for sale. All that portion of the goods were not landed from the vessel, but were transshipped into the Cyclone, which was lying alongside for that purpose, and with a perfect understanding between the parties that they were to be sent out of the jurisdiction of the federal courts. They were delivered without objection and without any arrangement in respect to the balance of freight, which remained unpaid. Delivery under such circumstances, especially when accompanied by part payment of the freight, as in this case, must be considered as a relinquishment of the lien upon the goods so delivered. That conclusion rests upon two grounds, either of which is sufficient for its support,—first, that the delivery was unconditional, and was made under circumstances clearly indicating an intention that the lien should be displaced; and, secondly, because the libellants well knew that the goods were designed for sale, and that in the usual course of business they would immediately pass into the hands of innocent purchasers. It may then be assumed that the goods delivered to be reshipped to London were fully discharged of all claim for the balance of the freight remaining due to the libellants. That circumstance, however, is not conclusive in respect to those which remained, as a carrier may, if he sees fit, deliver a part of a particular shipment, without impairing his right to hold the residue for the freight upon the whole consignment from which the part so delivered was taken. A delivery of a part of the goods, therefore, without the payment of freight, cannot affect the question under consideration, except so far as the attending circumstances afford a ground of presumption, in connection with the other facts and circumstances in the case, that it was the intention of the libellants to relinquish the lien upon the residue; and it is proper to remark, that those attending circumstances, standing alone, would clearly be insufficient to justify that conclusion, and if nothing more appeared to support that view of the case, the libellants would be entitled to prevail in the suit. But those circumstances do not stand alone, as the subsequent conduct of the libellants abundantly shows. They did not retain the possession of the residue of the goods after the Cyclone departed on her voyage. All that remained were discharged early in November, and were unconditionally delivered into the custody of the claimant as the representative of the consignee, and were by him placed in warehouse, and there entered in bond in the name of the original consignee.

Discharge and delivery were commenced shortly after the vessel arrived at her port of destination, which was on the 12th of October, 1857, and were fully completed on the 7th of November following. Nothing was said at any time by the owners of the vessel, either during the discharge and delivery of the goods or afterwards, of their intention to hold the goods or any part of them for the freight, and the case furnishes no ground to infer that any attempt was made to negotiate any arrangement to that effect. On the contrary, it is expressly agreed between the parties, that the goods were all discharged and delivered without qualification. Administration on the estate of Augustine Wills was taken out by the claimant, in November, 1857, and more than four months elapsed after his appointment before the libel was filed. All the goods not reshipped remained throughout that period in the custody of the claimant, as administrator of that estate, and were claimed by him as belonging to the estate of the decedent. After his appointment, the libellants made application, in repeated instances, for the payment of the balance of the freight, which was refused or declined by the claimant as often as it was made, and yet it does not appear that the libellants even so much as intimated, on any one of those occasions, that they had any lien upon the goods described in the libel. On one or more occasions, when those applications were made, the libellants were informed by the claimant that he would not pay their demand, until it was ascertained how the estate was likely to turn out; and there is much reason to infer, from the statement of facts, that the doubts which have since arisen as to the solvency of the estate have had too much influence in convincing the libellants of the justice of their case. Five and ten days' credit was given by the charter-party for the payment of freight, after the goods were discharged in Boston, and it was stipulated that the credit so given, on the payment of the charter, should not impair the lien of the ship-owners on the cargo, for freight; and, therefore, it is insisted by the counsel of the libellants, that the case does not show an absolute delivery of the goods, which it is admitted would furnish strong, if not conclusive, evidence of a waiver of the lien. Two errors, however, are observable in the reasoning by which that conclusion is reached, which will now be pointed out. In the first place, the counsel assumes that the word "discharge," as used in the charter-party, is equivalent to the word "delivery," and that the credit contracted to be given for the freight was five and ten days after the goods were delivered to the consignee at the port of destination. Such are not the words of the charter-party, and the construction assumed, in the opinion of the court, would be unwarranted and unreasonable, as its effect would be to defeat the lien altogether. Ship-owners, so long as they continue in possession of the ship, are in possession also of the goods carried by her, and their right to a lien on the goods for the freight due in respect to such goods, whether by charter-party or under a bill of lading, is beyond question. They may, if they think proper, part with that posses-

sion, and relinquish their right to hold the goods; and in general the lien is not supposed to exist where the parties have, by their agreement, regulated the time and manner of paying the freight, so that the cargo is to be absolutely delivered before the time fixed for the payment of freight. Abb. Shipp. (5th Am. Ed.) 365; Chandler v. Belden, 18 Johns. 157. Judge Story accordingly said, in the case of The Volunteer [Case No. 16,991], that it is well known that, by the common law, there is in general a lien on the goods shipped for the freight thereon, whether it arise under a common bill of lading or under a charter-party, but that this lien may be waived by consent; and in cases of charter-parties it often becomes a question whether the stipulations are or are not inconsistent with the lien, as, for instance, if the delivery of the goods is, by the charter-party, to precede the payment or security of payment of freight, such a stipulation furnishes a clear dispensation with the lien for freight, for it is repugnant to it and incompatible with it. That case was cited and approved in Raymond v. Tyson, 17 How. [58 U. S.] 61, decided by the supreme court in 1854, where the same doctrine was distinctly reaffirmed. A similar question was again presented in this circuit in the case of Certain Logs of Mahogany [Case No. 2,559], and the same learned judge held that the word "discharged," as used in the charter-party, then before him, referred to the unlading of the goods, and not to the delivery of the cargo; and he admitted, in that case, also, that a contrary construction would defeat the right of the owners to any lien for freight. This view of the question also derives support from the language employed in the bill of lading, which is made a part of the case. By a fair construction of the bill of lading, the freight was payable at the same time that the goods were delivered. According to its material words the goods were to be delivered at the port of Boston, "unto Augustine Wills or to his assigns, he or they paying freight for the goods at the rate of eleven dollars per ton." Payment of freight and the delivery of the goods were obviously required by that instrument to be contemporaneous, and there is nothing in the language of the charter-party inconsistent with that view of the contract. These considerations lead necessarily to the conclusion that the word "discharge," as used in the charter-party, referred to the unlading of the goods after the arrival of the vessel, and not to the delivery of the consignment to the consignee, and that the parties did not stipulate for any credit upon the freight after the goods were delivered. In the second place, the argument for the libellants fails to give full force and effect to that part of the statement of facts wherein it is agreed by the parties that the goods were all discharged and delivered without qualification. All the authorities in the jurisprudence of the United States agree that an absolute delivery displaces the lien, and turns the party over to his remedy against the shipper or owner of the goods. That principle is so definitely settled in the courts of this country, that any examination of the authorities is unnecessary. They were delivered in this case without qualification, and so the parties have agreed; and it is difficult to see in what respect the delivery described in the agreed statement differs from that absolute delivery which all admit discharges the lien. Words more explicit or more comprehensive to express the act of absolute delivery could not well be selected, and when considered in connection with the subsequent conduct of the parties in respect to the same subject-matter, they must be regarded as decisive of the question.

The decree of the district court, therefore, is affirmed, with costs.

SEARS (FURBISH v.). See Case No. 5,160.
SEARS (JONES v.). See Case No. 7,494.

Case No. 12,590.

SEARS v. NOON.

[2 Cranch, C. C. 220.] [1]

Circuit Court, District of Columbia. Nov. Term, 1820.

ATTACHMENT—VIRGINIA ACT—WHERE ISSUED.

An attachment, by a justice of the peace, under the sixth section of the Virginia act of 26th of December, 1792, can only be issued by a justice of the county in which the defendant resides, or from which he is privately removing, or in which he absconds, or conceals himself.

[Cited in Channing v. Reiley, Case No. 2,596.]

Mr. Wise, for defendant, moved the court to quash the warrant of attachment, which recited as follows: "County of Alexandria, ss. Whereas, Charles L. Sears, of the city of Washington, in the District of Columbia, hath this day complained before me, the subscriber, one of the United States' justices of the peace for the county aforesaid, that Patrick Noon, of the city of Washington aforesaid, is indebted to him in the sum of nine thousand dollars current money, and that the said Patrick Noon hath privately removed himself out of this county, or so absconds or conceals himself that the ordinary process of law cannot be served on him; these are therefore," etc.

THE COURT (nem. con.) quashed the attachment, with costs.

SEARS (O'NEIL v.). See Case No. 10,530.
SEARS (PARKER v.). See Case No. 10,748.
SEARS (PRICE v.). See Case No. 11,416.

Case No. 12,591.

SEARS et al. v. The SCOTIA.

[The case reported under above title in 2 Am. Law T. Rep. U. S. Cts. 60, 3 Am. Law Rev. 582, and in 5 Am. Law Rev. 382, is the same as Case No. 12,513.]

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

Case No. 12,592.

SEARS v. UNITED STATES.

[1 Gall. 257.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1812.

PENAL ACTION — DECLARATION — CONCLUSION — SEVERAL ACTS CHARGED—SPECIFICATION OF USES—IN WHAT NAME BROUGHT.

1. If a declaration on a penal statute do not conclude against the form of the statute, it is a fatal omission on error. Alleging "whereby, and by force of such act," the defendant had forfeited, &c. is not sufficient.

[Cited in Smith v. U. S., Case No. 13,122; U. S. v. Babson, Id. 14,489; Jones v. Vanzandt, Id. 7,502.]

[Cited in Reed v. Northfield, 13 Pick, 99.]

See The Nancy [Case No. 10,008]. See, also, 1 Chit. Cr. Law, 290.

2. If several acts are mentioned in such a declaration, and it be alleged, that "by force of said act," without designating the particular act, the forfeiture hath accrued, &c. it seems that it is not fatal on error.

[Cited in Fish v. Manning, 31 Fed. 341.]

3. It seems also, that such a declaration need not specify the uses to which the forfeiture enures; and if it allege it to be "to the uses expressed in said statute," where several statutes have been before mentioned, and no one of them is the statute which expresses such uses, it is not fatal on error.

[Cited in The Idaho, 29 Fed. 189.]

4. If the suit be in the name of "the United States of America," and the verdict find that the defendant is indebted to the United States, without saying "of America," it is sufficient.

[Cited in Smith v. U. S., Case No. 13,122.]

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

The original action was debt for a penalty. The declaration was as follows: "Attach Richard Sears, Jun., &c. to answer to the United States of America, in a plea of debt; for that during the continuance of an act of the United States, entitled, 'An act laying an embargo on all ships and vessels in the ports and harbors of the United States,' and of the several acts supplementary thereto, to wit, on the 20th day of January, last past, a certain schooner or vessel called the Dinah, did depart from a port of the United States, to wit, from the port of Chatham, in the district aforesaid, without a clearance or permit, and departing as aforesaid, did forthwith, between the said 20th day of January and the 1st day of March following, proceed from said port to some foreign port or place, contrary to the statutes in such case made and provided; and that said schooner or vessel hath not been seized for the offence aforesaid; and that he, the said Sears, was then and there knowingly concerned in said prohibited foreign voyage, whereby, and by force of said act, he, the said Sears, hath forfeited, and become liable to pay, to the uses expressed in said statute, a sum not exceeding twenty thousand, nor less than one thousand dollars; and an action hath accrued to the United States, who sue as aforesaid, to have and recover the same accordingly, of all which the said Sears hath had due notice; yet though often requested, he hath never paid either of the said sums, but detains it." Nil debet was pleaded. Verdict for "the United States."

The following errors were assigned: 1. There is error in this; that it is alleged in said declaration, that said schooner, called the Dinah, departed from a port of the United States without a clearance or permit, and afterwards proceeded to a foreign port or place contrary to the statutes in such case made and provided; whereas, the same was done and committed, if at all, contrary to one statute only, and not contrary to more than one statute. 2. That the offence, supposed in said declaration to have been committed, is not therein alleged to have been committed against the form of any statute or statutes, act or acts, not being an offence at common law. 3. That several different acts of congress, passed in different sessions thereof, having been previously mentioned in said declaration, it is afterwards therein alleged, that the supposed cause of action accrued to the United States by force of one of said acts, without specifying, or in any way designating which of them. 4. There is also error in this; that it is alleged in said declaration, that the complainant forfeited, to the uses specified in one of the statutes therein mentioned, a sum not exceeding twenty thousand, nor less than one thousand dollars; whereas, if forfeited at all, it was to the uses mentioned in another statute, and not to the uses mentioned in either of the statutes in said declaration mentioned; and it is not therein specified to whom, nor to whose use, nor by which of said acts or statutes, said sum was forfeited. 5. That the original writ was sued out in the name of the "United States of America"; but the verdict is returned, and judgment rendered for the "United States," and not for the "United States of America." 6. The general errors.

Wm. Prescott, for plaintiff in error.

G. Blake, for the United States.

STORY, Circuit Justice. Several errors have been assigned. I shall pass over the first, as it has been presented as the governing point in another cause, and the present action may well be decided without reference to it.

The second error strikes me to be fatal; the offence charged in the declaration is the being knowingly concerned in a prohibited foreign voyage, and it is not alleged to be contrary to the form of any statute. The necessity of such an averment in an action founded upon a penal statute is abundantly supported by authority. 1 Saund. 135, note; 12 Mod. 52; 1 Chit. Pl. 356; Doct. Plac. 332.[2] The doc-

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

[2] But see Attorney General v. Rattenbury, 9 Price, 397, where in an information for a pe-

trine was confirmed by the decision of this court in Cross v. U. S. [Case No. 3,434], on full consideration; and I consider it too well settled to admit of argument. Lee v. Clarke, 2 East, 333.

As to the third and fourth errors assigned, I incline to think them of no validity. The objectionable parts of the allegations may be rejected as surplusage, or at most would be cured by verdict. There is no authority to show, that in a count on a penal statute, it is necessary to refer to the statute giving the remedy, as well as to that creating the offence, and giving the penalty; and in cases where this objection occurred incidentally, it does not seem to have had much weight. 1 Chit. Pl. 359; Lee v. Clarke, 2 East, 333; Clanricarde v. Stokes, 7 East, 516. And there are many precedents in the books of entries, where it is omitted. Lil. Ent. 148, 175, 255; Lutw. 132, &c.; Co. Ent. 159, &c., 161, &c. No case has been cited, to show that in a declaration of this nature, it is necessary to aver the uses, to which the forfeiture is to be applied, and the general doctrine seems the other way. 2 Hawk. P. C. bk. 2, c. 26, § 20; 4 Burrows, 2018. But even supposing that the special averments were necessary, which I do not admit, it is but the case of a title defectively stated, and not of a statement of a defective title. 4 Burrows, 2018.

As to the fifth error assigned, I think it to be clearly amendable, even supposing the description incomplete; for a court of error may amend an error apparent upon the face of the record, if there be sufficient matter to amend by. Rex v. Ponsonby, 1 Wils. 303; Tidd, Prac. (4th Ed.) 652.[3] But "the United States" in the verdict seems to be a sufficient description of the plaintiffs in the original action, without further addition. It must be intended to mean "the United States of America."

But for the second error, the judgment must be reversed.

Judgment reversed.

See authorities in Smith v. U. S. [Case No. 13,122].

SEARS (UNITED STATES v.). See Cases Nos. 16,246 and 16,247.

SEATON (BEDILIAN v.). See Case No. 1,218.

cuniary penalty for smuggling, it was not stated that the smuggling was "contra formam," &c.; but only that the forfeiture accrued according to the form of the statute, &c., and it was held sufficient by the court. And a distinction was taken between an information of the crown for a penalty, and a suit by an informer for a penalty. The case of Lee v. Clarke, 2 East, 333, was on the game laws for a penalty by an informer. But in Wells v. Iggulden, 3 Barn. & C. 186, the court of king's bench held the law to be as decided in Sears v. U. S. It was, however, the case of an informer.

[3] So it may allow an amendment of a clerical error, though nothing to amend by. De Tastet v. Rucker, 9 Price, 432. In King v. Attwood, Id. 483, Wood, B., said it was not always a valid objection that there was nothing to amend, as ex. gratia clerical mistakes.

Case No. 12,593.

SEAVER et al. v. The CARRONI.

[40 Hunt, Mer. Mag. 319.]

District Court, S. D. New York. Nov. 20, 1858.

ADMIRALTY DECREES—VACATING—LACHES OF SHIPOWNER.

[1. Delay by a shipowner, having full knowledge of proceedings against her by brokers, who had agreed to act as ship's husbands, to recover advances and disbursements made by them upon the security of a voyage which was abandoned because the ship was found unseaworthy, *held* to be such laches as would prevent the owner from seeking to annul the decree and the sale had under it, where he interposed no claim, and did not appear in the suit until his motion to vacate the decree was made, some 10 days after the sale of the vessel, and after all the proceedings were perfected.]

[2. Where fraud of the libelants was alleged as the ground of vacating the decree, *held*, that, under the circumstances, the proper method of obtaining relief would be a separate suit to reclaim the vessel from the hands of the purchasers, and there impeach the title of the latter by affirmative proofs of their fraud in procuring the decree.]

[3. It is, prima facie, no impeachment of a decree of sale of a vessel that the persons who prosecuted the libel purchased the claim on which it was brought pending the suit, and continued the action as assignees of the original libelants.]

In June or July last, Emory H. Penniman, then the owner of the brig Carroni, being in this port, applied to the firm of Tappan & Starbuck of this city, to act for him as brokers or ship's husbands of the vessel in making a voyage to Aspinwall with a cargo of coal, representing the vessel to be seaworthy and in good repair, and obtained from them an advance of $500 cash, upon the arrangement that her freight bills should be assigned them for their security, and that they should further make the necessary expenditures for her outfit and dispatch on the voyage. The brig was sent by them to take a loading of anthracite coal, on the North river, near Rondout, and early in July arrived in New York with such cargo on board; when her owner duly assigned the bill of lading therefor to his said brokers and agents, and under their directions the libelants [Zachariah Seaver and others] shipped a crew for the vessel and voyage, and advanced the moneys necessary for that purpose. On or about the same day her owner left the city of New York to visit his family in Connecticut. The vessel, on inspection, after her return to the city with her lading of coal, was discovered to be unseaworthy, and, under the directions of her master, the agents, or ship's husbands, had her taken to a proper berth and the coal discharged from her, for the purpose of necessary repairs. On examination, she was found, however, so decrepit and unsound that the said agents declined to make further advances, and, the owner not supplying means for her refitment, the voyage was abandoned. The libelant having shipped her crew for the voyage, and made the advances necessary to that end, and the owner not repaying these expenditures, he arrested

the vessel in this court to recover these charges. Tappan & Starbuck, the ship's husbands, declined to make further advances to Penniman upon the security of the bill of lading, or the vessel, or his own responsibility, although repeatedly inportuned by him to do so, and not obtaining repayment of what they had already advanced, had taken out an attachment in a state court against the vessel to enforce their demand against her. The libelant in the meantime pressing his suit to a decree, they paid off his demand in full, and took an assignment of it to themselves, and, relinquishing their attachment under the local law, prosecuted that suit to a final judgment, took out execution thereon, and caused the vessel to be sold at auction under that decree and process. Being themselves the highest bidders at the execution sale, the vessel was struck off and conveyed to them by the marshal, and they now hold and claim her as their own property, having offered, however, to release and convey her to Penniman, her former owner, on the satisfaction of their advances in her behalf. Penniman now applies to the court for an order to set aside the decree of sale entered in this cause, and all proceedings under the same, and to allow Penniman to file a claim in this cause, and appear and defend the same, or for such other or further order in the premises as the court may see fit to grant.

BY THE COURT. The grounds upon which the application is founded are: That the payment by Tappan & Starbuck of the demands of the libelants was an extinguishment of that debt, and the assignment to them of the claim was unavailing to keep the action alive; that they were agents of Penniman, under obligations to him to discharge the debt, and their attempt to acquire its lien to themselves was a fraud upon him, and voided the act so far as respects its interests. I think neither position is established upon the papers before me. The bearing of the evidence plainly is that Tappan & Starbuck were to act for Penniman only under the security of the bill of lading for the voyage, and were under no contract to make advances to him or for the ship upon his personal responsibility. They were his brokers, to collect and receive freights earned by the ship on the voyage proposed, and to disburse them as ship's husbands and in their own remuneration for such agency; and that the voyage fell through because of the insufficiency of the vessel for the service she was to perform,—her seaworthiness being the essential condition of the undertaking on their part.

But, independent of all questions upon the merits of the case, the method of relief sought for by this motion must be denied, because of the laches of Penniman in not intervening in the cause, and making his appeal to the court while the suit was in prosecution. The libel was filed July 12, 1858, the interlocutory decree was taken September 7th, the report of the commissioner filed September 14th, and the final decree perfected September 16th, ordering a venditioni exponas issued, returnable the first Tuesday in October thereafter, under which a sale of the vessel was duly made by the marshal, and the execution filed in court on the 18th of September. During that period Penniman was frequently in the city urging application to Tappan & Starbuck and others for loans of money on the security of the vessel, and otherwise to relieve his indebtedness. The notice of this application is dated the 29th of September, after all the proceedings had been perfected, and, in effect, in the direct presence of Penniman, or, certainly, so that, with the slightest diligence, he could, if he did not, in point of fact, know, the position of the case, and every step taken in it, from its inception to its close, and the final sale and delivery of the vessel by the marshal to the purchasers. This state of facts takes from him all equity to set the proceedings aside and require the libelants to prosecute their action anew, especially as no deceit or irregularity in the carrying of the suit is made out against them.

The affidavit of Penniman, imputing fraud in fact to Tappan & Starbuck, in the transaction with which they were connected, is repelled by the affidavits in reply thereto on their part, in so far, at least, that the court cannot rightfully, in that state of the proofs, annul the judgment and sale in the cause, and put the libelants to renew the action. Moreover, it is wholly unnecessary to interfere with that suit by any summary order impeaching its validity, if the allegations of the party making the application for that relief are well founded; because, if the proceedings against the vessel are founded in fraud, they can interpose no impediment to an action by Penniman to reclaim her out of the hands of her purchasers. The onus should be imposed upon him to proceed affirmatively, and show his title to the property, and that the judicial sale was unauthorized and nugatory. This result cannot be obtained by summary motion, and there is no legal reason why he should not assume this burden in the first instance, without invoking the court to cast upon the purchasers of the vessel the necessity of vindicating their title under the judgment, when he, by his negligence or acquiescence, allowed it to be taken in due course of procedure against the vessel.

I consider it, prima facie, no impeachment of the validity of the judgment, or the purchase under it, that Tappan & Starbuck were owners of the debt by assignment when the decree was obtained. They took, as assignees, all the interest in the debt, and power to continue the action, possessed by the original suitors. I accordingly deny the motion to disturb the judgment or sale in this case, as upon the claim of Penniman he has ample remedy to repossess himself of the vessel, if she has been acquired by any fraudulent

practices of her purchasers, either in the action against her or her sale.

Ordered that the motion made in behalf of Emory H. Penniman to vacate the final decree in the above cause, and the sale of the vessel under execution thereupon, be denied, with costs.

Case No. 12,594.

SEAVER v. The THALES.

[40 Hunt, Mer. Mag. 707.]

Circuit Court, S. D. New York. 1850.

SEAMEN—WAGES—ADVANCES TO SEAMEN—MARITIME LIEN—CREDIT OF OWNERS.

1. A seaman's lien for wages does not pass to a shipping agent by reason of advances made to the seaman at the home port, there being no assignment of the right to such lien.]

[2. A shipping agent has no lien for expenses of fitting out and notarial fees at the home port. Such expenditures are presumed to have been made on the credit of the owners, in the absence of proof to the contrary.]

[This was a libel in rem by Zachariah Seaver, against the bark Thales, and in personam against Capt. Howland, the master, for advances to the seamen, notarial and shipping fees.]

BY THE COURT. The libelant brings this action as notary public in the city of New York, against the above vessel in rem, and against Howland, her master, to recover compensation for shipping in this port a crew for the bark, in 1857 and in 1858, and advancing them moneys, notarial fees, and for putting the crew on board the bark, and they claim therefor $227.50. The crew were to perform a voyage at sea from the port of New York to Mobile, thence to Europe, and back to the United States. The demand of the libelants is made up of the following particulars: Cash advanced to the mate, $35; cash advanced to second mate, $13; cash advanced to Capt. Howland, $5; cash advanced to same, $15; cash advanced to cook, $20; cash advanced to five seamen, $45; cash advanced to four seamen, $36; boatage for crew, $4; shipping fees, $26; notarial fees, $16; payment to first mate, for wages, $12,—total, $227.50.

The answer and claim interposed by the owners of the bark denied the liability of the vessel to the demand, and also denies all knowledge of the debt having been incurred, and avers that the vessel, at the time alleged, was a domestic ship belonging to this port, where her owners resided, and were of abundant responsibility to satisfy the claim, if a just one, and avers that she is now owned in New Orleans. The libelants do not prove they advanced wages to the crew, or paid any moneys for the ship to aid in fitting her out for the voyage. The master testifies those payments were to be made by the owners.

Held: The libelants have no legal competency to maintain an action for the recovery of the wages of the crew, without proving an assignment to them of such wages. They acquire no right to subrogate in place of the seamen upon voluntary advances made in discharge of wages. They were no way under responsibility to pay them. In that their case is widely distinguishable from the one of a master who advances wages to his crew, for he is liable, under his contract of hiring, to satisfy their demand. Accordingly, he is entitled to take, with the discharge of that liability, the benefit of his principal, the privilege of lien the sailors had at the time that debt was so satisfied by him. The Boston [Case No. 1,669]. But these libelants never acquired the relationship even of purchasers of the lien debt, and can claim no higher standing than creditors of the masters or owners of the vessels in making these advances to the seamen at the request of the master. Had this been a foreign vessel there would be reason to imply that their services as ship's brokers were rendered upon the credit of the ship, and the services, being of a character to aid the outfit and necessary supply of the vessel for a sea voyage, would be regarded as carrying a privilege against the vessel. The Gustavia [Id. 5,876].

The reason for admitting that rule does not apply to domestic vessels in the port where their owners reside and are amply responsible for her outlays and necessities. In such case, it must be assumed that shipping agents and brokers render their assistance in the supply of a ship for a voyage, upon the credit of the home owner, unless they prove an express assignment of the debt, by the privileged creditor, or, at least, that the advances were refused to be made on the personal credit of the master or owner. In my opinion, this action, upon the pleadings and proofs before the court, cannot be sustained against the ship. Libel dismissed.

Case No. 12,595.

SEAVERNS et al. v. GERKE et al.

[3 Sawy. 353.] [1]

Circuit Court, D. California. June 10, 1875.

ADMINISTRATOR—SALE OF LANDS—GUARDIAN—SALE BY—CONFIRMATION BY STATUTE OF VOID SALE.

1. A sale of lands in the Sacramento district in 1849 made by John Bidwell in the assumed character of administrator, upon authority to settle the estate of a deceased person given by Alcalde Schoolcraft, upon a verbal application, no judicial record of the proceeding having been shown, *held* to be void.

[Cited in McNeil v. First Congregational Soc. (Cal.) 4 Pac. 1098.]

2. Under the act of 1850, authorizing the appointment of guardians for non-resident minors having estates within the state, "after notice given to all persons interested in such manner as the judge shall order," an appointment of guardian without giving any notice whatever is void.

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

3. In such case the record must affirmatively show that every act essential to give jurisdiction to make the appointment has been performed, or the appointment will be void.

4. Where the appointment of a guardian is void by reason of its having been made without first acquiring jurisdiction by giving the notice required by the statute, all subsequent proceedings, including the sale of the ward's estate, are void.

5. The statute of 1866, making valid all sales under orders of the probate court, where there have been "defects of form, or omissions, or errors," does not validate sales made where no jurisdiction to act at all has been acquired. It was only intended to embrace cases where defects, omissions or errors have arisen in the course of the exercise of jurisdiction already acquired.

[Cited in note in Hahn v. Kelly, 34 Cal. 393.]

6. If otherwise, the act itself is void for want of constitutional power in the legislature by a legislative act to arbitrarily transfer the property of one party to another.

Bill in equity to determine an adverse claim and remove a cloud upon the title of complainants to certain lands.

In 1844 the governor of California granted to Edward A. Farwell five leagues of land. In 1845 said Farwell conveyed to James and John Williams the north half of said tract. In or about the month of December, 1845, said Farwell died intestate, seised of such interest in the south half of said tract, being the premises in question, as he acquired under said grant. He left surviving him, residing in some of the Eastern states, a mother, four brothers and one sister, he having at the time neither wife nor children. His said sister, named Lydia Jane Farwell, afterwards in 1851, inter-married with George W. Seaverns. The complainants are the offspring of this marriage, Mary A. Seaverns having been born May 10, 1853, and George H. Seaverns, May 28, 1854. Mrs. Farwell, the mother of said Edward A. Farwell, died intestate in 1852, leaving the said four sons and Lydia Jane, mother of complainants, her heirs at law. On June 14, 1855, said Lydia Jane died intestate, leaving her surviving the said husband George W. and her children, Mary A. and George H. Seaverns, the complainants in this case, who thus inherited from their said mother two fifteenths of all the premises in question, unless the title of the latter was cut off before coming to them by a sale, hereinafter mentioned, made by John Bidwell, October 25, 1849, in the assumed character of administrator of the estate of said Edward A. Farwell. Neither the complainants nor any of said heirs of Edward A. Farwell were ever in the state of California. Prior to and during the year 1849, there was an extensive district of country, including the premises in question, recognized by the people as, and called, the Sacramento district, within which officers, called alcaldes, chief magistrates, and judges of courts of first instance, residing at Sacramento, assumed to act in a judicial character, exercising both civil and criminal jurisdiction. Their acts were generally recognized by the people of the district. At the time of the transfer of California to the United States, Captain John A. Sutter was judge of the court of first instance, in said district, acting under appointment by the Mexican authorities. Subsequent to that time, down to the spring of 1849, these officers were appointed by the United States military commanders in California acting as governors. During the latter part of 1848 and early part of 1849, one Dr. Bates, by virtue of an appointment by Colonel Mason, acted in the capacity of alcalde and judge of the court of first instance until superseded by Henry A. Schoolcraft, who, sometime in the spring, or early part of 1849, was elected alcalde by the people, at a public meeting held at Sutter's Fort. By authority conferred by this election, and, so far as appears, without any appointment by the military commander, or acting governor, or otherwise conferred, he assumed to act as alcalde, judge of the court of first instance, and recorder of conveyances, till about the second of August, 1849, when he was succeeded by Judge Thomas, who acted under an appointment by General Riley, military governor of California, till the establishment of the state government under the present constitution. At the time of his death, Edward A. Farwell was indebted to John Bidwell, and to sundry other parties in various sums. Bidwell, sometime in the summer or fall of 1849, applied to said Schoolcraft for authority to settle up the estate of said Farwell, deceased, and, as Bidwell testifies, authority was given him. But the terms of the authority are not given, otherwise than that, as Bidwell testifies, he followed the directions of Schoolcraft. The date of this application is not very clearly fixed. The most definite testimony on this point is, that the application was made and authority given on the same day upon which Bidwell prepared the notice of sale of the property of the deceased, which notice bears date August 22, 1849. If this is the proper date, it must have been after Schoolcraft ceased to be alcalde, as his successor's records date from August 2, 1849. But it will be assumed that it was while Schoolcraft was still acting. The application for authority to administer on the estate was verbally made in person by Bidwell, no written application or petition being filed, and the authority given by Schoolcraft seems, also, to have been verbal. At all events, there is no evidence sufficient to show that any order in writing, or any record of the transaction was ever made. The application was made, authority given, and the notice of sale of lands prepared, all at the same time, without any kind of notice to the parties interested, or, so far as shown, any record whatever of the proceedings. The notice of sale published, simply states that the estate of Edward A. Farwell, deceased, will be sold at

Sacramento, October 25, 1849, giving a general description of the property, without any reference to any order of court, or authority of any kind, other than the signature, which is, "John Bidwell, Administrator." The notice was published in the Placer Times weekly from August 25 to October 20, and the sale took place October 25 to John Potter for $1,250. The deed to Potter makes no reference to the notice of sale, or authority of Bidwell, other than it purports to be made "between John Bidwell, administrator of the estate of Edward A. Farwell, and John Potter;" and "the party of the first part bargains, sells and conveys to the party of the second part, all the right and title of the said Edward A. Farwell to" the premises described, and it is signed, "John Bidwell, Administrator of Edward A. Farwell." It does not appear that any order confirming the sale was ever asked or made. A paper purporting to be an inventory of Farwell's estate, and an appraisement made and sworn to by P. B. Reading and S. J. Hensley, before S. J. Thomas, judge of the Sacramento district, was filed with said Thomas, marked "Filed October 27, 1849," but the filing is not attested by the signature of that officer. Mr. Bidwell, the only witness on the point, is not certain by whom, or how, the appraisers were appointed, or whether appointed at all, and there is no record of their appointment. An auctioneer's account of the sale of Farwell's estate is marked "Filed October 27, 1849," without being attested by the signature of the officer filing it. On May 11, 1850, the claims against the estate of four several persons, viz.: John Bidwell, Thomas Cummings, Samuel J. Hensley and Talbot H. Green, with vouchers showing payment by Bidwell, were filed in the probate court of Sacramento county, established under the state constitution. On the same day, May 11, 1850, there was filed and so marked by the clerk of the said probate court, a document purporting to be the final account of said Bidwell. On May 17, 1850, an order was made and entered by said probate court, Edward J. Willis, county judge and ex officio probate judge, presiding, wherein, after reciting the presentation of Bidwell's account, and that there remained in his hands "a balance of $2,295.20, which account is approved," it was "ordered by the court that the said administrator distribute the said sum among the legal heirs of said deceased equally," without naming them. On the same day a receipt of Tarr & Cone to Bidwell for fifty dollars attorney's fees was filed, and an order was entered by the court allowing said fees. The auctioneer's receipted account was filed November 11, 1850. The foregoing constitute the entire files, and the said two orders entered May 17, 1850, by the probate court, the only orders now to be found, or shown by the evidence ever to have been of record in the administration of said estate. Judge Thomas' record from August 2, 1849, is in existence, and shows his court to have been opened and business to have been transacted therein on October 25, 26, 27, 29, and 30, 1849—the day of the sale, and days immediately following—but they show no entry of any kind, relating to this proceeding on either of these days, or on any other day during his incumbency of the office from August 2, 1849, until the end of his term of service. No entry is satisfactorily shown to have ever been made by Schoolcraft, or any paper therein ever presented to, or filed by him. There is some evidence, not very satisfactory, tending to show that Schoolcraft kept a small book in which he sometimes entered minutes of judicial proceedings had before him. But there is no evidence to justify the court in finding that any minutes of these proceedings now in question were ever entered, or, if entered, what those entries were.

Section 30 of the act of February 28, 1850, required "the records of the courts of first instance and all books, papers and documents in the custody of such courts, or the clerks thereof, in any way relating to judgments, orders, suits, or any legal proceedings therein" to "be delivered to the county clerk of the county in which is the place of holding the court of first instance immediately after the election and qualification of such clerk," and to be "by him deposited and kept in his office, subject to the order of the district court." St. 1850, p. 80, § 30. Section 33 authorizes the district court thereafter to proceed in "all suits and proceedings" then pending, the same as if proceedings had been commenced in the district court. Section 35 makes similar provisions respecting alcaldes' records in matters where the alcalde acted as judge of the court of first instance; and section 38 similar provisions for transferring other records appropriate to alcaldes' courts to justices of the peace elected under the state organization, who were authorized thereafter to proceed with proceedings then pending. But there is no act authorizing the transfer of anything to probate courts, or authorizing probate courts to proceed and close up any unfinished business of any kind of the alcaldes' courts, or courts of first instance. And section 39 provides for transferring "books of records of deeds, mortgages, powers of attorney and other instruments kept by the alcalde or judge of first instance" to the county clerk. The records of Judge Thomas, Schoolcraft's successor, were transferred under this act. The books and records of Schoolcraft of conveyances, etc., were also transferred as required. And said records so transferred—"the books of records used by Henry A. Schoolcraft for the record of deeds and other instruments in writing, and deposited in the recorder's office in said county (of Sacramento)—were afterwards adopted and recognized as public records by the legislature of California in the act of May 18, 1853. St. 1853, p. 227. But no judicial records were transferred by Schoolcraft as required by the statute before cited, and there is no subsequent legislation adopt-

ing or recognizing any such judicial records. The state government was organized not many months after Schoolcraft was superseded by Thomas, and whatever the nature of the minutes kept by him, if any were kept, it seems highly improbable that they were worthy of being dignified by the name of judicial records; for they must have been in existence at the organization of the state courts, and, if of any importance, in all probability would have been turned over under the provisions of the statute, as were the records of conveyances kept by him, and the judicial records of Thomas.

On February 18, 1853, James Williams, one of said Farwell's grantees to the north half of said Mexican grant of five leagues, by E. O. Crosby, his attorney "on his own behalf, and in behalf of the heirs and legal representatives of Edward A. Farwell, deceased," presented a petition to the board of land commissioners for a confirmation of said grant. He prays that the grant may be confirmed to himself, "and the heirs and legal representatives of said Edward A. Farwell, the names of all of whom will be given in a supplemental petition hereinafter to be filed," etc. On February 13, 1855, by the same attorney, said James Williams, and a number of other parties named, including the heirs at law of said John Potter, filed a supplemental petition, in which, among other things, they set out the death of Farwell: the action of Bidwell as his administrator; the sale of said south half—the premises in question—to John Potter, and the rights of his heirs therein, etc. The heirs of Farwell are not mentioned by name in the petition. On August 28, 1855, the board of land commissioners confirmed "to the heirs at law of Edward A. Farwell, deceased, the south half of the entire grant," and adjudged that the claim of Potter's heirs to the south half "of the grant is not valid, and it is decreed that the same be rejected." On appeal to the district court, the decree of the board was affirmed in the same language, and said decree became final, and the land was patented to the heirs at law of said Farwell in 1863, in accordance with said decree. Whatever interest said John Potter acquired through said sale by John Bidwell by subsequent conveyances, and prior to the filing of the bill had passed to the defendants in this suit. Sometime prior to 1860, Henry R. Mighels, a cousin of Edward A. Farwell, residing at the time in California, and a part of the time in Butte county, had some correspondence with the heirs of Farwell upon the subject of the estate left by Edward A. Farwell. In a letter to his father in 1859, seeking to obtain powers of attorney from some of the heirs, he represents their interest as worth at that time $75,000. He obtained powers from some of them previous to, or early in, 1860, and soon afterward, among other things entered into an agreement with certain attorneys to act for the heirs in recovering their interest, the lands being in the possession of trespassers, and as compensation to give them one-third of the estate; and another agreement with defendant, Henry Gerke, by which he contracted to convey to him all the remainder of the lands to which the title could be assured and possession recovered, at from two to three dollars per acre, and Gerke was to advance him $2,000 to enable him to go East and obtain proper powers from all the heirs to enable him to carry out his contract. He went East as agreed, and obtained powers from the four brothers, and a power of attorney from George W. Seaverns, father of the complainants; but the power of Seaverns in evidence dated April 7, 1861, duly authorizes Mighels to act as his own attorney to convey such interest as he himself had as heir, without making any reference to his children, the complainants. But if there was any other attempt by the father to authorize the sale of complainants' interest in the land, it was necessarily void. Upon his return, instead of carrying out the first contract, after further consultations and negotiations, he entered into a new contract with Gerke, by which the latter was to pay a gross sum of $6,000 for the interest of the heirs. But Mighels was unable to convey the interest of the complainants, who were still minors under ten years of age, and Gerke's attorneys advised him to institute proceedings in the probate court to divest their rights. Acting upon this advice, and for the purpose of enabling whatever right, title and interest in said lands was vested in complainants to be alienated and divested, said Mighels filed a petition in the probate court of Butte county on March 2, 1861, stating generally the facts of the case, and praying to be appointed guardian with authority to take charge of their said estate. Without any notice whatever, or any other proceeding than the filing of said petition, two days afterwards on March 4, 1861, an order was entered in the minutes of the court as follows: "Now comes H. R. Mighels, and files his petition praying to be appointed guardian of Mary Agnes Seaverns, and George Henry Seaverns, heirs at law of the estate of E. A. Farwell, deceased. Whereupon, it is ordered by the court that said petitioner be appointed guardian of the aforesaid minor heirs of E. A. Farwell, deceased, upon his filing his bond," etc. In due time bond was given, a petition for sale was filed, appraisers appointed who appraised the interest of complainants, being two-fifteenths of several leagues of land situate in Butte and Colusa counties, and one square mile in Sutter county, including claims against trespassers for damages, at $3,500. Such proceedings were had that a sale at auction was afterwards made at which the entire interest, consisting of the said three separate and distinct tracts of land, lying in three different counties, were on December 2, 1861, struck off and sold in gross at one bid to defendant, Gerke, for $100, he being the only bidder; and in pursuance of a subsequent order of the court, the premises were conveyed to Gerke for said sum by said Mighels, and the proceeds remitted to the father of complainants.

J. A. Moultrie, W. H. Laine, and F. E. Spencer, for complainants.

O. C. Pratt, R. R. Provines, W. C. Belcher, and Sharp & Lloyd, for defendants.

SAWYER, Circuit Judge (after stating the facts). Upon the facts stated, the first question presented is, as to the effect of the sale by Bidwell, assuming to act as administrator of the estate of Edward A. Farwell, deceased, under authority claimed to have been derived from Schoolcraft, as alcalde or judge of the court of first instance. It would be going a great way to hold that Schoolcraft could legally exercise any such judicial authority as he is claimed to have exercised in this case, by virtue merely of an election by the people at a public mass meeting held under no existing law, and without any other recognized authority. But, without deciding the question, I shall concede for the purposes of this case, that he was vested with all the authority that alcaldes, appointed by the military governors in the usual way at that time, were authorized to exercise. On this hypothesis, it is claimed by the defendants that the case is within the decision in Ryder v. Cohn, 37 Cal. 69, and governed by it. That case, undoubtedly, goes to the uttermost limit of the legal principle invoked by the court to sustain the sale then under consideration. This decision was by a divided court. It fell to my lot to participate in it, and it was after great hesitation that I yielded my concurrence. Without questioning the correctness of that decision, it would, in my judgment, be necessary to go far beyond it to sustain the sale by Bidwell now in question. In that case the proceedings were of the most formal character, and there was a complete formal record of every step in the proceedings, from the beginning to the end, except that it did not affirmatively appear that any notice of the application was given; but the court held that under the decision in Hahn v. Kelly, 34 Cal. 391, the court being one of general jurisdiction, all presumptions were conclusively in favor of the record, and that its judgments would be upheld on a collateral attack, if tested by the strict rules of the common law. Besides, the record shows that "Edward Norton, Esq., appeared as and was attorney for the absent heirs," who were adults. 37 Cal. 77. In this case there is nothing in the semblance of a record. No application was ever filed; no record of any order or action of the court is produced, and none is shown to have ever existed. The only two orders of which there is any evidence of their having ever existed in writing, are the orders approving the account of Bidwell and allowing an attorney's fee of $50, entered by the probate court on May 17, 1850. The authority of that court was wholly derived from the probate act of the state of California, which, as has long been settled, had no application to the estates of persons who died before the passage of that act. Grimes v. Norris, 6 Cal. 624; Tevis v. Pitcher, 10 Cal. 465; De la Guerra v. Packard, 17 Cal. 193; Soto v. Kroder, 19 Cal. 97; Downer v. Smith, 24 Cal. 114; People v. Senter, 28 Cal. 502; Wilson v. Castro, 31 Cal. 420; and Coppinger v. Rice, 33 Cal. 408. Besides, as will be seen by referring to the statement of facts, the statute of February 28, 1850, expressly conferred authority to proceed in "all cases and proceedings" pending before alcaldes and courts of the first instance, at the date of the transfers of the records of the state courts, upon the district courts and justices of the peace, and not upon probate courts.

The only written evidence of any act performed in the case by either of the alcaldes or judges of the court of first instance, acting during the progress of the proceedings—the only courts having any jurisdiction in the matter—shown to have ever existed, is the taking and certifying by Judge Thomas of the oaths of Hensley and Reading to the appraisement, October 25, 1859, and marking that document filed October 27; and on the latter day marking filed the auctioneer's report of sale; and neither of these filing marks is attested by the signature of the officer. To sustain a forced sale of large landed estates of absent heirs under judicial proceedings so loosely conducted, and of which there does not appear to have been any record, or other written evidence, would be going beyond any authority or legal principle brought to the notice of the court; and further, I think, than any court having a due regard for the safety of private rights, would be justified in going. Besides, the heirs of John Potter presented themselves as claimants in the supplemental petition for the confirmation of the Mexican grant made to Farwell, and set out their title derived by the sale by Bidwell as the basis of their claim. Thus, in a proceeding to which they were parties seeking for themselves confirmation of the grant, their claim to the land, based upon this same title, was rejected, and the adverse claim of Farwell's heirs confirmed, and the lands patented to said heirs in accordance with the decree of confirmation. If Potter's heirs or their successors in interest should file a bill against the heirs of Farwell, as patentee, to charge them as trustees and seek a conveyance of the legal title, I apprehend that no court would grant the relief upon the evidence as presented in this case. If not, the same evidence and state of facts ought not to constitute a valid defense to the present bill.

2. The next question is, as to the validity of the sale of complainants' interest in the premises by Mighels as guardian, which is earnestly and confidently assailed on various grounds. The first ground is, that Mighels never was legally appointed guardian, the court never having acquired jurisdiction to appoint a guardian for want of notice. The act relating to guardians, in force at the time of the appointment of Mighels as guardian for complainants, so far as relates to this case, provided that the "probate judge of each county, when it shall appear to him necessary or convenient, may

appoint guardians to minors * * * who shall reside without the state and have any estate within the county." St. 1850, p. 268, § 1. Section 43 of the same act is as follows: "When any minor or other person liable to be put under guardianship, according to the provisions of this act, shall reside without the state, and shall have any estate therein, any friend of such person, or any one interested in the estate in expectancy or otherwise, may apply to the probate judge of any county in which there may be any estate of such absent person, and after notice given to all persons interested, in such manner as the judge shall order, and after a full hearing and examination, if it shall appear to him proper, he may appoint a guardian for such person." Id. 272.

Under this section the authority to appoint a guardian is "after notice is given to all persons interested, in such manner as the judge shall order." In this case, as in all actions where the rights of parties are to be affected by judicial proceedings, the fundamental condition of authority to act at all is to first acquire jurisdiction of the persons whose rights of property are to be affected, by giving them notice of the proceeding. Until the party to be affected has legal notice, the court has no jurisdiction whatever to act, and all proceedings without notice are without authority and absolutely void for want of jurisdiction. In Gronfier v. Puymirol, 19 Cal. 629, the question was as to the sufficiency, not the want, of the notice. There was notice given by publication in accordance with the order of the judge, and it was held that the time and manner of the notice, under the express provisions of the statute to that effect, were within the discretion of the judge; but it was not intimated that the judge could acquire jurisdiction without any notice. Besides, some importance seems to have been attached to the fact that the attack was made by third persons in a collateral way, and not by the minor. The court say "third persons cannot question the validity of the order upon any allegation that insufficient notice was given of the hearing of the application for the appointment under the statute." Id. 632. But in this case there does not appear to have been any notice whatever, and the record of what did take place seems in all respects to be very formal and complete. There is no recital of notice. The appointment was made two days after filing the petition, and only recites the filing of the petition as the basis of the appointment. But notice is essential to give jurisdiction, for the appointment is only to be made "after notice given to all persons interested." The person whose estate is to be divested by some one who voluntarily assumes to intermeddle, is, certainly, a "person interested," and under the statute is entitled to some notice, even though the kind and manner of it is left to the discretion of the judge. In the language of Mr. Justice Field, in Galpin v. Page [Case No. 5,206],—a case where publication in a prescribed form was authorized: "Where personal service cannot be made by reason of the non-residence in the state or absence of the infant, service must be made by publication, as in other cases. Such publication is the prescribed condition to the exercise of jurisdiction over the infant." So, in this case, "notice given to the persons interested"—the infants whose estates in many leagues of land are sought to be divested for the purpose of perfecting a contract of sale already made without legal authority, "in such manner as the judge shall order," "is the prescribed condition to the exercise of jurisdiction over the infant." This proceeding is in no sense in the nature of a proceeding in rem, like that in Grignon's Lessees v. Astor, 2 How. [43 U. S.] 319, and in that case letters of administration had been "duly granted and jurisdiction acquired." It is not sought in case of this guardian sale to apply property in the jurisdiction of the court to the payment of the debts of the infants for which it was liable. The whole object is, to divest the title of the infants by a stranger, on the pretense that it is for their benefit. There certainly should be notice of some sort, as the basis of jurisdiction, and this the statute requires.

Under the statute placing the proceedings of the probate courts upon the same footing as superior courts of general jurisdiction, and the decision of the supreme court of California in Hahn v. Kelly, 34 Cal. 391, conceding that I might have felt authorized to sustain the appointment of a guardian on the doctrine of presumptions recognized in that case, the supreme court of the United States in Galpin v. Page, 18 Wall. [85 U. S.] 350, and Mr. Justice Field in the same case on retrial [Case No. 5,206], have overruled that case and distinctly held that, where the parties to be affected reside out of the jurisdiction of the court, the record must affirmatively show that every step necessary to give jurisdiction has been regularly taken, otherwise the proceedings are utterly void. That case was in all essential particulars in principle similar to this. The infant, a posthumous child of tender age, was a defendant in an action to settle an alleged partnership of her deceased father, one of whose heirs she was. An attempt to procure service by publication of summons upon her and her mother, with whom she lived in the state of New York, was made. Notice in some form actually reached the mother, with whom she resided, as she appeared and defended. The notice to the infant, in point of fact, was practically all that could be accomplished; for the same attorney who appeared for the mother, and, doubtless, at her suggestion and with her approval, was appointed guardian ad litem by the court, answered and defended the same as the mother. Besides, her interests and those of the mother were precisely the same, and not adverse. The same defense was actually made, and undoubtedly by the same guardian ad litem that it would have been made by had the publication been made in strict accordance with the provisions of the

statute. Yet the supreme court of the United States held that the appointment of guardian ad litem, without the record showing affirmatively that the service had been made in strict accordance with the provisions of the statute, was utterly void, and, consequently, that all subsequent proceedings were void. In the present case the proceedings were instituted by a stranger, upon advice of counsel of an adverse party, ostensibly, it is true, and it may perhaps have really been, in the interest of the infants, but for the express purpose of divesting their title to lands. They were entitled to notice so that an opportunity might be furnished to ascertain whether for their interest or not, and to oppose it if deemed expedient so to do. And the statute in this case, as in the other, imposes notice in some manner as a condition precedent to the appointment—as an essential prerequisite to the attaching of jurisdiction to act in the case. In my judgment it is impossible to distinguish this case from Galpin v. Page [supra]. If there is anything to the contrary in the prior decisions of the same court it must be regarded as overruled. This decision is of course conclusive upon this court. I feel bound, therefore, to hold the appointment of guardian to be void for want of the notice prescribed by the statute, and that the court never acquired jurisdiction to affect the rights of complainants in the proceedings had. The appointment of Mighel's guardian being void on the grounds indicated, and this appointment being the basis of the subsequent proceedings, authorities to show that all subsequent action must necessarily be void, do not seem to be required. Yet authorities on the exact point are not wanting. Frederick v. Pacquette, 19 Wis. 541. See, also, Galpin v. Page, before cited.

3. It is next claimed by defendants that if the guardian's sale is void in consequence of the defects in the proceeding, it is rendered valid by the provisions of the "Act in Relation to Probate Sales" of 1866. St. 1865–66, p. 824. Section 1 of said act is as follows: "In all cases where real estate has been sold in this state under the order of the probate courts of the several counties to purchasers in good faith, for a valuable consideration, and defects of form, or omissions, or errors exist in any of the proceedings, such sales are hereby ratified, confirmed, and made valid and sufficient in law to transfer the title to the property sold; provided, however, that this act shall not affect in any manner rights acquired prior to its passage, by vendees, grantees, or mortgagees, who claim interests in or liens upon such property under heirs or devisees adversely to such probate sales, nor to sanction in any manner cases of actual fraud."

There is something more in the probate proceedings under consideration than a defect of form or mere errors. There is a failure to acquire jurisdiction of the parties whose interests are to be affected—a failure of authority to act at all. This is, it is true, the result of an "omission" to give notice; but it is hardly to be supposed that the legislature contemplated such an omission. The term doubtless refers to omissions in the acts to be performed in the exercise of a jurisdiction, which has once attached, and not omissions of acts essential to give jurisdiction to act at all. If the act was intended to include the latter, then it must be void as to such matters. Before the passage of the act, the proceedings, as we have seen, were utterly void for want of jurisdiction. The rights of the complainants were as much unaffected by the proceedings as if they had never been taken. If then, they became valid by the passage of this act, the title has passed from the complainants to the defendants by virtue of the provisions of the act. That is to say, the legislature has arbitrarily transferred the property of the complainants to the defendants. I suppose it will not be seriously contended that the legislature, by passing a law declaring that the property of A., by virtue thereof, shall be transferred to and vested in B., can transfer the property of one private party to another. That such an act would be unconstitutional, it seems to me, requires no argument to establish; yet such, substantially, would be the result if the act in question has the effect claimed.

There are other formidable objections to the validity of the proceedings upon which defendants rely, but it will be unnecessary to consider them, as those already decided dispose of the case.

There must be a decree for the complainants as to an undivided two-fifteenths of the premises in question, in pursuance of the prayer of the bill, with costs, and it is so ordered.

Case No. 12,596.

SEAVEY v. SEYMOUR.

HARRINGTON v. SAME.

[3 Cliff. 439.] [1]

Circuit Court, D. Maine. Sept. Term, 1871.

HABEAS CORPUS—WHO MAY GRANT WRIT—ARMY—ENLISTMENT—WANT OF AGE—RETURN OF WRIT.

1. Under section 14 of the judiciary act [1 Stat. 81], justices of the supreme court and district courts have power to grant writs of habeas corpus where a person is imprisoned or restrained of his liberty, for the purpose of inquiry into the cause of the commitment; but the writ in no case extends to prisoners in jail, unless when they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are to be brought into a court to testify.

2. Under that act a circuit court has no authority to re-examine a decision of a district court.

3. The first section of the act of February 5, 1867 [14 Stat. 385], confers upon all the judges and justices of the courts of the United States, in addition to the authority previously conferred, power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution or any law or treaty of the United States, and

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

gives an appeal from the decision of an inferior to the circuit court.

[Cited in U. S. v. Hanchett, 18 Fed. 28.]

4. In case of the enlistment into the service of the United States, without the consent of parent or guardian, of a person under eighteen years of age, on a hearing under a petition for a writ of habeas corpus, parol evidence is admissible to show the age of the recruit.

5. The certificate of enlistment is not conclusive that the recruit was of age sufficient to enter into the contract.

6. The first proviso of section 20 of the act of February 24, 1864 [13 Stat. 10], does not vest the exclusive jurisdiction of applications of this nature in the secretary of war.

7. If the recruit was under the age of eighteen years, his certificate under oath that he was of the age required for lawful enlistment, would not be conclusive as to the actual fact.

[Cited in Re Davison, 4 Fed. 509; s. c., 21 Fed. 622.]

8. The act of March 3, 1815 [3 Stat. 224], repealed the act of December 10, 1814 [Id. 146], which made the enlistment binding upon all persons under the age of twenty-one years as well as upon persons of full age.

9. By the act of the 24th of February, 1864, the secretary of war is empowered to order the discharge of all persons in the military service who are under the age of eighteen years at the time of the application for the discharge, provided it appears on due proof that such persons are in the service without the consent of parent or guardian, provided bounties, advance, etc., are first repaid to the government and the local authorities.

[Cited in Re Davison, 21 Fed. 623; Re Chapman, 37 Fed. 330.]

10. But this does not give the secretary of war exclusive jurisdiction of such applications.

11. This provision giving the secretary of war power to hear such applications, is not repugnant to, or a repeal of, section 14 of the judiciary act.

12. In order to work a repeal by implication there must be a positive repugnancy between the provisions of the older and later statute.

13. Upon an application for a writ of habeas corpus before the district court, there was no defence that the recruit was awaiting a trial under a charge of desertion before a military court, and no evidence to that effect introduced before that court: *Held*, that at the hearing of the appeal before the circuit court, the suggestion that that fact was shown by the return could not avail the respondent, because the jurisdiction of the circuit court in this case was purely appellate.

[Cited in U. S. v. Fowkes, 53 Fed. 14.]

14. The return on the writ should be signed by the person to whom it was directed.

15. The proper course is for the petitioner to make his answer to the return on the writ, and not to make his allegations in full in the petition.

[Appeal from the district court of the United States for the district of Maine.

[These were actions by John T. Seavey, father of John E. Seavey, against T. Seymour, military commander at Fort Preble, and William K. Harrington, father of Charles W. Harrington, against the same defendant. Heard on petitions for writ of habeas corpus.]

Strout and Gage, for petitioners.

T. F. Barr and A. B. Gardiner, for the United States.

CLIFFORD, Circuit Justice. Provision is made, by section 14 of the judiciary act, that either of the justices of the supreme court, as well as the judges of the district courts, shall have power to grant writs of habeas corpus "where a person is imprisoned, or restrained of his liberty," for the purpose of an inquiry into the cause of commitment; but the same section provides that the writ "shall in no case extend to prisoners in jail, unless when they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." 1 Stat. 82.

Circuit courts, under that act, possess no power to re-examine a decision of the district court, as the act makes no provision for the removal of such a case from the district to the circuit court by writ of error or appeal; and the reported decisions of the circuit court do not show a case where appellate jurisdiction in such a case was ever exercised in a circuit court.

Appellate jurisdiction is exercised in such cases by the supreme court over the decisions of the circuit courts, as appears by many reported cases; but the circuit courts have never claimed to exercise the power to re-examine the decisions of the district courts in such cases under the judiciary act.

Tested by the regulations prescribed in that act, it is clear that the appeal before the court should be dismissed, as the circuit courts would possess no jurisdiction to re-examine the decisions of a district court in such a case; but section 1 of the act of the 5th of February, 1867, confers the power upon all of the justices and judges of the courts of the United States, in addition to the authority previously conferred, to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law, of the United States; and the provision is, that, from the final decision of any judge, justice, or court inferior to the circuit court, an appeal in such case may be taken to the circuit court for the district in which said cause is heard, under the regulations prescribed in the same section. 14 Stat. 383.

Pursuant to that provision, the appellee, on the 10th of September, 1870, filed his petition under oath, in the district court for this district, praying that a writ of habeas corpus might issue in the case before the court, to bring into court the body of the person named in the petition, and that he, the person so named, might be discharged from his confinement.

He represented in his petition that he, the petitioner, was the father of the person so named; that his son was a minor under the age of eighteen years, and that he, the petitioner, was entitled to the custody and services of his son; that he, the son, was unlawfully imprisoned and restrained of his liberty

by the appellant at Fort Preble, in this district; that he, the petitioner, was informed that the appellant claimed to hold his son under and by virtue of a pretended enlistment into the army of the United States, but alleged that the enlistment, if any such is set up, is illegal and void, because, as he alleged, his son was at the time, and now is, a minor under the age of eighteen years, and not emancipated; and that he, the son, did not have the consent of the petitioner to the said enlistment. Return was made to the writ that the person named was held at the alleged place of confinement by reason of his being a regularly enlisted soldier in the army of the United States, and that he is also awaiting trial on a charge of desertion.

Express authority is given in the act to the petitioner to deny, under oath, any of the material facts set forth in the return, and to allege any fact to show that the detention is in contravention of the constitution, or any laws, of the United States. Hearing was had in the district court, and the district court decided that the enlistment of the person named in the petition was void, as it appeared that he was at the time of the hearing, as well as at the time of his enlistment, a minor under the age of eighteen years; and the district court entered an order or decree that the person so named be discharged from his said confinement.

Due appeal was thereupon taken from that decision of the district court to this court, and the appeal was duly entered at the last term. Since that time the parties have been heard, and the case now comes up for final determination. Certain irregularities are noticeable in the proceedings on the one side and the other; but the case will be examined and decided as if none such appeared, as they have been substantially waived by the parties.

Power to grant writs of habeas corpus is conferred upon the several justices and judges of the courts of the United States by section 1 of the act of 1867, in addition to their authority in that behalf under prior laws, in all cases where any person is restrained of his or her liberty in violation of the constitution, or of any treaty or law, of the United States; and it is clear that an appeal in all such cases, where the petition is commenced in the district court, will lie from the final decision of that court in the case to the circuit court of the United States for the district in which the cause was heard. Ex parte Yerger, 8 Wall. [75 U. S.] 102.

Justices and judges of the federal courts are empowered, by section 14 of the judiciary act, "to grant writs of habeas corpus for the purpose of inquiry into the cause of commitment"; but the additional power conferred by section 1 of the act under consideration is "to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law, of the United States"; and the further provision is, that the court or judge granting the writ "shall proceed in a summary way to determine the facts of the case by hearing testimony and the arguments of the parties interested; and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty." 14 Stat. 386; Ex parte Watkins, 3 Pet. [28 U. S.] 201; Ex parte Metzger, 5 How. [46 U. S.] 176; Hurd, Hab. Corp. 150.

Appeals to the circuit courts lie under that act from the final decisions of the district courts, but an appeal does not lie from the decision of the district court in such a case where the jurisdiction of the district court is derived solely from section 14 of the judiciary act.

Documents, purporting to be the original enlistment of the recruit, were introduced in each case, and they are so exactly alike in all particulars, which are material in this investigation, that a reference to one will be sufficient without any reference to the other. Take, for example, the enlistment of the recruit first named. He states his name, place of birth; that he is aged twenty-one years; also his occupation, and acknowledges that he voluntarily enlisted on the 6th of June, 1869, as a soldier in the army of the United States for the period of five years, unless sooner discharged by proper authority, and agrees to accept such bounty, pay, rations, and clothing as are or may be established by law. Superadded to that certificate of enlistment is the certificate of an oath purporting to have been taken by the recruit on the same day, in which he, as represented, does solemnly swear that he will bear true faith and allegiance to the United States; that he will serve them honestly and faithfully, and that he will observe and obey the orders of the president, and the orders of his superior officers.

Those documents are admitted to be genuine, but they do not contain any certificate that the recruits, or either of them, did, at the time of their enlistment, take and subscribe any oath as to their respective ages, as seems to be contemplated in such cases, by a recent act of congress. 12 Stat. 339. Appended to each document is a paper purporting to be a certificate of an oath, subsequently taken by the recruit, in which he certifies that he, at the time of his enlistment, was twenty-one years of age, but the United States do not contend that such certificates are a part of the enlistments, nor do they rely on them as conclusive evidence of what is therein certified.

On the contrary, they concede that the recruits respectively were, at the time of their enlistment, and that they still are, under the age of eighteen years, if evidence to that is admissible, which they deny, and insist that parol evidence is not admissible to prove that allegation.

Views diametrically opposite are entertained by the respective parties in this case, as appears by a comparison of the several propositions submitted by their counsel at the argument. Based on the state of facts here exhibited, the proposition of the petitioner is, that the enlistment of his son was in violation of section 2 of the act of the 13th of February, 1862, and void, as he was under the age of eighteen years, and that it was the duty of the district court to grant the writ of habeas corpus, and to discharge his son from his imprisonment.

Two principal answers are made by the government to that proposition, and if either of them can be sustained, the decision of the district court must be reversed. 1. That the evidence offered as to the age of the recruit at the time of his enlistment, is not admissible; that the certificate of enlistment, as given in evidence, is conclusive that the recruit was of sufficient age to make the contract. 12 Stat. 339. 2. That the first proviso in section 20 of the act of the 24th of February, 1864, operates to vest in the secretary of war the exclusive jurisdiction to hear and determine such an application. 13 Stat. 10; Id. 380.

Where the recruit is less than eighteen years of age, and was mustered into the military service without the consent of his parent, guardian, or master, proof to show that fact has always been admissible in evidence, except for the period of three months, as hereafter explained, from the organization of the judicial system of the United States to the present time, and it is still admissible under the rules of law, unless it can be held that the act which provides that "the oath of enlistment taken by the recruit shall be conclusive as to his age," has established a different rule. 12 Stat. 339.

Strong doubts are entertained whether that provision can have any application in any case where the writ of habeas corpus is sued out by the parent, guardian, or master, but it is unnecessary to determine that point in the case before the court, as it does not appear that the respective recruits did take any oath as to their age at the date of their enlistment. As before explained, they severally made oath that they would bear true faith and allegiance to the United States; that they would serve them honestly and faithfully, and that they would observe and obey the orders of the president and the orders of their superior officers; but they do not, as appears by the certificate of enlistment, make any representation under oath as to their respective ages.

Construed literally, the phrase that "the oath of enlistment taken by the recruit shall be conclusive as to his age," it may be conceded, would afford some support to the theory of the respondent, that the evidence offered to show that the recruits were under eighteen years of age, was inadmissible, but it cannot be admitted that congress intended to enact that the enlistment, with or without such a certificate, should be conclusive evidence that a given relation exists between the United States and a citizen, when the same section of the act of congress enacts that the party in question shall never hold any such relation as that imputed.

Even suppose the phrase in question may be construed as enacting in respect to recruits between the ages of eighteen and twenty-one, that the enlistment shall be conclusive that they were competent to make such a contract, which is not admitted where the petition is filed by the parent, guardian, or master; still it is clear that it cannot properly be so construed in respect to recruits under the age of eighteen years, as the same section enacts, "that no person, under the age of eighteen, shall be mustered into the service of the United States."

Congress, in the opinion of the court, could never have intended to enact that the certificate of enlistment should be conclusive as to the validity of the contract, in a case where the recruit is declared not competent to be mustered into the military service, by the same section that contains the provision which it is supposed excludes the evidence to prove its invalidity. Such a construction, if not positively absurd, would certainly violate one of the acknowledged canons of construction, which forbids that any part of a statute shall be held to be without meaning, as it is clear that that consequence must follow if such a view is adopted as to the meaning of that phrase.

Support to the opposite view is also derived from the consideration, that if the rule assumed by the respondent may be applied where the recruit is under the age of eighteen, it may, with equal propriety, be applied when the enlistment is of a recruit under sixteen years of age, in which case the recruiting or mustering officer, if he acted knowingly, is liable to be dismissed the service, with forfeiture of pay and allowances, and "shall be subject to such further punishment as a court martial may direct." 13 Stat. 380.

Recruits, it seems, are sometimes required to make oath as to their age at the time of their enlistment, and sometimes they are not, as is sufficiently shown by the enlistments and the certificates appended to the same in these cases. Attempt was made in argument to show that the enlistment never contains any such statement of the recruit, but the reports of judicial decisions furnish satisfactory evidence to the contrary, as appears by several cases. In re Cline [Case No. 2,896]; In re Stokes [Id. 13,474]; In re Riley [Id. 11,834].

Evidently the enlistment cannot, in any case, be regarded as conclusive of the age of the recruit unless it contains the certificate of the recruit under oath that he was of the required age, and the court is of the opinion that even where it contains such a certificate it cannot have the effect to exclude evidence as to the actual fact, if the recruit was under the age of eighteen years at the time of his enlistment, as the same section provides "that no

person under the age of eighteen shall be mustered into the United States service."

Express provision is made by section 11 of the act of March 16, 1802, that no person under the age of twenty-one years should be "enlisted or held" in military service without the consent of his parent, guardian, or master, if any he had, and the same section enacted that if any officer should enlist any person contrary to the true intent and meaning of that act, he should be liable to the penalty therein provided. 2 Stat. 135. Many changes were subsequently made in the details of that regulation, and especially during the war of 1812, not material to be noticed, as one of them contains a re-enactment of the substance of the original provision, and no one of them authorized the enlistment of a minor under the age of eighteen without the consent of the parent, guardian, or master, until the act of the 10th of December, 1814, was passed, which was approved only fourteen days before the treaty of peace was signed. 3 Stat. 146; 8 Stat. 218; 2 Stat. 792.

Consent in writing of the parent, guardian, or master, was required by the act last referred to, which was a supplementary act for the more perfect organization of the army during that war. Throughout that period it is clear that persons under the age of eighteen could not be enlisted or held to service in the army without the consent, oral or written, of the parent, guardian, or master; but section 1 of the act, making further provision for filling the ranks of the army, authorized commissioned officers in the recruiting service to enlist into the army any free, effective, able-bodied men between the ages of eighteen and fifty years, and the provision was that the enlistment should be absolute and binding upon persons under the age of twenty-one years, as well as upon persons of full age, where it appeared that the recruiting officer had complied with all the requisitions of the laws regulating the recruiting service. 3 Stat. 146. Provision was also made by section 3 of the act, that so much of section 5 of the prior act as required the consent in writing of the parent, guardian, or master to authorize the enlistment of persons under the age of twenty-one years, "shall be, and the same is hereby, repealed." Such consent in writing, after that, was certainly no longer necessary, and perhaps the better opinion is, that persons under the age of twenty-one years might be enlisted into the army under that act without any such consent, oral or written, as that required under prior laws. Concede all that, still it is clear, as is expressly admitted by the respondent, that the act repealing the provision requiring such consent was itself repealed by section 7 of the act fixing the military peace establishment, which became a law in less than three months after the provision in question was repealed. 3 Stat. 225.

War had then terminated, and congress proceeded without delay to reduce the army, as the congress on the 16th of March, 1802, had previously done, re-enacting many of the provisions of the former law, and prefixing the same title to the new act. By section 1 of that act it was provided, that the military peace establishment should consist of such proportions of artillery, infantry, and riflemen, not exceeding in the whole ten thousand men, as the president should judge proper, and that the corps of engineers as then established should be retained.

Section 4 of the same act prescribes the compensation, subsistence, allowance, etc., of the officers, non-commissioned officers, privates, etc., in the new military peace establishment, and provides in express terms that they shall be the same, except in certain particulars not material to be noticed, as are prescribed in the old law upon that subject. All the corps retained by that act were declared "to be subject to the rules and articles of war," and section 7 provides that "they shall be recruited in the same manner, and with the same limitations . . . . as are authorized" by the before-mentioned old law upon the same subject, and the act to raise for a limited time an additional military force. 2 Stat. 481.

Nothing can be plainer than the proposition that the new act fixing the military peace establishment of the 3d of March, 1815, repealed that part of section 1 of the act of the 10th of December, 1814, which made the enlistment absolute and binding upon all persons under the age of twenty-one years, as well as upon persons of full age.

Were counsel permitted to re-argue the case, it might perhaps be suggested that the court, in the Case of Riley [Case No. 11,834], decided that the act of the 10th of December, 1814, is still in force and unrepealed; but it would be a sufficient answer to that suggestion, if made, that the court, though it gave a pretty thorough review of the acts of congress upon the subject, did not refer to the act of the 3d of March, 1815, which is the repealing act, as is admitted by the counsel for the respondent.

Obliged to concede that the act of the 10th of December, 1814, was repealed by the act of the 3d of March, 1815, the next proposition of the appellant is that the latter act was also repealed by subsequent acts of congress. Support to that proposition is attempted to be drawn from the act of the 2d of March, 1821, and from the act of the 2d of March, 1833, the act of the 23d of May, 1836, and the act of the 5th of July, 1838, but it is so obvious that the proposition finds no such support as is supposed from anything contained in any one of those acts of congress, or from the whole combined, that it is not deemed necessary to reproduce any of their provisions. 3 Stat. 615; 4 Stat. 647; 5 Stat. 32; Id. 256.

Attention is also called to three opinions of the attorneys general, but the inquiries presented in those cases were widely different from the one before the court, and it is quite evident that the particular question involved

in this proposition was not examined at all in either of those cases. 5 Op. Attys. Gen. U. S. 313; 6 Op. Attys. Gen. U. S. 474; Id. 607.

Power was conferred upon the secretary of war, by section 5 of the act of the 28th of September, 1850, to order the discharge of any soldier of the army of the United States who, at the time of his enlistment, was under the age of twenty-one years, upon evidence being produced to him that such enlistment was without the consent of his parent, guardian, or master; but it is too clear for argument that that provision did not have the effect to repeal or modify section 14 of the judiciary act. 9 Stat. 507.

Express authority is also conferred upon the secretary of war by section 20 of the act of the 24th of February, 1864, to "order the discharge of all persons in the military service who are under the age of eighteen years at the time of the application for their discharge, when it shall appear, upon due proof, that such persons are in the service without the consent, either express or implied, of their parents or guardians," provided the applicant, his parent or guardian, shall first repay to the government, and to the state and local authorities, all bounties and advance pay received by him in consequence of his enlistment. 13 Stat. 10.

"May order the discharge," etc., are the words of that provision, but congress subsequently enacted that it should be construed to mean that the secretary of war "shall discharge minors under the age of eighteen years under the circumstances and on the conditions prescribed in section 20 of the former act." Id. 380.

Military officers are forbidden, by the same section of the act just named, to enlist or muster into the service any person under the age of sixteen years, with or without the consent of the parent or guardian; and the further provision is, that such person, if so enlisted or recruited, shall be immediately discharged upon repayment of all bounties received, and that such recruiting or mustering officer who shall knowingly enlist any person under sixteen years of age, shall be discharged the service, with forfeiture of pay and allowances, and shall be subject to such further punishment as a court-martial may direct.

Beyond all doubt the effect of that enactment is to make it the duty of the secretary of war, under the circumstances and on the conditions prescribed, to discharge such persons who are under the age of eighteen years at the time of their application, when it shall appear, upon due proof, that such persons are in the military service without the consent, either express or implied, of their parents or guardians, as provided in the former act, and the appellant contends that it vests in the secretary of war the exclusive jurisdiction to hear and determine such an application, but the court is entirely of a different opinion.

Important and inalienable liberties and privileges were either granted or secured to every order of men in the parent country, by the great charter, whose crowning glories are those essential clauses which protect the personal liberty and property of all the citizens, by giving security from arbitrary imprisonment, and from forcible spoliation, without due process of law.

Centuries afterward, the declaratory statute, called the petition of right, was passed, by which it was designed to subject even the sovereign to the power of the law, and bring the right of personal liberty within legal protection, and to afford additional guarantees against arrest without due process, illegal restraints, and arbitrary commitments.

Special reference ought also to be made to another fundamental statute which, with the two others previously mentioned, constitute the constitutional safeguards of personal liberty in the parent country. Prior to that enactment the courts had decided they could not upon habeas corpus either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council. 3 Bl Comm. 134.

Indignant at such a decision, the parliament enacted that any person committed even though by the king himself, in person, or by his privy council, should have granted unto him, without any delay upon any pretence whatsoever, a writ of habeas corpus, upon demand or motion made to the court of king's bench or common pleas, and that thereupon the court, within three court days after the return is made, should examine and determine the legality of such commitment, and should do what to justice might appertain in delivering, bailing, or remanding such prisoner. 3 Bl. Comm. 135.

Throughout that period, however, notwithstanding the errors of judicial decisions, and the culpable delays in the administration of justice, the writ of habeas corpus was the chief if not the only reliance of the citizen against illegal restraint and unlawful imprisonment.

Partial remedy for such evils in judicial administration was provided by the statute just referred to, which gave the courts jurisdiction, even though the commitment was made by the king or privy council, but other abuses had also crept into daily practice, which had in some measure defeated the benefit of that great constitutional remedy.

Judicial errors of the kind mentioned, when committed at a still later period, had the effect to arouse parliament a second time to a sense of the incalculable importance of that essential safeguard of civil liberty, which finally led to the enactment of the statute ever since known as the "Habeas Corpus Act," and as the second great charter of that country for the protection of the

citizen from unlawful imprisonment, and the aggressions of arbitrary power.

Reference is here made to judicial decisions and parliamentary acts, which preceded even the discovery of our own country; but when our ancestors immigrated here they brought with them, as a part of the common law, those great and essential guaranties and safeguards of civil liberty against unlawful imprisonment and arrest, without due process of law. They claimed the full possession of the rights, liberties, and immunities of British subjects, and, in their early legislative assemblies, insisted upon a declaratory act, acknowledging and confirming such rights, liberties, and immunities. 1 Story, Const. (3d Ed.) § 165; Ancient Char. 43, 214.

Guaranties and safeguards equally effectual are also found in the constitution of Massachusetts adopted in 1780, before the convention assembled which framed the federal constitution. Gen. St. Mass. 15–31.

When the constitution was ordained, it was declared by the framers that one of the purposes for which it was established was to secure the blessings of liberty; and it also provides that the privilege of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it; that the trial of all cases of impeachment shall be by jury; that no person shall be held for a capital, or otherwise infamous, crime, unless on a presentment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. Very strong doubts are entertained whether congress could constitutionally pass a law giving the exclusive power to the secretary of war to hear and determine such cases as those mentioned in the petitions before the court; but it is quite unnecessary to determine that question, as the court is of the opinion that the provision which requires the secretary of war to discharge such persons, when application is made to him, is in no respect repugnant to section 14 of the judiciary act.

Decided cases are referred to which give some support to the opposite theory; but it is not deemed necessary to give them much examination, as the question, in the judgment of the court, must turn upon the construction of the two acts of congress previously mentioned, when considered in connection with the act under which the petitions in this case were filed. Applications for discharge in such cases may be made by such minors to the secretary of war; and the provision is, that he shall order a discharge if it appears upon due proof that the applicant is in the military service without the consent, either express or implied, of his parent or guardian; but there is not a word in the section to show that the parent or guardian may not apply to the associate justice of the supreme court, or to the circuit judge, or to the district judge for the district, for the same relief which the secretary of war may grant.

Repeals by implication are never favored. On the contrary, the rule is that there must be a positive repugnancy between the provisions of the new law and the old to work a repeal by implication, and even then the old law is only repealed to the extent of such repugnancy. Wood v. U. S., 16 Pet. [41 U. S.] 363; U. S. v. Walker, 22 How. [63 U. S.] 311; 2 Dwar. St. 533.

Suppose it was otherwise, and that the theory that the authority given to the secretary of war to discharge such minors is inconsistent with section 14 of the judiciary act, still the conclusion would not benefit the appellant, as the petitions in these cases were filed under the act passed three years subsequent to the act which gives that authority to the secretary of war; and, by the act last mentioned, power to grant writs of habeas corpus, in all cases where any person may be restrained of his or her liberty in violation of the constitution or any treaty or law of the United States, is expressly given to the several courts of the United States, and to the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority conferred by the prior acts of congress. 14 Stat. 385.

Such an enactment evidently contemplates a judicial remedy, and indeed the writ of habeas corpus is everywhere regarded as a judicial writ, and the only one which is designed to procure liberation from illegal confinement. By all the forms, the writ is directed to the person detaining another, and commands the person to whom it is directed to produce the body of the prisoner, or person detained, together with the day and cause of his capture and detention, to submit to and receive whatsoever the court or judge awarding the writ may determine in that behalf.

Grant that, and it is still insisted by the appellant that the decree of the district court discharging the petitioners is erroneous, because the return shows that the petitioners are awaiting trial as deserters; but the decisive answer to that objection is, that no such defence was set up in the district court, nor was any evidence introduced in that court to support the allegation of the return.

Where the petition is filed and the case heard in the district court, the case can only be removed into the circuit court by appeal, and in that state of the case the jurisdiction of the circuit court is wholly appellate.

Power to re-examine the decree of the district court is all the power in such a case which is possessed by the circuit court; and such re-examination must be made upon the same evidence as that introduced in the district court, except in case where competent evidence was offered and excluded which should have been admitted. Errors of the

district court may be corrected; but it was not the intention of congress, in providing for an appeal, to give the party a new trial, unless the same should be ordered by the appellate court for some error committed by the district court.

Two irregularities are noticed in the proceedings which were not the subject of remark by either party at the hearing. Subsequently they were discovered by the court, and the attention of counsel was invited to the subject, with leave to each party to file an additional brief. Since that time, briefs on the one side and on the other have been received, and the subject attentively considered.

One of the errors is in respect to the return, which is not signed by the person to whom the writ is directed, nor does it contain any explanation in that behalf. Probably the returning officer is the commanding officer of the military post, and the proper one to make the return, but the necessity for any further inquiry into the matter is obviated by the waiver of the objection by the petitioners.

Petitioners in such a case may deny any of the material facts set forth in the return, or they may allege any fact to show that the detention is in contravention of the constitution or the laws of the United States. Instead of waiting till the return was made, and then making their answer to it, they set forth their response to it in their petition, but inasmuch as the allegations of the petitions are full and explicit to the point, and are also under oath, the court is of the opinion that the objection ought not to prevail in the appellate court, especially as it was not made in the district court, nor in the circuit court, until the attention of counsel, subsequent to the hearing, was called to it by the appellate court.

The decrees of the district court are respectively affirmed.

SEA WITCH, The (PORTER v.). See Case No. 11,289.

Case No. 12,597.

In re SEAY.

[4 N. B. R. 271 (Quarto, 82);[1] 4 Am. Law T. 16; 1 Am. Law T. Rep. Bankr. 244.]

District Court, D. Tennessee. Nov. 16, 1870.

BANKRUPTCY—DISCHARGE—AMENDATORY ACT.

1. Where a bankrupt applies for his discharge, his assets not being equal to fifty per cent. of the claims proved against his estate, which were contracted since January 1, 1869, *held*, that bankrupt shall be discharged from all debts provable against his estate which were contracted prior to January 1, 1869.

[Cited in Re Van Riper, Case No. 16,874.]

2. Discharge does not bar debts contracted since January 1, 1869, which have not been proved.

In bankruptcy.

By ALEX. S. BRADLEY, Register:

The original petition by the creditor, the Traders' Bank, was filed June 24th, 1869, and the debtor was adjudged bankrupt on the 19th day of November, 1869. On the 5th day of November, 1870, the meeting for hearing on petition for discharge was held, at which bankrupt attended and passed his last examination. There was no appearance or opposition by any creditor, and the assignee reported that he had neither received nor paid any moneys on account of the estate, and that the assets were not equal to fifty per cent. of the claims proved against said estate, contracted since January 1st, 1869, on which bankrupt was liable as principal debtor. It appeared that three proofs of debts on which bankrupt was liable, as principal debtor, had been filed, two of which had been contracted before January 1, 1869, and the other (or part of it) had been contracted since that date. No written assent was filed in the case. I certified that there was no opposition, and that it appeared to me that the bankrupt had in all things conformed to his duty under the act [of 1867 (14 Stat. 517)], and to all the requirements thereof except the requirement contained in the second clause of section 33, as amended by acts of July 27, 1868 [15 Stat. 227], and July 14, 1870 [16 Stat. 276].

The question is, under the above state of facts, whether a discharge shall be granted to the bankrupt, and if granted, what must be its form and its effect upon his debts contracted both prior and subsequent to January 1, 1869. The clause of section 33 referred to, as amended by act of July 27, 1868, is as follows: "In all proceedings in bankruptcy commenced after the 1st day of January, 1869, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, be filed in the case at or before the time of the hearing of the application for discharge."

Thus the law stood at the time of the commencement of the proceedings in this case. But before the hearing of the application for discharge, the act of July 14, 1870, was passed, which is as follows: "Be it enacted, etc., that the provisions of the second clause of the 33d section of said act, as amended by the 1st section of an act in amendment thereof, approved July 27th, 1868, shall not apply to those debts from which the bankrupt seeks a discharge, which were contracted

[1] [Reprinted from 4 N. B. R. 271, by permission.]

prior to the first day of January, 1869." Had not the last amendment been passed it is evident that no discharge could have been granted this bankrupt, as the obstacle to his discharge (and the only obstacle thereto) would have been the provision of said second clause, the obvious application and sole object of which was to prevent such discharge, except upon certain conditions respecting assets.

One of the two great objects to be effected by the bankrupt act is the discharge of a debtor who has fully complied with the requirements of the act, and it would seem to follow that if a particular restriction upon the right of a debtor to a discharge has been removed, then the right is immediately resumed to the full extent that it is unaffected by any remaining restriction. The time when this restrictive clause could have any operative force would be on the day of the hearing of the application for discharge, and in this case on that day there was no restriction on the bankrupt's right to a discharge, except with regard to his debts contracted subsequent to January 1st, 1869. Upon this state of facts I think a discharge should be issued to the bankrupt, modified to read as follows:

"Whereas, George W. Seay has been duly adjudged a bankrupt under the act of congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf respecting his debts contracted prior to January 1, 1869, it is therefore ordered by the court that said George W. Seay be forever discharged from all debts and claims which by said act are made provable against his estate, which were contracted prior to January 1, 1869, and which existed on the 24th day of June, 1869, on which day the petition for adjudication was filed against him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy."

The question whether the discharge should also bar those debts contracted since January 1, 1869, which have not been proved, I think must be answered in the negative for the following reason: By the terms of the last amendment it seems that the restrictive clause is left to operate with the same force and effect upon the debts contracted since January 1, 1869, as it previously did upon all debts, whenever contracted. Since, therefore, before the last amendment, no discharge at all could have been issued (even to bar debts not proved), if the assets did not pay fifty per centum of those which were proved, and the last amendment only modifies the action of the court respecting the debts contracted prior to January 1, 1869, it would seem to follow that there is no authority given to grant a discharge for any debts contracted subsequent to that date.

TRIGG, District Judge. I have examined the questions submitted in the foregoing certificate from Mr. Register Bradley, and I fully approve the opinion which he has given, and it is ordered that a discharge issue to the bankrupt in accordance therewith.

SEBASTIAN COUNTY (NATIONAL BANK OF WESTERN ARKANSAS v.). See Case No. 10,040.

Case No. 12,598.

SEBRING v. WARD.

[4 Wash. C. C. 546.] [1]

Circuit Court, Pennsylvania.[2] Oct. Term, 1825.

COSTS—TAXATION—TRAVEL PAY OF PARTY TO ACTION—ATTENDANCE.

The clerk of the circuit court for the district of Pennsylvania cannot charge in the bill of costs any compensation for the travel and attendance of the successful party, none such being allowed in the supreme court of the state. But he ought to tax one dollar and twenty-five cents a day for the attendance of each witness, and five cents a mile for their travelling to and from the court.

[Cited in Hathaway v. Roach, Case No. 6,213.]

[Cited in Good v. Mylin, 8 Pa. St. 56; Wier v. Myers, 34 Pa. St. 379.]

In taxing the bill of costs in this case, the clerk refused to allow to the successful party any compensation for his own attendance, and for his travelling expenses, because no such allowance was, or is allowed by the laws of the state. He also refused to allow to the party's witnesses more than fifty cents for every twenty miles travelling, and the same for each day's attendance; his opinion being, that the act of the 28th of February, 1799 [1 Stat. 624], is confined to witnesses in criminal cases, who are to be paid by the United States. The counsel for the successful party now appeals to the court.

WASHINGTON, Circuit Justice. The act of congress of the 1st of March, 1793, § 4 (Ing. Dig. 384 [1 Stat. 333]), declares, that there shall be allowed and taxed in the courts of the United States, in favour of the party obtaining judgment therein, such compensation for their travel and attendance, &c. as is allowed in the supreme, or superior courts of their respective states. But as no compensation whatever is allowed in the supreme court of this state to the successful party for his travel and expense, none can, under this act, be allowed.

2. As to the allowance to witnesses, this must depend upon the true construction of the act of the 28th of February, 1799. Ing. Dig. 389. The third section of the act of the 8th of May, 1792 [1 Stat. 275], allows compensation to grand and petit jurors, and fixes it at one dollar and twenty-five cents per diem

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

[2] [District not given.]

for attendance, and five cents for every mile going and returning; and to witnesses summoned in any of the courts of the United States, the same compensation as is allowed in the supreme court of the state where the particular court sits. The second section of the act of the 1st of June, 1796 [Id. 492], in addition to the compensation then allowed to jurors and witnesses by the above act and section, allows to each grand and petit juror for attendance fifty cents per diem, and to witnesses, for like attendance, the same sum. The ninth section of the act of the 28th of February, 1799, repeals the above two sections; and the sixth section, which is substituted for them, declares that the compensation to jurors and witnesses in the court of the United States shall be as follows, viz. to each grand and other juror, for each day he shall attend in court, one dollar and twenty-five cents, and for travelling, at the rate of five cents per mile, going and returning; and to the witnesses summoned in any court of the United States, the same allowance as is provided for jurors. Now as it has been decided in all the courts, including the supreme court of the United States, that this section in relation to jurors extends to civil as well as to criminal cases, it would seem necessarily to follow that it must equally extend to witnesses in civil cases. We are therefore of opinion that the clerk ought to allow, in the bill of costs for the witnesses of the successful party summoned in this cause, the sum mentioned in the above section for attendance and travelling.

Case No. 12,599.

SECKEL v. BACKHAUS et al.

[7 Biss. 354; 4 N. Y. Wkly. Dig. 49; 9 Chi. Leg. News, 161; 4 Cent. Law J. 125; 15 Alb. Law. P. 311.] [1]

Circuit Court, E. D. Wisconsin. Jan. 15, 1877.

COURTS— FEDERAL JURISDICTION — CITIZENSHIP— ASSIGNEE OF MORTGAGE.

Under the act of March 3, 1875 [18 Stat. 470], the United States circuit courts have jurisdiction of a bill to foreclose a mortgage in behalf of a non-resident assignee of such mortgage, though the assignor could not, by reason of citizenship, have filed such bill.

[Cited in Whiting v. Wellington, 10 Fed. 815.]

In equity.

The complainant filed a bill to foreclose a mortgage of which he was the assignee. The bill alleged that the mortgage was given to secure certain notes executed by the mortgagor, which notes and mortgage were sold and transferred by the payees and mortgagees named therein, and by written assignment and delivery came to the hands of the complainant. Defendant demurred on the ground that the court had not jurisdiction of the subject-matter of the action.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 4 N. Y. Wkly. Dig. 49, and 15 Alb. Law J. 311, contain only partial reports.]

Winfield Smith, for complainant.
E. Mariner, for defendants.

DYER, District Judge. By the demurrer to the bill in question is presented whether this court has jurisdiction of a suit in equity to foreclose a mortgage, prosecuted by a non-resident assignee, in a case where the assignor is a citizen of the state and district in which the mortgagor resides and the action is brought. This question must be answered as we determine the construction to be given to the first section of the act of congress of March 3, 1875, relating to the jurisdiction of circuit courts of the United States. 18 Stat. pt. 3, p. 470. That act (section 1), after providing that "the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and * * * in which there shall be a controversy between citizens of different states," declares that "no circuit or district court shall have cognizance of any suit founded on contract, in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." Prior to the passage of this act no suit at law upon a promissory note could be prosecuted in the federal court by the transferee or assignee of the note, in cases where the assignor, by reason of citizenship, could not have prosecuted such suit. By virtue of the enlarged jurisdiction conferred by the act, such an action may now be maintained by an assignee who is a citizen of another state, though it could not have been prosecuted by the assignor. Now, does the act give to the court jurisdiction to entertain a proceeding in equity in behalf of such assignee, to foreclose a mortgage given to secure promissory notes, in a case where the assignor could not, because of citizenship, have prosecuted such a suit?

In Osgood v. Chicago, D. & V. R. Co. [Case No. 10,604], the circuit judge of this circuit, in construing the act of March 3, 1875, regarded it as the intention of congress, by that act, to consolidate in one act all the previous general acts conferring jurisdiction upon the circuit courts, and at the same time to give the court jurisdiction in some cases where no previous act of congress had conferred it. By the act, not only is jurisdiction extended, but the right is given to remove causes from state to federal courts in cases where removals were never before authorized. The language of the first section includes suits of a civil nature in equity as well as at common law; and another section of the act contains new and ample provisions for acquiring jurisdiction of non-resident parties in suits for enforcement of equitable and other liens. Reference is made to these features of the

act, as indicative of its spirit and general scope. A mortgage given to secure the payment of a promissory note is a mere incident to the note. It is extinguished by payment of the note. It passes with a transfer of the note. The debt is the principal thing, and the mortgage is collateral. No defense involving the validity of the debt can be set up against a mortgage in the hands of an assignee which cannot be set up against the debt itself. A mortgage is attached to the debt, and follows its destinies and ownership. It is beneficially assigned, transferred, released, surrendered, re-issued and revived with the instrument evidencing the debt, and without any other forms or ceremonies than are requisite in case of the latter. Martineau v. McCollum, 4 Chand. 153; Croft v. Bunster, 9 Wis. 503; Blunt v. Walker, 11 Wis. 334.

Although it was formerly held by the supreme court of the United States that, in a foreclosure decree, it could not be adjudged that the mortgagor pay a balance that might remain unsatisfied after exhausting the proceeds of the mortgaged premises (Noonan v. Lee, 2 Black [67 U. S.] 500; Orchard v. Hughes, 1 Wall. [68 U. S.] 74), it is now provided by rule of that court that, in suits in equity for the foreclosure of mortgages, a decree may be rendered for any balance that may be found due, over and above the proceeds of sale, and execution may issue for the collection of the same ([Cross v. Del Valle] Id. 3). In view of the relation which the mortgage bears to the debt, it may be accurately said that an action to foreclose the mortgage is founded upon the debt. It rests upon the principal contract, which is the note, and its object is the recovery of the debt by exhausting the security, which is the incident; and, as we have seen, the security being exhausted, the debtor may be pursued in the same proceeding by execution for any balance against his general property.

In Sheldon v. Sill, 8 How. [49 U. S.] 441, cited in the argument, the court say that a mortgage is but a special security, and that the remedy obtained on it in a court of equity is but the satisfaction of the debt. "It is the pursuit, by action, of one debt on two instruments or securities, the one general, the other special." The jurisdiction invoked by bill to foreclose, is appealed to for recovery of the debt, the evidence of which lies in the principal contract, the note. The mortgage following the debt, the holder of the debt has the equitable right to the security, and can therefore foreclose. As the result of this view of the question, I hold that, under the act of 1875, this court has jurisdiction in a suit in equity to foreclose a mortgage given to secure a promissory note where the assignee and holder is a citizen of another state, and the maker a citizen of this state and an inhabitant of this district, though the assignor could not, by reason of citizenship, have brought the suit.

Demurrer overruled, with leave to answer.

NOTE. Although the assignment of a note secured by a mortgage carries with it the equitable interest in the mortgage, it carries only an equitable interest. Edgerton v. Young, 43 Ill. 464. The mere assignment of the mortgage by an indorsement thereon, without an assignment of the note, will not operate to pass the power of sale to the assignee, but it will still remain in the mortgagee. Hamilton v. Lubukee, 51 Ill. 415. Although no defense can be made to a promissory note transferred to an innocent purchaser before maturity, still when the assignee of such a note proceeds to enforce payment in a court of equity by foreclosure of a mortgage or other lien, he will occupy the same position that the payee would, and the maker may interpose any defense that would defeat a recovery in the hands of the payee. Thompson v. Shoemaker, 68 Ill. 256.

Case No. 12,600.

In re SECKENDORF.

[2 Ben. 462; [1] 1 N. B. R. 626 (Quarto, 185); 15 Pittsb. Leg. J. 450; 1 Am. Law T. Rep. Bankr. 122.]

District Court, S. D. New York. June, 1868.

BANKRUPTCY — ADJOURNMENT — EXAMINATION OF BANKRUPT — OBJECTIONS.

1. Where an order was obtained for the examination of a bankrupt and his wife, proceedings on which order were adjourned several times, during which time the bankrupt filed a petition for discharge, and obtained an order to show cause, but nothing was done on the return day of that order, but objections were afterward filed, and thereupon, on the day to which the examination had been adjourned, the bankrupt objected to being examined, on the ground that he had applied for his discharge, and the time to file objections to the discharge had expired: *held*, that the adjournment, without day, of the proceedings under the petition for discharge, terminated those proceedings, unless a new order was issued.

[Cited in Re Seabury, Case No. 12,573.]

2. The objections to the discharge might stand as properly filed.

3. The time to examine witnesses had not expired.

4. The time to file objections should be kept open by adjournments of any order to show cause, until a full opportunity for the examination of the bankrupt and his wife, and other witnesses, had been given.

[Cited in Re Jacobs, Case No. 7,160.]

[In the matter of Isaac Seckendorf, a bankrupt.]

By the Register:

[2] [I, Edgar Ketchum, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and is stated and agreed to by the counsel for the opposing parties, to wit: Mr. Du Bois Smith (substituted for Mr Kaufman), who appeared for the bankrupt, and Messrs. Brown & Estes, who appeared for J. Stadeker, a creditor of the said bankrupt.

[Facts: The petition was filed 21st November, 1861, and the first meeting of creditors

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

[2] [From 1 N. B. R. 626 (Quarto, 185).]

was held on return of the warrant, 30th January, 1868, when this creditor made proof of his claim. On the 3d of March order was made, on application of the creditor's attorney, for examination of the bankrupt and his wife, and the respective attorneys attended from time to time, and, by consent, adjourned, without examination, seven days in March, eight days in April, and five days in May, the last the 19th of May, when the bankrupt not appearing, nor his wife, adjournment was made by the register to the 26th of May. On the 18th of March, the bankrupt, on his petition for discharge, obtained order to show cause, &c., returnable to the 20th April. On the 15th of May, this creditor filed notice of appearance in opposition, the bankrupt's attorney being present, and saying that he did not object, but gave no consent thereto; and both attorneys then consented to postpone the said examination to 19th of May. On the 19th of May, this creditor filed his objections to the bankrupt's discharge. On the 26th of May, the present attorney of the bankrupt first appeared, and showing his substitution as such, he objected in writing to the examination of the bankrupt and his wife. First. Because the time to examine witnesses had expired, the bankrupt having applied for his discharge. Second. That the time allowed to file objections of the creditor had expired. The bankrupt has not attended or taken the oath under the 29th section [of the act of 1867 (14 Stat. 532)], nor has the assignee made return as to assets, nor have any proofs of publication of notice to show cause, &c., been filed. Nothing was done by the bankrupt on the 20th of April, required then for his discharge, and proceedings were then, after filing notice of appearance in opposition by another creditor, adjourned without day.

[Opinion: I am of opinion that the adjournments mentioned kept open the time for appearance in opposition, and for filing objections, and for making the examinations before ordered. An affidavit by the creditor's attorney and the objections of the attorney of the bankrupt are sent herewith.

[Respectfully submitted.] [3]

BLATCHFORD, District Judge. The adjournment without day, on the 20th of April, of the proceedings under the petition for discharge, terminated those proceedings, so far as any action under the order to show cause against the petition was concerned. The petition for discharge remains good, but nothing can be done under it, unless a new order to show cause is issued. The creditor who filed the objections to the discharge was not called upon to file them when he did, but they may stand as properly filed under the petition for discharge. All the creditors who shall have proved their debts will have a new day for filing objection, under the new order to show cause. The time to examine witnesses has not expired, and the time to file objections to the discharge should be kept open by adjourning any day which may be fixed for showing cause against a discharge, until a full, reasonable opportunity is afforded for the examination of the bankrupt and his wife, and other witnesses, if such examination is desired.

[3] [From 1 N. B. R. 626 (Quarto, 185).]

Case No. 12,601.

SECOMBE v. MILWAUKEE & ST. P. RY. CO.

[2 Dill. 469.] [1]

Circuit Court, D. Minnesota. 1873.[2]

RAILROADS — CORPORATE SUCCESSION — EMINENT DOMAIN—RIGHT OF WAY.

1. Under the legislation of the state, the Milwaukee & St. Paul Railway Company is the lawful successor of the rights of way obtained by its predecessor, the Minnesota Central Railway Company.

2. The proceedings on behalf of the railroad company to obtain the right of way over the lot in question examined; and it was *held* that they were sufficient to divest the title of the owner, upon the payment into court for him of the amount of compensation awarded for the property taken.

This action is brought to recover possession of lot 10, block 42, in the city of Minneapolis. Ovid Pinney and Hiram Osborne, it is conceded, were the owners in fee of the lot, August 19th, 1863. On August 9th, 1866, Pinney conveyed his interest, which was one-sixteenth, to Stewart, and on February 19th, 1870, Stewart conveyed to plaintiff. On February 15th, 1870, Osborne and wife by their attorney in fact conveyed their interest, fifteen-sixteenths, to plaintiff, so that he became the owner of all the interest Pinney held in the lot August 9th, 1866, and all that Osborne held July 15th, 1870. The defendant claims title as the successor to the rights and franchises of the Minnesota Central Railway Company. The latter company obtained all its corporate powers by the acts of the legislature of the state of Minnesota, passed March 8th, 1861, March 10th, 1862, and February 1st, 1864, and by virtue of these acts became vested with all the rights, powers and franchises of the Minneapolis & Cedar Valley Railroad Company. The Minneapolis, Faribault & Cedar Valley Railroad Company, the immediate successor of the Minneapolis & Cedar Valley Company, commenced proceedings, under the charter of the latter company, passed March 1st, 1856, to obtain the right of way for its railroad over lot 10, and a final judgment of condemnation in behalf of the Minnesota Central Railway, its successor, was entered December 22d, 1868, under the 20th and 22d

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

[2] [Affirmed in 23 Wall. (90 U. S.) 108.]

sections of the act of February 1st, 1864. The amount of damages awarded was paid on that day, and it became, as it is claimed, entitled to the exclusive use, control, possession, and absolute title to this lot, which by proper instruments of conveyance, passed to the defendant.

Mr. Secombe, plaintiff, in person.
F. R. E. Cornell, for defendant.

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

NELSON, District Judge. It is urged against the validity of the defendant's title: First. That the Minnesota Central Railway Company, in whose favor the judgment of condemnation was entered, was not a corporation. Second. That all of the proceedings taken to obtain the title to the lot were void.

The first point came before the supreme court of the state of Minnesota in the case of First Division St. P. & P. R. Co. v. Parcher, 14 Minn. 297 (Gil. 224). And it was expressly settled by the court in that case that the act creating the St. Paul & Pacific Railroad Company a corporation, and vesting it with all the rights and franchises of the Pacific Railroad Company, which had become forfeited to the state, was not in violation of section 2, art. 10, of the constitution. The act of February 1st, 1864, comes clearly within the reasoning of the court in that case, and created the Minnesota Central Railway Company a corporation by virtue thereof.

In regard to the second proposition, many points are urged against the judgment of condemnation, which, in our opinion, although they might be proper subjects for the consideration of the legislature, cannot affect its validity.

It is necessary to a proper understanding of the position of the defendant to give a history of the proceedings which resulted in the judgment of condemnation.

The Minneapolis, Faribault & Cedar Valley Railroad Company, by act of March 10th, 1862, succeeded to all the rights of the Minneapolis & Cedar Valley Railroad Company, and on the 19th day of August, 1863, commenced proceedings under the charter of the latter company, passed March 1st, 1856, to condemn the lot in controversy. Section 10 of this act requires in substance that the company should give thirty days notice of an application to the judge of the district court of the state for the appointment of three commissioners to appraise the damages for right of way, by publishing the same in a newspaper in the county through which the road runs, and after the appointment of the commissioners it should be their duty "to cause ten days' notice of their meeting to appraise the damages of any land through which said road may run, to the owner or claimant thereof." Provided, that "the notice * * shall be in writing, and delivered to the owner or owners; * * or, if non-residents, then said notice shall be published in the nearest newspaper to where said land is situated, at least four weeks before making said appraisement."

The necessary steps were taken by the company, commencing by the publication of a notice on the day aforesaid, that application would be made to the judge of the district court of Hennepin county, October 26th, 1863, for the appointment of three commissioners. They were appointed by the judge on that day, and gave the required notice of their meeting on December 2d, 1862, to appraise the damages, personally, upon Pinney more than ten days before their meeting, and upon Osborne, who was not found by the person authorized to serve the notices, by publication of the same for a period of four weeks in a newspaper printed in Minneapolis. The commissioners met December 2d, 1863. Pending these proceedings, and before the commissioners had made and filed their award, the act of February 1st, 1864, was passed, changing the name of the company to that of the Minnesota Central Railway Company, and provided in section 22 of the same, that "the proceedings heretofore taken by said company for the appointment of commissioners to assess damages for lands taken by said company, and the proceedings of such commissioners are hereby confirmed, and all proceedings in all cases pending at the time of the passage of this act shall be carried on and completed in conformity with the provisions of this act, and with the same effect as is specified in this act, and all proceedings heretofore taken in any case may be filed with the clerk of the district court of the county where the lands to which they relate are situated, with the like effect."

The company, after this, perfected and completed their proceedings under section 20 of this act of February 1st, 1864. The commissioners made their report April 8th, 1864, awarding the damages, and filed it on the 16th of the same month. On July 26th, 1867, the judge ordered the money awarded to be paid into court for the benefit of the parties interested, and judgment was entered condemning the property for the use of the railroad company, and the money was paid, under this order, December 22d, 1868.

We have examined the record and the proceedings in this case, from the commencement to the final entry of judgment, and find that the company pursued the statutory provisions.

It is urged by the plaintiff that section 10 of the act of March 1st, 1856, and section 20 of the act of February 1st, 1864, when followed, can confer no right to the property sought to be taken, for the reason that no proceedings in court are contemplated by those sections, and no notice of the award when filed is to be given, and no personal

service of notice is to be made upon non-residents.

The legislature of this state was the only competent tribunal to judge of the mode and manner of exercising the right of eminent domain within the constitutional limits, and having given this company authority to obtain rights of way and depot ground, by section 10 of the act of 1856, and section 20 of the act of 1864, it is our duty only, no questions being raised as to the constitutionality of these sections, to see that the authority was not exceeded. The statute is the guide for the action of the company, and if we find that it has conformed to the provisions of the several acts laid down for its government in these proceedings, it is not our province to question the discretion exercised by the legislature.

In our opinion, the judge of the district court, who appointed the commissioners, obtained jurisdiction of the proceedings. The notices were sufficient. The necessary steps were taken to secure the attendance of claimants to the lot, at the meeting held to consider the amount of damages. The 22d section of the act of February, 1864, confirmed the proceedings previously taken. No appeal was taken from the award to the court, where there might have been a trial by jury, and it is now too late for the owners or their assigns to object.

It is true that after the order was made for judgment, and that the money be paid into court, several months elapsed before it was done; but this delay, in our opinion, does not invalidate the judgment. No action was taken to have it set aside. The award was confirmed without complaint, and the owners cannot now attack it here on that account.

The record of judgment has been completed, and the same, with a certificate by the clerk of satisfaction as against the company, has been filed with the register of deeds of Hennepin county. This record is declared by law to be evidence of title to the lands described therein, in the same manner and with like effect as deeds to real estate.

The title to this lot is perfect in the defendant, in our opinion, and judgment must be entered accordingly. Judgment accordingly.

A writ of error was sued out from the supreme court [where the judgment of this court was affirmed. 23 Wall. (90 U. S.) 108].

NOTE. As to condemnation of right of way: Eidemiller v. Wyandotte [Case No. 4,313]. Relation of new corporations to the old corporations in Minnesota, see Hopkins v. St. Paul & P. R. Co. [Id. 6,690].

SECOMBE MANUF'G CO. (ROBERTSON v.). See Case No. 11,928.

SECOND NAT. BANK v. HUGHES. See Case No. 4,811.

SECOND NAT. BANK (MAIN v.). See Case No. 8,976.

Case No. 12,601a.

SECOND NAT. BANK v. NEW YORK SILK MANUF'G CO.

[13 Reporter, 355.] [1]

Circuit Court, D. New Jersey. Feb., 1882.

REMOVAL OF CAUSES—ATTACHMENT—CREDITORS—JURISDICTIONAL AMOUNT.

1. After the filing of the petition and bond required by the act of congress, the jurisdiction of the state court over a removable action is at an end, and subsequent proceedings in the state court are coram non judice, and an amendment or other order by it will not affect the decision of the federal court upon a motion to remand.

2. Where a state attachment act provided that, before appearance by the defendant, all creditors who applied to be made parties to the suit should share pro rata in the fund, and that after such appearance all other creditors should be debarred from coming in upon the fund, *held*, that after the removal of the attachment suit to the federal court the latter had no power to strike off the defendant's appearance in order to let in the other creditors.

3. In such case, where the amount in dispute between the plaintiff and the defendant is within the jurisdiction of the circuit court, such jurisdiction is not ousted by the fact that the claims of applying creditors are less than $500. Such claims will be considered as incidental only, and the court, having jurisdiction of the main controversy, will dispose of the incidents also.

Motion to remand to state court.

At the suit of the plaintiff two writs of foreign attachment, dated respectively October 3d and 29th, 1881, issued out of the circuit court of the county of Hudson, against the defendant, a New York corporation. Under these writs the sheriff attached the property of the defendant. Motions to dissolve the attachments were made and refused. After the attachment other creditors of the defendant entered rules under the New Jersey practice to be allowed to prove their claims and share in the attached fund. Some of these claims were in amount under $500. The plaintiff presented a petition for the sale of the attached property as perishable, and for the appointment of an auditor to distribute the proceeds. Before this application was disposed of the case was removed to the federal court, the defendant entering an appearance in the state court, and the record being filed in the federal court December 15, 1881. On December 31, 1881, on motion the state court allowed the defendant to withdraw its appearance in the attachment suits. The defendant now moves to remand the suits.

George S. Hastings, for the motion.

Preston Stevenson, for plaintiffs in the attachments.

John W. Taylor, for creditors.

NIXON, District Judge. A motion is made by the party which petitioned for the removal to this court to remand the cases again to the state court. I find nothing in

[1] [Reprinted by permission.]

the proceedings or in the order of the state judge setting aside the appearance of the defendant which would justify me in granting this motion. The suit is clearly within the class of cases where removal is authorized. The parties are citizens of different states. The matter in dispute exceeds $500, exclusive of costs. The petition is in due form, and no complaint has been made against the bond. The petition was signed by the defendant and presented to the state court, and the bond executed and filed for no other purpose than to transfer the case from that court to this, and jurisdiction ceased there and attached here as soon as these steps were taken. This has been the general tendency and result of the judicial construction of the removal statutes, both in the state courts and in the courts of the United States, for some years past. Dill. Rem. Causes, § 15. In the case of Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, it is distinctly held that the jurisdiction changes when removal is demanded in proper form; that it is transferred from the state to the federal court, and that all questions relating to the fact of removal are to be determined by the last named court. It results from this that all proceedings in the state court after a due demand for removal are coram non judice. Its jurisdiction is lost, and no order by that court can be invoked as ground for an application to remand.

The suggestion was made, that if I could not find grounds for remanding the case, I could at least authorize the defendants to withdraw the appearance heretofore entered in the Hudson circuit, and thus allow outside creditors to come in and share in the proceeds of the attached property. But there are two difficulties in the way. The first is, that all the presumptions lead to the conclusion that the appearance was authorized in effect if not in express terms. The second is, that the attaching creditors have acquired an exclusive lien upon the property under the attachment act of New Jersey, of which this court has no right, if it had the disposition, to deprive them. The provisions of sections 14, 35, 38, and 39 show that when the defendant in the attachment enters an appearance without the execution of the bond prescribed by section 33, the property seized remains in the custody of the officer and under the control of the court, and is held for the satisfaction of the plaintiff, and of such persons as before the appearance have entered rules to be admitted under such attachment. All other creditors are then excluded from participation in the proceeds of the res, until the plaintiff and such applying creditors are paid in full. This may seem inequitable and unjust to meritorious creditors, who have for any reasons refrained from becoming parties to the proceedings, but it is the reward which the law gives to the diligent. When the defendant gave instructions to the attorney to take the necessary steps to effect the removal of the suit into this court, it was probably not aware of the legal consequences of the act, and had no thought of depriving other creditors who had not become parties to the attachment proceedings of sharing in the pro rata distribution of the assets. In other words, a mistake in law was made; but I do not understand that I have any power to correct mistakes in law, if by so doing I take away from other innocent parties any rights which they had acquired by such mistakes.

It was further urged that there was a practical difficulty arising from the peculiar features of the New Jersey act, in holding that this court had jurisdiction over a suit begun by attachment in a state tribunal. Section 38 makes it lawful for any defendant to enter an appearance to the suit of the plaintiff or of any applying creditor without giving bond for the return of the property, and, after such appearance, the suit or suits of the plaintiff and creditors shall proceed in all respects as if commenced by summons. The difficulty, earnestly pressed, was that some of the applying creditors had entered a rule for claims for less than $500, and that there was no power in this court to exercise jurisdiction in a controversy between parties in a removal case where the sum in dispute was less than that amount. No question of that kind has yet appeared in the case, and it will be time enough to meet it when it arises. I have no hesitation, however, to anticipate it by saying that the jurisdictional limitation to $500 has reference to the sum in dispute between the plaintiff in attachment and the defendant; that the right of applying creditors to have their claims adjusted is a mere incident to the principal suit, and that the court having acquired jurisdiction over the principal suit necessarily exercises it over the incident.

Motion to remand refused, and sheriff of Hudson county appointed auditor to sell property.

[NOTE. This matter was again before the court on a motion to strike out the appearance entered by the defendant company to two writs of foreign attachment against the property of said company. The motion was refused. 11 Fed. 532.]

Case No. 12,602.

SECOND NAT. BANK v. OCEAN NAT. BANK.

[11 Blatchf. 362; [1] 30 Leg. Int. 433.]

Circuit Court, S. D. New York. Nov. 10, 1873.

BAILMENT—GRATUITOUS BAILEE—RECORD—EVIDENCE OF WHAT.

1. A bank applied to another bank to perform the service of loaning some money for it, requesting that a proper charge be made to it for the service. The latter bank made the loan. It had a running account with the former bank, but made no charge, in such account, for such service, and determined to accept no compensation therefor from the former bank, but did not communicate such determination to the former bank. The loan was made on a deposit of securi-

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

ties with the latter bank, which, while in its custody, were stolen from it. The depositor of the securities, in a suit against him by the former bank, recovered against it a judgment for the value of the excess of the securities beyond the amount of the loan, which it paid. It then brought this suit against the latter bank, to recover the amount of the money loaned and the amount so paid to the depositor, on the ground that the latter bank was negligent in allowing the securities to be stolen. *Held*, that the latter bank was not a gratuitous bailee of the securities, as between it and the former bank.

[Cited in Davisson v. Ford, 23 W. Va. 628.]

2. The record of the suit brought by the depositor of the securities against the former bank was offered in evidence in this suit, on the part of the plaintiff, not only to prove the quantum of damages sustained by the plaintiff in consequence of the loss of the securities, but to prove the liability of the defendant for such loss: *Held*, that such record was not evidence of such liability.

At law.

Lewis Waln Smith, John K. Porter, and John Sessions, for plaintiff.

Noah Davis, for defendant.

SHIPMAN, District Judge.[2] This case was tried by the court, the parties having, by written stipulation, duly filed, waived a trial by jury. The plaintiff is a banking corporation, organized under the national currency act, approved June 3d, 1864 [13 Stat. 99], and located and doing business at Erie, in the state of Pennsylvania. The defendant was, at the several times hereinafter mentioned, a banking corporation, organized under the same act, and located and doing business at the city of New York, and was a correspondent of the plaintiff, the plaintiff keeping an account with said defendant in the transaction of its ordinary banking business in said city of New York. On the 2d of June, 1869, the plaintiff wrote to the defendant, asking if the plaintiff could loan, through the defendant, twenty-five or fifty thousand dollars, on call, on government bonds, as security, to which the defendant answered, that the defendant could make loans on governments, "strictly on call," at 6 per cent. On the 8th of June, the plaintiff wrote to the defendant that Robinson, Cox & Co. would deposit with the defendant $30,000, and requested the defendant to loan the same strictly on call, at 6 per cent., on government bonds. The defendant received, and, on the 10th of June, loaned, said $30,000 to Smith, Randolph & Co., of New York, strictly on call, at 7 per cent., on government bonds, as collateral security, and advised the plaintiff of the making of the loan, and the terms and kind of security, but did not disclose the names of the borrowers, till after the loss hereinafter mentioned had occurred. On the 12th of June, the plaintiff acknowledged the receipt of the advice, and directed the defendant to add $20,000 more to the loan, which sum the plaintiff remitted for that purpose. The defendant received this sum also, and, on the 14th of June, loaned the same to the same parties, on the same terms and like security, and advised the plaintiff that the loan was made, but did not disclose the names of the borrowers till after the loss hereinafter mentioned had occurred. On making these loans, the defendant received from Smith, Randolph & Co., as collateral security, on the first loan, $30,000, at par value, in government bonds, and, on the second loan, $20,000, at par value, in government bonds. These bonds, on their receipt, were placed in an envelope by themselves, marked with the plaintiff's name, and a statement of the loan and the envelope containing the same were put in a tin trunk of the defendant's, called "the government trunk," in which the defendant then, and had for a long time, kept its own government bonds and other like securities, which trunk was deposited in one of the safes in the vault of the bank, called "the burglar-proof safe," in which the said trunk and its contents were, and for a long time had been, accustomed to be kept by the defendant. In said trunk and safe the defendant ordinarily kept, and was accustomed to keep, large amounts of its own government bonds and securities, and like securities deposited with the defendant for safe keeping. Between the night of Saturday, the 26th of June, and the morning of Monday, the 28th of June, 1869, the defendant's bank was broken into, and entered by burglars, who broke and forced open the doors of the vault of the bank, and broke open the safe containing said trunk, and stole and carried away the contents of the trunk and a large amount of securities and money, amongst which were the government bonds deposited for said loans, and upwards of $50,000 of the property of the defendant, all of which were lost. The loans made, as above stated, for the plaintiff by the defendant, were the only transactions of that kind between the parties, all other transactions between them being the ordinary and regular business between banks. In remitting the $20,000, to be added to the former loan, the plaintiff wrote to the defendant: "Charge our account whatever is satisfactory for the above, and we will be satisfied," but the cashier of the defendant, after consulting with the president, directed the book-keeper to make no charge, as the plaintiff kept a large balance with the defendant, and, although the money loaned passed through the account of the plaintiff, to its debit and credit, yet no charge for making such loans was in fact made therein, and the monthly account afterwards, and after the loss, rendered to the plaintiff in due course of business, contained no charge; but the defendant never communicated to the plaintiff in any way, except by this omission to charge therefor in such monthly account, that no charge had been made for negotiating this loan. The defendant had been the cor-

[2] This case was decided by Judge W. D. Shipman as of a date anterior to his resignation of his office, but the formal opinion was not filed until the 10th of November, 1873.

respondent of the plaintiff for about two years. The defendant's bank had been in the same location, and its business carried on in the same building and rooms, and with the same vaults and safes, during that period. The cashier of the plaintiff was, during that period, frequently in the city of New York, and, when in the city, was often at the defendant's bank, and on intimate business relations with the defendant, and knew the general manner in which the defendant's business was conducted, and the mode of keeping its accounts, but not the degree of care it exercised in keeping its own funds and securities, or those entrusted to it by others. After the robbery of the defendant's bank, and on or about the 23d of October, 1869, the plaintiff brought suit against Smith, Randolph & Co., in the supreme court of the state of Pennsylvania, to recover the moneys so loaned to them on said call loans made by the defendant. Smith, Randolph & Co. appeared and defended said action, and, amongst other things, alleged that said bonds delivered by them as collateral to said loans were lost by the negligence of the agent of the plaintiff, the Ocean National Bank, with whom the same were on deposit, by means of the robbery of said bank. Afterwards, and on or about the 13th of January, 1871, the said action was brought to trial in said court before one of the justices thereof, and a jury; and the question tried therein, and submitted to the jury, was, whether the Ocean National Bank, the agent of the plaintiff in said action, was guilty of negligence or want of ordinary care, in the keeping of said bonds so deposited with it, the court charging the jury that the plaintiff, the Second National Bank of Erie, was, as between it and Smith, Randolph & Co., liable for negligence and want of ordinary care in the keeping of said bonds. The jury found for the defendants on said issue, and rendered a verdict in favor of Smith, Randolph & Co., against the plaintiff, for $9,991 56, that being the excess of the value of said bonds over and above said loan of $50,000, upon which verdict judgment was entered in due form against the plaintiff, for $9,991 56, and $310 50 costs, which judgment was afterwards, and on or about the 21st of March, 1871, paid and satisfied by the plaintiff. The plaintiff produced and proved the record of said judgment, and of the charge of said court, in evidence, on the trial of the action. The defendant herein was not a party of record to said action.

On the evidence given on the present trial, the defendant was not guilty of negligence, as alleged by the plaintiff, unless said record is conclusive evidence of that fact. After the commencement of said suit, and the joining of issue therein, and before said trial, the plaintiff notified the defendant, in writing, as follows: "Second National Bank of Erie, Erie, May 24th, 1870. D. R. Martin, Esq., Dear Sir: On my return home, after an absence of some days, I find your letter of the 12th inst., and note its contents. The suit was continued to December term, which will give counsel ample time to prepare the case. I cannot see but your board could, with equal propriety, decline to entertain the claim of Mr. Stevenson, cashier, for services, as to refuse to pay Mr. Davis. Contrary to the legal advice and opinion of Messrs. Cram, Robinson & Co., after several interviews with yourself and Mr. Davis, your counsel, we adopted your suggestions as to the course to be pursued for the recovery of our money, with the offer made, on your part, to turn in the services of your counsel, free of expense to us, and, in addition, to give us all the assistance you could in the matter personally. You are certainly aware that quite a large portion of the time occupied and expense incurred taking testimony in New York, was for the purpose of meeting and refuting the insinuations made by the defendants' counsel, that he would make it clear before a jury, that the officers or employees of the bank committed the robbery. They may be able to make some such impression upon a jury, from the fact of the loss being so disastrous to depositors, and so small an amount of the bank's property taken. If the instructions of our letters of June, 1869, to loan, on call, $50,000, on government collaterals, had been complied with, and the collaterals surrendered, on call, to their owners, we would have had no trouble or expense. But, in the suit, we are met by an affidavit of defence, of which I herewith send you a copy. You will notice that the defendants say: 1st, that your bank did not lend them our money; 2d, that, through the gross laches and negligence of the Ocean National Bank and her agents, the collaterals were lost or stolen, and, therefore, the defendants are not bound to repay the loan; 3d, that, on settlement with them, the Ocean Bank recognized the justice of setting off the loss of the bonds against the loan, and that the loan of $50,000 was paid to the Ocean Bank, with interest. Now, these defences and such as these concern the Ocean Bank. If we fail to recover because of any one of them, we will have recourse to your bank. You already have notice to intervene in this suit, but, in view of your letter, we repeat our request, that the Ocean Bank intervene, with all the evidence, counsel and other means it deems proper to sustain this case against this defence. Our bank will do the best it can to sustain this suit and recover the money, but ask you to give notice to your directors of our position. As to expenses, we should not pay any of the court expenses, or evidence, or counsel, with such grounds of defence as exist in this case. But, in view of the misfortunes of the Ocean Bank, our bank will easily be induced to be liberal in settling the costs. We will not abate our energy to bring this suit to a successful result, and hope to receive the same reassurance from your bank. I note the arrest of O'Kell, on sus-

picion of being connected with the robbery of the Norwalk National Bank. I would not be at all surprised if it comes to light that he is the man that planned and executed the robbery of the Ocean. There are many circumstances that look in that direction. The depositing of his box in the vault, gave him some opportunity to get the combinations of your lock, and his box not having been disturbed, are straws that show which way the wind was blowing. Very respectfully, Wm. C. Curry, Cashier." "Philadelphia, December 7th, 1870. C. S. Stevenson, Esq., Prest. Ocean Nat. Bank of the City of New York, Dear Sir: The suit of the Second National Bank of Erie v. Smith, Randolph & Co., pending in court here, for the recovery of certain loans made through your bank, as agent, is down and marked for trial on the 19th inst. You and your counsel are aware of the evidence which has been taken in said suit upon both sides, and the purpose of now writing is to afford the Ocean Nat. Bank an opportunity to produce any other testimony upon the trial which she may desire; and the purpose is also to put the Ocean Nat. Bank upon notice, that, if the Second Nat. Bank of Erie should fail to recover against S., R. & Co., in the present suit, it will be by reason of the negligence of the Ocean Bank, and in which case the Erie Bank will hold the Ocean Bank for the amount of the said loans and interest. Very respectfully, Lane & Roney, Attorneys for Second Nat. Bank of Erie." After the recovery of said verdict and entry of judgment thereon, the plaintiff served on the defendant a notice in writing, offering to allow the appeal of said suit by the defendant, and to transfer the management and conduct of such appeal to the control of the defendant and its attorneys. While said suit was pending, the defendant, at the request of the plaintiff, furnished, at its own expense, and paid, an attorney and counsellor, (he being the regular counsel of said bank, and familiar with the facts and details of said robbery,) to assist and advise in taking the testimony in the city of New York, by deposition, before a commissioner, and also to be present and assist in the trial of said cause, but the defendant, at all times, denied its liability for the loss of said bonds, and while the defendant did not, in fact, take charge of, or control, the said suit in the supreme court of Pennsylvania, the defendant did unite with the plaintiff in the trial of said cause, and rendered all the aid and assistance in its power. The plaintiff, at all times, claimed and insisted to the defendant, that the latter would be liable to the former in case Smith, Randolph & Co. should recover of the plaintiff for the loss, or should succeed in setting off the amount of the loss against the sum loaned to them. The defendant recommended the plaintiff to bring the said suit in Pennsylvania. The amount of money deposited by the plaintiff with the defendant amounts, with interest to November 10th, 1873, to $65,446 50. The judgment recovered by Smith, Randolph & Co. against the plaintiff amounts, with interest, to $12,-281 74. This makes a total of $77,728 24. The plaintiff has sustained damages, by reason of said loss of said bonds, in the amount of the sums loaned and the amount so paid upon the verdict and judgment in the supreme court of Pennsylvania, including interest to November 10th, 1873, to the amount of $77,728 24.

(1.) The claim made by defendant, on the argument, that, upon the facts above found, the Ocean Bank must be deemed, in judgment of law, a gratuitous bailee, as between it and the plaintiff, does not command my assent. The plaintiff accompanied its application to the defendant to perform the service of loaning the money with the remarks: "Charge our account whatever is satisfactory for the above, and we will be satisfied." It is true, that the president and cashier of the defendant decided not to charge anything for the service, inasmuch as the plaintiff kept a large balance with the defendant. This was very natural. The plaintiff had long been the correspondent of the defendant, and, as this was a single transaction, of this particular character, attended with slight trouble and no unusual risk, the defendant might well execute the agency free of charge. But, as the plaintiff coupled the request to transact the business with a promise to pay a reasonable charge therefor, and the defendant accepted the agency without communicating to the plaintiff the fact that it declined compensation, the plaintiff had a right to assume that it accepted the position of an agent for hire. It is too late, after the enterprise has miscarried, for the defendant to repudiate this relation, and set up the claim that it was a mere voluntary or gratuitous service which it undertook to perform, and thus shelter its miscarriage under the rule of inferior duty which the law applies to agents who act without compensation. The argument of the defendant on this point was, of course, to maintain that it was a mere voluntary agent, rendering only a gratuitous service, and, therefore, only liable for gross negligence. But, I am satisfied that this claim is unsupported by the facts found.

(2.) A graver and much more difficult question arises on the effect to be given to the record of the suit in Pennsylvania, which the plaintiff proved and gave in evidence. This record was undoubtedly admissible to prove the quantum of damages which the plaintiff has suffered in consequence of the loss of the bonds. The authorities on this point, which will hereafter be cited, seem to be pretty uniform and decisive. But, the plaintiff claims that it is conclusive not only as to the measure of damages but as to the liability of the defendant in this action. As a general rule, a judgment rendered in a suit between two persons cannot affect the rights of a third,

unless the latter is a privy in blood, estate or law. Case v. Reeve, 14 Johns. 79. There is no privity between the present defendant and either of the parties to the record offered in evidence, arising out of their relations to the subject-matter of this controversy. The present defendant was simply the agent or servant of the present plaintiff, in loaning the money to Smith, Randolph & Co., and in receiving and holding the custody of the bonds pledged to secure the repayment of the loan. In doing this, it was, as we have already seen, the agent of the plaintiff. The bonds having been stolen while in the custody of the Ocean Bank the borrowers refused to repay the loan unless their bonds were returned to them, and the Erie Bank brought suit against them, to recover the amount. They set up, by way of defence and counterclaim, that the bonds were lost through negligence and want of ordinary care on the part of the Erie Bank, acting through its agent, the present defendant, and recovered judgment for the amount by which the value of the bonds exceeded the amount of the debt. The court, in that case, held, that, the question of negligence being made out, the loss was chargeable to the creditor, and constituted an equitable claim which extinguished the debt, and that the debtors, Smith, Randolph & Co., were entitled to recover the excess. The result, therefore, was a judgment by a third person against a principal, for the misconduct of his agent. The precise question to be disposed of here is, whether such a judgment is conclusive evidence for the principal, in a suit brought by him against his agent, to recover the damages to which the former has been subjected by the negligent manner in which he executed his agency. No case has been cited which sustains this proposition. The case of Kinnersley v. Orpe, 2 Doug. 517, which has been so often cited and commented upon by judges and text-writers, does not support the plaintiff's claim on this point. That was a suit against the agent, for an act commanded by the principal. On the trial, a judgment against another agent of the principal, for a similar act, also commanded by the latter, was produced in evidence. The first suit was trespass for fishing in the plaintiff's fishery. The defendant justified as the servant of one Cotton, setting up the right of the latter to the fishery in question. Judgment having gone for the plaintiff, a new trial was sought and denied. Cotton, in order to have another trial of the same question, involving the same title, commanded another servant to repeat the trespass. Suit was again brought and, on this second trial, the same justification was set up, and the record of the former judgment was produced in evidence. No other proof was offered. The plaintiff claimed that this record was conclusive proof of his exclusive right to the fishery, and the judge so held. On a rule to show cause why a new trial should not be granted, the court reversed the decision and held that it was evidence, but not conclusive. Even this latter proposition has been doubted, and only assented to on the ground that, in point of fact, Cotton was the real defendant in both cases, and the act which constituted the ground of the second action was committed by his direction, for the express and only purpose of again testing the legal right involved in the first. For all substantial purposes, the second suit stood upon the same ground, as both had been brought against the principal instead of his servant. Case v. Reeve, 14 Johns. 79, 82. A question involving the principle now under consideration has often arisen on objection to the testimony of witnesses who sustained the relation of master or servant to one of the parties, the objection being based on the ground that the witness would be liable over in the event of a recovery. The case already cited from Johnson is an example. McClure v. Whitesides, 2 Cart. (Ind.) 573. See, also, Gevers v. Mainwaring, Holt, N. P. 139; Miller v. Falconer, 1 Camp. 251. In Green v. New River Co., 4 Term R. 589, the court of king's bench held, that verdicts against masters were evidence in actions brought by them against their servants, as to the quantum of damages, but not as to the fact of the injury or negligence. In the notes to Duchess of Kingston's Case, 2 Smith, Lead. Cas. (5th Am. Ed.) 685, after an elaborate review of the authorities, it is said, that: "A judgment is always admissible as proof of the existence or extent of the obligation it imposes on one person, even when incompetent to prove that the burden ought to be shared by another. When, therefore, a recovery is had against a master for the tortious act of his servant, or against a surety in consequence of a breach of contract by the principal, it will be evidence of the amount of loss resulting from the default, although not that the default was committed." Whether such a recovery would be conclusive evidence of the amount of damages we need not stop now to enquire, as there is no dispute, in the present case, on that point.

I am well aware that there are cases which hold that, where one person is responsible over to another, either by positive law or express contract, and the latter is cited in to contest a suit, the judgment, if obtained in good faith, will be conclusive against him. Bank of Owego v. Babcock, 5 Hill, 152; Littleton v. Richardson, 34 N. H. 179. These cases, are, however, clearly distinguishable from those involving the liability which arises out of the relation of principal and agent.

It has been decided that a judgment in an action of trespass against the principal for the act of his servant, rendered upon a trial of the merits of the case, is a bar in a suit against the servant for the same act. Emery v. Fowler, 39 Me. 326. But the principle involved in that case, and others of a similar character, is very different from the one

now under consideration. As between a third party and a principal and agent, the last two constitute but one legal entity, there being a complete legal absorption of the agent in the principal. The act for which redress is sought, although done by the agent, is the act of the principal, and, where the latter is exonerated, the liability of the agent is extinguished. But it is obvious that a judgment against the principal cannot settle the rights or liabilities of the principal and agent to each other, growing out of their legal relationship. These rights and liabilities may depend upon mutual relations arising out of the terms of the agency, which in no way interest third persons, and which would not be drawn into, or in any way settled by, a recovery against the principal. The very act of the agent upon which the liability of the principal to a third person rests as a ground of recovery, may be done with the consent, or connivance, or express command of the principal. It follows, from these views, that the judgment of the supreme court of Pennsylvania, in favor of Smith, Randolph & Co., against the present plaintiff, is not evidence that the defendant is liable in this action.

Judgment must, therefore, be rendered for the defendant, with costs.

SECOND NAT. BANK OF NEW JERSEY (UNITED STATES v.). See Case No. 16,248.

Case No. 12,603.

SECOND NAT. BANK OF ST. LOUIS v. GRAND LODGE OF FREE & ACCEPTED MASONS.[1]

Circuit Court, E. D. Missouri. March Term, 1875.[2]

CORPORATIONS — POWER TO HOLD PROPERTY — LEGISLATIVE RESTRICTIONS.

[A statute incorporating a Masonic association with power to acquire and hold real and personal property to the amount of $50,000 (Act Mo. Feb. 13, 1864, Laws 1863–64, p. 387), contains an implied prohibition against the purchase of property to any greater amount; and an executory contract entered into by such corporation to assume the payment of $200,000 worth of bonds of another corporation in consideration of receiving stock of that corporation to the same amount cannot be made the basis of any liability, even in favor of persons who had purchased such bonds upon the faith of the contract.]

[This was an action by the Second National Bank of St. Louis against the Grand Lodge of the State of Missouri of Free and Accepted Ancient Masons.]

TREAT, District Judge (charging jury). Gentlemen: Under the views which the court entertains concerning the law of this case as it will be stated to you, it is not necessary to detain you long. This is an action against the Grand Lodge of the State of Missouri of Free and Accepted Ancient Masons, and is brought against it in its corporate capacity. On the 13th of February, 1864, the legislature of the state of Missouri incorporated the defendant here, the grand lodge, and gave it very few strictly limited and defined powers; and, so far as this action is concerned, the essential power was one "to acquire, hold, possess, use, occupy, and enjoy real and personal estate to the amount of $50,000, and to sell, convey, or otherwise dispose of the same, according to the laws, rules, and regulations of the aforesaid grand lodge, with power to sue and be sued in all courts and places; to have a common seal." The second section contains a provision "that the corporation shall be exempt from the requirements of certain sections in the general act concerning corporations, and shall have power to loan the money of the grand lodge at a legal rate of interest, provided that the power hereby granted shall not be used for banking, insuring, or doing anything not expressly granted by the provisions of this act." Now, so far as this action is concerned, the essential limitation upon its powers is one that restricts the defendant in the purchase of real and personal estate to the amount of $50,000. When that statute was in force, the grand lodge of Missouri, on the 14th of October, 1869, passed this resolution: "Resolved, that this grand lodge assume the payment of the $200,000 bonds issued by the Masonic Hall Association, provided that stock is issued to the grand lodge by the said association to the amount of said assumption of payment of this grand lodge, as the said bonds are paid." On the 12th day of February, 1853 [Laws 1853, p. 263], the legislature of the state of Missouri incorporated a body under the style of the "Masonic Hall Association," with a capital stock of $50,000, to be increased at the will of the stockholders to any amount not exceeding $200,000, and shares of $20 each. This body was made capable of acquiring and holding any and every kind of property whatever, for the purpose of building a Masonic hall in the city of St. Louis, and to sell the same, or otherwise dispose of it; to have the power of making contracts, to sue and be sued, etc. The fifth section provided that "the stock of this association shall be considered personal property, and transferable according to such rules and under such restrictions as the board of directors may by their by-laws direct." The statute having declared that the stock of the Masonic Hall Association was personal property, and the charter incorporating the defendant (the grand lodge) giving it power to purchase real and personal estate to the amount of $50,000, it would follow, in the opinion of the court, that a contract on the part of the grand lodge to purchase property at one time to the extent of $50,000, or to purchase stock to the extent of $50,000, would

[1] [Not previously reported.]

[2] [Affirmed in 98 U. S. 123.]

be within the lawful powers of the defendant, and could be enforced; but the fundamental idea underlying all corporation law in this country is that corporations have no powers other than those which are conferred by a fair construction of their charters, and that it is the duty of courts to guard against constructive powers and implied powers of those bodies, and to keep their wings clipped to the legal corporate standard fixed by their charter or the law. Now, then, we instruct you that when the legislature of the state of Missouri said to this body, "You may purchase property to the amount of $50,000," that impliedly prohibited the purchase of property to any greater amount, and that the most favorable view that can be taken of the resolution of October 14, 1869, on which this action essentially rests, is that it authorized a purchase of $200,000 of this stock, to be paid for by the assumption of these bonds. This is an entire transaction; that is to say, if this resolution is valid for any purpose, it is valid in its whole extent, and therefore to undertake to authorize the acquisition of property by this defendant to the amount of $200,000 was in direct contravention of its charter. It is not a case where this contract has been executed and the property actually acquired by deed, in which case it might well be that, although it exceeded $50,000, no one but the state, whose franchise had been violated, could take advantage of it. But this action is brought upon this resolution as an executory contract. The stock has not been acquired, and by the terms of this resolution was not to be acquired until the grand lodge (the defendant here) has paid the bonds; so that this action rests essentially upon this resolution as an executory contract,—one to be performed in the future by the defendant; and to allow this action to be maintained would, in the opinion of the court, overthrow the limitation which the legislature put upon this body in respect to the amount of property which it had authorized it to acquire. This was the charter in force when this resolution was passed. On the succeeding 22d day of March, 1870, the legislature passed an act entitled "An act to reconvey to the Grand Lodge of Ancient Free and Accepted Masons in the State of Missouri the college grounds and the property of the Missouri Military Institute at Lexington" [Laws 1870, p. 60]; and that act, after making provision for the conveyance of the property, contains two provisos: "That on the acceptance of the deed to be accepted under section 1 of this act, the state shall not be liable under any former act or contract for the payment of any sum or sums of money to said institution; and provided further, that said grand lodge (which is the corporate body) upon the acceptance of said deed, shall be, and is hereby, authorized to own property of any value not exceeding $300,000." Now, this act would not be binding upon this corporation until it was accepted by them, and it would have to be accepted by the corporate body that next met in the fall of 1870, in October, when a resolution was passed by that body, as I understand it, repealing the resolution of October, 1869, assuming the payment of these bonds in consideration of stock to be received.

Without going into the full statement of our reasons, we instruct you that that act, under any construction we are able to give it, does not have the effect to validate this resolution of assumption; so that, inasmuch as there was no corporate power to pass the resolution of 1869, it cannot form the basis of any liability on the part of the defendant. In order that the whole case, if it shall go beyond this court, may be before the appellate court, we also instruct you in respect to another question in this case. The language of the resolution is: "That this grand lodge assume the payment of the $200,000 bonds issued by the Masonic Hall Association, provided that stock is issued to the grand lodge by the said association to the amount of said assumption of payment by this grand lodge as the said bonds are paid." It seems that on the 1st of June, 1869,—which was the June preceding this resolution,—the Masonic Hall Association issued and negotiated bonds secured by a first mortgage on their property, payable at 15 years, on their hall, for $140,000. Prior, also, to this resolution they had executed $60,000 second-mortgage bonds, payable at five years. These last bonds, at the time this resolution was passed, were in the hands of certain creditors of the Masonic Hall Association as collateral security. Now, we instruct you that under these circumstances this resolution cannot be the foundation of any action on the part of the holders of these bonds, although the present holders may have acquired them after this resolution was passed, and on the strength of it.

Your verdict, therefore, will necessarily be for the defendant.

[The judgment of this court was affirmed by the supreme court, where it was carried on writ of error. 98 U. S. 123.]

Case No. 12,604.

SECOR v. The HIGHLANDER.

[19 How. Prac. 334.]

District Court, S. D. New York. Nov. 14, 1855.

MARITIME LIENS—EFFECT OF AGREEMENT FOR EXTENSION CONTRARY TO STATUTE.

[A maritime lien under a state law, for materials and repairs, with a provision against extension of the time allowed for the lien, is not defeated by an agreement to take payment in a promissory note, if no note has in fact been given or tendered.]

[Cited in The Kate Tremaine, Case No. 7,622; Young v. Merchants' Ins. Co., 29 Fed. 275.]

The libel in this case was filed to recover for work done and materials furnished by the libelants to the steamboat. A contract in writing was made between the owner of the boat and the libelants on the 2d of February, 1855, by which the libelants agreed to build and put on board the steamboat a boiler, and do certain other work, for which the owner agreed to pay $4,400 as follows: $1,000 on March 1, $1,000 on April 1, $1,000 when the boiler was put on and all the work completed, and the balance in a note payable three months from the completion of the work. The boat was to run between New York and Albany. The work was finished June 6, 1855. The three cash payments were made, but the note for $1,400 was never given or tendered. Some extra work was done to the boat, the amount of which was disputed, and, the agents of the libelants coming to receive payment of both claims, the owner offered to give a note at three months for $2,500 in satisfaction of both. This was denied, and the libel then filed. The respondent claimed that the libelants, by agreeing to receive a note at three months from the completion of the work, had waived the lien given them by the state law upon the boat for the $1,400. For the rest it was admitted that he would have a lien.

Mr. McMahon, for libelants.
Benedict, Scoville & Benedict, for claimant.

HELD BY THE COURT: That if it can be fairly inferred from the stipulations of the contract that the libelants meant to trust to the personal responsibility of the owner, the contract is inconsistent with the exercise of a lien, and the same is waived. [Raymond v. Tyson] 17 How. [58 U. S.] 53. And it would also be waived if an unconditional credit were given for the payment extending beyond the time for which a lien is given by the state law. [Peyroux v. Howard] 7 Pet. [32 U. S.] 324. That the fair import of the lien law of this state is that the material man shall have a lien for what the owner agrees to give him in payment for his work and materials, provided that which is agreed to be given is by the agreement to be given before the expiration of the time allowed by law for the lien to exist. That the owners of the Highlander agreed to pay the libelant by a note at three months, to be given when the work was finished, and for the fulfillment of that payment the libelant had a lien; and if the note for $1,400, at three months, had been given or tendered by the owner, the lien would have ceased, and in that case there would have been a credit extending beyond the time allowed by the state law for the existence of the lien. But, the note not having been given or tendered, the libelants still have a lien upon the boat, as well for the balance upon the contract as for the extra work. Decree for libelants, with a reference to ascertain the amount.

Case No. 12,605.

SECOR v. TOLEDO, P. & W. R. CO.

[7 Biss. 513; 4 Law & Eq. Rep. 283; 9 Chi. Leg. News, 393. 409; 2 Cin. Law Bul. 223; 25 Pittsb. Leg. J. 14.] [1]

Circuit Court, N. D. Illinois. July 31 and Aug. 29. 1877.

CONTEMPT — INTERFERENCE WITH PROPERTY IN HANDS OF RECEIVER—INTERFERENCE BY STRIKERS.

1. Property held in trust by the court for the purpose of protecting it pending its foreclosure, and over which a receiver has been appointed, is in the possession of the court, and any interference with it is punishable as a contempt.

2. Where a railroad is in the hands of a receiver, and the employés of another road who have struck, or any other persons prevent the employés of the receiver from working, they commit a contempt of court and are to be treated in as summary a manner as if the contempt were committed in the actual presence of the court.

[Cited in U. S. v. Anon., 21 Fed. 770; Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 816. Cited in brief in U. S. v. Debs, 64 Fed. 738. Cited in Re Acker, 66 Fed. 295.]

[Cited in Quidnick v. Chafee, 13 R. I. 430.]

[This was a bill in equity by James E. Secor against the Toledo, Peoria & Warsaw Railroad Company.]

A bill was filed in 1874, in the circuit court of the United States for the Northern district of Illinois, for the foreclosure of a mortgage, given by the Toledo, Peoria & Warsaw Railway Company, and in January, 1875, a receiver was appointed by the court to take charge and possession of the railway and other property of the corporation, who was required by the court to operate the road. The receiver soon after entered upon the discharge of his duties, and has ever since, with the exception hereafter named, operated the road as the officer of the court. During the railroad strikes, which occurred during the latter part of July, the employés of the Toledo, Peoria & Warsaw Railway Company did not in any manner participate in the disturbances. They were at all times willing to perform their duty, and continued their work till prevented by force or intimidation of others not connected with the railroad. Fearing that violence would be used to obstruct the running of trains, application was made to the court for assistance to keep and retain possession of the railroad property in the hands of the receiver, and an order was accordingly made by the court conferring the necessary authority on the marshal to accomplish that object. Notices were conspicuously posted in Peoria, advising all parties of the fact that the railroad was in the custody of the court, and that all interferences with it by unauthorized persons would be summarily punished. A deputy of the marshal was sent to Peoria on the 26th of July, with instructions to carry into effect the orders of the

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 4 Law & Eq. Rep. 283, contains only a partial report.]

court. On that day a mob of strikers and others, at Peoria, assembled at the depot, some with clubs, sticks and other weapons, and by threats and force took possession of the trains of the company, and arrested for a time all the operations of the road. They refused to permit the employés of the company to attend to their usual services in the conduct of trains, but on the contrary, took forcible control of them either by themselves or by intimidation of the employés of the company. Mack, one of the defendants, was particularly active in obstructing the running of the cars, and was known to be one of the principal leaders. Several of these persons were attached, as for contempt, in interfering with the property in custody of the court, through its receiver, and a hearing was had before the circuit and district judges. By common consent the witnesses for and against the alleged obstructionists, as well as themselves, were heard orally in court. It appeared satisfactorily, as well by the proofs introduced as by the admissions of the parties, that they had all taken part more or less actively in the stoppage of trains.

[2] [The court held, in accordance with all the authorities, that the appointment of the receiver, and the order to him to take possession of and operate the road, was exclusive in its character, and by its terms necessarily prohibited all interference with the road by unauthorized persons, and that such interference was of itself a contempt of the court and of its authority. The custody of the receiver was that of the court. The court further ruled that these parties must be presumed, as in other cases, to intend what was the necessary result of their acts; that obstructing the railroad trains of the company by force, and preventing their employés, by intimidation and threats of personal violence, from continuing their work, was not only illegal, but criminal, and it was not competent for them to say that they did not intend a contempt of the court. That was a conclusion of law from an act done. A man could not enter the court and insult suitors and witnesses, and then escape from the consequences of the contempt committed by claiming, even though such was the fact, that he believed he was only in the presence of another court, as a mayor's or a justice of the peace. And as a man, by perpetrating some outrage in an ordinary assembly, as a public meeting, would not be guilty of a contempt of court, even though he might believe he was in the presence of a court, so, on the other hand, if it were done in court, it would not cease to be a contempt of its authority, how much soever he might be persuaded he was not in its presence. Whether it was a willful and persistent contempt would be for the court to consider in meting out punishment for the offense. The position of the court, then, was that these defendants, in taking possession by violence of the trains of the company, and by intimidating the employés, and thereby preventing the receiver from executing the orders of the court, were guilty of a contempt of court, and that if they were informed of the fact of the possession of the receiver as the officer of the court, it was an aggravation only of the offense, and did not of itself constitute the offense.] [3]

Mark Bangs, U. S. Dist. Atty., for the United States.

J. N. Jewett, for receiver.

Michael C. Quinn, for defendants.

DRUMMOND, Circuit Judge. I think the evidence in this case leaves no doubt that all these persons participated in a common object, which was to prevent the running of the trains of the Toledo, Peoria & Warsaw Railway Company. On the evening of Wednesday, the 25th of July, there was a meeting where Mack and Ennis, two of the defendants, were present and took part, the object of which was to prevent the operation of the railroads at Peoria. That purpose seems to have been carried out on the following day; and others from some cause or other, were induced to join them in this common object. It is a little remarkable that not one of these men now before the court was actually in the employ, at the time, of any railroad company, and that but one of them seems to have ever been employed by a railroad company at Peoria. Mr. Ennis, a short time before, had been employed by the Toledo, Peoria & Warsaw Railway Company.

We all acknowledge the rights of labor. It is simply the right of the man who performs labor to obtain the best price he can from his employer, and not to dictate terms to the employer. The rights of labor result from an agreement made among men, not by an order, or a dictation from one man to another. The rights of labor as thus understood, we all admit, and it is not improper perhaps, to call those rights sacred. But when it is claimed that the right of labor consists in not only refusing to labor, but in interfering with the labor of others we, of course, can have no feeling of respect for any such right as that. It is unlawful; it is criminal; it affects all the relations of life, and strikes at the root of everything in which the right of labor consists. I suppose that it was under the claim of protecting the rights of labor that these men interfered with the right to labor of the employés of the Toledo, Peoria & Warsaw Railway Company.

This was the pretext. But how absurd and unreasonable it was, we all must now acknowledge. It is impossible for the court to lose sight of the consequences of the acts of these defendants. It was not interference merely with private property, held by an individual, which had simply a private object to accomplish, but it was interference with

[2] [From 9 Chi. Leg. News, 393.]

[3] [From 9 Chi. Leg. News, 393.]

property which had a public object to accomplish. It was employed in transporting property, persons, and the United States mail. It was at once a means of communicating intelligence and carrying on the business of the country. These railroads are among the principal means of modern civilization by which the business of a country is transacted. Therefore when a man interferes with a property whose object is so important, which affects so materially all the relations of society, he commits as great an offense against the rights of individuals and against the rights of the public, as can well be imagined.

It is impossible to estimate the damage which has been done to this country within the last ten or fifteen days by just such acts as these defendants have performed. We have to consider further that these defendants have interfered with a property held in trust by this court, for its protection while a proceeding by foreclosure was going on for the purpose of enabling those who have a right to the property to obtain it by purchase by decree of this court. While thus in possession of the court, it is like public property, and the court can allow no interference whatever with it from any foreign source. The receiver who holds it is the officer of the court, and can do nothing with it without sanction of the court.

And then, in relation to the transportation of the mails by means of railroads: It is true that it appears by the evidence in this case that these defendants were willing that the mail car should go, but it must be borne in mind that the mail car can only go in such a way as to enable the railroad to transport the mail, when there are other cars accompanying it. It is not practicable, as a general thing, for a railroad to transport a mail car by itself, because that would be attended by serious loss. So that, while nominally they permitted the mail car to go, they really, by preventing the transit of other passenger cars, interfered with the transportation of the mail.

It is not usual in cases of this kind for a court, even though it is clear that there has been an unwarrantable interference with the property held by it, to impose very severe penalties, provided the parties manifest regret and repentance for what has been done. It is to be presumed that all these parties who participated in this act of violence do now regret what they have done. But in one sense every offender regrets after he has committed an offense, and particularly if he sees that punishment or penalty will follow. These men all knew that they were doing wrong. It is not possible, if they possessed ordinary intelligence, that they did not know that they were violating the law; that the tendency of what they did was to interfere with all the business of the country and do incalculable injury to the whole community.

What I wish to impress particularly upon them is, that it is incomprehensible to every man of any intelligence, any man who can sympathize even with what are sometimes called the wrongs of labor, that there can be any pretense of right in preventing other men from labor. As I said before, it is an absurdity to say that you can protect the rights of labor by trampling upon the rights of labor. All these men were willing to work for this railroad. They were willing to run these trains. They were prevented from running them by these defendants and men who acted in co-operation with them.

We all admit what is called the hardness of the times. We know that the business of the country has been disturbed; that for men who are willing to labor, it is difficult at all times to find an opportunity to labor, or to get such compensation for their labor as they desire. But when we hear of the compensation which is actually given to many of the employés of our railroads, we certainly must be somewhat surprised at the dissatisfaction which is shown by so many of them. I venture to say that a majority of the people of this country live and support their families on much less than is given to many of the employés of the railroads. It would be well to call to mind how many of the people of this country live on $400, $500, $600, or $700 a year, and support their families.

While we admit, therefore, that there may be some reason for dissatisfaction, still there are two sides to every question of this sort, and it is one of those questions that must be settled by a common agreement between the employer and the employed—by the demand and supply of labor. And this must be borne in mind, that we cannot change the nature of man. We cannot change his capacity and habits. We cannot make all men alike. Superiority of talents, of skill, of industry, of capacity for business, will always have its influence. It cannot be expected, therefore, that even all those men who will labor, are able to, or will, obtain the same price. There must be differences. Different kinds of labor receive different kinds of compensation. It is not possible that brakemen or switchmen can obtain as much as the superintendent. But it is one of the glories of our common country that every man, if he will only exercise the talents and the industry which he possesses, has the opportunity for rising as high as his talents, his industry and his capacity for business will enable him.

We have the custody and control of this property. It is seldom that it has been necessary for a court to interfere by the infliction of punishment upon those who have unlawfully and wrongfully obstructed the operations of a railroad, or, indeed, of any property which is in the hands of the court. In punishing these defendants we simply discharge a public duty. A public example must be made, and it must be made emphatically, from the nature of the offense which these defendants have committed—the interference with the whole public business of the country. In this

circuit there is a large number of railroads in the control of the court. Any interference with the running of those roads, any obstruction to a train interrupts the business of the whole northwestern country; prevents men from communicating with each other. It prevents merchandise from passing from point to point. It is, therefore, indispensably necessary that the court should not tolerate any interference, however slight, with the management of railroads thus in its custody. At the same time the court does not lose sight of the tempest of folly, and passion, and crime—because we must characterize it as crime; the law so regards it—which has swept over the country; we are not insensible to the influence which that may have over unthinking men.

But this thing must be stopped, and, so far as this court has the power to do it, it shall be stopped. We feel, both of us, that we would be wanting in the duty which we owe to the public and to the ultimate owners of the property which we have thus in possession, if we did not visit with severe punishment those who interfered with it. A fine imposed upon these men would really be no punishment, for I suppose most of them, perhaps all them, are unable to pay a fine. The only punishment that we can impose upon them is imprisonment. That is something they can feel and understand, and that, although not usual in cases of this kind, still, owing to the considerations that I have already mentioned, we feel that we must inflict upon these defendants. There is a difference among them. Mack, one of them, seems to have been the principal leader, and he looks as though he might be the leader in such a mob. He seems to have assumed his natural position. He therefore was pre-eminently guilty of the offense of which all are guilty. Ennis, who perhaps committed an overt act, more criminal, in one sense, than any of the rest of these defendants—namely: by drawing a weapon and threatening to shoot an engineer—seems to be a man who is in the habit of drinking too much, and was under the influence of liquor at the time, so as to affect his reason. But for that, he perhaps would have been equally guilty with Mack.

The defendant Mack will be imprisoned in the jail of the county for four months, and the others for two months, subject to the further order of the court.

Upon a further hearing of the case, August 29, 1877, the court gave the following opinion:

DRUMMOND, Circuit Judge. The defendants were brought before the court some time since, for being engaged with others at Peoria, on the 26th of July last, in forcibly stopping the trains of the Toledo, Peoria & Warsaw Railway Company, then in the possession of a receiver appointed by the court, and for preventing by intimidation and violence, the employés of the company from performing their duties in the running of the trains. They were found guilty of the offense, and a penalty imposed by the court.

The order of the court, appointing the receiver and putting him in possession of the railway and its appendages, required him to operate the road; indeed, he was appointed receiver for that special purpose among others; and the possession was exclusive in its nature—that is, it in effect prohibited any disturbance of the possession by unauthorized persons, so that the order of the court placed the railway in the possession of the receiver more effectually, if possible, under its safeguard and protection than personal property in the hands of the marshal, held by virtue of an ordinary process, which requires him to do some specific act in relation to it. This is not usually ordered directly by the court, but is issued by the clerk at the instance of counsel, or of the party, and the court or the judge may in fact have no knowledge of its existence. But it is issued under the seal of the court and by its authority, and when the officer holds property under it, the process is a protection, both to him and to the property. Where property is delivered to a receiver, the authority of the court is directly impressed on it by its order or decree, entered of record, which is considered notice to all persons that it is in custody of the court through its receiver. The marshal, under ordinary process, holds the property for a limited time, subject to the requisition of the writ. The receiver holds it under a continuing order, which remains in force till rescinded or modified by the court.

The possession by a receiver of a railroad is not like the ordinary case of his possession of an estate or of a house to collect rents. The obligation cast on the receiver by the decree of the court is personal, and demands the continued, hourly control of the rolling stock by him, and therefore it is that any forcible deprivation, even for a time, arrests the order of the court by taking from him the means of compliance. The property being thus in possession of the court, it becomes its duty to protect the receiver in its use by all the means in its power, and if he is deprived of it, to restore it to him by the necessary orders or writs of assistance to the marshal. And if that is unavailing, it can call on the general government to aid in enforcing its lawful process or orders. And among the means at the disposal of the court are summary proceedings against persons who unwarrantably interfere with property in its custody in disobedience of its orders.

Therefore, it is, that it has been considered by all the authorities, the supreme court of the United States among others, that any wrongful disturbance of the possession of property held by a receiver, is a contempt of the authority of the court, and punishable as such. So rigid is the rule that the court will not tolerate a seizure of the property by the process of another court, even though it may appear the party seeking it may have the

right to it. Any one having a claim on it must make it in the court that holds the property, or obtain its authority to sue elsewhere.

The right of a court to punish summarily by fine or imprisonment for contempt of its authority, is undoubtedly a power requiring great caution in its exercise, but it has always been considered, that in some form and with some limitations it ought to exist. The court must have the means without delay to protect itself, its process and the property in its custody by punishing those who wrongfully and forcibly disturb the possession held under its authority. Something must be left to the discretion of the court. It must be a legal discretion uninfluenced by passion or feeling. The object must be to maintain its authority for the present, and in the future—not merely to punish. When this is attained, penalty should cease. The court should decide it as free from personal feeling as though it were a mere question of property between parties litigant.

Under our federal judicial system the power of the court to punish for contempt is limited to the misbehavior of any person in its presence or so near as to obstruct the administration of justice; the misbehavior of its officers in their official acts, and the disobedience or resistance by any person to any lawful writ, process, order, rule, decree or command of the court.

In addition to the order of the court placing the railway in possession of the receiver, there was on the 26th of July a special order of the court requiring the marshal to prevent any interference with it and to assist the receiver in retaining it, and restore it if he were deprived of the possession. But if the marshal in restoring the property to the receiver, took possession of it, he, like the receiver, would hold it under the authority of the court, the difference being in the one case, as in the ordinary writ of assistance, it would be held by the marshal to be delivered to the receiver, and in the other by the receiver to execute the orders of the court, prescribing his duties pending the litigation—each being the officer of the court subject to the performance of his own special functions.

Such has been the embarrassed condition of the railroads in this part of the country within a few years past, that many of them are in the possession of the circuit court of the United States for this circuit, the gross annual earnings of which amount to more than fifteen millions of dollars. This statement shows the magnitude of the interests intrusted to our care. The theory is that our possession is only temporary, but there is generally such a multitude of claims to be adjudged in each case, and so great are the difficulties in arranging conflicting rights among the mortgagees preparatory to a sale and reorganization, that it sometimes happens in spite of the earnest efforts of the court to hasten the sale by foreclosure, that they remain in the custody of the court for some years. The Toledo, Peoria & Warsaw Railway Company has been in the hands of a receiver for more than two years.

It will be seen, therefore, that the forcible interruption of the traffic of so many railroads for days, was a very serious matter, and the judges were of opinion, after the fact, that it was not possible to pass by so great an outrage upon the rights of property in our possession, by a reprimand or mere nominal punishment of the guilty persons. If it had been a few cars or engines that had been interfered with, it would have been different, but there was the business of many railroads, for a time struck down by men who bade defiance to the law and to the authority of the court. There seemed to be a necessity to exercise the power vested in the court. If such things could be repeated, then was not only a great wrong done to those whose interests we were obliged to protect, but the government itself had ceased to accomplish one of the chief objects of its creation.

We could take no part in any supposed conflict between capital and labor, if there can be a conflict in a country where the laborer of to-day may be the capitalist of to-morrow. All men are equal before the law. Neither the capitalist nor the laborer has a right to violate it. We personally desire that the laborer in all departments of life should obtain adequate reward for his services. What that should be, it was not for us as a general question to decide. We can only say that we found no sufficient excuse for the wrong done to the property in possession of the court. The men who committed it had no claim whatever to it, and if they had, the result would have been the same. Those who may be said, in one sense, to own the property of the Toledo, Peoria & Warsaw Railway Company, and who will be entitled to its proceeds when sold, are the bondholders under the mortgages, but though many of them may be capitalists, still even they would be guilty of a contempt if they violently took possession of the property while in the custody of the court. It is the act committed that constitutes the offense, whether by capitalists or strikers, the forcible seizure of property not in the possession of an individual or of a corporation, but of the court.

But while these circumstances have influenced us to impose a penalty, we do not desire to continue it, if the purpose has been effected—the maintenance of the authority of the court and the prevention of similar offenses hereafter. And after due consideration we have come to the conclusion, the court still being in session, that we may remit the penalty and discharge the defendants.

The railroads have resumed their ordinary traffic. There seems at present no danger of future trouble. Railroad employés have returned to their duties. It is to be hoped that the lessons of the time have not been lost on the public, nor on employers or employés. The defendants have expressed regret for

what has been done, and promise that the offense shall not be repeated. And then it is to be remembered that we consider only the disobedience of the orders of the court and not the general criminal act. And though the wrong done was great, still it is but justice to say that at Peoria, as elsewhere in this circuit, there was no destruction of property as at Pittsburgh; on the contrary, there were in some places earnest efforts made by the strikers to preserve property.

Again, we do not lose sight of the fact that at Peoria, as elsewhere in the circuit, persons who aided in depriving the receiver of control over the property, did not fully realize the nature of the offense as against the court. They must to a great extent be held answerable for all the consequences which followed from their wrongful and violent acts, but it must be admitted that after a time, when they fully comprehended that they were obstructing the orders of the courts and the possible results, they relinquished the control of the trains and allowed the receiver to retake possession. In Peoria this was sooner accomplished than in some other places. So, that in view of these considerations, and with the concurrence of the district attorney and the counsel of the receiver, all the defendants will now be discharged, on each one giving his own recognizance to observe the laws of the United States, and to abstain from all wrongful interference with any property in the possession of a receiver of this court, for one year from this time.

NOTE. See, also, King v. Ohio & M. Ry. Co. [Case No. 7,800].

The authorities on the subject of contempt of court by interfering with property in the hands of a receiver can be found in 2 Daniell, Ch. Prac. 1743, and in High, Rec. §§ 163–174.

Case No. 12,605a.

The SECRET.

[See 15 Fed. 480.]

Case No. 12,606.

In re SECTIONAL DOCK CO.

[The case reported under above title in 3 Dill. 83. is the same as Case No. 3,536.]

SECTIONAL DOCK CO. (SALVOR WRECKING CO. v.). See Case No. 12,273.

SECURITY INS. CO. v. The MILWAUKEE. See Case No. 9,625.

Case No. 12,607.

SECURITY INS. CO. v. TAYLOR.

[2 Biss. 446.] [1]

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

EXECUTORS—FOREIGN—ACTION AGAINST.

1. An executor cannot be compelled to appear and answer in a state where he has not taken out letters testamentary, nor done any official act.

2. His power and liability are local, and the fact that process is served upon him while within the jurisdiction of this court, does not make him amenable to its process in his representative capacity.

[Cited in brief in Luce v. Manchester & L. R. Co., 63 N. H. 588, 3 Atl. 619.]

3. A scire facias in this court to bring in the executors of a Wisconsin estate, will be dismissed.

This was a demurrer to a plea in abatement to a scire facias to make the executors of the defendant, Emeline Taylor, parties to this proceeding. The original proceeding was a libel in personam for a marine tort, filed by the libellant, the Security Insurance Company, against Emeline Taylor, executrix of Isaac Taylor, deceased; John Campbell and Hollingford Warfield alleging in substance that they were the owners of the steamer Geo. S. Weeks, a vessel of twenty tons burthen, duly licensed and enrolled, and plying upon the waters of the Mississippi river between the port of Red Wing, in the state of Minnesota, and Savannah, in the state of Illinois; that respondents, as the owners of said steamer, were guilty of negligence in the transportation of a cargo of wheat from Red Wing to Savannah, by which the libellants sustained great damages. On the hearing an interlocutory order was entered in favor of the libellants, and reference made to one of the masters of this court to take testimony, and report as to the extent of the damages sustained. Exceptions were taken to the master's report, and a hearing had upon these exceptions. Pending the decision upon that hearing, a suggestion was made of the death of the respondent, Emeline Taylor, and leave was taken to issue a scire facias to make her executors parties to the proceeding. That scire facias was served upon one Kelly, alleged to be one of the executors of Mrs. Taylor, who came in and pleaded in abatement to the scire facias that Emeline Taylor, during her lifetime, was domiciled in the state of Wisconsin, that her residence was there, that she died there, and her will was probated there, and had not been probated in the state of Illinois; that the respondent Kelly is one of three executors named, and that they have proved the will in the county of Racine, in the state of Wisconsin, and are acting as such executors, under letters testamentary from the proper court of said county; that he was casually in the state of Illinois when served with process, and has never in any wise acted as executor within the jurisdiction of this state. To this plea libellants demurred.

Rae & Mitchell, for libellants.

Wm. F. Whitehouse, for respondent.

BLODGETT, District Judge. It seems very clear to me that this scire facias cannot be sustained. The law is well settled that executors and administrators cannot act out of the jurisdiction in which they are ap-

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

pointed, except by complying with the statutory provisions made by comity in such exterior jurisdiction. For instance, an executor in another state may have ancillary administration in this state, for certain purposes, under the statutes of this state, by probating the will here; in which case the authorities of this state will respect his character as executor, and allow him to proceed, and sell or control such portion of the estate as lies within this jurisdiction. This rule, a rule of legislative inter-state comity, holds in nearly all the states, as far as my investigation has gone; but it does not in any way override, or otherwise compromise the general principle that the power of an executor or administrator is local. In this case the process of this court cannot reach the administrators or executors of Emeline Taylor, unless they have made themselves executors within the jurisdiction of the court. This they have not done, and the mere fact that one of the executors came within the jurisdiction of the court upon other business, does not make him amenable to the process of this court in his representative capacity; his official mantle falls when he leaves the jurisdiction in which he was appointed. If persons having claims against the estate of Emeline Taylor wish to pursue their remedy here, they must either take out letters of administration against the estate in this jurisdiction, or procure the executors to probate the will within this state, before the courts of this state, either state or federal, can obtain jurisdiction in personam of the executors, or of the property of the decedent.

The demurrer to the plea in abatement will therefore be overruled; plea sustained, and scire facias dismissed.

NOTE. Where an administrator sues as such, and he is a citizen of the same state as the defendant, the court has no jurisdiction, although the intestate was a citizen of another state. An administrator is in such case the real and not a nominal party. Dodge v. Perkins [Case No. 3,954]. That an executor cannot be sued in his official character in another state for assets received by him in the jurisdiction where he was appointed, see Mellus v. Thompson [Id. 9,405]. No action can be maintained against an executor or administrator, founded on a debt due from the estate of the deceased, unless he has been duly qualified by a probate tribunal in the state or county where the suit is brought. Caldwell v. Harding [Id. 2,301].

Case No. 12,608.

SEDAM v. TAYLOR et al.

[3 McLean, 547.] [1]

Circuit Court, D. Indiana. May Term, 1845.

MARSHAL—FAILURE TO TAKE SUFFICIENT SECURITY—PLEADING AT LAW—PLEA IN BAR.

1. To an action on a marshal's bond, for taking insufficient security on a replevin bond, a plea that a levy was made on goods and chattels, lands and tenements, sufficient to satisfy the judgment, is good in bar.

2. Such a plea is good in bar to an action brought on an injunction or appeal bond.

At law.

Mr. Wright, for plaintiff.

Morrison & Bright, for defendants.

OPINION OF THE COURT. This action is brought on the official bond given by the defendant Taylor, as marshal, for taking insufficient security on a replevin bond. The defendants pleaded that, after the taking and return of the replevin bond, a fi. fa. was issued and placed in the hands of the marshal, who, before the bringing of this suit, did levy on divers goods and chattels, lands and tenements of the said sureties in the replevin bond; to the full value of the judgment interests and costs, which levy remains undisposed of, &c. To this the plaintiff replies, that the lands and tenements levied upon by the fi. fa. were subject to a prior lien of a judgment against the said sureties, for the sum of $2,760.38, on which execution was issued, and the above land sold, the proceeds of which sale were insufficient to pay that judgment, &c. To this replication, the defendants demurred.

The replication is bad, as it does not answer the plea. In the plea, the levy is alleged to have been on divers goods and chattels, lands and tenements. The plea does not answer to the goods and chattels, but to the lands and tenements only. The replication may be true, and the plea of the defendant may, notwithstanding, be a bar to the plaintiff's action. The sureties of the marshal were bound collaterally, for the performance of his duty. The plaintiff, in this action, seeks to make them liable, where the plea avers there was a levy on goods, &c., to the full value of the judgments. This is, clearly, a bar to the action. Such a levy is a bar to an action on an injunction or appeal bond. Cass v. Adams, 3 Ohio, 223; M'Intosh v. Chew, 1 Black. [66 U. S.] 289.

On leave, the replication was amended.

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

Case No. 12,609.

SEDAM et al. v. WILLIAMS et al.

[4 McLean, 51.] [1]

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

JUDGMENT — MERGER—EQUITY—IN AID OF LAW—NEGLIGENCE—PARTNERSHIP—MORTGAGE.

1. When a judgment is obtained against one of two partners on a joint promise, the contract is merged in the judgment; and an action at law can not be maintained against the partners on the same ground.

2. Where a party has lost his remedy, through negligence at law, chancery will not aid; but where such remedy has been lost by accident, or

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

otherwise, except by negligence, chancery will aid.

[Cited in U. S. v. Ames, 99 U. S. 47.]

3. Where one partner sells to another, who binds himself to appropriate the goods on hand, to the payment of the debts of the firm, the assignee becomes a trustee to the creditors and the late partner, for the faithful performance of the trust.

[Cited in Smith v. Dennison, 101 Ill. 550.]

4. It is immaterial whether the bill in form be a creditor's bill, if it contain upon its face matter for relief.

5. A debtor of the judgment debtor, if he agree to pay the judgment creditor, may be decreed to make the payment.

6. A mortgage can not be split up into different suits, on the different tracts of land mortgaged; yet if one or more of such tracts have been sold by a prior mortgage, or if the mortgagor have no title to such tracts, they may be omitted in the bill to foreclose.

In equity.

Seaman, Douglass & Walker, for complainants.

Manning, Hunt & Watson, for defendants.

OPINION OF THE COURT. The bill in this case states that Williams and Hodges were partners, and that B. O. Williams purchased goods of plaintiff in his own individual name for the firm. That Williams sold out the goods to Hodges, who agreed out of the proceeds thereof, to pay the debts of B. O. Williams, contracted in the purchase of the goods, including plaintiff's debt. That Hodges gave a bond in the penalty of sixty thousand dollars, and a mortgage, to secure the payment of said debts. The bill is filed in behalf of the creditors of the late firm, to foreclose the mortgage, etc. A judgment was obtained by the complainants against B. O. Williams. The defendants demurred to the bill, and assigned various grounds as cause of demurrer, which will be considered.

It is first alleged that the complainants can not sustain their bill on the ground of the co-partnership. 1st. Because the judgment against B. O. Williams has not taken away the legal remedy of the complainants against Hodges and Williams, as co-partners. Sheeley v. Mandeville, 6 Cranch [10 U. S.] 253. 2d. Admitting the legal remedy against Hodges to be extinguished by the judgment, the complainants are not entitled to any relief in equity against Hodges on that account. It was through their own negligence, and not any fraud on the part of Hodges, or either of the other defendants, that they lost their remedy at law against him, and equity will not give relief in such a case. Penny v. Martin, 4 Johns. Ch. 566.

The first ground was undoubtedly sustained in the case cited from 6 Cranch, 253 [supra]. That case has not been overruled by the supreme court; but it would seem to be impossible to sustain it on general principles. That a judgment against one of two joint promisers, or persons equally bound to pay the debt sued for, both being sued, merges the debt, is a principle sustained generally, except in the above case. Had the note been joint and several, and the suit been commenced against one only, and a judgment obtained against him, another action might be brought against the co-promiser. But, whether the Case of Mandeville be law or not, the bill is not objectionable on that ground.

On the second ground, it is supposed, that if the right at law against Hodges be extinguished, by the judgment against Williams, that is no ground on which chancery can give relief. It may be admitted, as ruled in the case of Penny v. Martin, that where a party has lost his remedy at law by negligence, chancery will not aid him. But the remedy sought against Hodges, did not exist as against Williams. The bill seeks to foreclose the mortgage given by Hodges, and subject the property covered by it, to the payment of the debts of the firm. This, if not a new liability, is a new security, for the payment of those debts, and it can only be applied, as intended by the parties, by a court of equity. No procedure at law against Williams and Hodges, could effectuate this object.

It is contended that the bill can not be sustained on the ground that Hodges is a trustee for the creditors of the co-partnership. In support of this position, it is insisted, that no case can be found in which a court of equity has declared a debtor to be a trustee for his own creditors, and sought to charge him with the payment of his debts in this new character, aside from his legal liability. Hodges, it is said, was equally bound with Williams for the payment of complainant's debt, when he purchased out Williams's interest in the co-partnership; and when he afterwards gave the bond and mortgage. That the judgment was not obtained against Williams, until nearly two years after the bond and mortgage were executed. It is true that Hodges was equally liable with Williams, for the payment of the debts of the partnership. But by his contract with Williams, he bound himself, out of the proceeds of the goods received, to pay the debts of the firm. Does not this constitute a trust? If Hodges were about to appropriate the goods in any other manner, and for any other purpose, than to pay the debts of the partnership, could not Williams restrain him by injunction? Could not the creditors of the firm restrain him? It was upon the condition of the faithful application of the proceeds of the goods to the payment of these debts, that the goods were placed under the control of Hodges. The mortgage was given to secure the faithful performance of this contract. And those who are beneficially interested in the contract, may enforce the mortgage. Bleeker v. Bingham, 3 Paige, 249; 1 Johns. Ch. 82; 3 Johns. Ch. 261; 2 Story, Eq. Jur. §§ 1041–1044. As the bond and mortgage were intended to secure the payment of certain moneys to the complainants and other creditors of Williams, and not directly to him, he may be considered in equity as a trustee

of the bond and mortgage for the complainants and others. It was held, in the case of Hook v. Kinnear, 3 Swanst. 417, that a person not a party to a contract, nor privy to it, but for whose benefit a third person had entered into it, could file a bill in equity for a specific execution of it. [Russell v. Clark] 7 Cranch [11 U. S.] 69; 1 Johns. Ch. 129; 7 Paige, 627.

It is insisted, that the bill can not be sustained as a creditor's bill, as it does not show that the remedy at law has been exhausted. An execution on the judgment against Williams was returned no property found, as required. As to the character of this bill, it is not material, if it embody principles which show that the complainants are entitled to relief. It is not, technically, a creditor's bill. On the supposition that this is a creditor's bill, it is objected that it can not be sustained against the defendant Hodges and Gardner D. Williams. And the decision of Chancellor Sanford is cited in Donovan v. Finn, Hopk. Ch. 85, where he says "the court has no power to compel the debtor of a judgment debtor to make payment to the judgment creditor, in satisfaction of the judgment." And it is argued that Hodges is a debtor to B. O. Williams to the extent of the bond and mortgage, but the defendant, Gardner D. Williams, is not a debtor of B. O. Williams in any amount. Whether a debtor of a judgment debtor can be decreed to pay the judgment creditor, must depend upon the character of the contract out of which the indebtment arises. If the debtor bound himself to pay the judgment creditor, he would be decreed to pay him. Or if the contract to that effect were made with the judgment debtor, the principle stated in the above case will admit of qualification.

The complainants' bill is alleged to be multifarious, as it seeks to have the judgment at law satisfied out of a chose in action, the bond and mortgage; and also asks a foreclosure of the mortgage. Coop. Eq. Pl. 182, 183; Swift v. Eckford, 6 Paige, 22; Salvidge v. Hyde, 1 Jac. 151. It is a matter of difficulty to lay down any rule by which a bill shall be considered multifarious. But, we think the present bill is not subject to this objection. The claim of the complainants and the other creditors can be satisfied out of the mortgage only, by a foreclosure and a sale of the premises.

The bill prays a foreclosure of the mortgage, except lot ninety-six and a part of lot ninety-seven; and this, it is said, is good on demurrer. A bill, it is said, must apply to the whole, and not to a part, of the mortgaged premises, because it would multiply litigation. Coop. Eq. Pl. 184; Mitf. Eq. Pl. 183. It may be that the mortgagor had no title to lot ninety-six, and a part of lot ninety-seven. It is true that a party would not be permitted to file several bills, to foreclose different parts of the same mortgage. That would be an abuse which the court would correct. In general, such a procedure might be favorable to the mortgagor; especially if the property would be likely to sell for more than the mortgaged debt. The bill shows that the above lots have been sold under a prior mortgage.

It is objected that the bill is filed by the complainants, on behalf of themselves and all other judgment creditors of the defendant O. B. Williams, when it does not appear from the bill that there are any other judgment creditors. And it is said to be good ground of demurrer to the whole bill, that a person who has no interest in the controversy, and has no equity as against the defendant, is improperly joined as a party complainant. Clarkson v. De Peyster, 3 Paige, 336; King of Spain v. Justo De Machado, 4 Russ. 225; 3 Cond. Eng. Ch. 643. This may be good law, but its application to the case is not perceived. The argument used is, "if a complainant who has an interest in a suit, can not unite with him one who has no interest; it would seem to follow that he could not file a bill in behalf of himself and others, without showing there are others interested in the subject matter of the suit." The bill, by the general designation of judgment creditors of the firm, leaves no uncertainty as to the persons who may come in and claim a due proportion, under the sale of the premises. Where parties are very numerous, a part of the persons in interest may prosecute for the benefit of the whole. In their decree, the court will make the proper distribution of the money.

The objection that the citizenship of the defendants is not sufficiently alleged, is not sustainable. In the bill they are alleged to be residents, but in the subpœna they are stated to be citizens.

The demurrer is overruled, and the defendants are required to answer, etc.

Case No. 12,610.

SEDGWICK v. CASEY.

[4 Ben. 562; [1] 4 N. B. R. 496 (Quarto, 161); 3 Chi. Leg. News, 177.]

District Court, S. D. New York. Feb. 21, 1871.

BANKRUPTCY — SUIT BY ASSIGNEE — STATUTE OF LIMITATIONS—ADVERSE INTEREST.

1. An assignee in bankruptcy filed a bill in equity against C., to recover from him moneys alleged to be due on an agreement made by C. with the bankrupts. The defendant pleaded that the cause of action had not accrued within two years before the commencement of the suit, and that the defendant did not, at any time within two years after the cause of action accrued to the plaintiff against the defendant, make any acknowledgment or promise to come to any account for, or to pay or in any way satisfy the plaintiff in any sum or sums of money, for or by reason of anything alleged in the bill. The plaintiffs demurred to the plea. *Held*, that the limitation provided in the second section of the bankruptcy act [of 1867 (14 Stat. 518)] had no application to the suit, it being a suit merely to collect a debt in which the plaintiff claimed no interest adverse to the defendant, in any property of the bankrupts, and the defendant claimed no interest adverse to the plaintiff in any such property, and

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

no ownership of, or title to, any specific property which belonged to the bankrupts.

[Cited in Re Krogman, Case No. 7,936; Davis v. Anderson, Id. 3,623; Bachman v. Packard, Id. 709; Norton v. Barker, Id. 10,349; Smith v. Crawford, Id. 13,030; Walker v. Towner, Id. 17,089.]

[Cited in Beeson v. Shively, 28 Kan. 580.]

2. That limitation of two years, moreover, applied only to controversies of which the circuit court would have jurisdiction, and the circuit court of this district would have no jurisdiction of this suit. The plea, therefore, must be overruled.

[This was a bill by John Sedgwick, assignee in bankruptcy of John M. Berrian and others, against Henry H. Casey.]

T. M. North, for plaintiff.

A. R. Dyett and G. A. Seixas, for defendant.

BLATCHFORD, District Judge. This is a bill in equity to recover from the defendant money alleged to be due to the plaintiff on an asset of the bankrupts, namely, an agreement made by the defendant with the bankrupts, to pay them, as salaries for their services as clerks, certain portions of the net profits which should be realized from the business carried on by the defendant, and in prosecuting which the bankrupts were so employed as clerks, such payments to be made as soon after the terminations of their clerkships as there should be funds sufficient to discharge the liabilities of the business, and pay such profits. The agreement provided that the bankrupts should have no interest in the stock or property of the defendant's business. The bill prays for an account by the defendant, he having all the books and papers from which such profits can be ascertained, and for a discovery of such books and papers, and for the payment of what shall be found due on such accounting.

The defendant pleads to the bill, that the cause of action did not accrue within two years before the commencement of the action, and that the defendant did not, at any time within two years after the cause of action accrued to the plaintiff against the defendant, make any acknowledgment or promise to come to any account for, or to pay or in any way satisfy the plaintiff in, any sum or sums of money, for or by reason of anything alleged in the bill.

This plea of the statute of limitations is evidently supposed to be warranted by the second section of the bankruptcy act, which provides, that no suit at law or in equity shall, in any case, be maintainable by an assignee in bankruptcy, against any person claiming an adverse interest touching any property or rights of property of the bankrupt, transferable to or vested in such assignee, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued to the assignee. This suit does not fall within that provision. It is a suit merely to collect a debt or enforce the payment of money due on a contract. The plaintiff does not claim an interest adverse to the defendant in or touching any property or right of property of the bankrupts, transferable to or vested in the plaintiff as their assignee, nor does the defendant claim any interest adverse to the plaintiff, in or touching any such property, or right of property. The defendant claims no ownership of, or title to, the debt or contract which the plaintiff is seeking to enforce against the defendant. Nor does the plaintiff claim any ownership of, or title to, any specific property or right of property, as having passed to him by virtue of his appointment, which the defendant also claims to own. Nor does the defendant claim any ownership of, or title to, any specific property which belonged to the bankrupts. The limitation of two years applies only to such controversies. Moreover, it applies to controversies of which, by the same second section, the circuit court of the district has concurrent jurisdiction with the district court of the same district. The circuit court of this district would have no jurisdiction of this suit.

The plea is overruled, with costs, and the defendant is allowed to answer the bill within twenty days.

Case No. 12,611.

SEDGWICK v. FRIDENBERG.

[11 Blatchf. 77.] [1]

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

BANKRUPTCY—APPEAL—WHEN TO BE BROUGHT.

1. Unless the appeal provided for in the eighth section of the bankruptcy act of March 2d, 1867, (14 Stat. 520,) be taken within ten days after the decree is entered, this court acquires no jurisdiction thereby.

[Cited in Fellows v. Burnap, Case No. 4,721; Judson v. Courier Co., 25 Fed. 709.]

2. The provision of the second section of the act of June 1st, 1872, (17 Stat. 196,) that "no judgment, decree, or order of a district court, rendered after this act shall take effect, shall be reviewed by a circuit court of the United States, upon like process or appeal, unless the process be sued out, or the appeal be taken, within one year after the entry of the judgment, decree, or order sought to be reviewed," has not changed the provision of the said eighth section of the act of 1867, in that particular.

In equity. This suit was brought, in the district court, by the plaintiff [John Sedgwick], a citizen of New York, as assignee in bankruptcy of Abraham Valk and James S. Valk, who were adjudged bankrupts by said court, against the defendant [Henry Fridenberg], a citizen of New York, to set aside a transfer of property, made by the bankrupts to the defendant, as being void under the provisions of the thirty-fifth section of the bankruptcy act of March 2d, 1867, (14 Stat. 534,) the defendant claiming an adverse interest to the plaintiff touching said property. After a final hearing, on pleadings and proofs, the district court, on the 5th of October, 1872, made an interlocutory decree, declaring that such transfer was made in fraud of said act, and was void, as to

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

the plaintiff, and directing that the defendant account, before a master, for the value of such property. [Case unreported.] The master took the account, and made his report, and, on the 21st of December, 1872, the district court made a decree thereon, that the plaintiff recover from the defendant $14,793 37, and that the defendant execute certain conveyances to the plaintiff, and that the plaintiff recover his costs in the suit, to be taxed. The defendant claimed no appeal from such decree, within ten days after the entry of such decree in the district court; nor did he, within that time, give notice of any appeal therefrom to the clerk of said court, or to the plaintiff. On the 3d of January, 1873, the plaintiff, on notice to the defendant, had his costs taxed; and the bill, as taxed, was filed on that day in the office of the clerk of the district court. On the 20th of January, 1873, the defendant filed, in the district court, a notice stating that he appealed from the decrees in the suit, to this court. On the same day he filed, in the district court, a petition of appeal, signed by his solicitors, addressed to this court, reciting the proceedings in the court up to and including the decree of December 21st, 1872, and praying for the reversal of that decree. On the same day, the defendant filed, in the district court, a bond, executed by himself and two sureties, to the plaintiff, in the penalty of $30,000, dated that day, reciting the appeal, and conditioned that the defendant should prosecute such appeal to effect, and answer all damages and costs, if he should fail to make it good. On the next day the bond was approved by the district judge as to its form and amount, and the sufficiency of the sureties, and a copy of the notice of appeal, and of the petition of appeal, were, on that day, served on the plaintiff's solicitors, and were, on the next day after that, returned by them to the defendant's solicitors, with a notice objecting to the service thereof, as too late, and refusing to receive the same, for that reason. The plaintiff now moved to dismiss the appeal. The defendant claimed, that, under the second section of the act of June 1st, 1872, (17 Stat. 196,) which provides, that "no judgment, decree, or order of a district court, rendered after this act shall take effect, shall be reviewed by a circuit court of the United States, upon like process or appeal, unless the process be sued out, or the appeal be taken, within one year after the entry of the judgment, decree, or order sought to be reviewed," the appeal was taken in time.

Charles W. Bangs, for plaintiff.
Beebe, Donohue & Cooke, for defendant.

WOODRUFF, Circuit Judge. I have heretofore decided (In re Coleman [Case No. 2,979]; In re Place [Id. 11,201]) that, unless the appeal provided for in the eighth section of the bankrupt act, (14 Stat. 520,) be taken within ten days after the decree is entered, this court acquires no jurisdiction thereby.

I am satisfied, that the second section of the act of June 1st, 1872, (17 Stat. 196,) has not changed the law in that particular. I have, therefore, no discretion and no alternative. I am compelled to grant the motion to dismiss the appeal.

Case No. 12,612.

SEDGWICK v. GRINNELL.

[9 Ben. 429.] [1]

District Court, S. D. New York. April, 1878.

BANKRUPTCY—MORTGAGE—FORECLOSURE—ASSIGNEE—RIGHT TO REDEEM.

1. After a petition in bankruptcy was filed and before an adjudication, a suit to foreclose a mortgage given by the bankrupt was commenced in a state court, in which suit the bankrupt was a party defendant. The foreclosure suit was ended by a decree of foreclosure, and a sale and conveyance of the mortgaged property, before the assignee in bankruptcy was appointed. He subsequently brought a suit to redeem the property: *Held*, that, under the decision in Eyster v. Gaff, 91 U. S. 521, his right to redeem was cut off by the decree in the suit.

2. The title to the property remained in the bankrupt until the assignment was made to the assignee in bankruptcy, the right of the bankrupt to redeem was cut off by the decree, and no right to redeem passed to the assignee in bankruptcy.

[This was a bill in equity by John Sedgwick, assignee of Frederick S. Kirtland and others, against George B. Grinnell.]

T. M. North, for plaintiff.
Martin & Smith, for defendant.

BLATCHFORD, Circuit Judge. The petition in bankruptcy was filed March 18th, 1870. The suit to foreclose the mortgage was commenced May 9th, 1870. The mortgagor, Kirtland, was made a party to that suit. The adjudication of bankruptcy was made May 28th, 1870. The judgment of foreclosure and sale was entered July 15th, 1870, the sale took place August 23d, 1870, the deed of the referee to the defendant was given September 23d, 1870, the report of sale was filed September 26th, 1870, and the report as to surplus moneys was filed October 1st, 1870. The plaintiff was appointed assignee December 15th, 1870, and the assignment was made to him December 23d, 1870. It thus appears, that all the proceedings in the foreclosure of the mortgage took place between the time the petition in bankruptcy was filed and the time the plaintiff was appointed assignee. The plaintiff was not made a party to the foreclosure suit, and claims that his title to the mortgaged premises relates back to the 18th of March, 1870, a date before the foreclosure suit was commenced, and that his right to redeem from the mortgage was not cut off by the decree in the suit.

In Eyster v. Gaff, 91 U. S. 521, the foreclosure suit had been commenced before the peti-

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

tion in bankruptcy was filed, but the decree of foreclosure was made after the assignee in bankruptcy was appointed. The assignee was not made a party to the foreclosure suit. The question was whether the legal title to the mortgaged premises which passed to the assignee was divested by the foreclosure proceedings. The supreme court held, that, at the time the suit was commenced, the mortgagor was vested with the title and was the proper and necessary defendant; that, but for the bankruptcy of the mortgagor, the sale under the foreclosure decree and the deed would have vested the title in the purchaser, and such title would have related back to the date of the mortgage; that, as the suit was commenced against the mortgagor when the title or equity of redemption was in him, any person who took his title, or any interest he had, pending the suit, would have been bound by the proceedings and would have had his rights foreclosed by the decree and sale; that a transfer made to an assignee in bankruptcy by a bankruptcy proceeding will not prevent the court from proceeding with the foreclosure suit without the presence of the assignee in bankruptcy, nor affect the title of the purchaser who buys under the decree; and that the adjudication of bankruptcy did not divest the jurisdiction of the court in which the foreclosure suit was pending. In the present case, the foreclosure suit was brought before the adjudication of bankruptcy was made. I think the principles established in Eyster v. Gaff [supra] apply to the present case. The fact that, in Eyster v. Gaff, the foreclosure suit was brought before the petition in bankruptcy was filed does not alter the case. The state court had jurisdiction of the suit, of its subject matter and of the parties to it. If the adjudication of bankruptcy did not divest it of such jurisdiction, a fortiori the filing of the petition in bankruptcy did not. The plaintiff did not acquire any title till the 23d of December, 1870, and before that time the title and equity of redemption in the mortgagor had been divested by the foreclosure proceedings.

Nor does the fact that the statute declares that the assignment to the assignee in bankruptcy shall relate back to the commencement of the proceedings in bankruptcy, and that "thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee," alter the case. This is shown by the decision of the supreme court in Hampton v. Rouse, 22 Wall. [89 U. S.] 263. That case holds, that an adjudication of bankruptcy does not divest the bankrupt of his title to either his real or personal estate; that, prior to the assignment to the assignee, the title of the bankrupt's estate remains unchanged; that the question is not affected by the fact that the statute provides that the assignment shall relate back to the commencement of the proceedings, as the instrument of assignment cannot operate, either retrospectively or prospectively, before it is executed; that, until an assignee is appointed and the assignment is made to him, the title to the property remains in the bankrupt; and that, in that respect, the present statute differs from the act of 1841 [5 Stat. 440], under which the decree of bankruptcy divested the title. As the title to the mortgaged premises remained in the bankrupt up to the 23d of December, 1870, his right and equity of redemption were cut off by the foreclosure decree, and no right to redeem passed to the plaintiff.

It is not established that the firm composed of the bankrupts was insolvent on the 30th of December, 1867. The mortgage covered guarantees of the successive renewals of the two original notes. But these questions, and any question as to the payment of the mortgage, were concluded by the decree in the foreclosure suit, not only as against the mortgagor, but as against the assignee in bankruptcy.

The bill is dismissed, with costs to the defendant, to be paid out of the estate in bankruptcy.

[For subsequent proceedings in this litigation, see Case No. 12,613.]

Case No. 12,613.

SEDGWICK v. GRINNELL.

[10 Ben. 6.] [1]

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

COSTS—FEES ON COMMISSION TO TAKE TESTIMONY.

1. The practice of the court allows as a disbursement to a party who may be entitled to costs, what may have been properly paid by him for the execution of a foreign commission to take testimony. But disbursements must be reasonable and must have been necessarily incurred, and are not to be deemed to have been necessarily incurred unless they are reasonable for the service rendered.

[Cited in The Frisia and The John N. Parker, 27 Fed. 480.]

2. If such a commission is issued to another state of the Union, addressed a person other than one of the "commissioners of the circuit court," the compensation fixed by law for such services, when performed by a commissioner of the circuit court, fixes a standard which should control the discretion of the court as to the amount to be allowed for the fees on the execution of such commission.

[Cited in Powers v. Manning, 154 Mass. 374, 28 N. E. 290.]

3. If the commission issues to a foreign country, where no officers are provided by the law of the United States for the execution of such commission with definite fixed fees, the amount allowed by law here will be taken to be a sufficient compensation for the same service abroad, unless it be shown that the customary charge in such foreign country is greater. If that is shown, it must be held that the party taking out the commission necessarily pays such larger sum.

[This was a proceeding by John Sedgwick, assignee, against George B. Grinnell.]

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

Thomas M. North, for plaintiff.
Mr. Devine, for defendant.

CHOATE, District Judge. The defendant having a final decree for his costs and disbursements, claims to be allowed as a disbursement the payment of $75 paid by him for the execution of a commission to take testimony at Louisville, Kentucky, and $394.78 for the execution of a commission to take testimony in London, England. The commissions were issued by consent to the parties named therein as commissioners. The plaintiff's counsel insists that the persons to whom the commissions were issued are "commissioners" within the meaning of Rev. St. tit. 13, c. 16, which fixes the fees of attorneys, clerks, marshals, commissioners, witnesses, jurors, and printers. In this I think the counsel is in error. That chapter, as clearly appears upon a view of all its provisions, refers to "commissioners of the circuit court," appointed under section 627 of the Revised Statutes. The clerk held, however, that the rate of fees to be allowed was governed by the chapter of the Revised Statutes above referred to, which fixes the fees to be paid to "commissioners" at twenty cents a folio "for taking and certifying depositions to file," and he allowed as a disbursement on each of the depositions $25, which was agreed upon by the parties as a proper amount of the fees if determined by that statute. The practice of the court allows as a disbursement what may have been properly paid by the party entitled to costs for the execution of a foreign commission. Disbursements, however, must in all cases be reasonable in amount for the service rendered and must have been necessarily incurred. The exorbitant fees exacted in some parts of the world for the execution of foreign commissions have long been a grievance to attorneys and litigants, and these charges should in all cases where they are chargeable as part of the costs be reduced to what is a reasonable sum for the service rendered. If any amount, however excessive, which the party taking out the commission chooses to pay or is compelled to pay by the commissioner selected, can be charged on the other party, no check is kept on these exactions. The charges are not to be deemed necessarily incurred, except so far as they are reasonable in amount for the service rendered. On the question what will be a reasonable amount the fees fixed by statute for the like service afford a proper standard, with such variation as may be required to conform the charges to those customarily allowed for similar services in the country where the commission is excuted, provided such customary charges are not unreasonable.

If the commission is issued to another state in this Union, addressed to a person other than one of the "commissioners of the circuit court," who are officers especially appointed for the purpose of attending to such duties, the compensation fixed by law for such "commissioner of the circuit court" for the same service affords a definite standard, which should control the discretion of the court in determining the reasonableness of the charge in the particular case. If the commission issues to a foreign country where no officers are provided by the law of the United States for the execution of such commission at any definite fixed rates, the amount allowed by law here will be taken to be a sufficient compensation for the same service abroad, unless it be shown that the customary charge in such foreign country for the like service is greater, and if that is shown it must be held that the party taking out the commission necessarily pays such larger sum.

In this case, therefore, the clerk properly taxed these two items on the proofs before him, that of the Kentucky commission because the analogy of the statute fixes the standard of charge, that of the English commission, because there was no proof that the service is ordinarily more liberally compensated in England.

The fact that similar charges have been often included in bills of costs taxed, is immaterial, since no case is referred to where the question of the right to them has been raised. If a party to a suit is under the necessity of examining witnesses abroad, it may be a hardship or a misfortune that he is compelled to pay more than a fair compensation for the execution of the commission, but there is no equitable principle by which he can throw this hardship or misfortune on on the other party merely because he happens to prevail in his suit. The consent to the issuing of the commission cannot be deemed a consent to pay as costs any amount of fees that the other party may pay however unreasonable. In this case it does not appear whether the defendant paid these charges voluntarily or whether they were extorted from him by the commissioners by the withholding of the commissions till the fees were paid. But I see no difference in principle in the two cases. The matter is very much in the control of attorneys, who may in arranging their stipulations for the issuing of commission make proper provision for the payment of these expenses by agreement. The practice of allowing extortionate charges like those in the present case as costs would be giving the encouragement of the courts to the extortions complained of.

Taxation of costs confirmed, with leave to the defendant to apply for a retaxation as to the English commission upon further evidence.

[See Case No. 12,612.]

Case No. 12,613a.

SEDGWICK v. HUYGENS.

[Cited in The Fanny, Case No. 4,639a. Nowhere reported; opinion not now accessible.]

Case No. 12,614.

SEDGWICK v. LYNCH.

[Nowhere reported; opinion not now accessible.]

Case No. 12,615.

SEDGWICK v. LYNCH.

[5 Ben. 489;[1] 8 N. B. R. 289.]

District Court, S. D. New York. Feb., 1872.[2]

BANKRUPTCY—SALES OUT OF ORDINARY COURSE OF BUSINESS—PRICES RECEIVED—INSOLVENCY.

1. V. & Co. were wholesale grocers, having, also, retail stores. On December 12th, 1868, they suspended payment, owing debts to the amount of $150,000. On November 13th and 23d, and December 2d, they sold goods, at their wholesale store, to L., to the amount, in all, of $12,021.50, which were paid for by him in cash, at the time. L. was not in the grocery business, and bought the goods at a low price. V. & Co. having been adjudged bankrupts, their assignee brought suit against L., to set aside the sales and recover the property or its value. The suit was based on the 35th section of the bankruptcy act [of 1867 (14 Stat. 534)]. *Held*, that there was nothing about the sales that could be alleged to have been out of the usual and ordinary course of business, except in regard to price.

2. This fact of low prices, under the circumstances, was not sufficient to characterize the sales as out of the usual and ordinary course of business.

3. Although the debts of V. & Co. were maturing so fast, in comparison with their receipts from debts due them and ordinary sales, that, having exhausted their powers of borrowing, they were resorting to sales at a sacrifice, still there was nothing to show that they had not reasonable cause to believe that, by these sacrifices, they would weather the storm, except the fact that they suspended payment so soon, and three days after filed a petition as voluntary bankrupts; and this fact did not show that they were then insolvent or contemplating insolvency.

[This was a bill in equity by John Sedgwick, assignee in bankruptcy of Abraham and James S. Valk against John Lynch.]

T. M. North, for plaintiff.

W. Fullerton and D. N. Rowan, for defendant.

BLATCHFORD, District Judge. On the 15th of December, 1868, Abraham Valk and James S. Valk filed a petition in voluntary bankruptcy in this court. They were grocers. The plaintiff is their assignee in bankruptcy, and files this bill to set aside, as fraudulent, certain sales of groceries made by them to the defendant, three in number. The first sale was made on the 13th of November, 1868, and comprised 150 chests of tea, 6,300 pounds, at 45 cents per pound, $2,835.00; 60 bags of coffee, 9,600 pounds, at 13½ cents per pound, $1,296.00; 12 boxes of sugar, 5,400 pounds, at 9½ cents per pound, $513.00; 60 barrels of whiskey, 2,640 gallons, at 70 cents per gallon, $1,848.00; 25 casks of sherry, $500. The second sale was made on the 23d of November, 1868, and comprised 3,730 pounds of tobacco, at 45 cents per pound, $1,678.50; 25 barrels of whiskey, 1,027 gallons, at $1 per gallon, $1,027.00; 12 chests of tea, 540 pounds, at 60 cents per pound, $324.00. The third sale was made on the 2d of December, 1868, and comprised 20,000 pounds of sugar, at 10 cents per pound, $2,000.00. The amount of the first sale was $6,992.00; of the second sale, $3,029.50; of the third sale, $2,000.00; and of the aggregate of all, $12,021.50. The bill alleges, that the sales were made in fraud of the creditors of the bankrupts, and in fraud of the provisions of the bankruptcy act; that the bankrupts, being insolvent, and in contemplation of insolvency and bankruptcy, made the sales; that, at the time the sales were made, the defendant had reasonable cause to believe the bankrupts to be insolvent, or to be acting in contemplation of insolvency, and that the sales were made with a view to prevent their property from coming to their assignee in bankruptcy, or to prevent the same from being distributed under the said act, or to defeat the object of, or in some way to impair, hinder, impede or delay the operation and effect of, or evade some of the provisions of, the said act; that the sales were not made in the usual and ordinary course of business of the bankrupts; and that the sales were void under the provisions of the said act, and passed to the defendant no title to the property sold, as against the plaintiff. The bill prays that the sales may be decreed to be, as to the plaintiff, null and void; that the property sold may be decreed to have vested in the plaintiff, as such assignee, as against the defendant; that the plaintiff, as such assignee, may be decreed to recover the property, or the value thereof, from the defendant; and that the defendant be decreed to deliver to the plaintiff, as such assignee, all of the property remaining in his hands, and to pay to the plaintiff the value of so much thereof as may have been disposed of by him.

The bankrupts suspended payment on the 12th of December, 1868, owing debts to the amount of $150,000. In addition to a wholesale store in New York, they had had eight retail stores in New York, Brooklyn and Newark. The usual amount of their stock at their wholesale store was from $50,000 to $75,000. During the month before their failure $93,000 were paid by them to their creditors, and during the month before that $60,000. In their wholesale business they sold goods for cash and on time, to any one who came to purchase, and bought in large quantities from manufacturers, importers and jobbers. They failed, after having made all the efforts they could to collect the debts that were due to them, and they failed because they did not collect such debts. They also made all the sacrifices they could to meet their liabilities, struggling not to fail. They borrowed no money for the two months next preceding their failure, but made their payments out of moneys collected from debtors, and moneys

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

[2] [Affirmed by circuit court. Case unreported.]

received for goods sold for cash, and moneys received as the discount of notes taken for retail stores of theirs which they sold. Down to the 12th of December they met all their payments as they became due. Just before their failure money was worth from three-eighths of one per cent. per day to three-quarters of one per cent. per day, and they sold goods at a sacrifice for cash, to meet their liabilities, in preference to paying such rate of interest, as being actually less wasteful of money. The defendant was not the only person to whom they sold goods at a sacrifice for cash. They paid one of their creditors in goods, and to another they turned out four of their retail stores and other goods. On the 26th of October, they sold their other four retail stores, to raise money. All the money which they obtained from all these sources was paid to their creditors. Before their failure, they had disposed of most of their wholesale stock, besides their retail stores. The goods sold to the defendant were paid for by him in cash at the time. They were purchased at the wholesale store, and taken away by him to a place of storage provided by him. He sold the goods, through a broker, to four or five different purchasers. He was, at the time, in the jewelry business, and had been in it about a year and a half. The account the defendant gives of his purchases is this: "I lend money on all kinds of personal property. Mr. Moore came to me, and wanted me to buy some notes belonging to Valk Brothers. He said they were very short, there was a panic in money, he could buy this paper very cheap, it was good, and they were a firm of 17 or 18 years' standing. I told him I would not buy their notes, but, if they had stock such as he said, tea, sugar, &c., I would buy that, if they would sell it cheap enough. He took me over there, and I bought some tea, sugar, &c. I bought three times. My motive in buying was to make money on it. It was no loan to them. I bought it for myself and for my own profit, not with money borrowed from them, or that came from them. I thought there was 15 or 20 per cent. margin of profit on it. My wife and son carry on the jewelry business. I have been in the habit of dealing in foreign fruit and liquors, and have speculated off and on for twenty-five years in tea, coffee and rice. At the time I bought these goods, I was interested as a silent partner in two cellars under Washington Market, used for storing and selling goods." The defendant endeavored to sell the goods he bought, in one lot, to a grocer, for $14,000, telling where he had bought them, and what they had cost. Their market value was from $16,000 to $17,000. He sold to one person 145 chests of the tea at 67½ cents a pound, and the wine and whiskey at $1 a gallon. The same person offered him 18 cents a pound for the coffee, and 11 cents a pound for the sugar, but bought none of either. The defendant sold 23,575 pounds of sugar, less 2½ per cent. for tare, at 11½ cents a pound. The person who bought the tea at 67½ cents testifies that its market value was from 77 to 80 cents, when bought by the defendant; that the market value of the coffee was 17½ cents per pound, when bought by the defendant; that the market value of the whiskey was $1.25 per gallon, when bought by the defendant; and that the tobacco was worth from 45 to 50 cents per pound.

This suit is founded on that provision of the 35th section of the bankruptcy act which enacts that, if any person, being insolvent, or in contemplation of insolvency, within six months before the filing of the petition by him, makes any sale of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such sale is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under said act, or to defeat the object of, or in any way impair, hinder, impede or delay the operation and effect of, or to evade any of the provisions of, said act, the sale shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupts; and that, if such sale is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud.

It is contended, for the plaintiff, that these sales to the defendant were not made in the usual and ordinary course of business of the bankrupts. There was nothing that can be alleged to have been out of such usual and ordinary course except in regard to price. The sales were sales at wholesale, made by wholesale dealers, at their wholesale place of business, in view of the goods, and accompanied by manual delivery of the goods, which were paid for in cash at the time. They were sales out of a large stock of goods, and not sales of an entire stock or business. With all these indicia of a regular and ordinary business transaction to a purchaser, it will not do to say that the mere fact of sales at such low prices as those in this case makes them sales out of the usual and ordinary course of business of the sellers, and so prima facie evidence of fraud. If so, who would be safe from having a purchase made by him far below cost, at an auction sale, or a closing out sale, or what is often advertised as a selling off below cost, from being brought up against him as prima facie evidence of a fraud against the bankruptcy act? The business of a purchaser is to buy as cheaply as he can. Many men relieve themselves from temporary embarrassment, when money is dear, by sacrificing property at low prices, to meet their obligations. Such acts are often praiseworthy and successful, and much to be preferred for their own interests, and those of their creditors, to the incurring of new obligations at exorbitant rates of interest. To apply the doctrine contended for in this case would stamp such transactions

as fraudulent on their face, because, being sales below cost, they were, therefore, out of the usual and ordinary course of business of the sellers, although attended by all the other usual accompaniments of sales in market overt.

The sellers in this case were not insolvent, or acting in contemplation of insolvency, when the sales were made, in the sense of the statute. They were meeting their obligations as they matured, curtailing their business by disposing of their retail stores, and not contemplating suspension, but doing everything to avert it. They used the moneys derived from these sales to pay maturing debts in the usual course of business. It is true, that their maturing debts were coming around so fast, in comparison with their receipts due them and ordinary sales, that, having exhausted their power of borrowing, they were resorting to sales at a sacrifice. But there is nothing to show that they had not, when these sales to the defendant were made, reasonable cause to believe that, by these sacrifices, they would weather the storm, except the fact that, twenty-nine days after the first sale, nineteen days after the second sale, and ten days after the third sale, they gave up the struggle and suspended payment, and three days thereafter came into this court as voluntary bankrupts. It may be conceded that it would have been better for those who were their creditors when they petitioned, if they had suspended payment some time before they did; but that by no means shows that they were, within the statute, insolvent or contemplating insolvency, when they made these sales.

Of course, the defendant could not have reasonable cause to believe that which did not exist. Under the views suggested, the sales were not made by the bankrupts with a view to prevent the goods sold from coming to their assignee in bankruptcy, or from being distributed under the act, or to defeat the object of the act, or impair, hinder, impede or delay its operation or effect, or evade any of its provisions.

The present case is not unlike that of Lee v. Hart, 28 Eng. Law & Eq. 531. In that case, Peters, the bankrupt, commenced business as a retail draper in August. For several months subsequently he purchased large quantities of goods. In November, he commenced selling them to the defendant, who was a job dealer, and continued to do so from time to time, at prices stated to be about forty or fifty per cent. below cost. The following April, Peters stopped payment, and eleven days afterwards was declared a bankrupt. The defendant had paid the bankrupt about £1,800 in respect of goods which were stated to be worth about £3,000. The assignees of the bankrupt sued the defendant, in trover, for converting the goods. Evidence was given tending to show that the bankrupt was insolvent during the time he was making the sales, from time to time, to the defendant. For the plaintiffs, it was contended, that the sales amounted to an act of bankruptcy, as being a fraudulent transfer of goods within the statute. The plaintiffs had a verdict, at the sittings. On a motion for a new trial before the court of exchequer, Baron Parke says: "Without doubt, there may be a sale which is a fraudulent transfer, within the meaning of the bankrupt act. That is established by the case of Cook v. Caldecot, 4 Car. & P. 315, Moody & M. 522. Lord Tenterden there says: 'A sale is a transfer, and therefore may come within the provisions of the statute, as a fraudulent transfer.' For example, it would be a fraudulent act, if a party were to buy goods of another at a very low rate, knowing him at the same time to be in insolvent circumstances, and to have an intention of decamping with the money. What is meant as constituting an act of bankruptcy is a direct fraud on creditors, but not a mere selling of goods at a price below their value. That is the meaning of the case of Cook v. Caldecot." A new trial was granted and had. At the second trial it appeared that Peters set up business in September, beginning by obtaining a large stock of goods on credit; that, in November, the defendant bought some goods of Peters for about half their real value; that, after that, and up to the following April, between twenty and thirty similar transactions took place, the sales being always at less than two-thirds of the real value of the goods; that the bankrupt said that he applied the moneys received from the defendant in paying creditors; that Peters became bankrupt in April; and that his failure arose from his thus selling the goods at such low prices. At the trial, the court directed the jury that, if the transactions between the defendant and Peters were real sales, the one bargaining for the price, the other for the goods, each endeavoring to do the best for himself, the sales were not acts of bankruptcy. The jury found for the defendant. After judgment, the plaintiffs carried the case, by writ of error, to the exchequer chamber. In affirming the judgment, the court say (Lee v. Hart, 34 Eng. Law & Eq. 569): "We are of opinion, in this case, that the direction of the judge to the jury is correct, and that, if the jury were of opinion, on the evidence before them, that the dealings between the defendant and the bankrupt, which were in question, were real sales by the bankrupt to the defendant, each trying to make the best bargain he could for himself, such sales were not acts of bankruptcy, or fraudulent transfers of the bankrupt's goods, within the meaning of the" statute enacting, "that, if any trader liable to become bankrupt shall 'make or cause to be made any fraudulent gift, delivery or transfer of any of his goods or chattels,' every such trader so doing, with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy." "The statute does not mention 'sales' as one of the fraudulent modes by which an act of bankruptcy may be committed; but the

sale of goods at a low rate may be a fraudulent transfer, if the seller did not intend to sell the goods bona fide for the purpose of carrying on his business, but for the purpose of defeating and delaying his creditors. To that effect is Lord Tenterden's decision in the case of Cook v. Caldecot, which was much relied upon by the counsel for the plaintiff, and observed upon by the court of queen's bench, in Baxter v. Pritchard, 1 Adol. & E. 456. Neither of these cases, nor that of Graham v. Chapman, 21 Law J. (N. S.) C. P. 173, nor Young v. Waud, 8 Exch. 221, will apply to a case like the present, where the bankrupt sold goods at various times to the defendant at very low rates, for the purpose, as it would appear by the evidence, not of defeating or delaying the creditors, but of distributing the proceeds among them, and to enable him to carry on the business longer. The sales were bona fide sales, though they were at less prices than the goods were worth, and it does not appear that, at the time of each sale, or of any of them, the bankrupt could have obtained better prices for ready money, which seems to have been his object."

In the present case, the evidence that, at the time the goods were bought by the defendant, their market value was the prices stated in excess of those paid by the defendant, does not make the sales fraudulent. In the case of Lee v. Hart, the goods were sold at two-thirds and one-half of their "real value." It is not shown, in the present case, that the bankrupts could or ought to have obtained more for the goods, on sales of them for cash, than they did. The presumption is, that, with the object which it is proved they had in view —to get all the money they could to pay to their creditors—they would sell for the highest prices they could obtain, in their position. While it was open to them to borrow money or sell their notes, it might have been far from judicious, in its effects on their credit as merchants, for them to sell goods at all at auction, or for them to sell to others in the trade, even through brokers, at low prices; while they might deem it not injurious to sell at such prices to a purchaser like the defendant. There is an entire absence of evidence that they could or ought, in the then existing state of things, to have obtained more for the particular goods sold to the defendant; and, still further, of evidence to charge the defendant with reasonable cause to believe anything which involves him in complicity with what the statute declares to be a fraud. I cannot believe that the statute intends to throw such serious embarrassments in the way of ordinary trade as would arise if such sales as those to the defendant were held to be void. The bill must, therefore, be dismissed, with costs.

NOTE. The circuit court (Woodruff, J.), in affirming this decision, on appeal, in March, 1873, said: "This case seems to me one of much doubt, but, upon the best consideration I can give to the proofs, my conclusion is, that it is not sufficiently proved that the defendant, when he purchased the goods in question, had reasonable cause to believe that the sellers (Valk Brothers) were insolvent, and, also, that they made the sale in fraud of the bankrupt act, in the particulars mentioned in the 39th section. Nor is it proved that the sale was so out of the usual course of business of the debtors, as to raise a presumption of such fraud, which the explanation of the transaction given by the parties does not repel. The decree must be affirmed, with costs." [The opinion of the circuit court is nowhere more fully reported.]

Case No. 12,616.

SEDGWICK v. MENCK et al.

[6 Blatchf. 156; [1] 1 N. B. R. 675 (Quarto, 204).]

Circuit Court, S. D. New York. June 22, 1868.

BANKRUPTCY—BONA FIDE SALES—CONTEMPLATION OF INSOLVENCY.

In 1857, B., being insolvent, made an assignment of his property to M., giving preferences among his creditors. Under creditors' bills, filed against B. and M., C. was appointed receiver of the property of B. Afterward, C. brought a suit, as such receiver, in a state court, against B. and M., to recover the assigned property, and obtained a judgment, in 1858, adjudging the assignment to be fraudulent and void against the creditors of B. From that judgment, M. appealed, and the case was now pending on appeal. In 1868, B. was adjudged a bankrupt, and S. was appointed his assignee in bankruptcy. S. then, as such assignee, brought a suit in this court, against M. and C., to compel C. to deliver up to S. the property in the hands of C., as receiver. *Held*, that the suit could not be maintained.

[Cited in Re Davis, Case No. 3,620; Olney v. Tanner, Id. 10,506; Kimberling v. Hartly, 1 Fed. 574, 575; Re Pitts, 9 Fed. 544; Judd v. Bankers' & Merchants' Tel. Co., 31 Fed. 183; Wadley v. Blount, 65 Fed. 674.]

[Cited in brief in Ellis v. Boston, H. & E. R. Co., 107 Mass. 22. Cited in Gibbs v. Logan, 22 W. Va. 212; Stuart v. Hines, 33 Iowa, 60.]

On the 6th of January, 1857, Andrew Beiser, being insolvent, made an assignment of his property, real and personal, to William Menck, giving preferences among his creditors. Creditors' bills were filed against Beiser, the debtor, and Menck, the assignee, under which Charles B. Bostwick was appointed receiver of the property. On the 16th of March, 1858, he commenced a suit, in the court of common pleas for the city and county of New York, against Beiser and Menck, to recover possession of the property, and such proceedings were had, that, on the 9th of December, following, a judgment was rendered in favor of the receiver, adjudging the assignment fraudulent and void against creditors. From this judgment Menck appealed to the court of appeals, where the case is still pending. In January, 1868, Beiser was adjudged a bankrupt, and the plaintiff [John Sedgwick] was appointed his assignee. The plaintiff then brought this suit against Menck and Bostwick, to obtain possession of the assets of the

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

estate. An injunction having been granted [see Case No. 12,617], the defendants now moved for its dissolution.

Francis N. Bangs, for plaintiff.
C. Bainbridge Smith, for defendants.

NELSON, Circuit Justice. The filing of the creditors' bills gave, according to the law of New York, a lien upon the assets of the debtor, in behalf of the judgment creditors; and the receiver, representing their interests, has, it appears, been diligently engaged in endeavoring to reduce them to possession, and apply them to the payment of the judgments. It is difficult to see what right exists in the assignee in bankruptcy to this property, thus devoted by the law to the payment of the debts of these judgment creditors, some ten years before any right attached in bankruptcy. The judgment creditors have been subjected to very considerable expense, already, in the litigation, and have succeeded, in the lower courts, in setting aside the assignment, as fraudulent, and thereby giving effect to their judgments against the property. Whether they will derive any benefit from the expense and trouble, must depend on the decision of the appellate court. It seems to me, that they are entitled to, at least, this chance, and that the bankrupt's assignee is neither entitled to it himself, nor in a position to deprive them of it. The question involving the right to this property is in the state court, where it belongs, and the decision of that court will be conclusive upon the right. If it shall be in affirmance of the judgment of the court below, the property will be applied to the satisfaction of the judgments, on the creditors' bills. If it shall be in favor of the validity of the assignment, the property will take the direction given to it by the trusts created in the assignment. The right to this property attached long before the assignment in bankruptcy was made, and even before the passage of this bankruptcy law [of 1867 (14 Stat. 517)]. The motion to dissolve the injunction is granted.

Case No. 12,617.

SEDGWICK v. MENCK et al.

[1 N. B. R. 425 (Quarto, 108).] [1]

District Court, S. D. New York. 1868.

INJUNCTION—BANKRUPTCY—RESTRAINT OF SUIT IN STATE COURT.

An injunction may be issued out of the United States district court, sitting in bankruptcy, to restrain certain creditors of the bankrupt from all further proceedings in a state court, and from intermeddling or interfering with the bankrupt's property, which had been fraudulently assigned by him, before the commencement of proceedings in bankruptcy, to an assignee of his own selection.

[This was a bill by John Sedgwick, assignee of Andrew Beiser, against William Menck and Charles B. Bostwick. Heard on motion to vacate or modify an injunction.]

BLATCHFORD, District Judge. On a bill filed by the assignee, setting forth that in 1857 the bankrupt had made an assignment of his real and personal estate to the defendant Menck; that such assignment was in fraud of Beiser's creditors; that Menck still had the property or the proceeds thereof; that the defendant Bostwick, as receiver, had obtained a judgment of the court of common pleas of this city, setting aside said assignment as fraudulent and void, and directing the transfer of the property to such receiver; that an appeal from such judgment was now pending undetermined in the court of appeals; an injunction had been issued restraining the defendants from all proceedings in the court of appeals, and from intermeddling or interfering with the assigned property or the proceeds thereof. Messrs. C. Bainbridge Smith and N. B. Hoxie, for Mr. Bostwick, the receiver, applied to modify or vacate the injunction. Mr. Banks appeared for the assignee. It was insisted that by force of the bankrupt act, the assigned property had become vested in the assignee for the benefit of all the creditors of the bankrupt, and to be administered in this court by the assignee, and that either an affirmance or reversal of the judgment of the court of common pleas might, by ripening a lien or declaring the judgment erroneous, very materially interfere with the rights and duties of the assignee. After argument, his honor sustained the injunction and denied the motion to vacate or modify the same.

[For a hearing on motion to dissolve the above injunction, see Case No. 12,616.]

Case No. 12,618.

SEDGWICK v. MILLWARD.

[5 N. B. R. (1871) 347.] [1]

District Court, S. D. New York.

BANKRUPTCY—UNLAWFUL PREFERENCE—SHERIFF'S FEES PAID.

Where a creditor takes an unlawful preference by executions and seizes the bankrupt's property, the assignee is entitled to recover from the creditor such property or its value, and in the accounting the creditor is only to be allowed credit for the actual expenses of sale, which does not include the sheriff's fees.

In bankruptcy.

T. M. North, for plaintiff.
F. R. Coudert, for defendant.

BLATCHFORD, District Judge. There can be no doubt that the defendant took, by his executions, an unlawful preference. The debtors were insolvent and procured and suffered their property to be taken on the executions, with intent to give a preference to the defendant as a creditor, and he had reasonable cause to believe that the debtors were insolvent and that a fraud on the act was intended. The assignee is entitled to recover from the defendant the property or its value.

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The property has been sold. Under the circumstances in evidence in this case, I must, in the spirit of section twenty-five of the act [of 1867 (14 Stat. 528)], regard the sale of the property in New York, by the sheriff of New York, as having been made under the order of this court, and the proceeds of such sale as the measure of the value of such property for the purposes of the controversy in this suit. The defendant is entitled to be allowed credit for the three hundred and five dollars and seventeen cents paid for expenses of sale, and for the one thousand four hundred and forty dollars and forty-one cents paid over to the assignee, but not for the one thousand five hundred and seventeen dollars and twenty cents paid to the sheriff out of the proceeds for his fees on the execution. In regard to the property in Kings county, the plaintiff is entitled to its value less the expenses of selling it. But it does not appear what such expenses were, nor how the net proceeds, sixty-three dollars and eighty-one cents, were arrived at, nor how much it brought on the sale. I am not satisfied with the estimate of value put upon it in the evidence. What it brought at the sale may, if the condition of the property at the time and the circumstances of the sale be shown, be as good evidence of value as such estimate is. There must be an accounting for such value before a master unless the parties can agree upon it. The defendant cannot be allowed credit for the amount of the fees of the sheriff of Kings county, on the execution to him. The plaintiff is entitled to a decree according to these views, with the costs.

Case No. 12,619.

SEDGWICK v. PLACE et al.

[3 Ben. 360; [1] 3 N. B. R. 139 (Quarto, 35).]

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

BANKRUPTCY—RECEIVER—STATE ASSIGNEES—PRACTICE.

1. A bill was filed by an assignee in bankruptcy, to set aside an assignment made by the bankrupts when insolvent, and an injunction was granted, in pursuance of the prayer of the bill, restraining the assignees from, in any manner, interfering with the property covered by the assignment; and it appeared that the property consisted in part of claims against other persons, in part of moneys deposited, in part of moneys loaned on notes secured by merchandise, and in part of other property, and that the assignees had, in pursuance of an order of a state court, given security for the performance of the trusts of the assignment: *Held*, that a receiver should be appointed by this court.

2. The assignees had no right to invest the funds entrusted to them, in loans on notes secured by merchandise.

3. The security which the assignees had given, under the state laws of New York, was not available in this court.

4. The receiver should take possession of the property, collect all the collectible debts, and sell the merchandise, depositing his collections in the United States Trust Company, as fast as they should reach an amount to be named.

5. The plaintiff would be appointed such receiver.

[This was a bill by John Sedgwick, assignee in bankruptcy of James K. Place and James D. Sparkman, against James K. Place and others. See Case No. 12,622.]

F. N. Bangs, for plaintiff.

W. M. Evarts, T. C. T. Buckley, and A. H. Wallis, for defendants.

BLATCHFORD, District Judge. The main object of the bill, in this case, is to set aside, as null and void, an assignment made by the bankrupts when insolvent, on the 23d of December, 1867, to the defendants, Lewis W. Burritt, Jr., and Thomas T. Sheffield, of all their property, joint and several, in trust, to convert it into money, and therewith to pay the joint and several debts of the assignors, without preference or priority, except as provided by the laws of the state of New York and of the United States; and also to obtain a decree that certain property, which the bill alleges was conveyed by the bankrupts in fraud of their creditors, prior to the making of such assignment, vested in the plaintiff, as assignee in bankruptcy, as against the defendants, notwithstanding the execution of the assignment of December 23d, 1867. The bill prays for a receiver, pending the suit, of the property transferred to, or in the possession of, the defendants, and of the proceeds thereof. The bill avers fraud in fact, and makes allegations which, uncontradicted, show that the property in question was assigned and conveyed by the bankrupts in fraud of their creditors, and with intent to hinder, delay, and defraud their creditors. An injunction has been issued by this court, in pursuance of a prayer in the bill, restraining the assignors and assignees from disposing of, or in any manner interfering with, the property or rights of action purporting to be conveyed, created or affected by the said assignment, and from setting up or asserting, as against the plaintiff, any title to or right of action for any property conveyed by the bankrupts prior to December 23d, 1867, in fraud of their creditors. The plaintiff now moves for the appointment of a receiver. The merits of the case were not discussed on the motion, as the time for the defendants to put in their answers to the bill had not expired, and they were not held to deny by affidavit the allegations of fact in the bill. The only question argued was, whether, in view of the injunction issued by the court, and the status of the property in the hands of Burritt and Sheffield, the voluntary assignees, the safety of such property and the interests of the parties, whoever in the end might be entitled to it, required that a receiver should be appointed. The voluntary assignees produced a statement of the present condition, in their hands, of the property assigned to them, and showed that they had, in pursuance of an order of a

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

state court of New York, given under a statute of that state, security for the performance of their trust as assignees, in the sum of $320,000. The plaintiff showed, by his affidavit, that there is in the hands of Francis Skiddy, as asignee in bankruptcy of the Place Sugar Refinery, a large sum of money, consisting of dividends upon an indebtedness due from the Place Sugar Refinery to the bankrupts, and that the payment of such dividends is withheld by said Skiddy, on account of the conflicting claims thereto of the plaintiff and of the defendants Burritt and Sheffield; and also, that George F. Gilman is indebted to the bankrupts in the sum of from fifteen to twenty thousand dollars, payment of which he has withheld on account of such conflict; and that he, the plaintiff, believes that the estate of the bankrupts will suffer loss and depreciation, unless a receiver is appointed to collect the said and other demands. The statement produced by the voluntary assignees shows that the property in their hands consists of $55,000 of cash, in currency, which is deposited with the United States Trust Company, on interest; $40,000 cash, in currency, loaned to Gibson, Beadleston & Co., of New York, on $40,000 of United States bonds, which are deposited with the Long Island Safe Deposit Company, of Brooklyn; $12,510.02 of cash, in currency, which is loaned temporarily on notes secured by deposit of merchandise; $6,718.55 cash, in gold, on special deposit in bank; 1,463 bags and packages of coffee, stored in New York and Salem, valued at $14,222.11, gold; 922 packages and bags of ginger, stored in New York, valued at $6.658.21, gold; 157 half chests of tea, valued at $3,280.55, gold; sundry shares of bank stock and insurance company scrip, valued at $17,820; the claim against the Place Sugar Refinery, amounting to $56,807.28; the claim against Gilman, amounting to $15,682.45; $84,570.03 of debts, due in currency, put down as worthless; $23,563.99 of debts, due in currency, put down as doubtful or disputed; $55,670.93 of debts, due in gold, put down as doubtful or disputed; $31,811.90 of debts due in currency, put down as due from debtors who have gone into bankruptcy, other than the debt due from the Place Sugar Refinery; $201.75, due in gold, from a debtor who has gone into bankruptcy; $54,983.82 of debts, due in currency, other than the debt from Gilman, and $3,466.75, due in gold, which are not put down under any one of the above heads, $455.00 of the $54,983.82 being stated to be secured, $1,992.61 of the same being stated to be in the hands of attorneys for collection, $3,929.31 of the $23,563.99 being stated to be in suit, and the amount due from Gilman being stated to have been ordered by a state court of New York to be deposited in such court, in a suit brought against Gilman by the said voluntary assignees to recover the amount. The above are assets of both of the bankrupts jointly. In addition, there are in the hands of the voluntary assignees, assets of the bankrupt Place, individually, to the nominal amount of $5,420.75, and assets of the bankrupt Sparkman, to the nominal amount of $79,015.62.

On the foregoing facts, it is apparent that the appointment of a receiver is not only proper, but necessary. By the injunction granted by this court, on the bill, and which the defendants have not moved to vacate or modify, the voluntary assignees are restrained from, in any manner, interfering with the property in question. They, therefore, cannot lawfully collect any of the debts, or realize any of the assets; nor can they meddle with the property, even to secure it from loss. The fact that they have loaned a portion of the money in their hands, on notes secured by a deposit of merchandise, shows that they are improper custodians of trust money. No trustee has a right to make such an investment of trust funds. The security which they have given, under the state law of New York, is not available in this court; and, notwithstanding the injunction, they have full power over the funds and property in their hands. A receiver who will represent the conflicting titles to the property, ought to be put into possession of it, that he may effectually collect all the debts which are collectible, and sell, if necessary, with a clear title, the merchandise on hand. The receivership ought to be extended over all the moneys and property named in the statement of the voluntary assignees, as well the money on deposit in the United States Trust Company, as the other money and property. The $52,510.02 loaned, ought to be called in, and be, with the $55,000 and the $6,718.55 gold, deposited in the United States Trust Company, by the receiver, to the credit of this cause, on interest, subject only to the order of this court. As to the residue of the property, the receiver must give adequate security, in an amount to be fixed, on notice to all parties, for the faithful discharge of his duties; and he must be required to deposit his collections in the United States Trust Company, on interest, as fast as they reach an amount to be fixed in the order. The appointment of the plaintiff as receiver is asked for by creditors of the bankrupts, of high business standing and worth, and he will, accordingly, be appointed.

[NOTE. Subsequently certain funds in the hands of the receiver were ordered distributed. Case No. 12,623. The court decreed that the settlement made by James K. Place upon his wife of the real estate of Fifth avenue and the furniture therein was valid as against the creditors. Id. 12,620. This decree was, upon appeal to the circuit court, reversed upon this point, and affirmed upon other points. Id. 12,621.]

Case No. 12,620.

SEDGWICK v. PLACE et al.

[5 Ben. 184; 5 N. B. R. 168; 3 Chi. Leg. News, 409; 4 Am. Law T. Rep. U. S. Cts. 179; 6 Am. Law Rev. 181.] [1]

District Court, S. D. New York. June 7, 1871.[2]

BANKRUPTCY—VOLUNTARY CONVEYANCE BY A SOLVENT GRANTOR.

A conveyance by a man to another who subsequently conveys to the wife of the first grantor, cannot be set aside as being fraudulent and void under the statute of New York (2 Rev. St. p. 137, § 1), if, at the time of such conveyance, the grantor was solvent and had no intention of defrauding his creditors, where the application to set it aside is made in behalf of subsequent creditors.

[Cited in U. S. v. Stiner, Case No. 16,404; Platt v. Mead, 9 Fed. 98.]

This was a suit brought by [John Sedgwick], an assignee in bankruptcy [of James K. Place and James D. Sparkman, against James K. Place and others], to set aside, as void, various conveyances made by the bankrupts. Among the property so sought to be recovered was a house in the Fifth avenue, in the city of New York, with the furniture, held by the wife of one of the bankrupts.

[See Case No. 12,622 and note.]

F. N. Bangs, for plaintiff.

E. H. Owen, T. C. T. Buckley, and J. K. Hayward, for defendants.

BLATCHFORD, District Judge. The reargument of this case as respects the Fifth avenue property, and the furniture therein and the proceeds thereof, has only served to confirm the conclusion at which I arrived on the first argument, that the plaintiff is not entitled to a decree, as prayed for, as respects such property, furniture and proceeds.

The plaintiff claims that the settlement made by James K. Place, on his wife, of the Fifth avenue property, should be set aside as fraudulent and void, because made with an intent to hinder, delay and defraud the creditors of James K. Place. The settlement was a voluntary one, made in consideration only of the marriage relation. The plaintiff, as assignee in bankruptcy of James K. Place, is vested, by virtue of the 14th section of the bankruptcy act [of 1867 (14 Stat. 522)], with all property conveyed by the bankrupt in fraud of his creditors.

It was decided by the supreme court of the United States, in 1823 (Sexton v. Wheaton, 8 Wheat. [21 U. S.] 229), that a voluntary settlement in favor of a wife cannot be impeached by subsequent creditors merely because it was voluntary.

In Hinde's Lessee v. Longworth, 11 Wheat. [24 U. S.] 199, in 1826, the doctrine was laid down, that the mere fact that a grantor, who makes a deed to a child in consideration of affection, is in debt to a small amount, will not make such deed fraudulent as against creditors, if it be shown that the grantor was in prosperous circumstances and unembarrassed, that the gift to the child was a reasonable provision according to his state and condition in life, and that enough was left for the payment of the debts of the grantor. This doctrine was approved by the court of appeals of New York, in 1851, in Carpenter v. Roe, 10 N. Y. 227, and, in 1862, in Babcock v. Eckler, 24 N. Y. 623. The case last cited also says, that subsequent indebtedness cannot be invoked to make that fraudulent which was honest and free from impeachment at the time.

In Van Wyck v. Seward, 6 Paige, 62, in 1836, Chancellor Walworth said: "I presume it cannot be seriously urged, that, where a parent makes an advancement to his child, honestly and fairly retaining in his own hands, at the same time, property sufficient to pay all his debts, such child will be bound to refund the advancement, for the benefit of creditors, if it afterwards happens that the parent, either by misfortune or fraud, does not actually pay all his debts which existed at the time of the advancement."

In Bank of U. S. v. Housman, 6 Paige, 526, in 1837, the same judge said that it was the settled law of New York, that a voluntary conveyance was not per se fraudulent, even as against creditors to whom the grantor was indebted at the date of the deed.

In Frazer v. Western, 1 Barb. Ch. 220, in 1845, the same judge says: "The law sanctions a conveyance founded upon the consideration of blood or of marriage merely. The legal presumption, therefore, is, that such a conveyance is valid, and not a fraud upon the rights of any one."

In Parish v. Murphree, 13 How. [54 U. S.] 92, in 1851, the result of the cases in regard to the statute of 13 Elizabeth, rendering void conveyances made with intent to delay, hinder or defraud creditors, is well summed up by the court in these words: "The various constructions which have been given to the statutes of frauds by the courts of England and of this country, would seem to have been influenced, to some extent, from an attempt to give a literal application of the words of the statute instead of its intent. No provision can be drawn so as to define minutely the circumstances under which fraud may be committed. If an individual, being in debt, shall make a voluntary conveyance of his entire property, it would be a clear case of fraud; but this rule would not apply if such a conveyance be made by a person free from all embarrassments, and without reference to future responsibilities. But, between these extremes numberless cases arise, under facts and circumstances which must be minutely examined, to ascertain their true character. To hold that a settlement of a small amount, by an individual in independent circumstances, and which, if known to the public, would not affect his credit, is fraudulent, would be a perversion of the statute. It

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 6 Am. Law Rev. 181, contains only a partial report.]

[2] [Reversed in Case No. 12,621.]

did not intend thus to disturb the ordinary and safe transactions in society, made in good faith, and which at the time subjected the creditors to no hazard. The statute designed to prohibit frauds, by protecting the rights of creditors. If the facts and circumstances show clearly a fraudulent intent, the conveyance is void against all creditors, past or future. Where a voluntary conveyance is made by an individual free from debt, with a purpose of committing a fraud on future creditors, it is void, under the statute. And if a settlement be made without any fraudulent intent, yet if the amount thus conveyed impaired the means of the grantor so as to hinder or delay his creditors, it is, as to them, void."

These were the generally accepted doctrines in regard to voluntary settlements until the decision of Lord Chancellor Westbury, in 1864, in the case of Spirett v. Willows, 3 De Gex, J. & S. 293, 11 Jur. (N. S.) pt. 1, p. 70. In that case it is said: "The plaintiff sues, as a creditor, to set aside a voluntary settlement or deed of gift made by the defendant, his debtor. The plaintiff's debt was contracted before the time of making the settlement. He has since recovered judgment at law, and the debtor has become bankrupt. The plaintiff complains, in the words of the statute of Elizabeth, that his judgment and execution are hindered, delayed and defrauded by the conveyance of the goods and chattels of his debtor, made by this voluntary settlement. The defence is, that, at the time of making the settlement, the debtor reserved and had property enough to pay the plaintiff and all his other creditors in full, and that the settlement, therefore, is not fraudulent, because the debtor remained solvent after he had made it. There is some inconsistency in the decided cases on the subject of conveyances in fraud of creditors, but I think the following conclusions are well founded: If the debt of the creditor by whom the voluntary settlement is impeached, existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. But, if a voluntary settlement or deed of gift be impeached by subsequent creditors, whose debts had not been contracted at the date of the settlement, then it is necessary to show either that the settlor made the settlement with express intent to delay, hinder or defraud creditors, or that, after the settlement, the settlor had no sufficient means or reasonable expectation of being able to pay his then existing debts, that is to say, was reduced to a state of insolvency, in which case the law infers that the settlement was made with intent to delay, hinder or defraud creditors, and is, therefore, fraudulent and void. It is obvious, that the fact of a voluntary settlor retaining money enough to pay the debts which he owes at the time of making the settlement, but not actually paying them, cannot give a different character to the settlement, or take it out of the statute. It still remains a voluntary alienation, or deed of gift, whereby, in the event, the remedies of creditors are delayed, hindered or defrauded. I am, therefore, of opinion, that this settlement is void, as against the plaintiff." This case of Spirett v. Willows came under consideration in the case of Freeman v. Pope, L. R. 9 Eq. 206, in 1869. In that case, a subsequent creditor of the settlor's brought the suit, to set aside, as fraudulent and void, under the statute of 13 Elizabeth, as against the creditors of the settlor, a settlement of a policy of life insurance made by the settlor upon his goddaughter, in consideration of affection. Vice-Chancellor James says: "Were this case absolutely free from authority, I should have thought that the question I had to put to myself under the statute, was, in the words of the statute, whether there was actually any intention, by this settlement, on the part of the settlor, to defeat, hinder or delay his creditors. If I were a special juryman to whom such a question were put to me by the judge, I should, upon the facts of this case, come to the conclusion, that this gentleman had no such intention whatever. I am satisfied that he had not any idea whatever of defrauding or cheating his creditors by making that settlement, in favor of his goddaughter, of the policy of assurance." He then says that he considers himself bound by the decision of Lord Westbury in Spirett v. Willows, though he cannot follow the reasoning. He then quotes the material parts of the judgment of Lord Westbury, as above cited, and comments upon them thus: "That is to say, it is immaterial whether the debtor had any intention whatever of defeating his creditors; but if, in the result, from some accident, a small debt remained unpaid for some years, and, by reason of a voluntary settlement and subsequent insolvency of the debtor, the creditor was delayed in the payment of his debt, then, however honest the settlement was, however solvent the settlor was at the time, if at the time he had £100,000 and put £100 in the settlement, and a creditor for say £10 happened to be unpaid in consequence of the settlor losing his money in the interval, that would be quite sufficient to set aside the voluntary settlement. That is the decision of Lord Westbury. I am bound by that decision, and, therefore, although bound to express my extrajudicial opinion, that this gentleman, having regard to his income and his means, had no intention whatever to cheat his creditors at that time, I must judicially declare this settlement to be fraudulent and void as against his creditors." This case of Freeman v. Pope was appealed, and was heard on appeal before Lord Chancellor Hatherley and Lord Justice Giffard, in 1870. 5 Ch. App. 538. The lord chancellor, in his judgment, after holding, that, if the necessary effect of an instrument is to defeat, hinder or delay creditors, that necessary effect must be considered as

evidencing the intention to do so, whatever view may be taken as to what was actually passing in the mind of the maker of the instrument, says, that, in the case of Spirett v. Willows, there was direct and positive evidence of an intention to defraud, independently of the consequences which followed, or which might have been expected to follow, from the act. He adds: "But, it is established by the authorities, that, in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts, from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual), that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute." He then refers to what he speaks of as the dicta of Lord Westbury in the case of Spirett v. Willows, and especially points out the following remark of Lord Westbury's as a dictum: "If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement." In regard to this dictum he says: "This expression of opinion on the part of the lord chancellor was by no means necessary for the decision of the case before him, where the settlor was guilty of a plain and manifest fraud. It is expressed in very large terms, probably too large; but it is unnecessary to resort to it in the present case." He then holds that the decree of Vice-Chancellor James was right, on the ground that, irrespective of the question whether there was an actual intention to delay creditors, the facts were such as to show that the necessary consequence of what was done was to delay them. In the same case, Lord Justice Giffard says, that the propositions laid down in Spirett v. Willows, taken as abstract propositions, go too far and beyond what the law is. In respect to voluntary settlements, he says that an intent to defeat creditors may be inferred in a variety of ways. "For instance, if, after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent, and it would be the duty of a judge, in leaving the case to the jury, to tell the jury that they must presume that that was the intent. Again, if, at the date of the settlement, the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them."

It is, therefore, quite clear, that nothing in the case of Spirett v. Willows changes the settled view held in England and the United States prior to that case, as to the proper construction of the statute of 13 Elizabeth.

The statute of New-York (2 Rev. St. p. 137, § 1), declaring conveyances of, and charges upon, property, made with the intent to hinder, delay or defraud creditors, to be void as against the persons so hindered, delayed or defrauded, is, in substance, the same, in its provisions, as the first section of the statute of 13 Eliz. c. 5. The statute of New York also contains the provision (2 Rev. St. p. 137, § 4), that the question of such fraudulent intent shall, in all cases, be deemed a question of fact, and not of law, and that no conveyance or charge shall be adjudged fraudulent as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration.

James K. Place, the settlor, was, for several years prior to December 1st, 1865, in a prosperous business, in the city of New York, as a member of the mercantile house of J. K. & E. B. Place, in which he and Ephraim B. Place were the only general partners, and James D. Sparkman was the sole special partner. The copartnership had, by its terms, on the 30th of November, 1865, some time yet to run. In the summer of 1865, James K. Place, being at the time prosperous in business and free from embarrassment, and abundantly solvent, determined to make a settlement on his wife, of a house for a residence. In pursuance of that purpose, he purchased, for the sum of $5,000, a ground-rent lease of a lot of land on the northwesterly corner of Forty-Seventh street and the Fifth avenue, in the city of New York, in size twenty-five feet by one hundred feet. He paid $500 of the purchase money on the 13th of July, 1865, and the remainder on the 18th of September, 1865. The holder of the lease assigned it to James K. Place, by an instrument dated June 21st, 1865, and recorded September 19th, 1865. Place immediately commenced the erection of a house on the lot, making, for the purpose, prior to the 2d of November, 1865, written contracts with various persons to do various parts of the work and furnish the materials therefor, payments for the work and materials to be made by instalments, as the work progressed to defined points. The house was completed about September, 1866. The affixing of materials and of the results of labor to the premises, in the shape of the house, kept ahead of the payments made therefor by James K. Place, the accretion to the land being at the rate of from $7,000 to $8,000 a month during the year from September, 1865, to September, 1866.

On the 30th of November, 1865, the firm of J. K. & E. B. Place was dissolved, by the mutual consent of its general and special partners. E. B. Place retired from business, and James K. Place and James D. Sparkman formed, as general partners, on the 1st of

December, 1865, a copartnership under the firm name of J. K. Place & Co., for the purpose of continuing the business of J. K. & E. B. Place. The firm of J. K. & E. B. Place had been prosperous. At its dissolution, November 30th, 1865, its accounts were adjusted after being stated, and the balance of its assets, after allowing for the payment of its debts, was divided among the members of the firm, by carrying to the credit of each member his proper share. Such share of James K. Place was, on that day, $227,301 62, and such share of James D. Sparkman was $262,719 45. These sums, in the shape in which they were so credited, being in the shape of assets of J. K. & E. B. Place, were put by James K. Place and James D. Sparkman, as capital, into the new firm of J. K. Place & Co., and amounted to more than $490,000. J. K. Place & Co. took, as purchasers, the stock of goods which J. K. & E. B. Place had on hand, and continued the same description of business at the same store. J. K. Place & Co. collected the receivables of J. K. & E. B. Place, and with the proceeds liquidated the debts due by J. K. & E. B. Place. Such debts amounted to over $3,800,000. All of them, except debts to the amount of some thirty to thirty-five thousand dollars, were paid within from sixty to ninety days after the 30th of November, 1865, J. K. Place & Co. having collected about ninety-eight per cent. of the debts due to J. K. & E. B. Place. There is no evidence that, at the time of forming the new firm of J. K. Place & Co., December 1st, 1865, James K. Place had any intention of doing anything else in respect to his own future business, or the business of such new firm, except to continue the prosperous business which the old firm of J. K. & E. B. Place enjoyed, or to embark in any hazardous enterprises or speculations, and there is no evidence to show that he had any reason to suppose that the new firm would not be as successful as the old firm had proved itself to be.

On the 18th of April, 1866, two instruments of assignment of the lease so assigned to James K. Place, were acknowledged and recorded in the proper recording office. One was an assignment of such lease by James K. Place to Alexander H. Wallis, and was dated November 30th, 1865. Mr. Wallis was the legal adviser of James K. Place. The other instrument was an assignment of such lease by Mr. Wallis to Susan A. Place, the wife of James K. Place, and was dated December 1st, 1865.

On the making, on the 13th of July, 1865, of the first payment, $500, on account of the assignment of the lease, an account was opened, in a book kept by J. K. & E. B. Place, as a book of that firm, which account was headed: "Fifth avenue, cor. 47th St., J. K. Place." This account was continued as the same account, under the same heading, in such book, so long as the firm of J. K. & E. B. Place continued, and, after that, the same book being kept by J. K. Place & Co., as a book of that firm, the account was continued as the same account, in the same book, under the same heading. To this account were debited all payments made on account of the purchase of the lease and the building of the house. The first item debited in such account was the $500 paid on account of the lease, July 13th, 1865, and it was entered as of that date. The amount of the items debited in such account to and including November 30th, 1865, were $10,028 35; to and including December 31st, 1865, $11,774 44; to and including December 31st, 1866, $51,627 00; to and including April 30th, 1867, $82,547 08; and to and including November 20th, 1867, $95,533 04. The amount of the items so debited during the year 1865 was $11,774 44; during the year 1866, $49,852 56; during the time in the year 1867 which preceded the 1st of May, 1867, $20,920 08; and during the time in the year 1867 which succeeded the 30th of April, 1867, and preceded the 21st of November, 1867, $12,985 96. By the 1st of December, 1865, $25,000 had been expended on account of the property, although only $10,028 35 had been debited to the account.

In regard to the furniture in the Fifth avenue house, some of it belonged to Mrs. Place, having been given to her by her father a number of years before 1866. The rest of it was procured during 1866, the order for the making of a large part of it having been given in June, 1866. It was paid for by Mr. Place as a part of the settlement on his wife, having been ordered and purchased by Mrs. Place, in her own name.

After the completion of the house and the procuring of the furniture, Mr. and Mrs. Place moved into the house and occupied it with their family.

The business of the firm of J. K. Place & Co. was, at first, very profitable. During the year 1866, and after April or May in that year, it sustained some losses, but its losses were not ascertained until December 31st, 1866, when they amounted, up to that time, to about $175,000. By that time the labor and materials which went into the house had been, all of them, substantially put into it as between the settlor and the settlee, and the furniture had been procured. The business of the firm went on, however, and it did not fail until November 20th, 1867, although by May, 1867, there was reason to think it would become insolvent.

I cannot regard the investment in the house and lease, and in the furniture, as an investment of the funds of the partnership for account of the partnership. The expenditures were, in effect, charged to James K. Place, with the assent of his partner, and the money was, in effect, drawn by him from the firm and applied to such expenditures, as between him and his partner, and with such partner's assent. The transaction of the purchase of the lease and the building of the house was an open and not a secret one,

and all the moneys applied to the purpose and to purchasing the furniture were debited on the books of the firm in an account headed with the designation of the property, and with the name of James K. Place. This was, to all intents and purposes, an individual account of Place's, kept in that shape for the sake of convenience. All of his private accounts, with few exceptions, were kept in the same way, in the books of the firm.

Within the principles settled in the cases before referred to, James K. Place was solvent and pecuniarily in a condition to make the settlement he made. It was not unreasonable in amount, and, after he made it, he still had abundant property left to pay the debts which he owed. Whether the assignment of the lease to Mrs. Place be regarded as having been made December 1st, 1865, or April 18th, 1866, is of no consequence. On all the evidence, the settlement was a competent one, whether either of those dates be taken as the date of the execution and delivery of the assignment to Mrs. Place. I see no evidence of any intent on the part of Mr. Place to defraud his then existing creditors, or to divest himself of his property and embark in a new and hazardous business, and defraud subsequent creditors. The case is not at all like the cases of Savage v. Murphy, 34 N. Y. 508, and Case v. Phelps, 39 N. Y. 164, so strongly relied on by the plaintiff. In the former case, the court found that the settlor stripped himself of the title to all his property, by transfer to his wife and children, without any visible change of possession, and with the intent to contract and continue a future indebtedness in his business, on the credit of his apparent ownership of the property transferred. In Case v. Phelps the deed of conveyance was not put on record, there was no apparent change of ownership, and the creditor trusted him on the belief that he still owned the premises.

The evidence in the present case is very voluminous. The discussions of the case have been thorough and exhaustive, both orally and on paper. I have bestowed upon its consideration much care and time. I consented to a reargument of the case as respected the Fifth avenue property and the furniture, because of the large amount involved, of the importance of the principles and questions raised and debated, and of the apparent apprehension on the part of the plaintiff's counsel that he had not, on the first hearing, presented the case to the court in the light in which it ought to have been and might have been presented. I have considered fully all the views presented by the plaintiff's counsel in all his briefs, and, if I have confined what I have hereinbefore said to the salient and prominent features of the case, it is not because I have failed to pass upon every view urged on the part of the plaintiff, but because there are certain controlling features which, under the law as I understand it, must govern the disposition of the case, and because a detailed discussion of every point of law and fact urged on the part of the plaintiff would swell this opinion to an undesirable length. The result I have arrived at is one which I am thoroughly satisfied is correct, but I have the satisfaction of knowing, that, if I have committed an error, it can be corrected by an appellate tribunal.

[The decision in this case was reversed by the circuit court, upon appeal by complainants. Case No. 12,621.]

Case No. 12,621.

SEDGWICK v. PLACE et al.

[12 Blatchf. 163;[1] 10 N. B. R. 28.]

Circuit Court, S. D. New York. June 16, 1874.[2]

BANKRUPTCY—INDIVIDUAL PROPERTY—PARTNERSHIP—SETTLEMENT ON WIFE—FRAUD ON CREDITORS.

1. Certain property settled by a member of a copartnership firm on his wife, held to have been his individual property and not the property of the firm.

2. Such settlement held to have been made in fraud of creditors and to be void as against the assignee in bankruptcy of the settlor.

[Cited in Beecher v. Clark, Case No. 1,223; Re Duncan, Id. 4,131; Barnes v. Vetterlein, 16 Fed. 219.]

[Cited in Savage v. Murphy, 34 N. Y. 508.]

3. The settlement consisted in purchasing a lease of land in the city of New York, and erecting a house on the land, as a family residence, and furnishing the house with household furniture, the expenditures running through a period of over two years.

4. The pecuniary condition of the settlor, during the entire period of time, examined, and the acts of the settlor treated as one transaction.

5. In September, 1865, P., who was afterwards adjudged a bankrupt, purchased certain leasehold property on the Fifth avenue, in the city of New York, on account of which he paid the sum of $4,500. This property he caused to be transferred to his wife in December, 1865, as a voluntary settlement. He expended in the improvement of this property, and for the furniture of the house erected thereon, in the year 1865, the sum of $11,774; in 1866, the sum of $49,852; in 1867, prior to May 1st, $20,920; and between May 1st and November 25th, when the copartnership firm of which he was a member failed, $12,985. During the year 1865, the firm lost the sum of $175,000 in gold. During the same year it lost all its investments in another firm, and $200,000 by its endorsements therefor. It was losing money rapidly during the whole of the years 1866 and 1867, until it failed, in November, 1867: *Held*, that whether the conveyance was in fraud of creditors was a question of fact, to be decided upon all the evidence—whether, in buying the lot on the Fifth avenue, and making the payments and improvements, the bankrupt had good reason to believe, and did believe, that he could present such property to his wife, as a gift, and be able to pay his debts then contracted, and to be contracted in the business he contemplated pursuing, or whether the transaction was an anchor to windward, for the benefit of himself and family.

[Cited in Odell v. Flood, Case No. 10,428; Scott v. Mead, 37 Fed. 873.]

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

[2] [Reversing Case No. 12,620.]

6. Each payment was a separate transaction, respecting which the same inquiry must be made.

7. The nature of the business was to be considered, as well as the necessary expenses of the style and society in which the parties lived; and that a family provision which would leave to the settlor an estate which would be respectable and comfortable in the country, and an ample protection against contingencies, might be entirely insufficient when subject to the expenses and luxuries of a city life.

8. Under the circumstances of this case, the gifts to the wife were adjudged to be in fraud of creditors and illegal and void.

[Cited in Platt v. Mead, 9 Fed. 98.]

9. A mortgage held valid, made by the wife on the lease and joined in by the husband, after the lease was conveyed to her, the consideration of the mortgage being a loan of money made to her in good faith by the mortgagee, who had no knowledge of the weakness of her title.

[Cited in Simms v. Morse, 2 Fed. 329.]

10. Part of the money received by the wife for the loan on the mortgage was paid by her to her husband, and, as a consideration, he conveyed to her certain lots of land. She afterwards sold those lots. It was held that she must account to the assignee in bankruptcy for what she received on the sale of the lots.

11. A mortgage held void, made by the wife on the lease, to creditors of the husband's firm, after it had failed, as security for an existing debt, they having knowledge of all the facts which made the wife's title invalid.

12. A settlement made by S., another member of the same firm, on his wife, at about the same time, of a house and lot, occupied by him as a family residence, and the furniture in the house, and certain government bonds, held to have been made in fraud of creditors, and to be void as against the assignee in bankruptcy of the settlor.

[Cited in Barnes v. Vetterlein, 16 Fed. 219.]

13. The pecuniary condition of the settlor at the time of making the settlement, and afterwards, examined.

14. The wife was quite ill when the settlement was made, and she immediately made her will, giving the benefit of the whole property to the husband during his life, and, after his death, to his children, who were not hers, and she died six months after the settlement was made, and seventeen months before the firm failed. The bonds were never delivered to the wife, but continued in the possession of the firm, and were used by it, and were first delivered by it to her executor after the firm failed.

15. The bonds having been sold, the executor was held liable only for their value when sold, and not for the highest market price they had reached.

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

In equity. In this case, several appeals were taken from a decree of the district court, made in a suit in equity brought in that court by [John Sedgwick] the assignee in bankruptcy of James K. Place and James D. Sparkman, composing the firm of J. K. Place & Co., to set aside various transfers of property made by the bankrupts. The decision of the district court is reported in [Case No. 12,620].

[For prior proceedings, see Case No. 12,622, and note.]

Francis N. Bangs, for plaintiff.

Alexander H. Wallis and William F. Shepard, for Barker.

Edward H. Owen, for Phipps & Co.

Jedediah K. Hayward, for executors of Susan A. Place.

Edgar S. Van Winkle, for executors of Mrs. Sparkman.

HUNT, Circuit Justice. The plaintiff, as the assignee in bankruptcy of J. K. Place & Co., files his bill to set aside as void various assignments made by the bankrupts. Many questions were presented to the district court for its decision, which are now brought before this court upon appeal. Although arising out of transactions with one or more of the firm of J. K. Place & Co., and although, in some particulars, dependent upon the same evidence, the questions are distinct, and must be stated and passed upon separately. I will give them, in order, such consideration as may seem necessary.

For many years prior to December 1st, 1865, a large mercantile business had been carried on, in the city of New York, by James K. Place and Ephraim B. Place, as general partners, and James D. Sparkman, as special partner, under the style of J. K. & E. B. Place. On that day the firm was dissolved and a new firm was formed, under the name of J. K. Place & Co., consisting of James K. Place and James D. Sparkman only, both being general partners. This firm continued in business until November 19th, 1867, when it failed.

The title to certain property on the Fifth avenue was acquired by James K. Place in September, 1865, by the delivery to him, on that date, of a permanent lease of the same. This lease was assigned by Mr. Place to A. H. Wallis, for the purpose of being transferred by him to Mrs. Place, the wife of the assignor, and the same was so transferred by Wallis. The transfer to Wallis, and that by him to Mrs. Place, bear date of December 1st, 1865. They were acknowledged April 18th, 1866, and recorded on that day; and it is insisted by the assignee in bankruptcy that they were not, in fact, executed and delivered until some time in the month of April, 1866.

I. The first question argued is this—was the transfer of the Fifth avenue leasehold lots by James K. Place to Susan A. Place, his wife, made through the agency of Alexander H. Wallis, fraudulent and void?

While this property was held by Mrs. Susan A. Place, mortgages upon it were executed by her, one to Joseph S. Barker, to wit, in May, 1867, and one to Cross, now held by Phipps & Co., in January, 1868. The counsel for the assignee concedes, that, if the title of Mrs. Place is good, that of her mortgagees is good also, and hence, he says, her title is the first object of attack. If her title is invalid, it is insisted that the mortgages are also invalid.

The general propositions of the assignee as to the Fifth avenue property are these: (1.)

That it was partnership property, and has been wrongfully withheld from the payment of the partnership debts of J. K. & E. B. Place and of J. K. Place & Co.; (2.) That, if it was the separate property of James K. Place, it was conveyed by him to his wife in fraud of creditors and of his partner.

(1.) I am not able to concur with the assignee in his claim that the property in question was the property of the firm of J. K. & E. B. Place, or of the firm of J. K. Place & Co. The purchase was made by Mr. Place individually, for his own account, and not on account of either of the firms named. Neither of the partners was ever consulted about the purchase, so far as the evidence shows, nor did they ever claim any interest in the estate. The title was taken in the name of Mr. Place personally, and was by him personally transferred to Mr. Wallis. I see nothing in the book-keeping of the transaction which contradicts this conclusion. The accounts respecting the property were carried on the books of the firm for the convenience of Mr. Place, as were all his other private affairs, but the entries, taken together, show it to have been a private transaction. It was so deemed by the partners, as well as by the subordinates making the entries, from the beginning.

(2.) Was the conveyance by James K. Place to his wife, of the Fifth avenue property, fraudulent, within the purview of the bankrupt act [of 1867 (14 Stat. 517)]?

It is impossible, in rendering a decision upon a case containing so great a volume of testimony, received from so many witnesses, and based upon statements contradictory, involved, and confused, to make an argument upon the facts. That duty has been performed by the counsel for the respective parties, with great labor and great skill. I shall content myself generally with a statement of facts, as I find them to be, without attempting to sustain the conclusion of fact by argument or reference.

As already stated, the lease of the Fifth avenue property was assigned to Mr. Place in September, 1865. On the 19th of that month he paid to J. A. Livingston $4,500, on the purchase of the lease, having previously paid the sum of $500. Contracts were at once made for building a house on this property, and making other improvements, for which large amounts were paid by Mr. Place from time to time. The amounts thus paid for the improvement of the property, and for the furniture of the house, were made at the rate of from $7,000 to $8,000 a month, from September, 1865, to September, 1866. The books of J. K. & E. B. Place show that there was paid on this account as follows: Up to November 30th, 1865, $10,028.35; up to December 31st, 1865, $11,774.44; up to December 31st, 1866, $61,627.00; up to April 30th, 1867, $82,547.08; and up to November 25th, 1867, $95,533.04. Thus, there was paid during 1865, $11,774.44; during 1866, $49,852.56; in 1867, prior to May 1st, $20,920.08; and between May 1st and November 25th, $12,985.96. It is stated, in the opinion of the court below, and quoted in Mr. Hayward's brief, that, "by the 1st of December, 1865, $25,000 had been expended on account of the property, although only $10,028.35 had been debited to the account."

The question is not, simply, what was the condition of Mr. Place in September, 1865, when he made the payments to Mr. Livingston for the lot, but what was his condition when he made the various payments, during the residue of the term, for the much larger expenditures for the building and furniture?

The law upon this question of fraud has been elaborately argued by the respective counsel, and numerous authorities are cited in the opinion of the court below. The principles to be applied here are not difficult to discover. There is no act or fact in the case, that I discover, which stamps the transaction as necessarily and absolutely fraudulent. Fraud or no fraud is generally a question of fact, to be determined by all the circumstances of the case. Under all the facts, as developed by the evidence on this trial, is there a reasonable presumption, that, in buying the lot on Fifth avenue, or in making the subsequent payments, Mr. Place intended to defraud his creditors, existing or future? Were his pecuniary affairs in such a state that he had good reason to believe, and did believe, that he could present, as a gift, to his wife, this amount of property, and still be able to pay the debts due and to become due in the business he was then engaged in and that which he contemplated pursuing? Had he good reason so to believe, and did he so believe, during the entire period of the time in which he was making the payments? On the other hand, was he weak and unsteady in his pecuniary affairs, and was this transaction an anchor to windward, by which advantage to himself and family might be secured, in case the storm was too heavy for him to bear? Was this his motive and intent when he made any of these payments? Savage v. Murphy, 34 N. Y. 508; Case v. Phelps, 39 N. Y. 164; Spirett v. Willows, 3 De Gex, J. & S. 293, and 11 Jur. (N. S.) pt. 1, p. 70; Freeman v. Pope, L. R. 9 Eq. 206; Carpenter v. Roe, 10 N. Y. 227; Babcock v. Eckler, 24 N. Y. 623.

The conveyance to Mrs. Place was a single transaction in form; but, in truth, every payment was a new and separate conveyance of property, to her and for her benefit. When Mr. Wallis assigned the lease to her, the property became hers, and expenditures upon it but gave greater value to her estate. This was known to Mr. Place, and, if any part of his proceedings falls within the censure of the law, we are justified in considering that as reflecting upon all that preceded it. If he was not honest in turning the property of his creditors into the lap of his wife in the summer of 1866, we shall be justified in characterizing in like manner what took place

in the autumn of 1865. The subsequent expenditures were, in themselves, distinct and separate acts, but in pursuance of a plan formed when the first step was taken. The whole is to be taken as one transaction, and to be judged of by what was contemplated at the outset, what was afterwards contemplated, and what did occur at various times, in carrying it to perfection.

We are to consider, also, the nature of the business in which Mr. Place was engaged, and in which he expected to be engaged, and the society and style in which he lived and expected to live, and its necessary expenses. These all enter into the question we are to determine. A family provision which would still leave the donor in the ownership of an unencumbered estate of $100,000, would, in some parts of the country, and under some circumstances, be deemed to be, and be, in fact, a reasonable transaction. It would be supposed that an ample provision against all contingencies had been retained by the donor. This, however, might be differently decided, where the business of the settlor was extensive and hazardous, or where the family residence should cost $100,000, and where $20,000 or $30,000 annually would be required, by the usages of society, to maintain the establishment. The sum named would go but a little ways, either to support the fashion and luxury of a large city, or to meet the fluctuations and necessities of a business in which the existence of millions of debt gave no anxiety to the debtor. The economy of country life is not to furnish a standard for the measure of city life, nor is the enlarged business or private establishment of a city merchant to stand as it would in the simplicity of the country.

The time when the transfer to his wife was made by Mr. Place, with reference to the old and to the new business in which he was concerned, and the practical effect of the conveyance, are, also, to be considered.

In examining the condition of Mr. Place's affairs, a convenient starting point is found, in the dissolution of the old firm of J. K. & E. B. Place and the formation of the new firm of J. K. Place & Co. This occurred on the 1st of December, 1865. A statement of affairs was then made, for the purpose of a settlement, and it is sufficiently near to the time of the purchase of the Fifth avenue property, to furnish a standard of reasonable accuracy.

It is difficult to say, upon the proofs, whether the transfer from Wallis to Mrs. Place was actually made in December, 1865, or not until April, 1866. The plaintiff's proofs on that subject consist in the fact that the transfer to Wallis, and from him to Mrs. Place, were not recorded until the month of April, 1866, and in the argument, that a careful lawyer like Mr. Wallis would not be justified in retaining such papers unrecorded, and would not be likely to do so, and in the evidence of the fact that, in the bill for professional services rendered by Mr. Wallis to Mr. Place up to January 1st, 1866, no charge was found for examining the title, or drawing the transfers, respecting this property, while the charges on this subject were contained in a bill presented subsequently to April, 1866. The recollection and statements of Mr. Place, as found in his testimony, are not as positive and distinct as might be wished. The testimony of Mr. Wallis on the point is not taken, and no reason appears in the case why either party should be unwilling to call him. The difference of payments between December 1st, 1865, and January 1st, 1866, appears, by the books, to be $1,746.09. The amount paid between January 1st, 1866, and April 18th of that year, I am not able to discover. I cannot perceive that any important result would be attained by antedating the transfer by Mr. Place to his wife, from April, 1866, to December, 1865. The burden of proof on the point rests upon the party alleging the fraud or the error. I am not prepared to say that this has been proved, and I shall consider the transfer as having been made when it bears date, viz., December, 1865.

The theory of Mr. Place's counsel is this—that, on the dissolution of the firm of J. K. & E. B. Place, December 1st, 1865, the books of that concern showed him to be worth $227.000: that the merchandise of the firm was sold to their successors for the sum of $1,474,000; that their accounts were transferred to the new firm, to collect and pay the debts of the old firm, the new firm undertaking to liquidate, as it is technically expressed; that, within 60 or 90 days, 98 per cent. of these debts were collected, and enough to pay all the debts of the firm, except $30,000 or $40,000 due to Anderson & Ten Broeck, which debts were afterwards paid by E. B. Place; that the share coming to E. B. Place was about $300,000, and that to Sparkman $262,000; that James K. Place's interest in the spice concern of Place & Turlay was about $20,000; that obligations for building the Fifth avenue house, to $50,000 or $60,000, had been incurred by him; and that, after the payment of all his debts, James K. Place had an estate of the value of from $150,000 to $200,000. This is Mr. Place's own estimate, as given in his testimony. It appears, also, from the statements of Mr. Place, that the actual expense of the Fifth avenue building, and his liabilities arising out of it, were much larger than he had anticipated.

The failure of Mr. Place and his new firm, in November, 1867, is explained, first, by losses in the sugar refining business, amounting to $250,000; a loss of $30,000 of capital in the cork business; a loss by loans to the same concern of $200,000; and a loss in the value of goods, caused by fluctuation in the gold market, the last item amounting to $175,000 in the first thirteen months of the existence of the firm of J. K. Place & Co.

This theory is attacked by the assignee's counsel in various modes. It is insisted, that the "trial balance" of November 30th, 1865, shows an indebtedness of the firm of $3,842,-

000, and that the bills payable alone amounted to $1,246,777. The nominal assets, it is said, amounted to $4,500,000, including the Turlay & Place investment at $60,000, and the Fifth avenue property at $10,000. The merchandise was valued, it is said, by adding to the currency valuation the premium of 48 per cent. for gold, while gold fell to 33 by the end of the year 1866. The brief and the argument of the assignee's counsel in relation to the details of the business of the firm, its situation in December, 1865, and its proceedings afterwards, are exhaustive. It is not necessary to follow them. The result of the business was, that, at the end of the first third of the year, 1866, the condition of the firm was greatly altered for the worse, 1st, by their loss in gold; 2d, by their unsecured endorsements to a large amount for Place & Turlay; and 3d, by the purchase of the interest of E. B. Place in the Turlay concern; and, at the expiration of the year, the firm of J. K. Place & Co. was practically insolvent. It kept up its business by loans and renewals, living on the strength of its former good character. There was no technical failure, but it is manifest that the substance was being eaten out day by day, and that little more than the shell then remained. The struggle was maintained until November, 1867, when it was abandoned. During the whole of this year, the contest was maintained, doubtless with the hope and expectation that the firm could overcome the difficulties surrounding it, maintain its credit, and retrieve its affairs. The burden, however, was too great, and the absolute open failure took place on the 19th of November, 1867.

Two concurrent sets of facts are strikingly significant. They run side by side from September, 1865, to November, 1867. The first set arises out of the purchase, in September, 1865, of the Fifth avenue lots, and the payment for the same, in that month, of $5,000, to Mr. Livingston. Up to December 31st, 1865, Mr. Place paid $11,774.44 on account of this purchase and its improvement. By December 31st, 1866, the sum of $61,627 had been thus paid. On the 30th of April, 1867, $82,547.08, and on the 25th of November, in the same year, $95,533.04, had been paid on the same account. These sums were all paid by James K. Place. They were voluntary gifts made by him to his wife, at the dates mentioned, for the purchase and equipment of a house to be occupied by his wife and family, and by himself as a member of that family. The second set of facts arises out of the failing condition of the firm at the times these gifts were made. During the year 1866, the firm lost $175,000 in the single item of gold. During the same year the difficulty with Turlay occurred, by which the capital in that firm was lost, and $200,000 was added to their burdens by endorsements for that firm, which Place's firm knew it would be bound to protect, and by the assumption of E. B. Place's interest of $30,000 in the same establishment. In the face of these facts, Mr. Place made to his wife the gifts mentioned, to the amount of $50,000, during the year 1866. Assuming that he was worth the sum of $175,000 in December, 1865, as he estimates himself to have been, (he gives it, in his deposition as from $150,000 to $200,000,) invested in the manner and subject to the hazards specified, the occurrence of these losses must have admonished him that his situation was a precarious one. With this moderate fortune, thus hourly wasting away, subject to the expenses of a residence in the city of New York, these gifts to his wife cannot be sustained. They must be regarded as gifts of the property of his creditors, made for his own benefit or for that of his family. No principle of law can sustain them, nor do any of the cases to which my attention has been called justify them.

I am of the opinion, and do decide, that, within the provisions of the bankrupt act, the gift by James K. Place to his wife, of the Fifth avenue lease lot, and the payments thereon made by him, are illegal and void, and that the same must be set aside, and the value thereof applied to the benefit of his creditors, through the assignee in bankruptcy. In this respect, the decree below is erroneous, and must be reversed.

II. As to the Barker mortgage. On the 1st of May, 1867, Mr. and Mrs. Place executed and delivered a mortgage on the Fifth avenue property above described, to Joseph S. Barker, for $30,000. Mrs. Place was, in form, the owner of the property, and the legal title would, perhaps, have been fully passed by the execution of a deed by her alone. It is, however, the practice of prudent men, in such cases, to require the signature of the husband also, to show his assent to the transaction, and to cut off any possible claim, on his part, to the property. Hence, the signature of Mr. Place to the mortgage given by his wife to Barker affords no occasion for criticism.

The title of Mrs. Place, although impeachable by the creditors of her husband, was, in form, perfect, and the law is settled, that a purchaser from her, or a borrower in good faith, and having no knowledge of the weakness of her title, takes a good title. Ledyard v. Butler, 9 Paige, 132; Anderson v. Roberts, 18 Johns. 515; Hall v. Stryker, 27 N. Y. 596.

Mrs. Place was the niece of Mr. Barker. The testimony of the latter shows the transaction to have been an ordinary loan, made on the application of James K. Place, which, after time taken to consider, was accepted by Mr. Barker, and the full amount in cash paid by him, from moneys belonging to him held by J. K. Place & Co., subject to Barker's check. I discover nothing to impeach the good faith of Mr. Barker in making this loan. The decree sustaining this mortgage is right, and must be affirmed.

III. As to the mortgage to Phipps & Co., and its transfer to Bernard and Cullen. The position of Phipps & Co. is essentially differ-

ent from that of Barker. They cannot claim the protection of bona fide purchasers without notice. Their proceedings were taken after the failure of the firm of J. K. Place & Co., and the judgment in their suit was entered after the filing of their petition under the bankrupt act. It cannot be doubted, that Phipps & Co. were chargeable in law with notice of the defects of Mrs. Place's title. They took their mortgage, not as lenders in good faith upon the security of Mrs. Place's apparent title, but as creditors seeking to save a desperate debt, as creditors of one they charged with fraud in contracting a large debt with them, and whose conviction of that fraud they succeeded in procuring. In prosecuting that proceeding, it is proved by Mr. Place, that the transactions respecting Mrs. Place's title were fully examined by Phipps' counsel, and the accounts on that subject sifted, and the book-keepers called upon to explain the condition of things, and all this before the execution of the mortgage by Mrs. Place. They had knowledge of all the facts in the case. Had Mrs. Place's title been perfect, she could have granted or mortgaged as she pleased, without reference to the condition of her husband, to his firm, or to his creditors. Her title, however, was tainted, and nothing could make it good in her grantee, except his ignorance of its defects, and the payment of a good consideration by him. These elements are wanting in the Phipps mortgage, and it cannot be sustained. The decree sustaining it must be reversed. These observations apply as well to the furniture embraced in the mortgage of Phipps as to the real estate.

IV. Cullen was assignee of Mr. Place in the Phipps proceeding, under the act to abolish imprisonment for debt, already referred to, by an assignment dated January 25th, 1868. Under an execution issued on this judgment, the sheriff sold to Bernard all the right and interest of Place and Sparkman, or either of them, to the property in question.

There is good reason to hold that all of the proceedings in the Phipps suit, after the giving of Mrs. Place's mortgage to secure their debt, (January 23d, 1868,) including the conviction of fraud, and the assignment to Cullen, and the purchase by Bernard, were collusively and fraudulently contrived and transacted for the benefit of Mr. Place. It is hardly possible to reach a different conclusion, upon a careful reading of the evidence. Bernard's title, was, also, too late, inasmuch as the bankrupt proceeding was commenced before his purchase took place. The decree that Bernard and Cullen have no interest in the property described, should be affirmed.

V. Under these views, the executors of Mrs. Susan A. Place have no rights or interests, as owners of the equity of redemption of the Fifth avenue estate.

VI. As to the 43d street lots, and the judgment against the executors of Susan A. Place for the value thereof. The decision, that the conveyance to Mrs. Place by her husband, of the Fifth avenue property, was fraudulent, decides the question as to the 43d street lots. These lots were conveyed to Mrs. Place in May, 1867, by her husband, through his agent, Mr. Wallis, and the sum of $10,500, was paid as the consideration therefor. This sum, thus paid by Mrs. Place, was obtained upon a mortgage of the Fifth avenue property. It was a part of the amount received from Joseph S. Barker. Her husband received $10,500 of this money, and accounted to Mrs. Place therefor, by the transfer of these lots. The money thus paid by Mrs. Place to her husband was the money of the creditors. She held it for the assignee in bankruptcy; and the fund into which she transferred it, to wit, these lots, by a well settled rule of equity, became the property of the assignee. Had it remained in specie in Mrs. Place's hands, it could have been recovered by the assignee. She, however, sold the 43d street lots to Anthony McReynolds, in June, 1868, and, as the master found, received in value therefor the amount of $4,000. The court below raised this sum to $16,000, and ordered judgment for that amount. I think this revaluation is right. The deed from Mrs. Place to McReynolds recited that the property was sold for $16,000, and that she received that sum therefor. This recital is evidence, although not conclusive. So far as I can ascertain, there is nothing to diminish its force or to impeach it. There is a mysterious transaction with Jane C. Place, by which certain property is conveyed to her by McReynolds, respecting which, or the real transaction involved, no satisfactory information is given.

I am of the opinion, that the decree holding the executors of Mrs. Place liable should be affirmed; that they are liable, also, for the value of the substituted property received by Mrs. Place; and that such value is properly fixed at $16,000.

VII. As to the conveyance of the 42d street property to Mrs. Sparkman. By instruments bearing date about December, 1865, James D. Sparkman conveyed to his wife, Mary A., certain premises situated on 42d street, in the city of New York. The property constituted the family residence, and, with the furniture, was valued at $60,000. Mr. Sparkman continued to occupy the premises as a residence, until October, 1868. In October, 1868, the executor sold this property to Mr. Preble for $60,000, in part payment for which a mortgage of $40,000 was given, which remains in the hands of the executor. This settlement on the wife, together with $40,000 of government bonds, at the same time, was made because Sparkman was about to embark in business as a general partner, and was well advanced in years, and he desired to secure to her the sum of $100,000, by the conveyance of the 42d street prop-

erty and the furniture, carriage and horses used by him, and $40,000 in government bonds.

It is alleged and conceded, in the briefs of the counsel respectively on this question, that the firm of J. K. & E. B. Place owed $3,480,000. Their assets on paper were $4,500,000. They were succeeded by the firm of J. K. Place & Co., of which firm Mr. Sparkman was a general partner. It is claimed, on the part of Mr Sparkman, that he was worth $200,000, independently of his interest in the firm. The statements heretofore made respecting the affairs of James K. Place bear upon the present point, and the principles of law there stated are also applicable to it. They need not be recapitulated. Each member of the firm took the same occasion to make a settlement upon his wife, and apparently governed by the same principles. At the time of the dissolution of the firm of J. K. & E. B. Place, Sparkman was indebted individually in about the amount of $20,000. The debts and assets of the new firm have beeen stated. The career of the new firm, of which Sparkman was a general partner, until its final failure in November, 1867, has also been stated. The other concerns in which he was interested, and which were, in fact, bound up in, and dependent upon, J. K. Place & Co., soon went down together. The firms of Sparkman, Truslow & Co., and of Sparkman, Place & King, no longer existed. His interest in the Manufacturers' Bank stock was diminished one-half by these occurrences. The rest of his property was entirely swept away, and he was left a bankrupt. The conveyance in question to his wife, and the alleged transfer of the government bonds, were made to his wife while she was quite ill; and her will was immediately made, giving the benefit of the whole property to Mr. Sparkman during his life, and after his death to his children, who were not her children, and she died in June, 1866. The evidence shows that Mr. Sparkman occupied the house and furniture after the conveyance to his wife, as before. It fails to show that the bonds were delivered to Mrs. Sparkman, or to any one in her behalf, before her death. It appears that they were kept in the safe of her husband's firm; that they were used by the firm as their own property; that they were repeatedly pledged by them for loans for their firm; and that no actual possession was taken of them by Mrs. Sparkman's executor until the failure of the firm, in November, 1867. It is evident that the intent of Mr. Sparkman was to secure himself and family against the fluctuations of the large enterprises in which he was engaged and was about to engage. He owed very large sums. He expected to owe still larger sums, as he then became a general partner. He was about to embark in a new business. He was advanced in years. He intended to appropriate a portion of his property to provide a refuge for himself and family in the event of an unfortunate result to his enterprises. He incurs a new indebtedness of several millions of dollars by his general partnership, he unites in a sugar refining speculation, he carries on a boot and shoe business, he carries on a large and embarrassed cork factory, and he becomes a partner in business with Taylor and Young. He was in very deep water. His enterprises, in fact, were unsound, and all of them came to disastrous ends. At the moment of embarking in the most hazardous of these enterprises, he sets aside $100,000 for his wife. The wife then has a fatal sickness upon her, from which she soon dies. She makes a will giving to him for life the use of the property, and the remainder to his children after his death. The property conveyed is occupied by him as before. The bonds forming a part of the gift are used by the donor's firm as their own, are repeatedly hypothecated for their benefit, and are not claimed by, or delivered to, the executor until the failure of the firm, in November, 1867, when the firm borrows money to take them out of pledge and deliver them to the executor. These acts and doings of the donor and those representing him, furnish pregnant evidence of the intent of the donor. Allen v. Massey, 17 Wall. [84 U. S.] 351. Unless the authority of Case v. Phelps, Savage v. Murphy, Carpenter v. Roe, and Robinson v. Stewart (10 N. Y. 190), be denied, the transaction must, in all its parts, be adjudged to be fraudulent. I have no difficulty in concurring with the court below in vacating these transfers to Mrs. Sparkman by her husband, and declaring the title to be in the plaintiff, and that Mrs. Sparkman's executors must account to the assignee. The decree on this point is affirmed. Miller v. O'Brien [Case No. 9,586]; Case v. Phelps, 39 N. Y. 164; Carpenter v. Roe, 10 N. Y. 227; Savage v. Murphy, 34 N. Y. 508; Robinson v. Stewart, 10 N. Y. 190; Parish v. Murphree, 13 How. [54 U. S.] 92; and cases supra.

As the court of appeals of the state of New York now holds, it was error to fix the rule of damages at the highest market price of the bonds up to the time of the trial. Baker v. Drake, 53 N. Y. 211. It should have been their value when sold. This must be the principle to govern the rule of damages, and to this extent the decree is modified.

Case No. 12,622.

SEDGWICK v. PLACE et al.

[1 N. B. R. 673 (Quarto, 204);[1] 1 Am. Law T. Rep. Bankr. 97; 34 Conn. 552.]

Circuit Court, S. D. New York. June, 1868.

BANKRUPTCY—ASSIGNMENT UNDER STATE LAW.

A general assignment by insolvent debtors, under New York state law, for the benefit of creditors, untainted by fraud as against any creditors, or the bankrupt act [of 1867 (14 Stat. 517)], is valid, and the property will not be turned over to the assignee in bankruptcy.

[Cited in Spicer v. Ward, Case No. 13,241; Barnes v. Rettew, Id. 1,019; Beecher v. Clark, Id. 1,223; Mayer v. Hellman, 91 U.

[1] [Reprinted from 1 N. B. R. 673 (Quarto, 204), by permission.]

S. 502; Globe Ins. Co. v. Cleveland Ins. Co., Case No. 5,486; Re Temple, Id. 13,825; Myer v. Crystal Lake Pickling & Preserving Works, 14 N. B. R. 16.]

[Cited in Torlina v. Trorlicht (N. M.) 27 Pac. 798.]

[This was a bill by John Sedgwick, assignee in bankruptcy of James K. Place and James D. Sparkman, against James K. Place and others.]

NELSON, Circuit Justice. The bill is filed in this case by an assignee in bankruptcy, to compel the defendants, L. W. Burnett, Jr., and Thomas T. Sheffield, to deliver into his possession certain property and assets, which are claimed as belonging to the estate of the bankrupts, and which have become vested in him under and by virtue of the proceedings in bankruptcy. The case as presented in the papers is this: The bankrupts suspended payment of their debts, being insolvent, the 20th November, 1867; and several suits having been instituted against them, with a view to an equal distribution of their assets among all the creditors, made an assignment of all their property, real and personal, to the defendants, in trust, to convert the same into money, and pay their debts; and in case the fund fell short of paying all their debts, it should be distributed equally among all of the creditors, pro rata. The assignment was made and executed under and by virtue of the statute of the state of New York, relative to general assignments by insolvent debtors for the benefit of their creditors. It was duly recorded in the office of the clerk of the city and county of New York, and within the time prescribed the assignors made and filed under oath a full and complete inventory of all their estates, real and personal, and of all their debts and liabilities. The assets were large, and the assignees were required to enter into bonds with good and sufficient security for the faithful discharge of their trust to the amount of $320,000. The assignees are engaged in the execution of their trust, and have already on deposit in the United States Trust Company, $45,000 awaiting distribution among the creditors. At the time of this assignment the insolvent debtors had no intention or expectation of applying for the benefit of the bankrupt act, nor had the assignees any reason for the belief that any such intention existed. All intention to defraud creditors or to prevent the property of the debtor coming to an assignee in bankruptcy, is denied by the parties: and there is no proof in the case to the contrary. The insolvent debtors not being able to make a settlement with their creditors, and apprehending the provisions of the bankrupt act might cease relative to voluntary applications, unless by the assent of the creditors, or the payment of fifty cents on the dollar, applied in February following, by petition, for the benefit of the act, and were adjudged bankrupts as copartners on the 7th of that month.

The motion upon this state of the facts is, that the assignment under the state law be set aside, and the assignees render an account to the complainant as assignees in bankruptcy, and that they be restrained from any further execution of the trust. Assuming the assignment in question to be untainted with fraud, either against creditors or against the bankrupt act, which is the present position of the case, we find nothing in the provision of the law which would authorize us to take this property out of the hands of the assignee under the state law, and turn it over to the assignee in bankruptcy, and must therefore deny the motion for a preliminary injunction.

Motion denied.

[NOTE. Upon motion of the plaintiff a receiver was subsequently appointed. Case No. 12,619. Certain funds in the hands of the receiver were ordered distributed among the creditors of the bankrupts. Id. 12,623. Subsequently a final decree was entered. Case unreported. Upon reargument the settlement made by James K. Place upon his wife of certain real estate and furniture was declared not fraudulent as to the creditors of the said Place. Case No. 12,620. Upon appeal to the circuit court, the decree of the district court was reversed upon this point. Id. 12,621.]

Case No. 12,623.

SEDGWICK v. PLACE et al.

[3 N. B. R. 302 (Quarto, 78).] [1]

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

BANKRUPTCY—ASSIGNMENT—SPECIAL RECEIVER—DISTRIBUTION AMONG CREDITORS.

Where a voluntary assignment under the state law was adjudged valid, and debtors subsequently went into bankruptcy, a special receiver held moneys of bankrupts which had come to his hands through a voluntary assignment under the state law adjudged to be valid: *Held*, a proper portion thereof ought to be distributed among the creditors in bankruptcy, not through the assignee in bankruptcy, but direct by such receiver to the proper distributees. Reference ordered to master to ascertain and report as to amount of dividend, distributees, etc., etc.

[This was a proceeding by John Sedgwick, assignee, against James K. Place and others. For prior proceedings in this litigation, see Case No. 12,622.]

F. N. Banks, for plaintiff and special receiver.

Marsh, Coe & Wallis, for voluntary assignees.

BLATCHFORD, District Judge. I think that so much of the moneys in the hands of the special receiver appointed in this cause, as shall be ascertained to be a proper sum for the purpose, ought to be divided among the creditors of Place & Sparkman. Those creditors are, all of them, represented by the plaintiff as assignee of Place & Sparkman as bankrupts, or by the defendants, Burritt & Sheffield, as voluntary assignees of Place & Sparkman. If such division shall be made

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among such creditors of Place & Sparkman as have proved their debts in bankruptcy, and on the assumption that the indebtedness of Place & Sparkman amounts, on the whole, to not less than the aggregate amount of such indebtedness, as stated in the inventory or schedule of the creditors of Place & Sparkman, filed in the office of the clerk of the city and county of New York on the 13th of January, 1868, in pursuance of the state law in regard to voluntary assignments, and if the rate of such dividend shall not exceed the rate which would be divisible in case all the debts named in such inventory or schedule were proved in bankruptcy in addition to such debts proved in bankruptcy as do not appear in such inventory or schedule, the rights and interests of all creditors of Place & Sparkman who are represented by any of the parties to this cause will be fully protected. But such dividend ought to be made directly to such creditors by the special receiver as part of the proceedings in this cause, and not by the assignee in bankruptcy as part of the proceedings in bankruptcy after a transfer to him by the special receiver of the proper sum to be divided. There must be a reference to a master, to ascertain and report on the above basis the proper sum to be divided, and to prepare a schedule of the distributees, and of the amounts of their debts, which ought to share in the dividend, and of the rate of dividend, and of the amount to be paid to each creditor. On the coming in and confirmation of the master's report, the distribution, as reported, will be authorized.

[NOTE. Subsequently the district court decreed that the settlement by James K. Place upon his wife of certain real and personal estate was valid. Case No. 12,620. The circuit court, upon appeal, reversed the decision in this particular, and affirmed it upon other points.]

Case No. 12,624.

SEDGWICK v. SHEFFIELD.

[6 Ben. 21.] [1]

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

PAYMENT OF DEBT BY INSOLVENT—REASONABLE CAUSE TO BELIEVE IN INSOLVENCY.

1. P. & Co., being insolvent and knowing their condition, within four months before the filing of a petition in bankruptcy against them, paid, through their recognized and authorized agent, to S., $4,500, being a debt due to S., and payable on call. The assignee in bankruptcy of P. & Co. brought an action at law to recover back the money: *Held*, that, this payment having been made in the ordinary course of business, under proper general authority, and not prevented or repudiated by P. & Co., they being in the habit of having these payments made through these agencies, to individuals occupying the position of S., the only question for the jury was, whether S., in receiving this payment, had reasonable cause to believe that P. & Co. were insolvent at the time, and had reasonable cause to believe that this payment to him was made with a view that he should have a preference in respect to this $4,500.

[See Alderdice v. State Bank of Virginia, Case No. 154.]

2. The payment having been made in the establishment of P. & Co., out of the money of, and by the recognized agent of, P. & Co., they being insolvent and not stopping the making of the payment, and the payment having had the effect to produce a preference in favor of S., the jury were bound to conclude, under the law, that the payment was made by P. & Co. with a view to give a preference.

3. If S., at the time he received this payment, had reasonable cause to believe that the firm of P. & Co. was then in such a condition that it was about to stop payment of its debts, for want of money with which to pay them as they matured, in the ordinary course of business, then he had reasonable cause to believe that the firm was insolvent, in the sense of the bankruptcy act [of 1867 (14 Stat. 517)], even though it had not actually stopped payment of its maturing obligations.

[This was an action at law by John Sedgwick, assignee, against Thomas T. Sheffield.]

BLATCHFORD, District Judge. Gentlemen of the Jury: The general nature of this suit you have learned during its progress. It is true, as stated by the counsel in summing up this case to you, that this is the first case under the 35th section of the bankruptcy act which has been brought in this court before a jury. Large numbers of suits, brought to set aside preferences, have been prosecuted and adjudicated in this court, sitting in equity, without a jury, where there was a prayer in the bill that the court would decree that mortgages given by way of preference, assignments given by way of preference, judgments recovered and executions issued by way of preference, papers and documents conferring an apparent title on the person receiving the preference, be set aside and declared null and void—a species of relief which gives to the court, sitting in equity, without a jury, jurisdiction. Some of these suits have been determined in favor of the party seeking to set aside the preference. Others have been determined in favor of the defendants. But, in this case, nothing took place which is sought to be impeached, but the naked payment of money. No documents or papers, to be set aside or declared null and void, passed between the parties—no mortgage, deed, conveyance, execution, judgment, or other instrument. Therefore, this suit has been brought as a suit at law, which, under the constitution of the United States, requires a trial by jury; and it is for you, gentlemen, on the facts in this case, as you shall understand those facts from the evidence, under the law and the interpretation of the statute as it shall be given to you by the court, to give your verdict in this case either for the plaintiff or the defendant.

This bankruptcy act, which, from the length

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of time it has remained upon the statute-book, now some five years, must be assumed to have met the general approbation of the community, it having stood longer than any other bankruptcy act, of which this is the third, that we have had in the history of our government—this bankruptcy act has, for its main object, to distribute the property of the persons specified in it as liable to its provisions, equally among all their creditors, without preference to any of them; and the system laid down in this act, and applied in its administration by the courts administering it, is in marked contrast to what was the privilege of debtors and the rights of creditors, at least in the state of New York, prior to the passage of this act. The principle of the act proceeds upon a high policy, considered to be a benefit to the commercial and trading community. Before the passage of this act, any individual finding himself about to suspend payment, or to fail (as the ordinary expression is), or to be in a condition in which he was unable to pay all his creditors in full, dollar for dollar, could, subject to certain immaterial restrictions, exercise a choice and preference among his creditors, could devote his entire assets to pay in full such bona fide creditors as he chose to select, to the entire exclusion of others. That privilege is cut up by the roots by this bankruptcy act, and it is the intention of the act to produce that change, while, at the same time, it does not at all interfere with the ordinary pursuits of business. It is designed to protect creditors. It does not at all deal with that class of the community who transact their commercial business for cash, who, when they sell and deliver their goods, receive the money for them, or who, when they purchase their goods, pay the money for them; but it deals with those commercial transactions, and with those individuals engaged in commercial transactions, where there is a passage of property from one to another, without, at the same time, an extinguishment and liquidation, entire and final, of the consideration for that property, where the business is done on credit. The principle upon which it proceeds is, that while it does not interfere with the ordinary operations of business, while an individual can, if he will contract a debt, and not deal upon cash principles, protect himself by asking and demanding security at the time, and while the act protects all such transactions made in good faith, and for a present consideration, it says to creditors: "If you deal upon credit solely, without security, you shall all stand upon an equal footing, and it shall not be within the power of your debtor, when he is insolvent, to make a preference among you. You are free entirely, as creditors, not to give credit without getting security at the time. That privilege is open to you. Exercise it fully for a present consideration; or, if you have allowed a debt to become due to you, or to become contracted to you, obtain your security at a time when there is no possible chance of there being a violation of the bankruptcy law. But, if you will enter the domain of a simple creditor, the law sets before you, in plain language, that you are not thereafter, under certain specified circumstances, to obtain a preference, having waived your privilege, when you contracted your debt, of then and there obtaining the security which you might have obtained, but which you voluntarily relinquished, contracting your debt as a general creditor." The principle upon which the statute rests is manifest. It is, that any one of you, seeing a person apparently in prosperous circumstances, and trusting him upon what you see ostensibly to be his condition and his property, shall not some day suddenly find that you have been relying on a broken reed, that he has suspended payment and failed, and that you are to receive nothing, but that everything is given to certain preferred and favored creditors. The object underlying this legislation in the bankruptcy act is, that men shall not be exposed to the temptation of trading when they have no business to trade, when they are really insolvent, by borrowing money from individuals whom they can confidentially protect and prefer, and going into the market with such money, and using it to obtain credit for large purchases in dealing with their ordinary creditors in the business of trade, and, in the end, committing what amounts to a fraud under the circumstances of the case. This policy, introduced into the bankruptcy law, is founded upon the principles I have mentioned, and is regarded as wise and beneficial, compared with the former system.

It is not every transaction by a person insolvent, or in contemplation of insolvency, that is condemned by the bankruptcy act. It is limited in its scope; and it has been interpreted, in all the particulars in which it comes under consideration in this case, by decisions which I shall cite to you. The provision of the law (section 35), under which this case arises, is a very plain one: "If any person being insolvent, or in contemplation of insolvency, within four months [2] before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act,

[2] By the amendment to the bankruptcy act, passed June 22d, 1874 [18 Stat. 178], this time is changed to two months, in cases of involuntary bankruptcy.

the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited." There are certain facts in this case which are not contested, and which are to be taken as true. One is, that this transaction between the house of James K. Place & Co. and Thomas T. Sheffield did take place on the 19th of November, 1867, and that that was within four months prior to the filing of the petition in bankruptcy in this case. It is also conceded, in this case, that James K. Place & Co. were, at that date, the 19th of November, 1867, insolvent, in the sense of this law. Further, it is not in dispute that Mr. Sheffield was a creditor, and, as appears from the evidence, a bona fide creditor, of the house of James K. Place & Co. Whether he was a creditor to this amount of $4,500 because of money which he had loaned to them, or deposited with them, or whether he was a creditor because of salary earned and not paid to him, makes no difference. The debt is of the same character, under the law, in either case. Except as against the bankruptcy law, it is not disputed that the payment of this $4,500 to the defendant was a legitimate payment, a payment such as one man in law and in morals would be obliged to make to another. Nor is it claimed that the payment was one which, but for the bankruptcy law, was not a proper payment to be made at the time it was made, with reference to the maturity of the debt. In other words, it was not a payment in anticipation, which Mr. Sheffield had no right at the time to call upon James K. Place & Co. to make, because it was, as appears from the evidence, a debt payable whenever Mr. Sheffield should call for it. These are matters which are not contested. This case, then, so far as respects points litigated in it, comes down simply to this, which is the only question, under the law, which you have to consider—whether Mr. Sheffield, receiving this $4,500, had reasonable cause to believe that James K. Place & Co. were insolvent on the 19th of November, 1867, and reasonable cause to believe that this payment to him was made with a view that he should have a preference in respect to this $4,500, and obtain this $4,500, dollar for dollar, in full, as against other creditors of the firm of James K. Place & Co., who should receive less than dollar for dollar. I say that that is the only question for your consideration, for the reason that, under the law, as interpreted by the decisions which I have mentioned, if, in this case, this $4,500 was paid to Mr. Sheffield, and received by him from the recognized, proper, official, and authoritative representative of James K. Place & Co., it is of no consequence whether James K. Place or James D. Sparkman knew that this money had been loaned to the firm by Mr. Sheffield (if that was the nature of the debt), and it is of no consequence whether James K. Place or James D. Sparkman, individually, knew that Mr. Morgan, or any one else, having authority to make payments generally for the firm, had paid this particular $4,500 to Mr. Sheffield, and it is of no consequence whether or not James K. Place or James D. Sparkman had any idea, or motive, or notion, or individual purpose, in respect to this payment. If the payment was made in the ordinary course of business, under proper, general, authority, and was not repudiated by James K. Place & Co., and if James K. Place & Co. were, at the time, insolvent, they being held by the law to know their own condition, unless there is some evidence to show that they did not know it, and had good reason for not knowing it, and if they, being in the habit of having these payments made through these agencies, to individuals occupying the position of Mr. Sheffield, did not act in such manner as to stop and prevent the payment, the payment was, under the law, made with the intent, on the part of James K. Place & Co., to produce all the consequences which the payment, under the circumstances, would naturally and properly produce. And if, under the circumstances, not being prevented by James K. Place & Co., who had the power to prevent it, and who, knowing their condition, were bound to interpose to prevent it, that payment, in their then condition, had the effect to produce the preference, then, in judgment of law, the inevitable conclusion is, that James K. Place & Co. made the payment with a view to give a preference, and on that branch of the case there is no question of fact for the consideration of the jury. Because, if, as is undisputed in this case, the payment was made in the establishment of James K. Place & Co., out of the money of James K. Place & Co., by the recognized agents of James K. Place & Co., at a time when James K. Place & Co. were insolvent, and if James K. Place & Co did not stop the making of the payment, and if the payment has had the effect to produce a preference in favor of Mr. Sheffield, then the jury are bound to conclude, under the law, that the payment was made by James K. Place & Co. with a view to give a preference. Such is the law, as settled by the highest tribunal in this land, and by all the authorities that have interpreted this statute. Therefore it is, that I say that the only question of fact for your consideration is, whether Mr. Sheffield had reasonable cause to believe,[3] at the time he received this $4,500, that James K. Place & Co. were insolvent, and that this payment was made in fraud of the act—in other words, that this payment would give him the preference, provided you find that it has given him the preference.

In order that there may be no mistake in regard to this matter, I shall say what I

[3] By the amendment to the bankruptcy act, passed June 22d, 1874, there must be knowledge that the payment, &c., is made in fraud of the act, and reasonable cause to believe that the party is insolvent.

have to say on the subject in the very language of the supreme court of the United States, on such points as are involved in the question which is the only question for your consideration. In Toof v. Martin, 13 Wall. [80 U. S.] 46, the supreme court interprets the first clause of the 35th section in this way: "That clause was intended to defeat preferences to a creditor made by a debtor when insolvent or in contemplation of insolvency. It declares that any payment or transfer of his property, made by him whilst in that condition, within four months previous to the filing of his petition, with a view to give a preference to a creditor, shall be void, if the creditor has, at the time, reasonable cause to believe him to be insolvent, and that the payment or transfer was made in fraud of the provisions of the bankrupt act; and it authorizes, in such cases, the assignee to recover the property or its value from the party who receives it. * * * The counsel for the appellants have presented an elaborate argument to show that inability to pay one's debts at the time they fall due, in money, does not constitute insolvency, within the provisions of the bankrupt act. The argument is especially addressed to language used by the district judge, * * * to the effect, that, at the time the transfers were made," the transferees "did not believe the bankrupts were able to pay their debts, in money, but were able to do so on a fair market valuation of their property and assets. The district judge held that this was a direct confession of a fact which in law constitutes insolvency," (that is, an inability to pay debts, as they mature, in money, although, on a fair market valuation of their property and assets on one side, and their debts on the other, they were able to pay,) "and observed, that, if the bankrupts could not pay their debts in the ordinary course of business, that is, in money, as they fell due, they were insolvent." The term insolvent, when applied to traders and merchants, in the bankruptcy act, is used to express inability to pay debts as they become due in the ordinary course of business. In such sense the term is used when merchants and traders are said to be insolvent, and that is the sense intended by the bankruptcy act. In the present case it is not disputed that James K. Place & Co. were merchants and traders, within the sense of this rule.

Upon the subject in respect to which I have already made some observations to you, the supreme court, in the same case, says: "It is a general principle, that every one must be presumed to intend the necessary consequences of his acts. The transfer in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him, in such case, and not upon the assignee or contestant in bankruptcy." That was a case where a suit was brought by the assignee in bankruptcy against the party who had received a preference, and it is in respect to a suit of that kind that this language is used.

The observations I have cited apply to that part of the case which concerns the insolvent condition of James K. Place & Co., and the view with which this payment, if it operated as a preference, on the evidence, was made by them—a branch of the case in which the court instructs you there is no question of fact for you to pass upon.

We now come to the part of the case upon which a question of fact arises for your consideration—whether Mr. Sheffield, at the time he received this $4,500, had reasonable cause to believe that the bankrupts were insolvent, and that a fraud on the act was intended. On that subject, the supreme court, in the same case, uses this language: "The statute, to defeat the conveyance, does not require that the creditors should have had absolute knowledge on the point" of insolvency of their debtors, "nor even that they should, in fact, have had any belief on the subject. It only requires that they should have had reasonable cause to believe that such was the fact." The minds of individuals are differently constituted. Some persons arrive at their belief on very slight grounds; others hesitate and doubt on every subject. The belief of individuals, under the weakness of human nature, is very apt to be influenced by their desires. The bankruptcy act takes the question entirely out of any such domain. It does not say that the creditor must have believed that the debtor was insolvent. It says, "having reasonable cause to believe." It is for twelve independent jurymen to say, it is for an independent court, in a suit in equity, to say, not whether the creditor believed, in point of fact, but whether he had reasonable cause to believe. Did he shut his eyes? Did he shut his ears? Did he persistently and wilfully refuse to believe, when he had reasonable cause to believe? Were there such things before him that an indifferent person, judging of the matter, would say: "You had reasonable cause to believe this thing; you ought to have believed it; you shut your eyes to it; you shut your ears to it." The matter is not referred to the actual belief of the creditor, depending upon his strength or weakness of mind, upon his actual capacity for judging, in view of his interest; but the test is, reasonable cause to believe, judged of by the ordinary operations of the human mind, as a jury or a court shall, in view of the transaction, determine whether the man had or had not reasonable cause to believe. On that subject the supreme court says, in the same case: "Reasonable cause they must be considered to have had, when such a state of facts was brought to their no-

tice, in respect to the affairs and pecuniary condition of the bankrupts, as would have led prudent business men to the conclusion, that they could not meet their obligations, as they matured, in the ordinary course of business." The supreme court cites, with approbation, on this subject, the case of Scammon v. Cole [Case No. 12,432], an equity suit, which came before one of the judges of the supreme court of the United States, Mr. Justice Clifford, in the circuit court in Maine, where he makes some very clear observations on this subject. The supreme court goes on to say, that the act of congress was designed to secure an equal distribution of the property of an insolvent debtor among his creditors; and that any transfer by an insolvent debtor, made with a view to secure his property, or any part of it, to one creditor, and thus prevent an equal distribution thereof among all his creditors, is a transfer in fraud of the bankruptcy act.

It is for you to say, upon the principles stated to you, whether Mr. Sheffield, at the time he received this $4,500, on the 19th of November, 1867, in view of what, according to the evidence in this case (because you are to be confined to that strictly), had been communicated to him in reference to the condition of the firm of James K. Place & Co., had reasonable cause to believe that it was then insolvent, that it was in such a condition that it was about to stop payment of its debts for want of money with which to pay them as they matured in the ordinary course of business. If he had reasonable cause to believe that, then he had reasonable cause to believe that it was insolvent in the sense of the bankruptcy act. Even though it had not actually stopped the payment of its maturing obligations, he had reasonable cause to believe that it was insolvent if he had reasonable cause to believe that it was in such a condition that the gate must be shut down for want of means to pay, as they matured, its accruing obligations that were coming due. It is necessary, however, that he should not only have had reasonable cause to believe that the firm was insolvent, but that he should have had reasonable cause to believe that this payment to him of the $4,500 was going to operate, in respect to the $4,500, to give to him that $4,500 dollar for dollar, as a preference, while other creditors would not get dollar for dollar for their debts. That is the question of fact, on which you are to pass. If you shall believe that the plaintiff, upon whom is the burden of proof in this case, has made out this reasonable cause to believe on the part of the defendant, the plaintiff is entitled to recover the sum of $4,500, with interest from the commencement of the suit, which is agreed to be the sum of $5,369.75. If the plaintiff has made that out, by a fair preponderance of evidence, he is entitled to your verdict. If he has not made it out, by a fair preponderance of evidence, to your satisfaction, the defendant is entitled to your verdict.

The jury failed to agree on a verdict.

Case No. 12,625.

SEDGWICK v. STEWART et al.

[9 Ben. 433.] [1]

District Court, S. D. New York. April, 1878.

BANKRUPTCY—JUDGMENT LIEN—PROOF OF DEBT—SURRENDERING SECURITY.

1. If a person has a debt which is in judgment, and proves the debt in bankruptcy aside from the judgment, without naming the judgment, he will be held to intend to waive, discharge and surrender the judgment, and any lien under it. But, if the debt which he proves is the judgment itself, he cannot be said, in any proper sense, to discharge or surrender the judgment, unless the proof shows an intention to do so.

2. A proof of debts stated that the sum claimed was the amount of a judgment, and set forth the particulars of the judgment, and stated that its consideration was goods sold, and that for the sum claimed no security had been received, and did not state that the judgment was a lien on any real estate, when in fact it was. *Held*, that the debt was not proved as an unsecured debt, and that the security of the lien of the judgment was not surrendered to the assignee in bankruptcy.

[This was a bill by John Sedgwick, assignee of Frederick S. Kirtland and others, against Alexander T. Stewart and others.]

T. M. North, for plaintiff.

Davies, Work, McNamee & Hilton, for defendants.

BLATCHFORD, District Judge. The original proof of debt was for the sum of $46,294.14, "being the aggregate amount of three judgments obtained by the said A. T. Stewart & Company against the said bankrupts, to wit," setting forth the particulars of the judgments, and stating that the consideration for each of the judgments was goods and merchandise, sold and delivered by A. T. Stewart & Co. to the bankrupts, at their request, and further stating, that, for said sum of $46,294.14, or any part thereof, said A. T. Stewart & Co. had not received "any manner of satisfaction or security whatsoever." It is contended for the plaintiff, that, inasmuch as the proof of debt did not set forth the fact that the judgments were a lien upon certain real estate of the bankrupt, Kirtland, A. T. Stewart & Co. were, by force of the proof of debt, admitted as creditors for the full amount of their claim, and thereby the judgments were discharged and surrendered, under section 21 of the bankruptcy act [of 1867 (14 Stat. 526)], and the lien of the judgments was transferred to and vested in the plaintiff, as assignee in bankruptcy. In other words, it is claimed that the debt was not proved as a secured debt, but was proved as an unsecured debt, and that the security of the lien of the judgments on the real estate was thereby surrendered to and passed to the plaintiff, so that, as between him and A. T. Stewart & Co., he is entitled to the surplus moneys arising from the sale of the real estate on the foreclosure of the mortgage thereon.

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

I do not think that the plaintiff's view can be maintained. The proof of claim states the amount of the debt as being $46,219.14, and then says, "being the aggregate amount of three judgments," &c. It then states that "the consideration for each of said judgments was goods and merchandise sold and delivered by A. T. Stewart & Co. to the said bankrupts, at their request." Transcripts of the judgments, showing the particulars thereof, are annexed to the proof. This is clearly a proof of debt of and on the judgments. The judgments are the debt proved—the judgments as they are, with all their incidents, of being liens on real estate, if they were liens. The proof is not of the debts created by the sale of the goods, but of the judgments into which such debts had been converted. As the proof was a proof of the judgments, the statement that the creditors had not received "any manner of satisfaction or security whatsoever," must be read as a statement that they had received no security other than the judgments, other than such security as the judgments themselves afforded. There is no indication of an intention to surrender the security inherent in the recovery of the judgments, coupled with the ownership of the real estate by Kirtland, in view of the fact that the proof of claim is made on the judgments. The statute (section 22) says, that the proof must set forth that the claimant has not received "any security or satisfaction whatever, other than that by him set forth." This proof did set forth all the security that there was, namely, the judgments, and the fact of the ownership of the real estate was, of course, known to the assignee. If a person has a debt which is in judgment and proves the debt aside from the judgment, without naming the judgment, he will be held to intend to waive, discharge and surrender the judgment, and any lien under the judgment. But, if the debt which he proves is the judgment itself, he cannot, under section 21, be said, in any proper sense, to discharge or surrender the judgment, unless the proof shows an intention to do so, which the proof in this case does not. Section 21 says, that, when a creditor proves his debt, all "unsatisfied judgments already obtained thereon shall be deemed to be discharged and surrendered thereby." When the debt proved is the judgment, it is not proper to say that the judgment is obtained on the judgment. In the present case, there was no concealment in the proof of debt and no failure to state the full particulars of the judgments. The particulars of the debts on which the judgments were recovered were not stated. It appears that the claim was not voted upon at the meeting at which it was presented, and that it was objected to on the ground that it was secured. Nothing was ever done under it except to present it to the register and have it received by and filed with him. The proof of debt evinces no intention to receive a dividend on the entire claim and still retain the security. It disclosed the security by disclosing the judgments, and evinced no intention to release the judgments. It merely put the creditors making it in the position of creditors described in section 20 of the act, who can be admitted to a dividend only on so much of their debt as remains after the value of the security is deducted.

It results that the bill must be dismissed, and the surplus moneys be awarded to the defendants, with costs to the defendants, to be paid out of the estate in bankruptcy.

Case No. 12,626.

SEDGWICK v. WORMSER.

[7 N. B. R. 186.] [1]

District Court, S. D. New York. May 8, 1872.

BANKRUPTCY—FRAUDULENT SALES—SALES TO CURTAIL BUSINESS.

On a bill in equity brought to set aside the sale and transfer of certain stores by the bankrupts, *held*, that from the evidence it appeared that the stores were sold at a fair price, before insolvency, for the purpose of curtailing the business of the bankrupts, and hence the transaction cannot be impeached for fraud. Bill dismissed with costs.

In equity.

T. M. North, for plaintiff.

E. Cook and W. A. Coursen, for defendant.

BLATCHFORD, District Judge. I do not think the bill in this cause can be sustained, either as to the four stores, or as to the mortgages. The transaction in respect to the four stores, regarded as a sale of them on the 26th of October, 1868, at the price of fifteen thousand dollars, paid for by the four notes of that date, is entirely free from objection. The Valks were not then insolvent or contemplating insolvency, in the sense of the bankruptcy act. To sell the stores, under the circumstances in which they were placed, for the purpose of curtailing their business, cannot be regarded as doing a thing out of the usual course of business, so as to be prima facie evidence of fraud. They did not fail until nearly seven weeks afterwards, nor was the sale of the stores made in fraud of their creditors, or with intent to hinder, delay or defraud them. The stores were transferred, so far as appears, for a fair and proper consideration, and there was an actual and continued change of possession of them. The notes given for the purchase were paid by the defendant at maturity, one of them before the failure of the Valks, the rest not becoming due till after their failure. The Valks raised the money on the notes and paid it to their creditors. There is nothing to throw a doubt on this view of the transaction in respect to the stores, except the fact that in the mortgages the four notes are spoken of as notes made by the defendant at the request of, and for the accommodation of the Valks, and that the mortgages provide that the notes shall be paid by the Valks, and are given on their faces to secure such payment. The defendant states that the real object of the mortgage, so far as

[1] [Reprinted by permission.]

it relates to these four notes, was to secure the defendant against any deficiency in the quantity of goods in the stores as compared with the quantity represented by the books of the Valks, by which he bought them. This explanation would be more satisfactorily brought out if it were shown how the mortgages came to be drawn as they were, saying nothing about the turning over of the stores. But I do not regard that point as material. The notes were in fact given and have been paid by the defendant. The stores, in fact, passed into the hands of the defendant under the circumstances stated. If the notes were accommodation notes, loaned by the defendant to the Valks, so that the mortgages truly state the transaction, and which I am inclined to think must be held to have been the case, then the transfer of the stores must be regarded as a turning over of them by the Valks to the defendant, on account of their obligations in the mortgages to pay the notes, leaving the mortgages as security for any deficiency in the stores to reimburse the defendant. On this view it is plain why the mortgages were drawn as they were, and why the defendant insisted on having the stores, and considering them as his own, and sold to him. The theory of the transaction was that they had in them fifteen thousand dollars worth of goods, just the amount of the notes, and he took them as having that. Yet, though he took them at that, and considered them as absolutely sold to him, he did not regard himself as bound to respond in respect of them, for any more than the goods really in them. Having received the stores, he regarded himself as bound primarily to pay the four notes, and he acted accordingly. Yet they were really accommodation notes which the Valks were to pay, and did pay, through him, by turning over the stores to him, and he paid for the stores by giving and paying the notes. He is to account with the plaintiff in respect of the four notes, and the other two notes, secured by the mortgages, and the contents of the four stores, having credit for the notes he has paid and being charged with the contents of the stores, and holding the mortgages as security for any balance due him on such accounting. Such accounting must take place in some other suit, based on the validity of the mortgages and of the transfer of the stores. It cannot take place in this suit, brought to set them aside. I am impressed with the conviction that these transactions with defendant were honest ones, and cannot be impeached by the plaintiff. The bill must be dismissed with costs.

Case No. 12,627.

Ex parte SEELEY.

[3 App. Com'r Pat. 305.]

Circuit Court, District of Columbia. 1860.

PATENTS—DESCRIPTION IN PUBLISHED WORK.

[1. The description of an invention in a published work will bar the right to a patent though it has not been put in use.]

[2. The description in a publication of a canal lock gate as, "Others are so contrived that they can be drawn across the canal from a recess, and so made as to run in a groove," is sufficient to bar a claim for a patent for Dunlap's invention of an improvement in canal lock gates by the employment of a transversely sliding gate instead of a swing gate.]

Appeal by Samuel J. Seeley from the decision of the commissioner of patents refusing him a patent for an improvement in canal lock gates.

DUNLOP, Chief Judge. This is an appeal from the decision of the commissioner of patents refusing to Mr. Seeley a patent on his first claim for improvements in a canal lock gate. He made three claims, the last two of which were granted and the first only refused. That first claim is the employment of a transversely sliding gate at the ends of a lock, instead of the usual swinging gate. The first claim is in these words: "1st. The use of a gate, to close the end of a canal lock, moving in a direction transversely to the length of the lock; substantially as herein set forth." The office refers to Cressy's Engineering, page 1557, as containing a published description of the gate claimed. The words in Cressy are: "Others (that is to say, stop gates) are so contrived that they can be drawn across the canal from a recess, and so made as to run in a groove."

First reason of appeal: This avers in substance that the commissioner erred in holding that the description in Cressy of a stop gate barred a patent to Mr. Seely of a lock gate. It seems to me there was no error here. No difference is perceived between a stop gate and a lock gate. Both cross the canal from a recess, and enter a groove to fit them, on the opposite side. If not identical, they are, in the words of the examiner, analogous, and bear a strong resemblance to each other.

Second reason of appeal: That the description of the gate in Cressy is insufficient. No artisan or machinist could build it. I think, with the office, that any mechanic could make a gate from this description; the subject matter being simple and plain, and the material parts set forth in Cressy.

Third reason of appeal: That the appellant's device is the new application of old and known means to a useful result. There does not appear to be any difference between a stop gate, described in Cressy, and the lock gate claimed by the appellant, as limited in his first claim, without the corrugated iron and the air chambers. That first claim goes for the gate only. The counsel for appellant thinks it ought to be shown by the office that the gate has been put in use, but the patent law only requires it to be described in a published work in this or a foreign country. No reasonable ground is seen to exclude engineers or the public from the use of a canal gate accurately described in a published work on engineering, when

they find it proper or expedient to apply such gate, as a new invention for fourteen years.

The counsel for appellant thinks the description in Cressy refers to a sluice gate alongside of the canal, to draw off the surplus water, rather than to a stop gate across it, to prevent the flows of water beyond the gate. I have given the words of Cressy to show that this is not so. Again, he says the description would be no more suggestive of a sliding gate to a canal lock than would be a similar description of a sliding door to a parlor, or a sliding gate to a farm fence. But this gate in Cressy is described as crossing a canal from a recess, and running into a groove. As for the fixtures at the top, to operate it, there is nothing, I presume, patentable in them, and they form no part of the rejected claim. Again, he says: The first claim, when rightly understood, as set forth, covers only a sliding gate in combination with the means described of operating it from the top, which he claims, without a reference to like means as anticipating them, makes the rejection improper. But the first claim covers the gate itself, and the gate only, and not the means in combination to work it. Mr. Low, of counsel for Mr. Seely, insists earnestly for the appellant that no application of such a gate has ever till now been made in this country to a canal lock; that the appellant introduced it on the Erie canal, whose engineers have approved it, as well as all other engineers by whom it has been seen; that it increases the capacity of a lock for boats 25 per cent., with other advantages, in cheapness of construction and diminished cost of repairs, over the swinging gate. These views are entitled to consideration, and caused me to hesitate whether the principle laid down by me in the late case of Ex parte Larowe, [Case No. 8,093,] did not apply. I said in that case that Larowe's merit had its foundation in the combination and application of old elements to the production of new and useful results, not before attained. But the gate described in Cressy is as applicable to a canal lock as to any other part of the canal, and such published description, by the terms of the act of 1836 [5 Stat. 117], is a bar to a patent to him who constructs the thing so described. In the first claim of Mr. Seely, there is no alleged improvement on the Cressy gate. The improvements are embraced in the second and third claims, and they are granted by the office, being a combination of old elements to produce new and useful results.

As I have before said, the first claim is simply for the gate, and such a gate as Cressy describes. I must therefore affirm the decision of the commissioner in refusing the appellant a patent on his first claim, and I do affirm it this 16th day of April, 1860. I return all the papers with this, my opinion and judgment, this 16th day of April, 1860.

Case No. 12,628.

In re SEELEY.

[19 N. B. R. 1.] [1]

District Court, E. D. Michigan. 1879.

BANKRUPTCY — ILLEGAL PREFERENCE — PRESUMPTION—INTENT—GENERAL ASSIGNMENT—DISCHARGE.

1. The rule that every person is presumed to intend the natural and probable consequences of his acts is only a rule of evidence; and, where the testimony is conflicting, it is for the jury to find the actual intent existing in the mind of the party.

2. Though the necessary consequence of a payment by an insolvent debtor may be to give a preference, he will not be conclusively presumed to have intended such preference where the evidence shows he was actuated by a different motive.

3. But where the party is insolvent, and the payment necessarily operates as a preference, and no explanation is offered, the presumption is conclusive, and there is no question for the jury.

4. The words "fraudulent preference," as used in the bankrupt law [of 1867 (14 Stat. 517)], do not import moral fraud. Nothing more is meant than that a payment shall have been made under circumstances which the law inhibits as a preference.

5. The acts enumerated in Rev. St. § 5110, are not in the nature of offences or forfeitures of a right to a discharge, but are rather in the nature of violations of conditions precedent.

6. Quære: Whether it is competent to show that a general assignment for the benefit of creditors was not executed for the purpose of defeating the operation of the bankrupt law?

[Cited in Re Kraft, 4 Fed. 525.]

On motion for a new trial.

James M. Seeley petitioned for a discharge, and the case was tried before a jury upon the following specifications in opposition thereto: (1) A general assignment for the benefit of his creditors to Francis G. Russell, alleged to have been made in contemplation of bankruptcy, and for the purpose of preventing the property so assigned from coming into the hands of the assignee in bankruptcy, and being distributed in satisfaction of his debts. This assignment was executed on Monday, the 11th day of December, 1877, at the Russell House in this city, whither Seeley had gone, partly at least, to avoid the importunity of one of his creditors. It seems that Seeley had contracted to sell his stock to one Auringer for five thousand dollars, for the purpose of paying his debts, but the bargain had fallen through, and by the advice of counsel he finally concluded to execute the assignment. (2) In making a fraudulent preference to one Scott, two days before his general assignment, and when insolvent. The facts were, that Seeley was indebted to Scott in about the sum of twelve hundred dollars, for money loaned; that on the Saturday before the assignment was executed, he permitted Scott to take goods from his store to the amount of eight hundred dollars. This and the transfer to Harris, here-

[1] [Reprinted by permission.]

after mentioned, were the only important transactions for several days before the assignment. Scott had formerly occupied a produce store upon Woodward Ave., near Mr. Seeley's place of business, and had become intimate with him there. For the past twelve or fourteen years, however, he had been a farmer, and it seems had been accustomed to loan Seeley money from time to time, for which a note had been taken, payable on demand. Both Scott and Seeley swear that Scott did not surrender his note, and that there was no agreement that the goods were to be received in payment. On the other hand, there was no mention of the amount of goods Scott was to take, and no particular credit agreed upon. Scott swears that he had intended to open a store himself for the sale of essential oils, had rented a building for that purpose, and had engaged one or two of Mr. Seeley's clerks; but, owing to some failure to raise the money, this plan was never carried out, and the goods were stored in another building, and subsequently bought back by the assignee in bankruptcy at seventy-five cents on the dollar. (3) In making a fraudulent preference to one Harris also, upon the Saturday before the assignment, and when insolvent. There was no conflict here as to the facts. Seeley was indebted to Harris in about the sum of one hundred and twelve dollars, and upon the same day of the transfer to Scott he turned out to him goods to the amount of his debt, in consideration of his surrendering a note for one hundred dollars. On Seeley's journal there is an entry, under date of December 9, 1876, of "bills payable to A. R. Harris, for he surrenders note July 7, 1876, interest at ten per cent., one hundred dollars, half interest on the above note six months, five dollars." This was the entire testimony as to the transaction.

The case was submitted to the jury under instructions that if they found the assignment was made in contemplation of becoming bankrupt, for the purpose of preventing the property from coming into the hands of the assignee or of being distributed in satisfaction of his debts, or if payments were made to Scott or Harris when insolvent, with an intent to prefer them. they should return a verdict of guilty. Exceptions were taken to the refusal of the court to instruct the jury that as matter of law they should return such verdict.

E. E. Kane, for the motion.
Don M. Dickinson, for bankrupt.

BROWN, District Judge. With some hesitation, I submitted the question to the jury whether the assignment and payments in this case were made with the prohibited intent. I am free to say their verdict did not command my approval.

Counsel for the creditors claims that every person is conclusively presumed to intend the natural and probable consequences of his own act, and as it was the necessary effect of the assignment to withdraw the property from the hands of the assignee in bankruptcy, and of the payments to Scott and Harris to prefer them over the other creditors, the court was bound to find the intent as matter of law, and to take the case away from the jury. The position of the bankrupt was that this rule that a man is held to contemplate the necessary consequences of his acts is a mere rule of evidence, and that it is for the jury to find the actual intent existing in the mind of the party. My own view is that, as a general rule, the presumption is one of fact, and that where there are circumstances in the case tending to show that the party did not, in paying a certain creditor, in fact intend to prefer him, the question as to the actual intent may be left to the jury, notwithstanding the party was insolvent, and the necessary effect of his payment was to prefer. There have several cases arisen under the bankrupt law where all the elements of a preference existed, viz. insolvency and payment to a creditor which operated as a preference; in other words, the necessary consequence of the act was to prefer, and yet the court has not hesitated to find that no preference was intended. Such are the cases where payment has been made under a bona fide misapprehension of the debtor's real condition, though he was in fact insolvent, and where payment was made to grocers, butchers, and other persons furnishing necessaries to a debtor's family, or by a tenant to a landlord, in order to preserve his home, or prevent the forfeiture of a lease. In such cases the debtor is only presumed to know his condition until the contrary appears, the burden of proof being upon him. In re Silverman [Case No. 12,855]; In re Oregon Bulletin Printing & Publishing Co. [Id. 10,559]; Miller v. Keys [Id. 9,578]; In re Batchelder [Id. 1,098].

In Re Locke [Case No. 8,439] the court observes: "I am not prepared to say that the mere payment of a debt by a debtor who is insolvent, and knows it, is always and necessarily an act of bankruptcy. Upon this point I give no opinion. Such a rule is open to the same objection with the one just considered, viz. that it substitutes an inflexible rule of law for an inference which is properly one of fact; that every person must be presumed to contemplate the necessary consequences of his act is true, but when we come to consequences that are only more or less probable, it is fit that the jury should say whether they were in the mind of the party or not. No doubt, in the absence of controlling evidence, they may decide by the act itself; but the intent to prefer must include, I think, the intent or at least the fear of stopping payment, which idea is not necessarily included in insolvency." In re Croft [Case No. 3,404]. In the case of In re Rosen-

field [Id. 12,057], Judge Field, of New Jersey, held that servants' wages, payments made to counsel for services rendered and to be rendered, payments to an insurance company for premiums upon the bankrupt's house and furniture, to save the forfeiture of a lease, and all expenditures made by him in the ordinary course of business for the support of his family, could not be considered fraudulent preferences, notwithstanding all the legal elements of a preference were present, except the intent actually existing in the mind of the bankrupt. So, in Re Sidle [Id. 12,844], the payment of attorney's fees by an insolvent was held no preference under the statute, on the ground of public policy, which makes faith in the matter of attorney fees obligatory upon the parties. In Re Brent [Id. 1,832], Judge Dillon held that payments in the ordinary course of business, with a bona fide expectation that the debtor can keep along without going into bankruptcy, there being no actual design to favor or prefer, will not bar a discharge. In Re Randall [Id. 11,551], Judge Deady remarks that one of the necessary consequences of a general assignment for the benefit of creditors is to prevent the property from coming to the assignee in bankruptcy and being distributed under the bankrupt act, and that the assignors must be presumed to have intended this, unless they show to the contrary. As to this, the burden of proof is upon them. See, also, Webb v. Sachs [Id. 17,325]; In re Pierce [Id. 11,141].

I have no doubt the law is correctly stated in a recent case of Rice v. Grafton Mills, 117 Mass. 228. The evidence tended to show that one Smith, of whom the plaintiffs were assignees, was the keeper of a grocery and variety store, which was largely patronized by the employés of the defendant; that Smith was accustomed to deliver goods to these employés, rendering accounts monthly to the defendant, which paid to Smith whatever balance was due from the mills to their laborers. Smith was also indebted to the defendant in the sum of one thousand nine hundred dollars for money loaned. The amount of goods delivered in the two months preceding Smith's bankruptcy was about one thousand five hundred and eighty dollars, and the defendant, instead of paying the money to Smith, knowing his approaching bankruptcy, applied this amount to the balance due from Smith for money loaned; thus reducing it to about four hundred and thirty-seven dollars. The assignee claimed this to be a preference, and insisted the money should have been paid to Smith as had been done before, instead of applying it upon his account for money loaned. The court observes: "The intent to prefer is essential, and is to be found by the jury. A preference was not the direct or necessary consequence of the acts of Smith. A man may, indeed, be presumed to intend the natural and probable consequences of his own acts, but that presumption is only one element of proof to establish the fact of actual intent. The evidence does not show that, prior to the attachment by which Smith's business was interrupted, the probability that the defendant would insist upon a set-off, and thus secure a preference, was so obvious as conclusively to maintain the proposition that he contemplated it, and sold and delivered the goods with the view to such a preference, especially against the fact assumed by the instructions that he expected and supposed otherwise." What the court would have held if the preference had been the direct and necessary consequence of the acts of Smith, and no doubt had been cast upon his intention by the circumstances connected with the payment, does not appear.

We may consider the law then settled that, although the act must necessarily produce a certain result, the party is not conclusively presumed to have intended such result, where other circumstances tend to show that he may have contemplated a different one. But, where the act is wholly unexplained, and the effect is not only natural and probable but necessary, and no attempt is made to show that the party contemplated a different result, I understand the presumption to be conclusive, and the court is bound to instruct the jury as a matter of law. So, where the evidence is so overwhelming that the court, in an ordinary case, would be justified in taking the question away from the jury, I do not understand that the fact that such evidence bears upon the intent of a party in doing a certain act relieves the case from the operation of the general rule in the conduct of trials laid down by the supreme court in Pleasants v. Fant, 22 Wall. [89 U. S.] 116; Commissioners v. Clark, 94 U. S. 278, 284; Seitz v. U. S., 11 Chi. Leg. News, 97. In other words, I do not suppose there is any such sanctity about the question of fraud as requires it to be submitted to a jury when the testimony all points in one direction. "Before the evidence is left to the jury, there is, or may be, in every case, a preliminary question for the judge, not whether there is literally no evidence, but whether there is any on which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Commissioners v. Clark, 94 U. S. 284. There seems to be a general impression, even among lawyers, that all fraud in the eye of the law necessarily involves some sort of moral turpitude. This is certainly not the case. The law frequently adjudges that to be fraud which produces a certain result, notwithstanding the entire innocence of the party, not only of a covinous design, but of an intention to bring about that result. Bump, Fraud. Conv. 71; Potter v. McDowell, 31 Mo. 62; Grover v. Wakeman, 11 Wend. 187. And when the words "fraudulent preference" are used in section 5110, Rev. St., nothing more is meant than that a payment shall have been

made under circumstances which the law inhibits as a preference. In re Rosenfield [Case No. 12,058]. There is no element of moral fraud involved in such case, for at common law a man may lawfully pay any creditor in preference to another.

Again, counsel for the bankrupt argued that the jury ought to pass upon the question of intent in every case, as the acts mentioned in section 5110 are in the nature of offences or forfeitures of a right the bankrupt has to his discharge, and the proceeding is therefore quasi criminal. Support for this position is found in an incidental remark of Judge Field in the case of In re Rosenfield [supra]. It is clear, however, that a man has no moral or legal right to be released of his debts, except by virtue of some statute, and that, in the enactment of such statute, congress has the power to impose such conditions as it pleases to the granting of a discharge. It has, indeed, refused it altogether in voluntary cases, except by consent of a certain proportion of creditors. I am better pleased with those opinions which treat the discharge as a favor, and the commission of one of the acts specified, as the violation of a condition precedent. Such was the position of Judge Hall in Re Cretiew [Case No. 3,390], and of Judge Lowell in Re Goodfellow [Id. 5,536]. I see no reason why, in administering the law regarding fraudulent conveyances under this section, we should apply any other or different rule than if the question arose under section 5021.

Returning now to the main proposition that where the necessary effect of an act is to produce a certain result, and no other intent is shown to have influenced the actor, he shall be presumed to have contemplated this result, we find it supported by a great weight of authority. In the leading case of Cunningham v. Freeborn, 11 Wend. 240, Mr. Justice Nelson held that even under a statute which provided that the question of fraudulent intent in all cases of assignment should be deemed a question of fact, and not of law, fraud in law was not abolished, and that, if the jury found contrary to the law or facts, the court would be bound to set aside the verdict. The court states: "The true doctrine on this subject, notwithstanding the statute, I apprehend, is that if there is any provision in the deed of assignment, or any fact admitted in the answer, which is per se fraudulent according to the law of the case, it is so, the denial of the fraudulent intent to the contrary notwithstanding; that fraud in fact is a question compounded of law and of fact, which is to be found by the jury in a court of law, under proper direction duly observed by them, and may be by the chancellor in a court of equity. * * * The admission of facts which are per se fraudulent in judgment of law are as much so and as conclusive upon the defendant as if he had in express terms admitted a fraudulent intent in his answer, and in such a case any subsequent disclaimer of such intent will not avail him, * * * for the legal intent from these facts is stronger than the mere admission of it subsequently denied. * * * And if the weight of evidence is such, when applied to well-settled principles of law in relation to these voluntary assignments by failing debtors, as to force upon him the conclusion of a fraudulent intent, he is bound so to find, notwithstanding the denial of it in the answer; and if the jury do not thus find, a court of law would be bound to set aside the verdict." In an early case in this state (Kirby v. Ingersoll, Har. [Mich.] 172), it was held that an assignment containing illegal provisions was void upon its face, notwithstanding all intent to commit fraud was denied. This has ever since remained the settled law of this state. Buck v. Sherman, 2 Doug. [Mich.] 176; Pierson v. Manning, 2 Mich. 445. The state reports contain a large number of cases to the same general effect. Ewing v. Gray, 12 Ind. 64; 9 Ind. 461; Allen v. Wheeler, 4 Gray, 123; Potter v. McDowell, 31 Mo. 62; Milne v. Henry, 40 Pa. St. 352; Freeman v. Pope, L. R. 9 Eq. 206. The supreme court of the United States lent its sanction to the same doctrine in Lukins v. Aird, 6 Wall. [73 U. S.] 78. In this case a debtor in failing circumstances conveyed his land for a valuable consideration by deed, without reservation, but reserved to himself verbally the right to occupy and possess it for a limited time for his own benefit. The court, in this case, found the fraud to be an inference of law, on which the court was as much bound to pronounce the conveyance void as to creditors as if the fraudulent intent were directly proved. To the same effect is Toof v. Martin, 13 Wall. [80 U. S.] 40, 48, in which the intent to prefer was held to be conclusively presumed from the fact of preference.

Under the bankrupt law, decisions to the same effect are numerous. In Re Smith [Case No. 12,974], Judge Hall, in speaking of general assignments for the benefit of creditors, and the presumptions attaching thereto, uses the following language: "Every person of a sound mind is presumed to intend the necessary, natural or legal consequences of his deliberate act. This legal presumption may be either conclusive or disputable, depending upon the nature of the act and the character of the intention; and when, by law, the consequences must necessarily follow the act done, the presumption is ordinarily conclusive, and cannot be rebutted by any evidence of a want of such intention." In Re Drummond [Id. 4,093], Judge McDonald held that where the necessary consequences of a transfer by the bankrupt of all his property to a portion of his creditors were not only that it would probably give them a preference, but would necessarily and certainly produce that effect, the bankrupt must be conclusively presumed to have intended it. In Re Black [Id. 1,457], Judge Blatchford held that the burden of proof was upon the debtor to show that he had not the intent to prefer. See, also, In re Sutherland [Id. 13,638]; In re

Batchelder [Id. 1,098]; In re Locke [Id. 8,439]. In Re Brodhead [Id. 1,918], Judge Benedict held that a general assignment for the benefit of creditors cast upon the bankrupt the burden of showing the absence of the prohibited intent. In Re Goldschmidt [Id. 5,520], Judge Blatchford treats a general assignment for the benefit of creditors as necessarily involving the existence of a purpose to prevent the property from being distributed in pursuance of the bankrupt act, in satisfaction of the debts, and refused a discharge. In the case of In re Croft [Id. 3,404], Judge Blodgett held that, although a general assignment was an act of bankruptcy, in order to prevent a discharge it must be made with an intent to prefer, or for the purpose of preventing the property from coming into the hands of the assignee in bankruptcy, or from being distributed in satisfaction of his debts. He does not undertake to say that such an assignment does not necessarily presuppose that intent, but finds that in the case before him there were circumstances showing an actual intent in the mind of the bankrupt to withdraw certain property from the partnership fund, and therefore refused a discharge. In the case of In re Bininger [Id. 1,420], Judge Woodruff held that the procuring of a bankrupt's property to be put into the hands of a receiver of a state court necessarily operated to defeat the operation of the bankrupt law, and that in the judgment of the law the bankrupt knew when he did it that it would have that effect, and knowing the effect he must have intended to produce it when he voluntarily chose to do the act. "Whatever his motive was he acted voluntarily in choosing, and therefore in intending all the legal results which would flow from his action in the matter. This was a creditor's petition under section 39. In the case of Globe Ins. Co. v. Cleveland Ins. Co. [Id. 5,486], Judge Emmons held a general assignment to be an act of bankruptcy, upon the ground that it defeated the operation of the bankrupt law. Its effect in barring a discharge was not considered, nor does the learned judge discuss the question whether evidence may be received to show that the bankrupt in fact executed the assignment with no intent to defeat the operation of the act. In the recent case of In re Kasson [Id. 7,617], Judge Wallace held that a voluntary general assignment bears conclusive evidence upon its face of the intent of the assignor to prevent the property transferred being distributed under the bankrupt act. "By such an instrument the debtor not only selects his own assignee, but he selects one who has no power to question or attack a class of transactions which the bankrupt act seeks to prevent."

Let us apply these principles to the facts of this case. The necessary effect of the general assignment to Russell was to withdraw the property assigned from the operation of the bankrupt act, and to secure a distribution by an assignee of the bankrupt's own choosing. It is true that the assignment expressed an intention upon its face to secure an equal distribution of the assets of the party among his creditors, "and in no manner or way to impede or delay the operation of the bankrupt act, but to give the same benefits which might be derived under the said act, without the costs, expenses, and losses attendant upon the winding up of an estate in bankruptcy." There was also other evidence offered tending to show that the bankrupt did not in fact propose to have his estate wound up by his assignee, but that he executed the assignment as a preliminary step to his filing a voluntary petition, and in order to secure his property from attachment while such petition and the schedules were being prepared. Whether such evidence be competent to rebut the intention which the law infers from such an assignment is a doubtful question. Clearly, if such intention existed the bankrupt would be powerless to carry it out without the assent of the assignee, because when once vested with the trust he becomes the absolute owner for the purposes specified in the assignment, and the assignor cannot revoke it. Several of the cases above cited, however, seem to indicate that such testimony is competent, and that the assignee might show an actual intent different from the one which the law infers from the assignment itself. I do not find it necessary to express an opinion upon the point.

With regard to the transfer of goods to Scott, I think the verdict of the jury was clearly against the weight of evidence, and for that reason, if for no other, it must be set aside. Almost every fact connected with this transaction tends to show that the goods were turned over in payment of Seeley's note, and that Scott had no idea of paying for them. A general denial by Seeley of an intent to prefer will avail nothing as against the undisputed facts connected with the transfer.

There was no dispute at all with reference to the transfer to Harris. The necessary effect of the transfer was to prefer him, and as there was no attempt to explain away the inference that he intended to prefer, the presumption of such an intent must be held conclusive as matter of law.

I think the objecting creditors were entitled to the instruction prayed for, and that the case ought not to have been left to the jury. The verdict must be set aside, and a new trial granted.

Case No. 12,629.

SEELEY et al. v. BEAN et al.

[3 App. Com'r Pat. 446.]

Circuit Court, District of Columbia. March 23, 1861.

PATENTS—PUBLIC AND EXPERIMENTAL USE.

[The sale by an inventor of his perfected machines to persons, on trial, with the right to re-

turn them or keep them, as they saw fit, where made more than two years before the application for a patent, will bar the right thereto, as the use by such persons is a public and not an experimental use.]

Appeal from the decision of the commissioner of patents awarding to Bean and Wright priority of invention for improvements in machines for winnowing grain, and awarding to them the right to receive a patent therefor, supposed to be in substance the same invention for which a patent was granted to Griswold and Seeley November 22, 1859.

MORSELL, Circuit Judge. The commissioner adopts the report of the examiner, dated December 12, 1860, for his opinion, which, in substance, states that "the invention involved in the interference in this case has relation to a peculiar mode of vibrating a sliding screen, as well as to a novel arrangement of devices combined to control the movement of the several members of the machinery. Ellis Michael has withdrawn the interfering clauses of his claim, and of course from this interference. The question of priority of invention is therefore limited to the application of Bean and Wright, and the patent of Griswold and Seeley. Between these the interference is manifest, and the interference was properly declared between their several claims to the combination of a sliding screen, a rock shaft, and a vibrating bar, arranged in the manner and for the purpose set forth. From the testimony it appears, with some degree of certainty, but not absolutely so, that Bean used the combination in question in fan mills which were sold in the latter part of the year 1857. It is positively certain from the testimony of the leading witness that the invention in question was sold into public use by Bean and his then partner in the spring of 1858, but the first mills having the improvement upon them were sold as experimental machines. The purchasers had the right to keep them as they saw fit. The patentees, Griswold and Seeley, produce no evidence of an earlier invention by them of the improvement in question than the spring of 1859, but they argue that the sale by Bean & Burrows of the mills having the improvement attached to them, in the fall of 1847, constituted an abandonment of the invention to the public. The applicants were clearly, from the testimony before the office, the prior inventors, as between the parties to this interference. I am not aware that either the patent law or the decisions of our courts have fixed any precise period applicable to the experimental use of new inventions. The period for experiment must depend upon the nature of the invention and the opportunities of the inventors, so that what would not constitute proper diligence under some circumstances, where the experiments went over a few months, would not amount to abandonment under others, though the experiments might have gone over 15 or 20 years. In the present case, one or even two harvest seasons would have been no unreasonable period for experiment; and, even if the proofs were clear that the invention had been used by Bean & Burrows in the harvest season of 1857, it would be an extremely stringent enforcement of the rule of diligence to require them to apply for a patent within two years from that date, or to refuse them a patent on the ground of abandonment. I cannot think the law so rigid, and none of the decisions relied upon go to the extent. The experiment was proper, and, with no violence to the true rule of construction, could have been permitted to go through the harvest of 1858 without an extraordinary indulgence to those applicants, without granting too long a time to determine to the public. But, on the idea of the first experiment having been put before the public in the spring of 1858, as the positive recollections of the witness Burrows show it to have been, the applicants are clearly within a time that wholly excludes a constructive abandonment of their invention, for they made this pending application for a patent for the improvement in question in February, 1860, and are thus wholly saved by the act of 1839, § 7 [5 Stat. 354]. For these reasons, etc., this report is adopted and confirmed by the commissioner, December 12, 1860, and priority of invention awarded to Bean and Wright, to whom a patent was accordingly directed to issue."

To this decision the appellant filed eight reasons of appeal. They appear to be sufficiently full and sufficiently specific to cover all the points that will be considered in the decision of this appeal. As they are extended to considerable length, they will only be referred to as forming a part of this proceeding. The report of the commissioner in reply to the reasons of appeal is substantially the same with the decision just recited, except that the point as to what may properly be regarded as an experimental use of an invention, in connection with the rule of diligence required of an inventor to secure the legal protection of his exclusive right, and to avoid the presumption of abandonment, is more elaborately presented. The commissioner says: "It is possible, from the evidence in the interference, that the invention was attached to fan mills sold in the latter part of the year 1857." There is positive evidence that the invention was put on sale in the spring of 1858 by one of the joint inventors, but (the commissioner says) the sales were qualified sales. The purchasers "had the right to keep them or return them as they saw fit." And it is alleged that the sales of the invention embodied in these fan mills sold at both periods were for the purpose of an experimental test of the character of the improvement claimed, and certainly the fact of the very terms of the sale at the latter period sustains the allegation of the experimental condition of the use of the invention. If it had not been for an experiment, the opposite party was bound to show that the sales had

been open and without conditions; for, by the terms of the sales that were then made, the purchaser's privilege postponed the closing of the contract of sale until his experiments should determine, in his estimation, the value of the improvement, and this determination on his part was the best evidence that the inventor could have that his invention was valuable. In other words, the terms of the sale left the machines the property of the vendor, held at his risk, and without liability for deterioration from accident or wear by the purchaser, who only became liable for the price or acquired any property in the machines when determined to keep them. Until he thus determined, he was but the agent of the owner, and the presumption is both fair and legal that a part of the consideration in the sale on such favorable terms was that the experiment should be made by the purchaser fairly and fully; that is to say, in a proper manner, and through a sufficient period of time to determine whether the improvements were valuable. He says, "As stated in the decision, the time for, or period of, experiment must be governed by the character of the invention and the condition of the inventor." To illustrate his position, he puts the case of plaster designed to protect the outside of buildings against the action of light, heat, and moisture, and also a composition to protect timber from decay, etc.; showing that the length of time might be shorter or longer according to the nature of the subject. The conclusion which he comes to is thus expressed: . "The time, then, within which the office regarded an experimental use of an improvement in winnowing machines legitimate was not unreasonably stated in the decision. Even more than two harvesting seasons might not be too long for experiments," etc. He says: "In the present case, to take the most unfavorable view of the acts of the applicant, and admit that the machine was conditionally sold having this improvement upon it in the fall of 1857, and that it was then experimentally used, could it be viewed as right and lawful to fix abandonment upon the inventor?. The decision was against so rigid a rule of construction, and I am still of opinion that the experimental use of the improvement was not unreasonable." That an experimental is not a public use, in the meaning of the patent law, although an experiment may be publicly used, etc.

Such appeared to be the state of the proceedings when laid before me by the commissioner, according to previous notice given of the time and place of trial, together with all the evidence, original papers, etc. The principal point discussed by the commissioner in his opinion and report relates to the effect of the delay on the part of the appellee in making his application for a patent. He supposes the sale, made as stated in the evidence, was a conditional sale for the purpose of experiment,—the exercise of a right allowed to him by the principles of patent law. The nature and extent of this right depend on circumstances. It must be used consistently with the policy, spirit, and nature of the statute law on the subject requiring vigilance and newness at the time of application. Those applicable to the present questions are the acts of 1836, §§ 6, 15 [5 Stat. 119, 123], and 1839, § 7 [supra]. The statute of 1836, among other things, creates a bar in express language, stating what shall be a good defense, and, after enumerating several others, says: "Or had been in public use, or on sale, with the consent and allowance of the patentee before his application for a patent, or that he had surreptitiously or unjustly obtained the patent for that which was in fact invented or discovered by another who was using reasonable diligence in adapting and perfecting the same." The same, in substance, is to be found in the first section of this statute, relative to applicants for patents, as a prerequisite. Act 1839, § 7, modifies this defense, the latter part of which is in these terms: "And no patent shall be held to be invalid by reason of such purchase, sale or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public or that such purchase, sale, or prior use, had been for more than two years prior to such application for a patent."

That the transaction with respect to the sale may be understood, I will proceed to state the substance of the testimony of the witnesses. Elisha Davis says that he worked in the shop of Bean & Burrows in the summer of 1857 and in the year 1858. He gives a full and minute description of the mill in question, with the attachment of the particular invention. These mills, he says, were first built by Bean & Burrows in the summer or fall of 1857. In the closing part of his testimony he says: "In the latter part of the year 1857, mills were built in Bean & Burrows' shop, in Hudson, containing the vibrating bar, rock shaft, and cleaner, but I do not know who put them in. I understood they were built for public use." Wm. Thayer says he worked for Bean & Burrows in 1857 (it does not appear that he worked for them in any other year) making fanning mills. He thinks he commenced about the month of July. That during the time he worked for them he knew of mills being made in their shop with the vibrating bar, rock shaft, and cleaner combined. He thinks these mills were made and sold for public use. On cross-examination he says that Bean & Burrows sent off mills with the vibrating bar, rock shaft, and cleaner, but he does not know whether they got pay for them or not. The first party that he ever knew to make mills with the bar, shaft, and cleaner was John Bean. Burrows, the former partner of Bean at the time of the making and selling of the machines in question, examined as a witness on the part of the appellees, if the objection to his competency

should be considered as waived, says nothing materially contradictory of the testimony of Davis and Thayer. He says: "In company with John Bean, I got up some mills for public use in the spring of 1858, containing the vibratory bar and rock shaft. I do not know but some were made in the latter part of 1857, but with regard to this I cannot speak definitely." Q. "Why not? Did the partners keep no memorandum of the sales?" A. "The mills that we first sold with the vibratory bar and rock shaft were sold on experiment. They were put on trial. The parties had the right to return them or keep them as they saw fit."

Assuming, as the commissioner decides, that the inventions of the patentees and the claimants are substantially alike, and that in point of time the claimants' is prior, the question is, whether the right of the claimants has not been lost by statutory bar or abandonment, and, first, upon the ground of sale, or of keeping the machine, after having been completed, on sale, and that may depend on the point of time when made, and the nature of the transaction which the commissioner calls the conditional sale for experiment.

As to the point of time, it is contended by the appellants that it was in the fall of the year 1857. On the other hand, it is denied. The commissioner admits that there is a possibility that the proof does amount to that, but that it was sold on an experiment; that the purchaser had the right to keep it or return it, if he pleased; and that two seasons of trial was not an unreasonable length of time for that purpose.

The two first witnesses, who were workmen of the trade, and lived and worked in the shop of Bean & Burrows in the year 1857, prove that some machines of the kind were completed and on sale in the fall of 1857, which had been built by Bean, as one of them states, in the summer or fall of 1857; that during that period he understood they were built for public use, and made and sold for public use; that Bean & Burrows sent off such mills, but he does not know whether they got paid for them or not. Now, if this testimony stood alone, it would be difficult to conceive how any person could doubt for a moment that their testimony amounted to full proof. Then, what is there to impair the weight of their testimony? Burrows, who was a former partner, called as a witness on the part of the appellants, and therefore feeling his leanings in favor of appellants, from the relation in which he stood,—but what does he say? That Bean and himself got up some of them in the spring of 1858 for public use, and he does not know but that some of them were made in the latter part of 1857. Does this deny that John Bean had made some in the summer of 1857, which they had on sale in their shop, and sent off in the fall of 1857? The two witnesses, who stand fair as to credit, speak of the fact positively. The other, only doubtingly. I am satisfied, therefore, that it happened in 1857, as they state.

Now as to the condition. The two witnesses first alluded to say nothing about any such condition. The witness Burrows says they were sold on experiment. They were put on trial. The parties had the right to return them or keep them as they saw fit. This experiment, then, was after the machine had been completed and put on sale for public use in the shop, on account of the purchaser himself, and not as a neighborly act on account of the inventors, without profit, without limit of time or restraint as to a public or private use, but on the contrary put out of the possession and control of the appellants as to both. This was all done more than two years before the application for a patent. Under such circumstances, I am clearly of opinion, and I do hereby so decide, that the said claim of the said Bean and Wright is barred and precluded by the statute, and without protection, and that they are not entitled to a patent, as awarded by the commissioner; that the said decision is erroneous, and the same is hereby reversed and annulled.

Case No. 12,630.

SEELEY v. KOOX.

[2 Woods, 368.] [1]

Circuit Court, S. D. Georgia. April Term, 1874.

PENAL ACTION—VOTING—DECLARATION — ACTING IN JUDICIAL CAPACITY.

1. In an action on the case to recover the forfeit provided for in section 4 of the act of May 31, 1870 (16 Stat. 141), the declaration must aver that the plaintiff was prevented from voting, by force, bribery, threats, intimidation, or other such unlawful means.

2. A declaration which alleges that the unlawful means by which the plaintiff was prevented from voting was the erroneous decision of the defendant, who was an officer of the election, upon a question of law, without averring that the decision was willfully or maliciously wrong, is insufficient.

[This was an action by Isaac Seeley against Julius Koox.] Heard on general demurrer to the declaration.

Isaac Seeley, in pro. per.

Julian Hartridge and W. S. Chisholm, for defendant.

Before WOODS, Circuit Judge, and ERSKINE, District Judge.

WOODS, Circuit Judge. Section 4 of the act of congress, approved May 31, 1870, entitled "An act to enforce the right of citizens of the United States to vote in the several states of this Union," and for other purposes (16 Stat. 141), declares: "That if any person,

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

by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, prevent or obstruct any citizen from doing any act required to be done to qualify him to vote, or from voting at any election as aforesaid, such person shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs and such allowance for counsel fees as the court shall deem just; and shall also, for every such offense, be guilty of a misdemeanor; and shall on conviction thereof be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court." The constitution of the state of Georgia (article 2, § 2; Code 1873, p. 908) provides that a person to be an elector "shall," among other things, "have resided in this state six months next preceding the election, and shall have resided thirty days in the county in which he offers to vote, and shall have paid all taxes which may have been required of him and which he may have had an opportunity of paying agreeably to law for the year next preceding the election." Section 1283 of the Code of Georgia of 1873 prescribes the following oath to be taken and subscribed by superintendents of elections in the state: "All and each of us do swear that we will faithfully superintend this day's election; * * * that we will make a just and true return thereof, and not knowingly permit any one to vote unless we believe he is entitled to do so according to the laws of this state, nor knowingly prohibit any one from voting who is so entitled by law," etc.

On the 2d day of October, 1872, the plaintiff, claiming to be an elector under the laws of the state of Georgia, offered to vote at an election held on that day in the city of Savannah for governor and members of the general assembly. The defendant was a superintendent at the poll where plaintiff offered to vote, and refused to receive his ballot. The plaintiff thereupon brought this suit, the same being an action on the case to recover the forfeit of five hundred dollars provided for in section 4 of the act of congress above quoted. The charge in the declaration is that the defendant "did by unlawful means prevent the plaintiff from voting at said election, the said unlawful means then and there being the holding and deciding that the plaintiff must show that he had paid all legal taxes for the year 1871, the said year not being the year next preceding said election, which the plaintiff admits he had not paid, but avers he had paid all legal taxes for the year 1872 in the manner prescribed by law." A second count alleges that the defendant did unlawfully hinder and prevent the plaintiff from voting at said election, by refusing his vote, for the reason that the plaintiff had not paid his taxes for the year 1871, when in fact the plaintiff was a legal voter without the payment of any tax whatever.

It will strike the most careless reader of section 4 of the act of congress, above quoted, that the same state of facts that would authorize a recovery in this case would also authorize a conviction of the defendant for a misdemeanor with a penalty of fine or imprisonment, or both, at the discretion of the court. We must therefore construe this section with the same strictness that we would any other penal statute. The question then arises, would the facts stated in the declaration authorize a conviction in a criminal prosecution under this section? The offense described in the section is the preventing of any qualified elector from voting, "by force, bribery, threats, intimidation, or other unlawful means." It is clear that the words "other unlawful means" refer to something akin to force, bribery, threats or intimidation. Lord Bacon observed "that as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated." Hence, the celebrated rule that "where particular words are followed by general ones, as if after an enumeration of several classes of persons or things, there is added 'and all others'; the general words are restricted in meaning to objects of the like kind with those specified." 1 Bish. Cr. Law, § 275, and cases there cited. The "unlawful means" charged as having been used by the defendant are not of a like kind with those specified, to-wit: "Force, bribery, threats or intimidation." The defendant was acting under oath as a public officer in a quasi judicial capacity, and it is charged against him that while so acting he did not construe correctly an obscure clause in the constitution of Georgia. It is not alleged that he decided against the right of plaintiff to vote, knowing that plaintiff had that right or that his decision was willfully wrong, malicious or corrupt. Giving the most liberal construction to the averment of the declaration, it only amounts to this, that the defendant fell into error in passing upon the plaintiff's right to vote; that he construed that clause of the constitution which declares that "the elector must have paid all taxes which may have been required of him, etc., for the year next preceding the election," to mean the year which ended on the 31st of December before the election, and not the year current, when the election was held. Can it be possible that congress meant to impose a forfeit of $500, to be recovered in a civil action, and a fine not less than $500 or imprisonment not less than one month nor more than one year, or both, to be inflicted by a criminal prosecution upon an officer, acting under oath, who had made an innocent mistake in judgment? The proposition is too absurd to be entertained.

The declaration then utterly fails to make out a case for recovery. The elector who is prevented from voting cannot recover, unless he shows that he was prevented either by force, bribery, threats, intimidation or other such unlawful means. If it had been averred that the defendant willfully and maliciously or corruptly decided against the plaintiff's right to

vote, well knowing he had such right, and thereby prevented him from voting, it is possible the declaration might be sustained. Without some such averment it presents no cause of action against the defendant.

Demurrer sustained, and leave given plaintiff to amend.

NOTE. Public officers, acting in a judicial capacity or in matters requiring the exercise of judgment and discretion, are not liable for damages resulting from their mistakes. Harman v. Tappenden, 1 East, 555; Jenkins v. Waldron, 11 Johns. 120; Wilson v. City of New York, 1 Denio, 599; Weaver v. Devendorf, 3 Denio, 117; Griffith v. Follett, 20 Barb. 621; Mills v. City of Brooklyn, 32 N. Y. 489; Kendall v. Stokes, 3 How. [44 U. S.] 87.

SEELEY (MYERS v.). See Case No. 9,994.

SEELEY (UNITED STATES v.). See Case No. 16,248a.

Case No. 12,631.

SEELING v. RACINE.

[See Case No. 8,603.]

Case No. 12,632.

In re SEELY.

[1 MacA. Pat. Cas. 248.]

Circuit Court, District of Columbia. May Term, 1853.

PATENTS—APPEALS—POWER TO INTERROGATE EXAMINERS—AUTHORITY OF COMMISSIONER—UTILITY.

[1. When, by the act of 1839, the chief judge of the district court was substituted for the board of examiners created by the act of 1836, he succeeded to the same authority possessed by the board to require information of the commissioner and examiners in relation to any invention pending on appeal before him; and his authority in this respect is to be deduced both from the law of 1836 (section 7) and the law of 1839 (section 11). He therefore has ample power to allow an examiner to be interrogated, on the request of an appellant, on the subject of the peculiar nature and features of the invention which it is thought were not sufficiently set forth in the commissioner's report.]

[2. The oath of the applicant is prima facie evidence of the invention, and it is not necessary that there be an actual putting in use; therefore, when the application conforms to the requirements of the office, and the commissioner does not find that the invention falls within any of the conditions mentioned in the law as a sufficient ground for rejection, he has no authority to require additional evidence that the combination will produce the result claimed for it.]

[3. The combination of two blowers, one a suction blower and the other a forcing blower, with a lime kiln for the purpose of increasing the draft, and also a combination whereby the boiler of the blowing engine is heated by the same fire that heats the kiln, both combinations being new, though composed of old elements, *held* to be patentable, it appearing that a new and better result will be produced.]

[This was an appeal by Samuel Seely from a decision of the commissioner of patents refusing to grant him a patent for an improvement in lime kilns.]

P. H. Watson, for appellant.

Examiner Lane, for commissioner.

MORSELL, Circuit Judge. This is a case where there was no opposing party, and in which the decision rests only upon the examination of the commissioner under the seventh section of the act of 1836, as thereby particularly required of him in the cases therein mentioned. His decision was made the 24th of January, 1853, in which he says, addressing himself to the appellant: "In the matter of your alleged improvement in lime-kilns, I have to state in relation to the first claim that if the draft of a lime-kiln becomes too weak in consequence of extending the height of a kiln for the purpose of economizing heat, the application of any well-known means of increasing the draft is obvious, and cannot be considered a new and patentable invention. The use of two blowers—one a suction blower and the other a forcing blower—in order that one may be used when it would be inconvenient or impracticable to use the other, is considered a matter of common right as obvious as that of choosing between the two that which may be most convenient, and not a thing which can be deemed in a patentable sense a combination. In reference to the third claim—that of heating the boilers of the engine by the same fire that heats the kiln—a like device may be found in those furnaces in which the waste heat is applied to heat the boiler of the blowing engine, which possesses the same power of self-adjustment, if such a power be a practicable thing in either case in accommodating the production of steam to the blast required."

There were two reasons of appeal. The first, very nearly in the language of the clause of the act of congress just referred to, which limits the examination of the commissioner to matters therein expressed, and the second reason is in the terms of the part of the section which requires the commissioner to notify the applicant of his refusal, giving him briefly such information and references as may be useful, &c.

The commissioner answers the first reason by saying that what it states is a mere truism, because an appeal from a refusal of a patent must always be for that reason. Nothing more can be said specially in reply. And he refers to annexed copies of letters of the 9th and 11th of February last, communicating to Mr. Seely the reasons why the office differs from the opinion expressed in the first reason. The substance of the letter of the 9th states that the only things assumed as known devices in the official decision of the 24th ultimo upon the first claim in the case of the lime-kiln are, first, making the kiln high and feeding the limestone in at the top, for the purpose of economizing heat; and second, the use of a fan or other mechanical blower as the means of increasing the strength of a draft. These two devices are so generally known that the office does not consider a special reference to

either of them necessary, so long as the increased addition to the height of the kiln and keeping up a sufficient draft involves only the matter of carrying the economy of heat, and other advantages known to belong to the increase of height, to a greater extent. The application of a known means of strengthening the draft to this particular case is deemed unpatentable. On the second claim the only things assumed to be known, are, first, the forcing blower; second, the suction blower. As it is not pretended that either of these is new, a reference is not necessary. The office intended to be understood as giving its opinion upon the patentability, in view of those two things being known, of using both upon one lime-kiln for the purpose specified. In regard to the third claim, and the thing mentioned as an equivalent, the office has not unqualifiedly stated that the latter does act in practice as a self-regulator. On the contrary, serious doubts are entertained, as intimated in the letter of the 24th ultimo, whether either one will so act in practice. If not, then the device in either case consists simply in not building a separate fire for the engine-boiler, but putting it where it may take its heat from the main fire, and the two things will be considered as equivalent until satisfactory evidence is placed on file that the one claimed has been actually made practically to perform the self-regulating function claimed for it. The letter of the 11th, as to the first two claims, adds nothing. As to the third, the only additional thing is that the decision of the office extends so far as this, that in the absence of the evidence of fact that the thing does perform that function (that is, whether the principle has been or can be made susceptible of sufficiently definite and constant relations in quantity to serve in practice as the means of such a self-regulation of the apparatus as is claimed for it) a patent ought not to be granted for heating the steam-boiler over the kiln fire instead of a separate one. On the day and place appointed by previous notice for the hearing, the appellant appeared by his counsel and Mr. Lane, an examiner from the patent office, the commissioner having laid before me the original papers in the case, together with the grounds of his decision touching the points involved by the reasons of appeal.

Upon the application of the counsel for the appellant, Mr. Lane was sworn by the judge, according to the provisions of the statute, for the purpose of being examined in explanation of the principles of the invention for which the patent was prayed. Objections on the part of the office were made to answering the seventh interrogatory and the twelfth as not being embraced within the rule provided by the statute. The object of both questions was to obtain information on the subject of the peculiar nature and features of the invention forming the very subject of the issue, and essential to the right claimed, and which it was thought had not been sufficiently set forth in the report. In the seventh section of the act of 1836, giving the party a right of appeal to a board of examiners from the decision of the commissioner, it is made the duty of the commissioner to furnish to the board of examiners not only a certificate in writing of his opinion and decision, stating the particular grounds of his objections, and the part or parts of the invention which he considers as not entitled to be patented, but also such information as he may possess relative to the matter under their consideration. By the act of 1839 (chapter 88) this board was abolished, and instead thereof the appeal was authorized to be made to the chief judge of the district court for the District of Columbia, the eleventh section of which statute provides "that at the request of any party interested, or at the desire of the judge, the commissioner and the examiners in the patent office may be examined under oath in explanation of the principles of the machine or other thing for which a patent in such case is prayed for." It is supposed, without the necessity of entering on any particular course of reasoning on the subject, that it must appear clear that the judge succeeded to the same authority that the board possessed to require of the commissioner and examiners like information and to the full extent, and that the two laws, taken together in their provisions on this subject, authorized the examination according to said interrogatories. The objections must therefore be considered overruled. This examiner stated that, so far as he knew, there never had been a blast used in a lime-kiln before this; that the principle of the combination of the two blowers, so far as he knew, had never been used in any other lime-kiln. And so with respect to the feature of generating heat and flame in the same furnace for the purpose of calcining the limestone, and for the steam-boiler for the blowing apparatus, in the sense that it is in no other lime-kiln; also that other features of the invention, so far as related to lime-kilns, were new, and that if the practical results would be as stated it would save considerable fuel, which is one of the most considerable items of expense. This is believed to be the substance. (The paper containing the statement referred to is sent herewith.)

I proceed now to consider the reasons of appeal; and their connection is such that they may both be considered together. They involve the construction of the seventh section of the act of congress of 1836, as to the extent of the jurisdiction of the commissioner in requiring additional evidence in this case to sustain the claim of the appellant to have a patent for his invention, the terms of the law declaring the previous requisites, on a compliance with which the party is entitled; and those conditions in which, if the applicant's case falls, he will not be entitled, are so explicit as to need no other interpreter than itself, and need not be here stated. It

appears to be admitted that the application, specification, drawings, models, and oath have all been made according to the requirements of the law, and it also appears that this is not a case of interference. The invention claimed is a new and useful process, so arranged and adapted, in combination with the kiln for calcining limestone, as to prove greatly beneficial to the public and more economical, by great saving of expense in the cost of fuel, and producing a much better and superior article of lime. The commissioner in his report does not say in terms that he has discovered in the course of his examination any evidence that the invention, as stated in its combination, falls within any of the conditions mentioned in the law as a sufficient ground to justify a rejection; but he intimates that the parts (separated) are old, well-known things, and have been used in other applications; and though considered as combined in the intended application in a lime-kiln, there is no evidence of what the practical result would be. This, I think, is not meeting the proposition as to its practical result. To entitle the party to a patent, I consider it as settled law that (to use the language of Judge Cranch) "none of the patent laws have ever required that the invention should be in use or reduced to actual practice before the issuing of the patent otherwise than by a model, drawings, and a specification containing a written description of the invention, and of the manner of making, constructing, and using the same, in such full, clear, and exact terms as to enable any person skilled in the art to which it appertains to make, construct, and use the same." Heath v. Hildreth [Case No. 6,309]. To these facts the party applicant is required to make oath of the truth; and such, in a case of this kind, is esteemed prima-facie evidence. "Mr. Justice Story has held that this oath on a trial is evidence in the cause of a prima-facie character, and that it is the foundation of the onus probandi thrown upon the defendant." Curt. Pat. § 30. In such a state of things, if the commissioner shall deem it sufficiently useful and important, it is his duty to issue a patent therefor, as to which latter matter Curtis (section 28) says: "The subject-matter of a patent must not be injurious or mischievous to society, or frivolous or insignificant." Again: "It must be capable of use for some beneficial purpose; but when this is the case, the degree of utility, whether larger or smaller, is not a subject for consideration in determining whether the invention will support a patent." Nor is this rule of evidence at all unreasonable. The proceeding before the commissioner is an initiatory proceeding, and, from the nature of the subject, not unlike the practice in the incipient stages of many other allowed cases. With respect to the passage quoted by the commissioner from Curtis (section 401) on the subject of the use of old things in combination, the second branch of the very same paragraph shows a full explanation of the rule. The part quoted is where the rule was intended to apply in a case where the new use was only so far as the occasion was concerned; but he says immediately after, "or, on the other hand, the claim may be for the use of a known thing, in a known manner, to produce effects already known, but producing those effects so as to be more economically or beneficially enjoyed by the public, which the law decides is a patentable subject." The result in this case was new and better. But if further evidence were necessary, I think the examiner has fully supplied it.

Upon the whole, I think there was error in the decision of the commissioner refusing to grant the patent in this case, and I do so decide, and direct that the same be reversed and that a patent be granted as prayed.

SEGARS (UNITED STATES v.). See Case No. 16,249.

Case No. 12,633.

SEGEE v. THOMAS et ux.

[3 Blatchf. 11.] [1]

Circuit Court, D. Connecticut. April, 1853.

PLEADING IN EQUITY—EFFECT OF ANSWER—PROCESS—SERVICE ON ATTORNEY—PARTIES—WITNESSES—SALE OF INFANT'S ESTATE—REQUISITES OF DEED—ESTOPPEL.

1. A defendant in a suit in equity, who appears and answers the bill, cannot, on the hearing, object that the bill contains no prayer for process, or that he was not served with process.

2. Where the defendant in an action at law brought a suit in equity, in the same circuit court, against the non-resident plaintiff in that action, to restrain its further prosecution: *Held*, that service of the subpœna in the equity suit upon the attorney for the plaintiff in the action at law, was a sufficient service to confer jurisdiction.

[Cited in Cortes Co. v. Thannhauser, 9 Fed. 228; Bush v. U. S., 13 Fed. 628; Romaine v. Union Ins. Co., 28 Fed. 639.]

3. The question of who are necessary parties to a suit in equity brought by a defendant in an ejectment suit, to restrain its further prosecution, considered.

4. An objection of want of parties must be taken by plea or answer, and the name or description of the parties who should be brought before the court must be specified. Such an objection cannot be taken at the hearing for the first time.

[Cited in Florence Sewing-Mach. Co. v. Singer Manuf'g Co., Case No. 4,884.]

5. Under the 34th section of the judiciary act of September 24th, 1789 (1 Stat. 92), a state statute allowing interested persons to be witnesses is applicable to trials in actions at common law in the courts of the United States, but not to suits in equity or criminal cases.

6. Where the order of a court of probate in Connecticut, authorizing the sale of an infant's real estate, declared, as a fact, that the notice of hearing required to be given by a previous order of the court had been given: *Held*, that, as the court was a court of record, and had jurisdiction of the matter, the order was conclusive as to the

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

fact of the notice having been given, where it was questioned in a collateral proceeding.

[Cited in May v. Logan County, 30 Fed. 255.]

[Cited in brief in Raley v. Guinn, 76 Mo. 264. Cited in Ex parte Sternes, 77 Cal. 163, 19 Pac. 277.]

7. A court of probate in Connecticut was authorized, by statute, to order, for just and reasonable cause, the sale of the real estate of a minor, on application of his guardian, and to empower him, or some other meet person, to convey the same, on giving bond with surety, and was required, on application for such order, to cause notice of the application to be published in a newspaper. A petition being presented October 31st, the court made an order assigning the 27th of December for its hearing, and directing the notice prescribed by the statute to be published. Nothing further was done by the court till the 26th of February following, when the guardian gave the necessary bond, and the order of sale was made: *Held*, that it was to be presumed, that the determination of just and reasonable cause was made by the court on the 27th of December, and that the time between that and the making of the order of sale was occupied in procuring a person to make the conveyance and in perfecting the bond; and that the order of sale was valid.

8. *Held*, also, that, under that statute, the deed of the land must refer distinctly to the order of sale, and give its date, and show on its face the authority of the grantor, and that the deed in this case was defective, the only reference in it to the order of sale being an averment that the grantor was "authorized by an order of the court of probate for the district of S." to make the deed.

9. *Held*, also, that the deed was defective, because it did not show that the notice of sale required by the order of sale had been given.

[Cited in Thurston v. Miller, 10 R. I. 360.]

10. *Held*, also, that a court of equity would interfere in favor of the grantee in the deed, to aid such defective execution of a valid power, there being no opposing countervailing equity.

11. *Held*, also, that, as the minor had received the money paid for the real estate on its sale, which was its full value, and had retained it and never offered to return it to the vendee, and the power of sale given by the court was valid, but had been defectively executed, and the vendee had gone into possession of the land, and made improvements on it adding greatly to its value, a court of equity would, in a suit by the vendee, perpetually enjoin the minor from further prosecuting an action of ejectment brought by him, after he became of age, against the vendee, to recover the land with the improvements, on the ground of the defect in the deed, and would compel him to convey the vendee all his right and title in the land.

12. *Held*, also, that this was not a case where there was an adequate remedy at law, although there were, in the deed, covenants of warranty, and of quiet enjoyment.

The bill in this case was filed by the plaintiff [Lewis C. Segee], a citizen of Connecticut, against the defendants [Henry Thomas and Lucy W. Thomas, his wife], citizens of New York. It set forth that, on the 11th of October, 1825, Elijah Waterman, late of Bridgeport, Connecticut, died intestate, leaving certain real and personal estate, and leaving a widow, Lucy Waterman, now deceased, and seven children, of whom the defendant Lucy W. Thomas was one; that administration was granted on the estate of the intestate; that, on the 25th of August, 1826, the widow was appointed guardian of Lucy W. Thomas, she then being a minor; that, on the 31st of October, 1826, the guardian presented her petition to the court of probate for the district of Stratford, within which district the guardian and the minor then resided and the land was situate, for liberty to sell certain land which the minor acquired by inheritance from her father; that, on the same day, an order of notice was passed by the court of probate, fixing the 27th of December, 1826, for the hearing of the petition; that, on the 26th of February, 1827, the same court of probate made an order for the sale of the land belonging to the minor, and authorized one Wilson Hawley to sell and convey the same; that it was for the interest and benefit of the minor that the land should be sold; that Hawley, in pursuance of the authority so given him, on the 12th of March, 1827, executed a deed for the land to the plaintiff, and received the full consideration for the same, which consideration, amounting to $1,129.71, was paid by the plaintiff to the guardian, for the use of the minor, and came to the hands of the said minor by her guardian, and was in full for the minor's interest in all the real estate which descended to her from her father, and was receipted for by the guardian; and that the plaintiff, soon after the execution of the deed, with the full knowledge, assent, and understanding of the minor and of the guardian, went into possession of the premises, and had, from that time to the bringing of the suit, expended large sums of money in the improvement of the same, and had been in the exclusive possession of the same, claiming them as his own, without any claim on the part of the guardian, or of Lucy W. Thomas, until April, 1850, when the defendants commenced, in this court, an action of disseisin against the plaintiff, demanding the surrender of the premises, which action was still pending. The bill further alleged, that the deed was defective, and that the order of the court of probate, of the 26th of February, 1827, was defective, and prayed that those defects might be cured, and that the defendants might be enjoined against any further proceedings in the action at law, and might be decreed to convey to the plaintiff all their interest in the premises. The bill contained no prayer for process. The subpœna was not served on either of the defendants, but they appeared and put in their answer to the bill. The case was heard on pleadings and proofs.

Ralph I. Ingersoll and James C. Loomis, for plaintiff.

Henry Dutton and William B. Bristol, for defendants.

INGERSOLL, District Judge. Upon the hearing, several objections were interposed to a decision of the case by the court upon its merits. These objections were not taken

either by plea or answer, but were raised for the first time on the hearing.

It is said that, in the bill, there is no prayer for process. The object of such a prayer is, that process may issue to bring the defendants before the court; and, if parties appear and make themselves defendants, with the consent of the court and that of the other parties, and answer the bill, they cannot afterwards allege that there has been no prayer for process. If the defendants wished to avail themselves of the objection that there was no prayer for process, they should have taken that objection by plea. This they have not done. By appearing and filing their answer and taking proofs, they admit that they are regularly defendants, and waive the objection, that there is no prayer for process and that process has been issued without such a prayer.

It is said further, that the court has no jurisdiction either of the subject-matter or of the persons of the defendants; that the 11th section of the judiciary act of September 24th, 1789 (1 Stat. 78), prohibits a suit from being brought in any other district than that of which a defendant is an inhabitant, or in which he is found; and that, in this case, the defendants were not inhabitants of this district, nor found within the same. By virtue of the section referred to, a citizen of one state may be sued in another state, if the process be served upon him in the latter state. This clause in the act is not a restriction of the jurisdiction of the court, but only a grant of a personal privilege—that of not being served with process out of the district in which the defendant resides or is found. Being only a personal privilege, it may be waived. The defendant is entitled to be served with process in the district where the court is holden. But, if he appears without such service, he waives the right of so being served with process. It has been held that, if a defendant who is served, in the state where he resides, with equity process from the circuit court of another state, appears, in pursuance of such process, and answers, without objecting to such service, he thereby waives his privilege, and the court has jurisdiction. Serg. Const. Law, 118; Logan v. Patrick, 5 Cranch [9 U. S.] 288. And, if he is not served anywhere with process of any kind, and appears in the suit and submits to the jurisdiction of the court, it is the same as if he had been regularly served with process. The object of process is to get the defendant into court, to answer and defend the suit; and his appearing, to answer and defend, without process, is as binding upon him as if he appeared in pursuance of process regularly served. In this case, the subpœna was served upon the attorney of the defendants, in Connecticut. That was the only service; and the defendants, by appearing and answering the bill, waived all other service.

But, if the defendants had not thus appeared, and waived the service of process, they could not, in any stage of the proceedings, have successfully objected to the service of the process as made. For, where a party residing out of the jurisdiction of the court has obtained a judgment at law, which is sought to be enjoined by a bill in equity filed in the same court by the defendant in the judgment, or where a non-resident has instituted a suit in equity, and a cross bill is filed by the defendant, it has been held that the court will order that service of the subpœna upon the attorney or solicitor of such non-resident party shall be sufficient. Hitner v. Suckley [Case No. 6,543]; Eckert v. Bauert [Id. 4,266]; Ward v. Seabry [Id. 17,161]; Read v. Consequa [Id. 11,606]. And the same rule would apply where an action at law is pending, and the defendant brings a bill in equity to enjoin the plaintiff from proceeding with the same.

It is said further, that there are not the proper parties to this bill. The object of the suit is to enjoin the defendants from further proceeding in the action at law, and to compel them to convey to the plaintiff whatever legal title they may have to the premises in controversy, in right of the defendant Lucy W. Thomas, as heir-at-law of her father. If the plaintiff did not acquire the legal title to the premises in question, by virtue of the deed from Hawley, it still remains in the defendant Lucy W. Thomas; for, the adverse possession of the premises by the plaintiff, from the month of March, 1827, to the time of the commencement of the action at law, and his using and improving the premises as his own, and holding the same against the rights of all other persons, would not give him any legal title to the same, as, when such adverse holding commenced, Lucy W. Thomas was a minor, and the action at law was brought within five years after she became of age. No one but the plaintiff has claimed, or can claim, any equitable title to the premises. No one but the defendants can be affected by a decree enjoining them from the further prosecution of the suit at law. No one but the defendants can be affected by a decree compelling them to convey to the plaintiff any legal title which they may have in the premises. It would seem, then, that, as no one but the parties before the court can be affected by the decree prayed for, the proper parties, and all the proper parties, are before the court.

But, if this were not so, the defendants should not be permitted to urge this objection, in this stage of the proceedings. They have not taken it by plea or answer, or specified, in any plea or answer, the name or description of the parties who should be brought before the court. And, it is expressly provided, by the 53d of the rules in equity, prescribed by the supreme court in 1842, that, "if a defendant shall, at the hearing of the cause, object that a suit is de-

fective for want of parties, not having, by plea or answer, taken the objection, and therein specified, by name or description, the parties to whom the objection applies, the court (if it shall think fit), shall be at liberty to make a decree, saving the rights of the absent parties." If, then, there were any rights of absent parties, in this case, which could be affected by a decree, it would be right, if the facts in the case authorized it, to make a decree, reserving the rights of such absent parties. But there are no absent parties whose rights can be affected by the decree.

There is nothing, then, to prevent this case from being decided on its merits. In order to decide it correctly, it is necessary to consider four several questions. Those questions are:

1. Has Mrs. Thomas received pay for the land now sought to be recovered in the action of ejectment?

2. If she has, does she now retain that pay, without any offer to return it?

3. Was there a valid order of the court of probate for the sale of the land in question? In other words, was there a valid power given by that court to Hawley to sell the land?

4. Was the deed conveying the land defective? In other words, if there was a valid power given by the court of probate to Hawley to sell the land, was that valid power defectively executed?

In considering the case, I lay aside the deposition of Thomas T. Waterman. He joined with Hawley as a grantor in the deed, with covenants of warranty of title, and also of quiet enjoyment. He is interested in having the land in question secured to the plaintiff. If it is not so secured, he will be responsible to the plaintiff in damages, for the breach of such covenants. It is not claimed that he is a competent witness, unless he is made so by the recent statute of Connecticut, which authorizes parties and interested witnesses to testify, both in suits at law and in equity. The question, therefore, is, whether the rule of evidence established by that statute, for the state courts, governs this court, in a proceeding in equity? It is claimed that it does, by virtue of the 34th section of the judiciary act of September 24th, 1789 (1 Stat. 92). That section provides, "that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply." This section was intended to furnish a rule to guide the courts of the United States, in the formation of their judgments, in trials or litigations in court, in cases at common law. To enable them to form a judgment in such cases, the laws of the several states are to be regarded as rules of decision, or rules of evidence. But the section does not apply to cases in equity, or to criminal cases. If this were a trial at common law, I should hold that Thomas T. Waterman, although interested in the event of the suit, was, by virtue of the Connecticut statute, and of this act of congress, a competent witness. But, as this is a proceeding in equity, he is not a competent witness. The rules of evidence in the courts of the United States, in equity cases, and in criminal cases, are not affected by any state statute made on the subject.[2]

1. Has Mrs. Thomas received pay for the land now sought to be recovered in the action of ejectment? At the time of the death of her father she was a minor, and did not arrive at full age until about the year 1846 or 1847. Soon after her father's death, her mother, Lucy Waterman, was appointed her guardian, and she, as guardian, on the 31st of October, 1826, petitioned the court of probate for the district of Stratford, for liberty to sell the land belonging to the minor, and which descended to her from her father, and which included the land now in controversy. On the 26th of February, 1827, an order was passed by the court of probate, empowering Wilson Hawley to sell the land. On the 12th of March, 1827, Hawley executed a deed of the land, and, on the 14th of March, 1827, there was paid to the guardian the sum of $1,129.71, as expressed in the receipt which the guardian gave at the time, "in full of all the right, title, and interest which my daughter, Lucy Wolcott Waterman, has, or ought to have, in, unto and upon the estate of said Elijah Waterman, her late father, and in full of her portion in said estate, which sum I do hereby acknowledge to have this day received, as mother and guardian, to said Lucy Wolcott Waterman, she being a minor under the age of twenty-one years." It is admitted, in the answer, that, on the same 14th of March, that sum was paid to the guardian, as stated in the receipt, and that the receipt was duly executed by the guardian.

The guardian was the person appointed by law to receive what was due or payable to the minor; and a payment to the guardian was a payment to the minor. For what, then, was this payment made? Was it made for the land in question, or for some other consideration? It is expressed in the receipt to have been for the minor's portion in the estate of the deceased. It was for her portion either in the personal estate, or in the real estate. If she had any portion in any personal estate, to any amount, then it might be right to infer that it was for such portion

[2] Several cases have been decided by the supreme court in which it has been held, that the laws of the states prescribing rules of evidence, in civil cases, in trials at common law, are applicable, in like cases, to like trials in the courts of the United States. McNiel v. Holbrook, 12 Pet. [37 U. S.] 84, 89; Brandon v. Loftus, 4 How. [45 U. S.] 127; Sims v. Hundley, 6 How. [47 U. S.] 1, 6. But state statutes are not applicable to criminal cases in the courts of the United States. U. S. v. Reid, 12 How. [53 U. S.] 361. See note to U. S. v. Reed [Case No. 16,134].

in the personal estate. If she had no portion in any personal estate, but had a portion in the real estate, then it would be right to infer that it was for such portion in the real estate. For, if it was for her portion in some estate which came from her father, and which belonged to her, and there was no personal estate which belonged to her, but there was real estate which belonged to her, then it necessarily follows that the money was paid for some portion of the real estate.

The records of the court of probate show, that there was no personal estate, belonging to the heirs, to be distributed. All that belonged to them was real estate. Mrs. Thomas' share was a little short of $600, according to the valuation in the inventory. For this share she was paid over $1,000. It was paid to her guardian, the person appointed by law to receive it. The receipt shows for what it was paid. She was not only paid for it, through her guardian, but she has had the benefit of such payment. With it she has been supported and educated. And, if any thing was left in her guardian's hands, after deducting the cost of such support and education, she has received from the estate of her guardian more than sufficient to make up what may have been so left. She has, therefore, received pay for the land now sought to be recovered in the action of ejectment.

2. The second question is easily answered. It is not claimed by the defendants, that they, or either of them, have ever offered to return to the plaintiff any thing which Mrs. Thomas received as pay for the land. They deny, or they must deny, that she ever received any such pay. This fact is proved against them, and they are compelled to admit that, if she did receive such pay, it is retained, without any offer to return it.

3. Was there a valid order of the court of probate for the sale of the land in question? In other words, was there a valid power given by the court of probate to Hawley, to sell the land? The petition of the guardian for the sale of the land was presented to the court of probate on the 31st of October, 1826. On that day, the court of probate passed an order, that the 27th of December, then next, be assigned for the hearing of the petition, and directed notice to be given, by advertisement, in a newspaper printed in Bridgeport, for three weeks successively, at least six weeks before the assigned time. On the 26th of February, 1827, the court of probate passed an order for the sale of the land, and authorized Hawley to sell it. And, in passing such order, the court found that the notice required by the order of the 31st of October, 1826, had been given. It is claimed by the defendants, that the order of the 26th of February, 1827, was a void one—that it conferred no authority on Hawley to sell the land—that it was an invalid power. Two objections are made to it: First, that no notice was given in pursuance of the order of the 31st of October, 1826. Second, that it does not appear, by any record of the court of probate, that the hearing of the petition was continued from the 27th of December, 1826, to the 26th of February, 1827, the time when the order of sale was made.

As to the first objection: Courts of probate are courts of record. Full faith and credit are due to their official acts, when regular on the face of them. As much faith and credit are due to them, so long as they remain unreversed, not appealed from and not set aside, as are due to the official acts of other courts of record.

The order of the court of probate authorizing the sale of the land in question finds, that notice in conformity with the order of the 31st of October, 1826, had been given. The record, then, of a competent court, acting within its legitimate powers, has declared that notice in pursuance of the order was given. That record must be considered as speaking the truth, and as conclusive, if it is not void on its face, until it has been reversed, or in some way set aside, or vacated, or appealed from. And there is no claim that it ever was appealed from, or in any way vacated or set aside.

As to the second objection: In the petition for the sale of the land, it was alleged that it was for the interest of the minor that the land should be sold. On that petition, the court of probate, on the same day it was presented, passed the order referred to, and assigned the 27th of December, 1826, to determine the question, whether it was for the interest of the minor that the land should be sold. By the statute law of Connecticut then in force, (see St. Conn., Ed. 1821), the several courts of probate were authorized, for just and reasonable cause, to order the sale of the real estate of any minor, on application of the parent or guardian of such minor, and to empower him or some other person to sell or convey the same, upon his giving bond with surety as by the statute is provided. And, by a subsequent part of the same law, it is made the duty of the court of probate, whenever application shall be made for an order to sell the real estate of any minor, to cause notice of such application to be published in some newspaper, near where the real estate lies, three weeks successively, at least six weeks before making the order. The 27th of December, 1826, was the day fixed, not for making the order of sale, but for determining the question, whether there was just and reasonable cause to have such order made. It would not follow that an order of sale would be made upon determining the question of just and reasonable cause in the affirmative. That question might be determined in the affirmative, and yet no order of sale be made. Two things were to be done, after such question should be determined in the affirmative, before an order of sale could be made, to wit, first, to obtain some person

to consent to execute the power; and secondly, to receive from such person so consenting a bond, with surety, that the power should be executed in the manner required by law. These two things were to be done before an order of sale could be made. They might be done either at the time fixed for the determination of the question of just and reasonable cause, or at some future time.

Although the bond required by law upon an order authorizing the sale of the minor's land, was not given until the 26th of February, 1827, and although the order authorizing the sale was not made until that time, there is nothing in the order inconsistent with the idea that the determination of the question of just and reasonable cause was made on the 27th of December, 1826. And, as every thing, particularly after this lapse of time, is to be presumed to have been rightly done, it is fair to infer from the order itself, that the determination of the question of just and reasonable cause was made on that day; that, subsequently thereto, Hawley consented to execute the power; and that, he having, on the 26th of February, 1827, given bond with surety, as by law required, the order of sale was then passed.

The order of sale, therefore, it not having been appealed from, reversed, or vacated, must be considered as a good and valid order.

4. Was the deed for the conveyance of the land defective? Was the power given defectively executed? The plaintiff in his bill says, that the deed is defective. The defendants in their answer admit, that the deed is defective in form, and as they are advised, defective also in substance. And, as both parties say it is defective, no one can complain if the court treats it as a defective deed.

The deed must, however, be considered as defective, irrespective of the admission of the parties. The power given by the court of probate to Hawley, to sell the land, was defectively executed. The order authorizing the sale was dated February 26th, 1827. The only reference to the order of sale in the deed is as follows: "Being thereto authorized by an order of the court of probate for the district of Stratford." The date of it is not given. By the decisions of the state courts, this is not sufficient to make the deed a good one. The authority of Hawley does not sufficiently appear on the face of the deed. The reference to the order is not sufficiently distinct. Watson v. Watson, 10 Conn. 77.

The deed is defective in another particular. The order of sale directed Hawley, before a sale was made, to give notice of the same, by advertisement, on the sign-post in Bridgeport, and in a newspaper printed at Bridgeport. There is nothing in the deed to show that this direction was complied with; and no evidence is produced to show that any notice was given. The deed, therefore, must be considered defective. And the power given to Hawley was defectively executed.

The question, then, is—what should a court of equity do under the circumstances? Whatever may be said against the right of a court of equity to interfere, to aid a defective and invalid power, it is very clear that it is always ready to interfere to aid the defective execution of a valid power. Nothing is more common than for a court of equity to interfere to aid such defective execution of a valid power, when there are no opposing equities on the other side. In the deed in question, there is clearly an intention manifested by Hawley to execute the power given him. He made an attempt to execute it, and the execution was defective. A man has power to execute a deed of land. The statute requires that all deeds of land shall be executed in the presence of two witnesses. The deed is executed, by mistake, with only one witness. Equity will relieve. In this case, there was no statute regulation to be followed, in the execution of the power, by the neglect of which the execution of the deed was defective. But the two defects existed, which have been pointed out. And, to aid defects of this kind, a court of equity will interfere, when there is no opposing countervailing equity. 1 Story, Eq. Jur. §§ 95, 169–179; Smith v. Chapman, 4 Conn. 344; Watson v. Wells, 5 Conn. 468; Carter v. Champion, 8 Conn. 549; Sumner v. Rhodes, 14 Conn. 135. Is there, then, any opposing equity on the part of the defendants? None can be discovered. Upon the petition of the guardian, the court of probate, after due notice to all concerned, found and adjudged, that it was for the advantage of the minor to have the land sold, and that her interest would be promoted thereby. That being so, the court authorized Hawley to sell the land. He bargained with the plaintiff for the sale, and made a defective deed of the land. Upon the execution of such defective deed, all parties supposing it to be good and valid, the plaintiff paid the full value for the land, which full value was paid to the guardian. Thereupon, the plaintiff went into possession, using and improving it as his own, and, by his expenditures, greatly adding to its value, no one, until the commencement of the action at law, in April, 1850, contesting his right. Mrs. Thomas received the pay for the land, and now retains it, never having offered to return it; and, while so retaining it, seeks to recover the land, with all the improvements, upon the ground that the deed was defective in form. These facts show a strong equity on the part of the plaintiff, and no equity on the part of the defendants.

It is claimed, however, on the part of the defendants, that, notwithstanding this is so, the plaintiff has an adequate remedy at law, and therefore no relief should be granted. This remedy, which it is said the plaintiff has, is the right to bring an action at law, for damages, against Hawley, on the covenants contained in his deed. This is the only remedy at law which the plaintiff has. And, although it is a remedy which he may have at law, it is

not an adequate remedy at law. How much of a remedy the plaintiff may have upon such covenants, does not appear. Whether any one liable upon such covenants would be able to respond in damages for the breach of them, has not been made manifest. But, whether any one be able to respond or not, that should not be considered a sufficient reason why the defendants should not be restrained from doing that, the doing of which is inequitable and unjust, or why the defendants should be permitted to violate the equitable rights of the plaintiff. There is no remedy in favor of the plaintiff, by action at law, against the defendants. They are attempting to do that which, in equity and good conscience, they ought not to do. And, even if there was a remedy at law against the defendants, it would not prevent the interference of this court, as a court of equity, unless that remedy at law was a full and adequate remedy. For, it has been held, that the courts of the United States, as courts of equity, will grant relief to a legatee, against an administrator, although the party plaintiff may have a remedy at law, on an administration bond. Pratt v. Northam [Case No. 11,376].

The decree of the court therefore is, that the defendants be restrained from the further prosecution of their action at law against the plaintiff, and be decreed to release and convey to the plaintiff all right and title to the land sought to be recovered in that action, and that the defendants pay to the plaintiff his costs.

Case No. 12,634.

SEGOURNEY v. INGRAHAM et al.

[2 Wash. C. C. 336.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

MARSHAL—RULE TO RETURN WRIT—RETURN.

After a rule on the marshal to return the capias ad satisfaciendum, issued against the defendants, and the return of the marshal, that the plaintiff had directed him not to serve the writ on one defendant, and that the other could not be found; the court have nothing more to do with the rule. If the marshal has misconducted himself, the remedy is an action for a false return.

This was a rule upon the marshal to return the capias ad satisfaciendum, issued in this case. Judgment had been obtained against Ingraham and two others. The capias ad satisfaciendum issued against all three; and the marshal now returns that the plaintiff's attorney directed him not to serve it on Ketland, one of the defendants, he having paid his part, and been released; and that another of the defendants could not be found.

Mr. Morgan, for plaintiff. Ketland was not released. He paid part of the judgment, and a receipt for so much on account was given. Of several defendants, the plaintiff may direct the writ to be executed on which he pleases.

Mr. Dallas, for defendants. The plaintiff has no right to instruct the officer how to execute his writ—to serve on some, and not on others. On a capias ad satisfaciendum against two, if one is taken and discharged, it discharges the other. [M'Fadden v. Parker] 4 Dall. [4 U. S.] 275. There is no difference between that case, and one where the officer is instructed by the plaintiff to serve on one, and not on the others.

BY THE COURT. The writ is returned, and of course the plaintiff has obtained the effect of his motion. If the marshal has misconducted himself in not having served the writ, or has made a false return, the plaintiff can take his remedy. But on the present rule, we have nothing further to do.

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

Case No. 12,635.

SEIDENBACH et al. v. HOLLOWELL et al.

[5 Dill. 382.] [1]

Circuit Court, E. D. Arkansas. 1879.

COURTS—SUITS IN STATES CONTAINING MORE THAN ONE DISTRICT—ATTACHMENT OF PROPERTY.

Where a state contains more than one district, and the suit is not of a local nature, the defendant must be sued in the district in which he resides. If all of the defendants in such a suit reside in the same district, suit must be brought therein. It is only when the defendants reside in different districts that suit may be brought in either district (Rev. St. § 740); and where the defendants, not residing in different districts, were sued in a district in which neither resided, and a writ of attachment was directed to another district, where the owner of the property thereon attached resided, the court, on motion, discharged the property from the writ.

Plaintiffs [Seidenbach, Schwab & Co.], who are citizens of Ohio, sued, in an action to recover money, the two defendants [J. T. Hollowell and W. C. Watt], who are both citizens of the state of Arkansas, and who are inhabitants of the Western district, in the circuit court for the Eastern district, and sued out from this court a writ of attachment directed to the marshal for the Western district, but did not sue out any writ to the Eastern district. Both defendants being served, the defendant Watt made no defence, and an interlocutory judgment by default went against him. The other defendant answered, alleging that both defendants were inhabitants of the Western district. Both defendants then moved to discharge the attachment on the same grounds set up in the answer. It appeared that some time before the beginning of the suit the defendant Watt had sold all his interest in the goods attached to his co-defendant. The case is before the court on the motion to discharge the attachment.

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

U. M. Rose, for the motion.
Erb, Summerfield & Erb, contra.

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

DILLON, Circuit Judge. The state of Arkansas contains two districts. This suit is not of a local nature. The defendants are both residents of the Western district. They had been partners, and the firm had been dissolved, and the defendant Hollowell had purchased all of the interest of his co-defendant Watt in goods attached. These goods were in the Western district. It is undisputed that Hollowell resided in that district. It is claimed by the plaintiffs that Watt had lost his residence therein. The proof does not establish this. But if this were so, the proof shows that he did not reside in the Eastern district. Under these circumstances, the defendant Hollowell must be sued in the district in which he resides. Such is the true construction of section 740 of the Revised Statutes. It is immaterial that the service of the summons was made on both defendants in the Eastern district. It is not necessary to consider the effect of the default of Watt. He was not the owner of the property attached. Hollowell never submitted to the jurisdiction of the court.

The present motion is to discharge the property attached. That motion must be sustained, on the ground that there was no authority of law to send the writ of attachment into the Western district. State regulations as to where the writ of attachment may run, do not apply. Hollowell alone could move to discharge the property attached under the writ, and his right to this relief is not weakened by his co-defendant joining in the motion.

Such was the opinion of the district judge, and such is also the opinion of Mr. Justice Miller, to whom the records and the briefs have been submitted, as well as my own. Motion sustained.

SEIFERT, In re. See Case No. 16,439.

SEIGEL (WALKER v.). See Case No. 17,085.

Case No. 12,636.

The SELAH.

[4 Sawy. 40.] [1]

District Court, D. California. Aug. 25, 1876.

SHIPPING — MASTER — ENGLISH VESSEL — WAGES — LIEN CLAIMED UNDER ENGLISH STATUTE.

The claim of a master of a British ship to be paid his wages concurrently with the seamen, and in preference to the claims of material men, disallowed.

[Cited in Covert v. The Wexford, 3 Fed. 580. Quoted in The Graf Klot Trautvetter, 8 Fed. 836. Cited in The Brantford City, 29 Fed. 386; The Olga, 32 Fed. 331; The Angela Maria, 35 Fed. 431; The Scotia, Id. 909.]

In admiralty.

Milton Andros, for libellant.
Daniel L. Sullivan, for interveners.

HOFFMAN, District Judge. The master of the above bark, which is a British vessel, intervenes for the payment of his wages out of the proceeds concurrently with the seamen, and in preference to the claims of certain material-men for supplies furnished in this port on the usual credit of shipowners and masters.

He claims this right under the statute of 17 & 18 Vict. c. 104, § 191, which provides that every master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of which by this act or by any law or custom any seaman not being master, has for the recovery of his wages.

No decision is produced under this act to the effect that the master may assert his claim for wages in priority to those of material men with whom he has contracted, and to whom he is personally liable.

But even if such be the law of England, it cannot supersede our own laws which determine the rights of persons within our jurisdiction and the effect of contracts made under them. As the contract with the material-man was made in this port, its effect and the remedies under it must depend upon our own law, which is at once the lex fori and the lex loci contractus.

By the general maritime law prevailing in the United States, and administered by the national courts of admiralty, the claim of the material-man for materials furnished to a foreign vessel, carries with it a lien on the vessel and has a priority over the master's claim for wages.

It was held by Mr. Justice Story that even the states of this Union have no power to alter, enlarge or narrow, with respect to foreign vessels, the admiralty jurisdiction of the United States, as governed by the legislation of congress, and by the general principles of maritime law. They have no authority to change that law in respect to such vessels by denying liens existing under it, by creating new liens not recognized, or alter the priorities among different lienholders. The Chusan [Case No. 2,717].

If such powers are withheld from the states, they surely cannot be conceded to the legislature of a foreign country.

By the maritime law, which it is the duty of this court to administer, the libellant is entitled to a lien on the vessel, unless it clearly appears that he gave an exclusively personal credit to the master or owners in exoneration of the vessel. The Nestor [Case No. 10,126]; The Chusan, ubi supra.

The proof in this case is insufficient to establish that state of facts. Nor does it ap-

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

pear that an exclusive credit was given to the ship and owners in exoneration of the master's liability.

As the claim, therefore, is one to which the maritime law attaches a lien prior to that of the master of any existing under that law, and as the master is himself personally liable for the debt, his claim must be postponed to that of the libellant.

SELBY (BROWN v.). See Case No. 2,030

SELBY v. The ELIZABETH ENGLISH. See Cases Nos. 4,359 and 4,360.

SELBY (ROBERTSON v.). See Case No. 11,929.

SELBY (TALBOT v.). See Case No. 13,729.

SELBY (WAY v.). See Case No. 17,302.

Case No. 12,637.

Ex parte SELDEN.

[See Case No. 12,638.]

Case No. 12,638.

Ex parte SELDEN.

[6 Pittsb. Leg. J. 18; 3 App. Com'r Pat. 457.]

Circuit Court, District of Columbia. April 3, 1861.

PATENTS—APPEAL FROM COMMISSIONER—DIVISIONS—REISSUE—HARVESTERS.

[1. On an application for a reissue and division of a patent under act of March 3, 1837 (5 Stat. 191), the divisions, for the purposes of an appeal, are to be considered as a whole, and not as separate cases.]

[2. On a surrender and reissue, the patentee has a right to a patent for a division or separation of each essential part in combination with the other parts of the same invention in which it was connected.]

[3. The claims of Selden, as assignee of McNamara, in his application for a reissue and division of his patent for improvements in harvesters, *held* valid and not anticipated by prior inventions, and the application erroneously rejected.]

Appeal by G. M. Selden, assignee of D. S. McNamara, from the decision of the commissioner of patents refusing to grant his application for a reissue and division of his patent of Sept. 28, 1858, for improvements in harvesters.

MORSELL, Circuit Judge. The commissioner has raised the preliminary questions, "that the appeal is not properly taken;" that the application for reissues on this patent are four in number, and embrace twenty six clauses of claims that make a series of combinations which include many parts of the machine not previously embraced in the claim, &c.; that the application is made in the name of the assignee of the inventor. The commissioner thinks that the patent law contemplated that each case presented to the office for its consideration must be treated as a substantive application; and that each case appealed to one of the judges of the circuit court, must be presented as a substantive appeal. The commissioner assigns several reasons for his opinion: "1st. Because the law which allows the division of an application for a reissue provides that each additional division of a reissue shall pay the sum of thirty dollars for each additional patent (section 5, Act March 3, 1837). 2nd. Each reissued patent is called and becomes a new patent, and this designation is applicable to every decision, because it establishes rights not before secured by patent protection. 3rd. Each division presents substantive claims, requiring a separate consideration and an independent examination in the office; the correspondence connected with it being necessarily isolated, and the references distinct; as much so in all respects as any other application for a patent. 4th. There is not a syllable in the patent law which authorizes the office to embrace two separate applications involving different and separate questions for adjudication in one appeal, to the judges of the circuit court. 5th. The fee required to be paid is substantive, and is required to be paid in each case upon which an appeal from the decision of the commissioner is taken. And, lastly, because, as in the present case, the reasons of appeal in one case cannot be regarded as applicable to the action of the office in each of the other cases."

The substance of these preliminary objections may be considered as embraced in these positions: That the petition in this case to reissue the original patent by a division of the same into four parts must be considered as four distinct original substantive cases and applications, and therefore liable to the pre-requisite payment of $25 each case for the fee. Secondly. That the applicant has no right to impose such extra labor upon the office and the judge. As to the latter objection, it certainly would have much weight, if it could be so considered by any fair construction of the law on the subject; but if not, as we have taken our offices cum onere, we must submit to it until the law becomes changed. To ascertain the true nature of the subject, and what the law is, I shall refer to the different statutes. The first, as to the divisions, is the act of 1836. Section 13 [5 Stat. 122] provides that, upon a surrender by the patentee of his patent, and the payment of the further duty (paid upon the original application) of $15, the commissioner is to cause a new patent to be issued for the same invention for the residue of the period then unexpired for which the original patent was granted, in accordance with the patentee's corrected description and specification; and in case of his death or any assignment by him made of the original patent, a similar right should vest in his executors, adminis-

trators, or assigns. Under this act it is true but one reissue patent was allowed; but for the purpose of explanation and correction it is presumed that the party would have had the same right in his specification of division of the subject, and statement of his particular claims, as he now has. Yet no one could suppose that the commissioner or the judge could have considered it more than one application or case. The "case" then is, that application which embraces the whole matter, however it may become afterwards divided into parts, unless the law declares it to be otherwise. The next act on the subject is the act of 1837 (section 5), to this effect: "That whenever a patent shall be returned for correction and reissue under the thirteenth section of the act to which this is additional, and the patentee should desire several patents to be issued for separate and distinct parts of the thing patented, he shall first pay in manner and in addition to the sum provided by that act the sum of $30 for each additional patent so to be issued." It will be perceived that the practice under the act of 1836 was a very short one, as the present act followed in about twelve months. There might have been urgent reasons arising from the evils in the practice under the first act, such as that the invention contained in the first original patent might have covered many parts through which the obscurity running, each with its combination, would require corrections and explanations. This it would be impracticable to do satisfactorily unless by pursuing the course which has been done in this case, —by division.

The provision establishing the right of appeal from the decisions of the commissioner, in the case of an application for a reissue, is found in section 8 of the act of 1837, to this effect: "That whenever a patent shall be returned for correction and reissue the specification of claim annexed to every such patent shall be subject to revision and restriction in the same manner as are original applications for patents. The commissioner shall not add any such improvement to the patent in the one case, nor grant the reissue in the other case, until the applicant shall have entered a disclaimer, or altered his specification of claim in accordance with the decision of the commissioner, and, in all such cases, the applicant if dissatisfied with such decision shall have the same remedy and be entitled to the same privileges and proceeding as are provided by law, in the case of original applications for patents." The original act is the act of 1836 (chapter 357, § 7), which allows the inventor an appeal to a board of examiners: "Provided, however, that before a board shall be instituted, in any such case, the appellant shall pay to the credit of the treasury as provided in the ninth section of this act the sum of twenty five dollars; and each of said persons so appointed shall be entitled to receive for his services in each case, a sum not exceeding ten dollars, to be determined and paid by the commissioner out of any moneys in his hands," &c. Just before in the same section it is provided: "But if the applicant in such case (a newly discovered invention) shall persist in his claims for a patent with or without any alterations of his specification he shall be required to make oath," &c. By the act of 1839 (chapter 88, § 11 [5 Stat. 354]) the appeal is allowed to the chief-justice of the district of Columbia instead of the board of examiners, the applicant paying into the office to the credit of the patent fund $25, the judge to be paid $100 annually out of the patent fund in consideration of the duties therein imposed. The next and last act is that of August, 1852 [10 Stat. 75], which authorizes an appeal to either of the judges of the circuit court, in the second section of which the commissioner of patents is directed to pay to the judges, &c. the sum of $25 required to be paid by the appellant into the patent office by the 11th section of said act, on said appeal.

The foregoing contains a statement of all the statutes having any bearing immediately on the question involved in the position held by the commissioner, upon a careful consideration of which I am satisfied they do not sustain the theory adopted by him. That theory seems to be, that although there is but one petition setting forth the ground of the application to be for a reissue and division under the act of congress of 1837, each division is to be considered a separate case presented to the office for its consideration and liable as in the case of original substantive applications to pay the fee of $25 on an appeal taken.

First, "because the law imposes upon every additional division the sum of $30, for each additional patent." But this reason cannot be considered sound, because neither in terms or by inference has it any allusion to the provision for an appeal. The 8th section of the same law provides for that, which says "in all such cases," &c., and "as are provided by law in the case of original applications for patents." The term "case" is used in the same sense in both. Equally unsound is the inference drawn from the terms "a new patent," as used to designate or establish in every division "rights not before secured by patent protection." The law expressly declares that the patent so authorized to be issued shall be for a part of the old invention. The claim in the new patent is not of any new invention, but of the old invention more perfectly described and ascertained. See Curt. Pat. § 181, note 2. The "case" is that which is set forth as the ground of the application in the incipient stages of it and includes or embraces the whole and not a part only, each part of which is only a part of one whole, and so it must be here considered, notwithstanding the after effect produced by re-issuing separate patents for each part. And such has been the invariable contemporaneous

practice both by the office and the judges ever since the passage of the law. This alone, unless grossly erroneous, ought to be considered as sufficient authority for overruling the objections by the commissioner.

The preliminary objections being overruled and all the original papers on the merits being duly laid before me, together with the argument in writing by the counsel for the appellant, I proceed to consider the same. The reasons of appeal are so particularly noticed in the report of the commissioner, as to make it unnecessary to recite them. The substance of that report is that the original patent granted to D. S. McNamara, dated September 28, 1858, for improvements in mowing machines, was granted on two clauses which constituted the claim of the invention: One clause involved the mode of constructing the frame of a harvester, and the other involved the shoe combined with the frame. The assignee of the patent thus limited presents four divisions of this patent for reissue, and each one of these divisions has been separately examined and reported upon by the office.

The reasons of appeal noticed by the commissioner in his report are: 1st. The allegation of error in refusing the reissues when McNamara was the first inventor of all that is claimed by the appellant. 2nd. That there was error in giving so many references and in not pointing out their appositeness. And 3rd. That inasmuch as the reasons for the refusal of any of the claims were neither legal nor equitable there was error in not granting all he claimed in the several divisions. Division A. embraced fourteen clauses of claim of which the 1st, 2nd, 6th, 9th, 10th, 11th, and 12th, were allowed, and the remaining clauses were refused upon specific references. The 3rd clause was for no more nor less than a claim for a common truss or brace rod, and from its perfect familiarity as a strengthening device might very properly have been refused without a reference. The office however gave references in the letter of March 11, 1861, and those upon which this clause was rejected, were strictly apposite, as may be perceived at a glance at the drawings. The black line passing from a to a of the frame, in Adams and Clark's drawing being a truss rod.

This claim does not appear to be correctly stated by the commissioner. The claim is not for a common truss or brace rod. This may be old and would therefore justify the commissioner's opinion. But the claim as really made runs thus: "I also claim the combination of the truss rod c with the pieces c and e, substantially as and for the purposes set forth." The principles of patent law applicable to this part of the case have been declared repeatedly. It is not necessary that every ingredient or indeed that any one ingredient used by the patentee, in his invention should be new or unused, &c. The true question is "whether the combination of materials by the patentee is substantially new. Each of these ingredients may have been in the most extensive common use, and some of them may have been used for matches (the invention in that patent) or combined with other materials for other purposes. But if they have never been combined together in the manner stated in the patent, but the combination is new, then I take it the invention in the combination is patentable." And so also as decided in the Case of Emery [1]: "The party will be entitled to a patent for such parts of his machine as are new, or for the result of such a combination of old parts as he shows is new and valuable." Now it must be admitted that this claim forms one of the essential parts of the original patent; and that the new patent asked for, therefore, and the specification on which it will issue, have relation to the original transaction. The application may be considered as attached to the original application. If so, the patent can in no respect be considered as independent of the first.

The surrender of the old patent was not for the purpose of opening the investigation de novo, and if not as to the whole, equally not so as to its parts. No such issue is intended to be authorized by either of the statutes. The only issue which they authorize is, has the defect been innocently occasioned and without any fraudulent or deceptive intention, and he is also directed to confine the party to the true intent of the original invention, certainly however not to deprive the party of his right to have a patent for a division or separation of each essential part in combination with the other parts of the same invention in which it was connected.

The untenable ground taken by the commissioner, that the new patent, establishes independent rights not before secured by patent protection "differing from the true principles which I have hereinbefore stated," has led to a course presenting a false issue and embarrassed this investigation with a most unreasonable number of drawings and models. I have however submitted myself to a laborious comparison of the references with rejected claims, and will endeavor to give a condensed result, using as my guide the principles I have stated in deciding the points arising in the case.

In addition to what I have already said with respect to the 3rd rejected claim in the Clarkson & Adams case, a rod is found extending from the rear part of the frame forward to an upright piece connected to the front of the frame. This is what is supposed to be the same thing as combining a truss rod shown in the McNamara machine. There are differences between the two in the position, and object and purpose. The reference is for the purpose of draught connection. That of McNamara, the rod extends in such a direction, as it respects the line of draught and the position of the finger beam, as to have a tendency to elevate the outer shoe above the ground when drawn up as shown in Fig. 5 of the drawing, whereby much friction is obviated. There is not only a substantial differ-

[1] [Case No. 4,444.]

ence in the position, but an entire difference in the functions of the two trusses.

As to the 4th clause which is suposed to resemble the Dunham machine. It has a truss rod, but the frame is rectangular and not of a wedge form as in the case of McNamara, an entirely different construction and the effect entirely different. In this instance also the claim is not simply for the truss rod, but with its combination. This claim also falls within the principles I have before stated.

The fifth claim. In this combination, the finger which supports the outer and tracker is not only kept in proper line laterally but the outer end thereof can be elevated as before stated to prevent undue friction of the shoe upon the ground. In case the finger beam sags down, by the aid of the truss rod it can be brought up in place again. I have examined this reference, but cannot perceive any such arrangement as stated in the claim. With respect to this reference, the commissioner says, "The rejected application of Adroms & Marcellus presents a precise anticipation of the fifth clause." This is a very general reference, and if my duty in revising could be satisfied, or fulfilled by the mere ipse dixit, of the commissioner I should have no reason to complain, but if on the other hand, he is bound by law to give such information and reference as may be useful in enabling me intelligibly to judge, then surely the specific features, or arrangement of parts should be stated showing the grounds of his decision. A practical analogy in all similar cases shows this to be indispensably required to give any worth or weight to the references.

Seventh. The commissioner says: "The seventh clause being but a claim to a bent axle, is anticipated in the same reference as also in that of W. A. Woods' patent, December 29, 1857." This is incorrectly stated also. The knee is not claimed in itself but only in combination, as will appear by reading it. In the McNamara machine the stationary journal piece is cast with projections to fit against the sides of both of the cross pieces, B C, of the main frame, while it also rests on the top of both. By this form of construction, the frame is rendered strong and firm, while at the same time the curve or knee to which the wheel is attached enables a large wheel to be used. These elements are claimed in combination. The references show the knee, but according to the principles stated this is not enough. The objection is therefore overruled.

Eighth. As to this the commissioner says: "The equivalent of the 8th clause of the claim is manifest in the patent of S. S. Allen, dated Nov. 8, 1853, if indeed as a device for the throwing the cutter bar in and out of action the invention now claimed is not identical with that of the references." This objection also presents a part of the combination only and is therefore within the same rule as the 7th; and so of the 13th and 14th, and must therefore be overruled.

The commissioner, proceeding with his report, further says, case B of these reissues, case C and case D embrace many clauses of claim; some of which were allowed, whilst the others were rejected, and whenever a clause was rejected specific references were given with all the precision usual in the conduct of the business of the office.

In the division No. 2 the amended specification presents three claims which were rejected by the commissioner. These claims are for the hinged tongue in its various combined arrangements. As anticipating these claims five references were made. These have been carefully examined and compared, and in none of them can I find a hinged tongue having a right angled lever fulcrumed to the rear side thereof, or like the arrangement of a hinged tongue or draught beam as described in the amended specification containing said claims. It can hardly be necessary for me to refer to authorities to show the patentability of a new combination of particular forms and arrrangement of structure to accomplish a given end. I will however state one among several relied on by the appellant, being in manuscript, I suppose, and not generally known. It is a case decided by Judge Sprague,—Many v. Sizer [Case No. 9,056]. He says: "It is contended by the defendant that all the parts going to constitute the plaintiff's wheel were known before and developed in prior wheels. But if the patentee borrowed the idea of the different parts which go to constitute his wheel, and for the first time brought them together into one whole, and that whole is materially different from any whole that existed before, then he is the original and first inventor." The objection must be overruled. And for like reasons the objections in No. 3 must be also overruled. The same answer substantially must be given to the objections to the rejected amended claims in division No. 4 and the same overruled.

Upon the foregoing grounds stated in this opinion I think the commissioner erred in refusing to admit the said claims hereinbefore particularly stated, and that his decisions rejecting said claims ought and the same are hereby reversed and annulled, and it is ordered that patents be granted as prayed.

SELDEN (ALEXANDER v.). See Case No. 173.

SELDEN (FLETCHER v.). See Case No. 4,866.

Case No. 12,639.

SELDEN v. HENDRICKSON et al.

[1 Brock. 396.] [1]

Circuit Court, D. Virginia. Nov. Term. 1819.

BOTTOMRY—NECESSARY REPAIRS—RESIDENCE OF OWNER.

A vessel belonging to the port of Richmond, in Virginia, may be hypothecated in the port of

[1] [Reported by John W. Brockenbrough, Esq.]

New York, by the master, for necessary repairs, if the owner has no agent in New York. But the money for which the bottomry bond is given, must be advanced on the faith of the bottom, and must be necessary to enable the vessel to prosecute her voyage.

[Cited in The Eureka, Case No. 4,547; The Albany, Id. 131; Morrison v. The Unicorn, Id. 9,849.]

[Cited in Leddo v. Hughes, 15 Ill. 44.]

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

The appellees, John Hendrickson and George Pryor, merchants in the city of New York, filed their libel in the district court of the United States, at Richmond, against the schooner Richmond, her freight, tackle, and apparel, and Cary Selden, the owner of the said vessel, living in the city of Richmond, to recover the amount of a bottomry bond, executed by Joseph P. Colvin, master of the said schooner Richmond, of the port of Richmond, in favour of the libellants. The bottomry bond was dated on the 17th of February, 1816, and was for the sum of $1300, and purported to have been executed in consideration of advances made by Hendrickson & Pryor, for the purchase of necessaries for fitting out the vessel for sea. The libellants charged in their libel, that the advances thus made by them on bottomry, were indispensable to enable the vessel to prosecute her voyage. Cary Selden, in his answer, insisted, that Colvin had no right to hypothecate the vessel in the port of New York, that not being a foreign port in relation to the vessel, or to himself, as the owner; that the right of the master to hypothecate the vessel under his command, in a foreign port, was a right resulting from the necessity of the case, there being no opportunity in such foreign port to make application to the owner for requisite advances; but the reason of the principle had no application to this case, since, through the medium of the mail, the respondent was easily accessible to the application of the master. But if, by the laws and principles of admiralty, the master of a vessel, belonging to the port of Richmond, could hypothecate the vessel for necessary repairs, &c., in the port of New York, the respondent insisted, in the second place, that the amount alleged to have been advanced, was unreasonable and enormous, and called for full proof, that such advances were necessary, and were applied for the use of the vessel, &c. The deposition of the attesting witness to the bottomry bond, proved the execution and delivery of the instrument, and the deposition of John H. Watson, a clerk in the store of Hendrickson & Pryor, stated, that all the articles charged in the account exhibited, (amounting in the aggregate to the sum for which the bond was given,) were delivered by Hendrickson & Pryor, to Colvin, for the use of the schooner Richmond, and that they were charged at the usual New York prices; that at the time they were furnished, the vessel was in the port of New York, and unseaworthy, having encountered a storm in her voyage to New York, in which she lost her cables and anchors, and had her quarter boards stove in, and sustained other material injury. The district court rendered a decree in favour of the libellants, for the whole balance due on the bottomry bond, with interest at the rate of 7 per cent., (that being the rate of interest allowed in the state of New York,) and their costs [case unreported]; and from this decree the respondent, Selden, appealed to this court.

MARSHALL, Circuit Justice. This case arises on a bottomry bond, given by the master of the schooner Richmond, to the appellee, for repairs done on that vessel. The vessel belonged to the port of Richmond, at which place the owner resided, and the repairs were made, and the money advanced, in New York.

The question, whether the master of an American vessel may hypothecate her for necessary repairs in a port of the United States, is one of considerable importance to commerce, which has never yet, I believe, been directly decided. In considering it, the relative situation of the owner and master must be taken into view. The owner remains generally on land, engaged in those occupations to which his interest or his inclination may lead him. The care and management of his vessel, while navigating the ocean, is entrusted to the master. It is generally of much importance that the voyage should be prosecuted, and that it should be prosecuted without great delays. A ship, navigating the ocean, is exposed to perils which frequently disable her from prosecuting her voyage, without repairs, or necessary supplies. When these circumstances are taken into consideration, and when it is recollected that the master is appointed by the owner, it would seem reasonable to expect that every power necessary for the performance of the voyage, should be vested in him by his appointment; and might be exercised, wherever the owner himself, or his known and authorized agent, could not be consulted, without endangering or retarding the voyage.[2]

In conformity with this principle of reason, is the maritime law of all nations. It is stated to be the law not only by Valin, Emerigon, and other foreign writers, but is expressly laid down to be the law of the admiralty, and the law of England, in Bridgeman's Case, reported by Hobart (page 11) as admitted in the Case of Balsam, reported in Lord Raymond, as well as in several modern cases, and is recognized by Parke, Marshall, Jacobson, Abbot, Livermore, and other modern compilers. Upon

[2] The Aurora, 1 Wheat. [14 U. S.] 96; 3 Con. Rep. Sup. Ct. U. S. 501.

this point there is no doubt. In the absence of the owner, the master is in the place of the owner, and is, by his appointment, impliedly clothed with power to do all that is necessary for the success of the voyage, and to bind the vessel, or the owner, or both, by his engagements. The difficulty is, to decide in what situations the absence of the owner is such, as to authorize the master to act independently of his special orders. Must the vessel, if belonging to an American, be without the jurisdiction of the United States? Or is it enough, that she be without the jurisdiction in which the owner resides?

As the same motives exist everywhere for empowering the master to act, in the absence of the owner, during the voyage, the laws of the different nations of Europe, on this subject, resemble each other, very nearly; and, indeed, on all maritime questions, the decisions of one country have been very much respected in the courts of every other. They originate in the same source, and have preserved considerable uniformity. There is scarcely any thing on the subject which is entitled to more respect than the marine ordinance of Louis XIV. It was compiled with great care, by the first civilians of the nation, and with a view, as we are told, not only to all the ancient codes which are extant, but also to the customs and laws of all the maritime states of Europe. By that ordinance, the master is not allowed to hypothecate the vessel "in the place where the owner resides," and these words are construed, in France, to comprehend the whole district, but not the whole country. In his treatise on Agencies, Mr. Livermore says: "And upon the construction of these words, 'le lieu de la demeure des proprietaires,' the place of residence of the owners, Emerigon observes, that the whole district, or bailiwick, is to be considered the owner's place of residence, but that, if the vessel puts into a neighbouring port, in another district, this is not the owner's place of residence. Therefore, where the master of a vessel from Toulon, gave a bottomry bond at Marseilles, it was determined that he had authority to do so."[3] Valin says, the master may hypothecate the ship while on her voyage, and in a place where neither the owner, nor his correspondents, reside. This decision seems consonant to the principles of reason. The power of the master to act, in the absence of the owner, is a rule of convenience, founded on the necessity of the case. This necessity depends, not merely on the vessel's being within the same jurisdiction with the owners, but on its being so near them, that application may be made to them without material injury to the voyage. In small territories, the whole country may, without inconvenience, be considered as the place of residence of the owners, but in large territories, as in Russia, the rule would often be defeated by encumbering it with such a condition. In such countries, the power of the master must commence with the voyage, or must commence after passing some line within the limits of the empire, or the success of the voyage must be greatly endangered.

In England the same principle has been adopted, but has been so modified as to suit the situation of that country. The master has the power to hypothecate the vessel, or to bind the owners personally for repairs done abroad, but not at home. This is the general principle of English law, and is precisely the same with that which is contained in the marine ordinance of Louis XIV. When the vessel is abroad, and when at home, has been, in England, as well as France, a question for construction. This question has arisen in cases, where the repairs were actually made beyond the seas, and, generally, in a foreign country; and the language used by the court is adapted to the case. It has never arisen, I believe, in a case where an English vessel was hypothecated, by the master, in a distant port of England; and it has never, I believe, been decided, that such hypothecation would not be valid. Those writers, who lay down the English law, understand the principle to be, but do not say expressly that it is, that every port of England is to an English vessel, a home port. That principle, however, is not expressly affirmed by any writer, nor by any judge, so far as the cases have come under my inspection. Marshall, after stating the practise of allowing the master to hypothecate the ship in a foreign country, says: "And it is essential to the safety of the ship, and the success of the voyage, that the master, in the absence of the owners, should have this power, which is indeed, by the marine law, implied in his appointment. But as the owners are presumed to give entire authority to the master, only in their absence, and for such affairs as they cannot themselves conveniently transact, he is not, in fact, master, till after he sets sail. Till then, he is subject to their orders, and they have the power of dismissing him at pleasure; till then, therefore, he can transact no business of importance but under their immediate directions. Hence, if the master borrows money on bottomry in the place where the owners reside, without their express authority, it can only affect his own interest on board."[4] Nothing in this passage, or in any other part of Marshall, so far as I have examined him, would indicate, that the power of the master, commences only when he leaves England, and cannot be exercised, even in a port of England, other than the home port of the vessel. Mr. Abbot says: "It is obvious, that a loan of money upon bottomry, while it relieves the owner from many of the perils of maritime adventure, deprives him also of a great part of the profits of a successful voyage;" (this, I presume, alludes to those cases of bottomry, where more than legal interest is reserved;) "and, therefore," continues

[3] 1 Liverm. Princ. & Ag. p. 171, c. 5, § 4.

[4] 2 Marsh. Ins. 740; The Lavinia v. Barclay [Case No. 8,125].

Mr. Abbot, "in the place of the owners' residence, where they may exercise their own judgment on the propriety of borrowing money in this manner, the master of the ship is, by the maritime laws of all states, precluded from doing it, so as to bind the interest of the owners without their consent." "The meaning of the words, 'place of residence,' ('la demeure des proprietaires,') has given occasion to some questions in France. With us, I apprehend, the whole of England is considered, for this purpose, as the residence of an Englishman; at least before the commencement of a voyage."[5] Mr. Abbot cites no authority for supposing, that the whole of England would, for this purpose, be the residence of an Englishman. Nor have I been able to find any express authority for it. He gives it as his own speculative opinion, and he gives it with considerable doubt, for he adds, "at least before the commencement of a voyage." In the case of Watkinson v. Bernadiston, 2 P. Wms. 367, it is said: "But it is true, that if at sea, where no treaty, or contract can be made with the owner, the master employs any person to do work on the ship, or to new rig, or repair the same, this, for necessity and encouragement of trade, is a lien upon the ship; and, in such case, the master, by the maritime law, is allowed to hypothecate the ship." These words would rather seem to include a port in England, into which an English vessel, damaged during her voyage, might put for repair. Our countryman, Mr. Livermore, takes the same view of the subject with Mr. Abbot.

I am inclined to believe, that on this subject, the courts of admiralty in England, would proceed according to the general principles of the maritime law. The cases in the books, where they have been restrained, by prohibition, would seem to justify the inference, that, if not so restrained, they would have granted the relief which was sought, and in no case that I have seen, has a prohibition been awarded to a court of admiralty, proceeding on a bottomry bond, given by the master, in a distant English port, after the commencement of the voyage. In fact, I can conceive no reason, why a master may not, for the success of the voyage, hypothecate the vessel to secure a debt, carrying only legal interest, in any case where he might bind the owners personally: and it has been determined, that he may bind them personally by his contract, for repairs made in England, at a port where they do not reside.

Although it has never been decided affirmatively, that every port in England is, for this purpose, the residence of an English owner, it has been decided negatively, that a colonial port, or a port in Ireland, or a port in Jersey, is not a home port. On the same reason, I think it would be held, that a port in Scotland, is not a home port for an English vessel. That this is the prevailing opinion with legal men in England, I infer from the language of Mr. Abbot, who says, that he apprehends that "the whole of England," not the whole of Britain, "is considered for this purpose, as the residence of an Englishman." I infer it, too, from the general language of other cases, and particularly of Wood v. Hamilton [unreported] which was a case from Scotland, decided in the house of lords, and is mentioned by Abbot. These cases show conclusively, that by the law of England, it is not necessary that a vessel should be without the realm to authorize the master to hypothecate her for repairs, or other necessaries, to enable her to prosecute her voyage. The same principle, applied to the United States, requires, I think, that a port in one state should not be considered as the place of residence of owners, who live in another state. This rule of maritime law, originates in the principle, that in the absence of the owner, the master is, by himself, substituted for him; that he is entrusted with the vessel for the purpose of performing the voyage, and must necessarily act for the owner in all cases where he is incapable of acting for himself. The rule has no connexion with territory, or with jurisdiction. In reason, then, the power should exist whenever the necessity exists: and where there is no positive law modifying a rule thus originating, it would seem strange to insist, that the power of the master to act because the owner is absent, should not commence with his voyage, but should commence only on his passing the limits of the nation, however wide, or however narrow, those limits might be. It would be strange, if a vessel belonging to Eastport, might be hypothecated by the master in the port of St. Andrews, because the owner was absent, and yet could not be hypothecated at New Orleans, St. Louis, or the mouth of the Columbia.[6]

The reason of the case, then, concurs with the practise of maritime nations, in declaring that the owner cannot be considered as present in every port belonging to the nation, but that some subdivisional line, as the districts in France, must be taken, on passing which, the power of the master commences. If every port, except that in which the owner actually resides, be not for this purpose, a foreign port.

[5] Abb. Shipp., 151.

[6] In the case of The General Smith (4 Wheat. [17 U. S.] 438; 4 Con. Rep. Sup. Ct. U. S. 593) Mr. Justice Story said, that where repairs have been made, or necessaries have been furnished to a foreign ship, or to a ship in a port of the state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security; and he may well maintain a suit in rem, in the admiralty, to enforce his right. But, in respect to repairs and necessaries, in the port or state to which the ship belongs, (which was the case before the court), the case is governed altogether by the municipal law of the state; and no lien is implied, unless it is recognized by that law. This last proposition is also laid down by Hopkins, J., in the case of Harper v. New Brig [Case No. 6090].

I perceive no rule more proper in this country, no rule better adapted to our situation, and to the reason of the thing, than to say, that the power of the master to hypothecate, exists in every port out of the state in which the owner resides, where he has no agent. I am, therefore, of opinion, that a vessel belonging to the port of Richmond in Virginia, may be hypothecated in the port of New York by the master, for necessary repairs, if the owner have no agent in New York. This power is unquestionably limited by the necessity in which it originates. The money for which the bond is taken must be advanced on the faith of the bottom, and must be necessary to enable the vessel to prosecute her voyage.[7] Both these circumstances are proved in this case, if the witness is to be believed. I do not think myself at liberty to discredit him. His character is unimpeached, and I do not see any intrinsic impossibility in his statement. He might know all that he asserts himself to know. I cannot resist the suspicion, that these expenses were too considerable, and that the master has not been faithful to his owner. But this case presents no testimony, which will authorize a court to indulge this suspicion. There is no testimony, whatever, which questions any one item of the account on which the hypothecation was made, and every item of that account is proved.

It has been argued, that the owner might have had an agent in New York. I should rather think, that negative proof, on this point, ought not to be required from the person who advances the money; but if it ought, Mr. Selden's letter of the 24th of February, states expressly that he had no agent there.[8] It is said, that the vessel remained in New York long enough to have consulted the owner. The time of her arrival is not mentioned. The first advance was made on the 10th of February, and the instrument of hypothecation is dated on the 17th. The evidence is, that the advance was made on a contract of hypothecation, and this is supported by Mr. Selden's letter of the 24th, in which he acknowledges a letter of the 16th, giving notice of the fact. That letter, too, contains an express assumpsit of the debt.

I do not perceive any just objection, in law, to the account, and as the proof establishes both the necessity of the repairs, and the fact that the advance was made on the credit of the bottom, the judgment must be affirmed with costs.

SELDEN (SMITH v.). See Case No. 13,104.

SELDON (EQUITABLE TRUST CO. v.). See Case No. 4,508.

[7] The Aurora [supra]; The Virgin, 8 Pet. [33 U. S.] 538; The Lavinia v. Barclay [supra]; Walden v. Chamberlain [Case No. 17,055]; Crawford v. The William Penn [Id. 3,373]; Patton v. The Randolph [Id. 10,837].

[8] Philips v. Ledley [Id. 11,096].

Case No. 12,640.

SELF v. JENKINS.

[1 Hughes, 23;[1] 1 Am. Law T. Rep. (N. S.) 368; 71 N. C. 578; 6 Chi. Leg. News, 397.]

Circuit Court, E. D. North Carolina. June 18, 1874.

STATES—MONEY IN TREASURY DEVOTED TO PARTICULAR PURPOSE—MISAPPLICATION—CREDITOR—MANDAMUS.

Where money in a state treasury devoted by the state constitution to the payment of a particular indebtedness has been applied by direction of the state legislature to another purpose, and, afterwards, money comes into the state treasury which a public creditor, who was entitled to the money first unapplied, seeks to have paid to himself in discharge of his claim: *Held*, that although a court of chancery might properly have enjoined the state treasurer from the original misapplication, on bill filed in time, yet that it has no power, after the misapplication, to restrain the state treasurer from applying to the general purposes of the state subsequently received moneys, not especially dedicated by law, nor to compel the treasurer by mandamus to substitute such general funds for the moneys already improperly paid.

In equity.

WAITE, Circuit Justice. Article 5, § 5, of the constitution of North Carolina is in these words: "Until the bonds of the state shall be at par the general assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the state, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the general assembly shall have no power to give or lend the credit of the state in aid of any person, association, or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this constitution, or in which the state has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the state, and be approved by a majority of those who shall vote thereon."

Article 5, § 8, is in these words: "Every act of the general assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purposes."

The Wilmington, Charlotte and Rutherford Railroad Company was incorporated in 1855, to construct a railroad from Wilmington to Rutherford. This railroad was unfinished at the time of the adoption of the constitution. By an act of the general assembly, passed on the 29th January, 1869, the capital stock of this company was increased to seven million dollars, and, in order to complete the road, the public treasurer was directed to subscribe four millions of dollars to the stock. Payment of this subscription was to be made in the bonds of the state having thirty years to run, the in-

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

terest, at six per cent., being payable semi-annually. To provide for the payment of the interest and the principal at its maturity, the act imposed an annual tax of one-eighth of one per cent. upon taxable property of the state, to be levied, collected, and paid into the treasury as other public taxes. This authorized subscription was made, and bonds to the amount of $3,000,000 delivered to the president of the company in part payment thereof. The special tax provided for was levied in 1869, and $151,491.13 collected therefrom and paid into the treasury. Out of this, $29,400 was paid on account of the interest accruing upon the bonds; but on the 20th of January, 1870, a resolution was adopted by the general assembly instructing and directing the treasurer not to pay any more until authorized by the general assembly, and he thereupon suspended the payment. On the 8th March, 1870, the general assembly repealed the act making appropriations to the railroad company, and directed all the bonds in the hands of the president to be returned to the treasurer. On the 12th of the same month, the general assembly, by a law duly enacted, directed the treasurer to use $150,000 of the special tax funds, in payment of the ordinary expenses of the state government, and to pay advances theretofore made by the board of education, and authorized him to replace the same out of the first moneys which might come into his hands by way of dividends of corporations or of taxes theretofore or thereafter to be levied. By another act, passed December 21st, 1870, he was directed to use $200,000 more of the same funds in payment of the ordinary expenses of the state government, and the appropriations for the charitable and penal institutions, and to replace the same from the first moneys paid into the state treasury from dividends or taxes levied and collected for general purposes. In obedience to these directions the treasurer used $122,091.13 of the fund collected to pay interest on these bonds for the purposes specified in the acts. On the 20th December, 1871, the treasurer was forbidden by the general assembly to apply any money collected under the revenue act of 1871 to the repayment of any moneys borrowed under the act of December, 1870. On the 3d of March, 1873, another act was passed, entitled "An act to raise revenue," and by its terms the taxes therein levied were applied to defray the expenses of the state government, and to pay the appropriations for charitable and penal institutions. A similar act, with similar application of the funds to be raised, was passed in 1874.

The plaintiff is the holder of certain of the bonds issued to the above-named railroad company, on which no interest has been paid, and in this bill he asks that the treasurer may be restrained from the payment of any moneys out of the treasury of the state, until he has replaced the $122,091.13, borrowed by him from the special tax fund, applicable to the payment of the interest on the bonds issued to the said company. The facts are all admitted by the pleadings, and the simple question presented for our determination is whether upon such facts the relief asked for can be granted. The use of the special tax fund to pay the general expenses of the state government was in violation of the constitution and therefore unlawful, but the wrong, if any exists, has been done. We are not called upon to prevent the act, but to relieve against its consequences. The first, upon a proper application made in time, we might have done. The question now is, whether, upon this application, the latter is within our power. The treasurer is a public officer. His office belongs to the executive department of the state. His duty is to execute the laws, not to make them. He, within his official sphere, carries into effect the will of the legislature, and can only do what the law permits. The courts will not by mandamus compel a public officer to do that which the law does not authorize. Neither will they restrain him from doing that which the law requires. An unconstitutional law is no law, and the court will, when properly called upon, restrain its execution, because it cannot authorize action by any one. It is for this reason that the wrongful application of this money might have been prevented. The law directing it, being unconstitutional, conferred no authority upon the treasurer to do what was required. It is quite another thing, however, to compel him in his official capacity to substitute other moneys now in the treasury for that which he has improperly used. That in substance is what we are called upon to do in this case. True, the form of the prayer is that the treasurer be restrained from paying out money from the treasury, but the real object is to compel him to retain in the treasury an amount equal to that which he has misapplied. This requires a refusal by the treasurer to pay the orders drawn upon him by the proper authorities pursuant to law. He is but the custodian of the public money. He has no discretion as to its use. It is held to be paid out and appropriated as the law directs.

The immediate question for our determination, therefore, is not whether the state should provide the means and require the treasurer to replace this fund, but whether it has so done. When the order to use the $150,000 was made, the treasurer was authorized to replace it out of the first money which came into the treasury by way of dividends or taxes. When that of the $200,000 was ordered, he was authorized to replace it from dividends and taxes for general purposes. The revenue act of 1871, however, expressly prohibited him from using for that purpose any money collected under its authority. The acts of 1873 and 1874 do not contain any such express prohibition, but they each direct that the taxes levied shall be applied to defray the expenses of the state government and to pay appropriations for charitable and penal institutions. This is the state-

ment of the special object to which the tax is to be applied, required to be made in every law levying taxes, and the constitution expressly prohibits its application to any other. While, therefore, the law does not prohibit the reimbursement of the special tax fund out of the money raised under its authority, the constitution does. The expenses on account of which the money was taken from the fund, have already been paid with the money of the state. It is true the money paid ought not to have been so used, but it was none the less on that account the money of the state. The bondholders might, perhaps, if the money still remained in the treasury, compel its application to the payment of the interest on their bonds, but until so applied it did not become their property, and remains that of the state. It is not claimed that there is now any money in the treasury, except that which has been collected from taxes levied under the revenue laws of 1873 and 1874, and it is clear to our minds that there is no existing law which requires or even authorizes the treasurer to reimburse the special fund from that. The state may be under obligation to provide for such reimbursement, but the state and the treasurer occupy different positions. The state is the debtor, and is bound by its pledge of faith to provide means and pay its debts. The treasurer is but an agent of the state, bound only to pay its debts when required to do so by a valid law. If such a law exists, and he refuses to act, a proper court will by mandamus compel him to perform his duty. If he threatens to divert money appropriated for the payment of a debt, on proper application he may be restrained. But to authorize interference in either case, it must clearly appear that he wrongfully refuses to execute a valid law, which has been enacted by the legislative department for his guidance. The court cannot make laws for him. It can only compel him to execute such as have been made.

As there is therefore no money in the treasury which the treasurer is authorized or required by any existing law to appropriate for the reimbursement of the special tax fund, we cannot restrain him from paying out the funds in his hands until the reimbursement has been made. The principal in this case cannot be reached through the agent now before the court. The bill is dismissed with costs.

Case No. 12,641.

In re SELIG.

[1 N. B. R. 186;[1] Bankr. Reg. Supp. 40; 6 Int. Rev. Rec. 206.]

District Court, E. D. New York. Nov. 28, 1867.

BANKRUPTCY—DISCHARGE—EXAMINATION OF BANKRUPT'S WIFE—GOOD FAITH.

Where an assignee, who was also a creditor, neglected to make his report on the return day of the order to show cause why bankrupt should not be discharged, but subsequently appeared before the register and applied for an order for examination of bankrupt's wife: *Held*, that such order should be refused, as it did not appear to have been made in good faith.

[In the matter of Moses Selig, a bankrupt.]

By DAVID C. WINSLOW, Register:

I, David C. Winslow, one of the registers of said court in bankruptcy, do hereby certify, that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: George Wilcox, for the assignee, and Benedict & Boardman, who appeared for the bankrupt. The usual order was made by me for creditors and others to show cause before me, on the 18th of November, at ten a. m., why the bankrupt should not be discharged from his debts, and for second and third meetings of creditors. Notice was served upon Stephen Hyatt, who was both a creditor and assignee, by the clerk, as appears by his certificate. On the return day the bankrupt appeared with his attorney, and moved for a certificate to the effect that he was entitled to a discharge, which was granted upon producing the affidavit of the assignee, per form 35. The assignee had not filed his report, and his attorney, S. A. Underhill, was requested by the register and the attorney for the bankrupt to call upon him for that return, which he did on that day, but the assignee refused to make the return. On the 19th an order was made requiring the assignee to make his return to show cause before me on the 21st, at one p. m. Previous to that hour, but on the same day, Mr. George Wilcox, on behalf of the assignee, applied, upon affidavit of the assignee, for an order for the examination of the bankrupt's wife, which I then denied, with liberty to apply at one p. m., the hour fixed for the assignee to make his return or show cause. At that hour the assignee renewed his motion for an order to examine the bankrupt's wife, and at the same time filed the assignee's return as required by law. The attorney for the bankrupt objects to the granting of the order applied for, upon the ground that the application comes too late, the time to show cause, and for the second and third meetings of creditors, having been held on the 18th, and all the bankrupt's proceedings having been regular; there being no opposition at that time, he would have been entitled to a certificate from the register upon which a certificate of discharge would have been granted by the court, had the assignee performed his duty, and made his return at the proper time. That return not having been made, the register could not certify that all the proceedings were regular, and hence the bankrupt has been delayed in obtaining his discharge.

The bankrupt himself was examined upon the application of the assignee on the 22d of October last. I refuse to grant the order for

[1] [Reprinted from 1 N. B. R. 186, by permission.]

the examination of the wife of the bankrupt upon the grounds: (1) The assignee is guilty of laches. Had he made his return at the proper time, the bankrupt would have obtained his discharge. The assignee cannot take advantage of his own wrong. He had actual notice, as a creditor, of the meeting referred to, and knew it was his duty as assignee to present his report at that time. Besides this, he was called upon by his attorney to make his report, and refused to do so. (2) The examination of the wife of the bankrupt is not a matter of right. "She may be required to attend before the court for good cause shown." Section 26. I do not think good cause has been shown; on the contrary, I think the application is not made in good faith, but for the purpose of delaying the bankrupt in obtaining his discharge, to which he is clearly entitled as the matter now stands. He makes no excuse whatever for not making his return at the proper time, nor for not making this application at an earlier date. The affidavit upon which the application is made does not state a solitary fact, nothing but suspicion and belief. It must be borne in mind that the applicant is a creditor as well as assignee, and his zeal may not be altogether official. And the said parties requested that the same should be certified to the judge for his opinion thereon.

Dated at Brooklyn, November 22, 1867.

BENEDICT, District Judge. The decision of the register not to grant an order for the examination of the wife of the bankrupt upon the ground that the application was not made in good faith, but merely for delay, is confirmed.

Case No. 12,642.

SELIGMAN v. CHARLOTTESVILLE NAT. BANK.

[3 Hughes. 647; 25 Int. Rev. Rec. 385; 9 Reporter, 72; 2 Nat. Bank Cas. (Browne) 195; 1 Wkly. Jur. 584; 21 Alb. Law J. 196.] [1]

Circuit Court, W. D. Virginia. Oct. Term, 1879.

BANKS—NATIONAL—GUARANTEE OF CREDIT.

1. A national bank, upon the deposit of collateral security with it, has no power to guarantee the obligation of the person making such deposit.

[Cited in brief in Ellerbe v. National Exch. Bank of Kansas City, 109 Mo. 445, 19 S. W. 241.]

2. A national bank may lend money on personal security, but not on its credit.

In covenant.

W. J. Robertson and R. G. H. Kean, for plaintiffs.

1. The true construction of the transaction, upon the face of the papers set out in the declaration, is that the proceeds of the letter of credit were to go into the hands of the bank, and were to be used when so realized in discounting from time to time, as realized, so much of the "good business paper" hypothecated by the Flanagans.

2. In this (the true) view of the transaction, the question resolves itself into the inquiry whether a national bank can borrow money?

3. It seems to be conceded (as it must be) that, under certain circumstances, a national bank can borrow money, e. g., to meet a pressing liability. If so, who is to judge of the emergency? [2] Obviously, the lender cannot; therefore the question of illegality can only arise between stockholders and officers.

4. If a national bank can borrow money for legitimate banking purposes this transaction will be sustained, being, in legal effect, a mere method of securing a loan, the proceeds of which were to be used in discounting "business paper."

5. The subsequent insolvency of the bank and of B. C. Flanagan & Son in no way affect the legal questions. The receiver stands where the bank would if it had not failed. Woods, J., in Casey v. La Société de Credit Mobilier [Case No. 2,496].

6. The later view, in England and the United States, frowns on the defense of ultra vires, as applied to executed contracts, even when the contract is such as, upon a nice construction, would be regarded as beyond the corporate objects. See cases cited in printed note in Slaughter v. City of Lynchburg; also, Riche v. Ashbury Railway Carriage & Iron Co., L. R. 9 Exch. 244 [L. R. 7 H. L. 653], article on "Ultra Vires." January 4, 1878; Houghton v. First Nat. Bank of Elkhorn, 26 Wis. 663; Bushnell v. Chautauqua County Nat. Bank, 10 Humph. 378, Thomp. Nat. Bank Cas. 794; Whitney Arms v. Barlow, 63 N. Y. 62; Bissell v. Michigan, S. & N. I. R. Co., 22 N. Y. (8 Smith) 258; and Parish v. Wheeler, Id. 494; First Nat. Bank of Charlotte v. National Exch. Bank, 92 U. S. 122, Thomp. Nat. Bank Cas. 124; Town of Coloma v. Eaves, 92 U. S. 484; Commissioners of Douglas County v. Bolles, 94 U. S. 104; cases cited in the foregoing.

7. When the act complained of has been executed and the creditor has parted with his money on the faith of what the corporation has promised, only a substantial adherence to the purpose of its creation is required to bind it, although the act might be one which, if executory, it might be restrained from engaging in. Coleridge, J., in Eastern Co. R. Co. v. Hawkes, 35 Eng. Law & Eq. 29; Comstock, C. J., in Bissell v. Michigan, S.

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 9 Reporter, 72, and 21 Alb. Law J. 196, contain only partial reports.]

[2] See National Bank of Commerce v. National Bank of Missouri, Append. Fed. Cas.; also, Swayne, J., in Merchants' Nat. Bank v. State Nat. Bank, 10 Wall [77 U.S.] 604. "If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them." Same case, Thomp. Nat. Bank Cas. 55, for above-quoted expression

& N. I. R. Co., 22 N. Y. [S Smith] 258; and Parish v. Wheeler, Id. 494. As to executed contract, Bushnell v. Chautauqua Co. Nat. Bank, Thomp. Nat. Bank Cas. 796, 10 Humph. 378.

8. Nothing in the view that the nine per cent. guaranteed was illegal, because—First. The law specifically provides what the penalties of usury shall be. Second. It was never said that the forfeiture of interest should avoid the contract. Third. The bank is estopped to allege its usury practiced on Flanagan & Son as a reason for repudiating its agreement with plaintiffs, who are innocent of all usury. 9 Mass. 1.

9. To say that a temporary loan made to tide over a tight time, and protect customers, is an unlawful increase of the capital stock is to abuse language. The whole answer is, the thing is not true.

10. There was nothing wrong or vicious in what the plaintiffs did. Their bona fides is beyond question. This being so, to enable the bank to repudiate its engagement, on the faith of which the plaintiffs parted with their money, it must appear affirmatively that there was no natural and direct connection between the arrangement made and the purpose for which the charter was granted.

S. V. Southall and Duke & Duke, for defendants.

1. Corporations, created by statute, depend for their powers, and for the mode of exercising them, on the construction of the statute itself. Bank of U. S. v. Dandridge, 12 Wheat. [25 U. S.] 64; Head v. Providence Ins. Co., 2 Cranch [6 U. S.] 127; Fowler v. Scully, Thomp. Nat. Bank Cas. 855; Matthews v. Skinker, Id. 649.

2. A corporation can make no contract and do no act except such as are authorized by its charter, either expressly, or as incidental to its existence. First Nat. Bank of Lyons v. Ocean Nat. Bank, Thomp. Nat. Bank Cas. 737. "The express grant of the powers mentioned is, on familiar principles, an implied exclusion of all not mentioned." Wiley v. First Nat. Bank, Id. 908.

3. Section 8 of the national banking act (13 Stat. 101) defines and limits the powers of the banks, the powers not granted and not necessary to their existence being prohibited. Weckler v. First Nat. Bank of Hagerstown, Thomp. Nat. Bank Cas. 540-542. "Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power." First Nat. Bank of Charlotte v. National Exch. Bank, 92 U. S. 128, reported in Thomp. Nat. Bank Cas. 129.

4. Accommodation indorsement by banks unauthorized. Bank of Genesee v. Patchin Bank, 3 Kern. (13 N. Y.) 309; Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 128, 129; 26 Barb. 23, 568; 30 Barb. 421; 1 Daniel, N. Y. Notes, 290, 291; Green's Brice, Ultra Vires, 121, 122, note. Public policy requires that banks should not lend their credit, whether compensated for it or not; indeed, compensation but increases the evil. If they can guarantee for, or without a consideration, then they can guarantee railroad bonds, city bonds, private bonds, and all bonds, and their liability becomes illimitable.

5. Banks expressly prohibited from guaranteeing or borrowing. Nat. Bank Act, § 5202. Not only the shareholders and the depositors and the local public, but the United States government itself, and the people represented by it, are interested in maintaining the credit of the banks; hence the restrictions imposed upon them by congress. Farmers' & Mechanics' Nat. Bank v. Dearing, Thomp. Nat. Bank Cas. 117.

6. A person dealing with a corporation is presumed to know the extent of its corporative powers. Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 129, 130; [Pearce v. Madison & I. R. Co.] 21 How. [88 U. S.] 443; 42 Barb. 488; [Rogers v. Burlington] 3 Wall. [70 U. S. 669]. Hence Seligman knew that his transaction was illegal. The court may sympathize with Seligman's loss of his money, and rigidly enforce his remedy, if he has one, against the officers of the bank who exceeded their powers, but that is no reason why the money of either innocent depositors or stockholders should be taken to pay Seligman.

7. The Flanagan proposition to the bank, the resolution of the board of directors authorizing the guarantee, and the guarantee itself, as set forth in the declaration, import a simple guarantee by the bank upon the supposed protection of the $35,000 of business paper (so called) as collateral security. The bank could not "receive" (for purposes of discount) money arising under the Seligman contract, if said Seligman contract was "used" to a corresponding extent by the Flanagans themselves. But suppose it was understood all around that the money raised by the Flanagans on the Seligman contract should be turned over by them to the bank, provided it was returned to the Flanagans, as the proceeds of the discount of the business paper, were not the parties precisely where they would have been if the money so raised had remained in the Flanagans' hands, and the bank had been paid by them 2 per cent. for its guarantee? And if this could not be done directly, it could not be done indirectly.

8. Seligman's contract did not contemplate money being received by either the bank or Flanagan & Son, but only credit was to be gotten under it.

9. If the bank was to receive money on the Seligman contract, and discount Flanagan & Son's paper with it, in consideration of guarantee, then consideration failed, because Seligman furnished the money to Flanagan & Son (who used it), and not to the bank.

10. If the Seligman contract with the bank's guarantee is to be treated as a re-discount for the bank, then it was a re-discount by Seligman & Co. when they knew that the

$35,000 of business paper had not been previously discounted by the bank, and no bank can have paper re-discounted till by discount it becomes the owner of such paper. And the Flanagans, and not the bank, having received the avails of the arrangement, the bank is not bound legally or equitably. And if the Seligman contract with the guarantee is to be treated as Flanagan & Son's note indorsed by the bank, and if it was understood that Seligman should furnish Flanagan & Son the money on it, with the further understanding that Flanagan & Son should turn it over to the bank, to be returned to them by the bank as the proceeds of the discount of the business paper, then it simply amounted to a lending of the money by Seligman to Flanagan upon the bank's guarantee, which was protected by the business paper as collateral. And if this could not be done directly, it could not be done indirectly.

11. The bank had no power to borrow money to lend again.

12. Usurious lending by banks expressly prohibited. Seligman rests his case upon Flanagan's proposition, which was a usurious one, and, therefore, illegal, and, being illegal, cannot support Seligman's claim.

13. If a national bank has the power to borrow money, it certainly can be done only to meet an emergency, for instance, to raise money to meet a pressing debt, thus merely substituting one creditor for another. But no bank, least of all a national bank, can borrow money to lend a customer. To do this is indirectly to increase the capital stock of the bank, which the national banking act says cannot be done without the comptroller's consent. Besides, money borrowed by the bank upon the note of its customer, strengthened by its own indorsement, to be lent by it to its customer with the knowledge of the lender to the bank, amounts simply to a direct lending by the creditor to the bank's customer upon his note indorsed for his accommodation by the bank. It is merely an attempted evasion of the prohibition imposed upon the bank against indorsement for the benefit of a third party. See Leavitt v. Blatchford, 5 Barb. 9.

14. National banks may "make contracts," but only such contracts as the act contemplates, those belonging to legitimate banking business of the kind prescribed by the statute.

15. The guarantee in this case is so extraordinary, that the seal of the corporation is annexed to the paper.

16. It is true that the penalty imposed upon a national bank for committing usury does not extend to the principal of the debt. But it forfeits all the interest, so that the Flanagan proposition legally deprived the bank (if there was really to be anything more than a pretended discounting under it) of all the benefit which the plaintiffs say the bank was to get by it, thus leaving the transaction without the semblance of consideration, so far as the bank was concerned. And, besides, the penalty, though great or small, is imposed because an act forbidden has been done, and an act forbidden is illegal, and the Seligmans cannot rest their claim upon an act which they knew to be illegal, an act prohibited by law, and never sanctioned by the shareholders of the bank.

BOND, Circuit Judge. The declaration in this cause sets out that J. & W. Seligman & Co., of New York, are bankers; that on the 14th day of May, 1875, B. C. Flanagan & Son made a proposition to the Charlottesville National Bank, in writing, to this effect: "In consideration of the guarantee of a letter of credit to the extent say of (£5,000) five thousand pounds sterling, to be issued by J. & W. Seligman & Co., of New York, we propose to deposit with the Charlottesville National Bank business paper to the extent of $35,000. For such amounts of said letter of credit as we may use, we propose the bank shall discount of said paper at 9 per cent. a sufficient amount to cover the amount used by us, holding the balance as collateral security for same; the bank to receive the money under the letter of credit which is used in the discount aforesaid. It is further agreed that we will take the risk, as to any fluctuations in gold, so that the difference in rate of interest between that charged us and that paid by the bank shall not be less than at the rate of 2 per cent. per annum in favor of the bank, the bank having the benefit of any fluctuations which may increase their profit."

This proposition was accepted by the bank by the following resolution of its board: "Resolved, that the president and cashier be and they are hereby authorized, in accordance with the proposition submitted by B. C. Flanagan & Son to guarantee to Messrs. J. & W. Seligman & Co. drafts drawn under their letter of credit, in favor of B. C. Flanagan & Son, to the extent of £5,000 on the deposit with the bank of business paper by Flanagan & Son as collateral security to the extent of $35,000."

The plaintiffs aver that in consideration of this acceptance of Flanagan & Son's proposition by the bank, they gave to Flanagan & Son a letter of credit for £5,000, as follows: "No. 1023. New York, May 25, 1875. Messrs. Seligman Bros., London. Sirs: We herewith beg to open with you a credit in favor of Messrs. B. C. Flanagan & Son, of Charlottesville, Va., for £5,000, of which they will avail themselves either in their own drafts or the drafts of such parties as they may accredit with you at four months after sight. You will please honor said drafts to the above amount, advising us promptly of maturity. J. & W. Seligman & Co."

Flanagan & Son deposited the $35,000 business paper with the bank, and the bank gave its written guarantee to Messrs. J. & W. Seligman & Co., as follows: "In consid-

eration of one dollar, to us in hand paid, the receipt of which is hereby acknowledged, we guarantee to Messrs. J. & W. Seligman & Co. the prompt and punctual payment of all sums and amounts due them under their letter of credit No. 1023, for five thousand pounds sterling on the part of Messrs. Flanagan & Son, and we hereby hold ourselves liable for the prompt and complete payment of all amounts that may so become due to them, and for the exact fulfilment of all the conditions mentioned in the annexed receipt: 'New York, May 25, 1875. Bills receivable amounting to $35,089 16/100 have been deposited with the Charlottesville National Bank by B. C. Flanagan & Son as collateral security for the within-mentioned credit, in accordance with the resolution of the board of directors, adopted in full board on 14th May, 1875.'" Which guarantee and receipt are signed by the president and cashier of the bank. And the resolution further shows that Flanagan & Son gave plaintiffs the following receipt: "New York, May 25, '75. Gentlemen: We have received to-day your letter of credit for £5,000 on London in our favor, dated to-day, and in consideration thereof we hereby agree that whenever advised of a draft having been drawn under said credit we will receipt your draft, or reimburse you upon your notifying us of the date when due, for the amount of said bills, payable in New York, twenty-one days before the maturity of the bills in London, or their equivalent in cash. We will allow you 2 per cent. banker's commission on the amount of drafts made under the above credit, together with bill stamps, postage, etc., and deposit with you the following collateral, which we authorize you to dispose of at your discretion, in the event of our non-compliance with the above terms. We further authorize you to cancel this letter of credit at any time to the extent it shall not have been acted upon when notice of revocation is received by the user. B. C. Flanagan & Son."

Drafts were drawn against the letter of credit, in accordance with the agreement, which were ultimately paid by plaintiffs, Flanagan having failed to accept and pay the twenty-one day drafts spoken of in the receipt. The bank failed and was placed in the hands of a receiver by the comptroller of the treasury, and the plaintiffs allege that it is liable upon its above written guarantee for the amount of Flanagan & Son's draft remaining unpaid and held by them.

To this declaration there is a demurrer; all errors in pleading are waived, and the question presented is, whether, upon the facts above set forth, the plaintiffs are entitled to recover. The case is free from many difficulties that have arisen in like cases. It is not a contest against the corporation itself pleading a want of power to make a contract from which it has derived no benefit, but which caused loss to others, such a defence having been justly held by many courts to be as odious as the plea of the statute of limitations on the part of an individual debtor; but it is a contest between creditors claiming the same fund, where each party has the just right to contest the claim of the other in every legal manner. Nor is there any question of notice to parties, upon which many decisions in the bank cases depend. Here the transaction is in writing chiefly, and stands between the original parties to-day as it did the day it was made. Under these circumstances we are to determine whether or not a national bank is authorized by the statute creating it to guarantee the paper of a customer for his accommodation; for this is the real transaction set forth in the declaration. We will admit for the sake of the argument what plaintiffs' counsel have urged at bar, that a bank may borrow money to aid its customers; but here the bank got no money; none of the money procured by the letter of credit was to go to it. All the bank had to expect was the profit it was to make from the discount it received from the collaterals placed in its hands to secure it from loss by reason of the pledge of its credit to plaintiffs. The Flanagans were to give their own drafts to take up those drawn against the letter. They agreed what commissions the plaintiffs were to charge. The bank had nothing to do with the transaction except to see in the event of the failure of the Flanagans that the plaintiffs were secure against loss. What a national bank is authorized to do is defined by the statute of which it is the creature. The section of the statute applicable here is 5136 of the Revised Statutes. By that section it is authorized to exercise all such powers as are incidental to banking, by discounting and negotiating promissory notes, bills of exchange, and other evidences of debt. But certainly there is no discounting of promissory notes set forth in the declaration.

The cause of action is the written guarantee of the bank. To discount a note is to deduct the interest in præsenti and pay over in money the face value of the note to the holder. Here the bank parted with no money. To negotiate a promissory note is either to buy or sell it, and so with a bill of exchange. Here the bank neither bought nor sold any bills of exchange. It agreed to guarantee Flanagan's purchase of them from plaintiffs. By the same section the bank is allowed to lend money upon personal security; but it must be money that it loans, not its credit. Upon the deposit of the collaterals with the defendant by Flanagan, it loaned its credit to him to be used with plaintiffs.

It is alleged, however, that the bank by reason of the powers granted to it incidental to banking, could enter into this contract. But the incidental powers given are not the incidental powers given generally to all

banking institutions; but only such as are incidental to banks allowed to do such things as are prescribed by the statute,—such acts as are incidental to discounting and negotiating promissory notes and bills of exchange, and the loan of money on personal security, and the other acts of banking mentioned in the statute. We cannot see how this transaction can be brought within the powers of the bank granted by statute, and the demurrer must be sustained.

Case No. 12,643.

SELIGMAN v. DAY et al.

[14 Blatchf. 72; 2 Ban. & A. 467; Merw. Pat. Inv. 271.] [1]

Circuit Court, S. D. New York. Dec. 21, 1876.

PATENTS—NOVELTY—CORSET CLASPS.

The claim of letters patent granted to Phillipp Lippmann, September 30th, 1873, for "a corset clasp and cloth attachment," namely, "as a new article of manufacture, a covered corset clasp, the cloth of which forms a marginal flap or flaps along its length, suitable for, and adapted to, being sewn upon the corset, substantially as described, and for use in the place of broken, injured or worn out clasps or cloth, as herein set forth," claims merely the making and selling a part of an old and known manufacture as a new way of trade, and is not valid.

[This was a bill in equity by August Seligman against Joseph Day and Nathan Hyman.]

John B. Staples, for plaintiff.

John T. Richards, for defendant.

JOHNSON, Circuit Judge. This is a motion for an injunction to restrain, pending the suit, the infringement by the defendants of letters patent No. 143,359, granted to Phillipp Lippmann, dated September 30th, 1873, for "a corset clasp and cloth attachment." The patentee claims, "as a new article of manufacture, a covered corset clasp, the cloth of which forms a marginal flap or flaps along its length, suitable for, and adapted to, being sewn upon the corset, substantially as described, and for use in the place of broken, injured, or worn out clasps or cloth, as herein set forth."

The patent is not sustained by any previous adjudication and it is attacked by affidavits tending to show that the article which the patent describes was in earlier use than the time claimed by the patentee as that of his invention. Want of novelty may be made out, even conceding that, in a certain sense, the use which the patentee makes of the article is new. It is shown, that corset clasps covered with material similar to that of the corsets to which the clasps were to be applied, have been long made with flaps by which they might be sewn upon the rest of the corset; and that they were so sewn to the other parts of the corsets, in order to complete them. It is, also, shown that these, when worn out, have been frequently, and as matter of business, removed and replaced by new ones sewn on to the old corsets by means of the flaps. These, in a legal sense, are the uses to which the patentee contemplates that his articles shall be put; but he insists, inasmuch as he manufactures these clasps with covers, as a separate article of trade, in assorted sizes, and applicable by purchasers to the making or mending of corsets generally, that a quality of patentable novelty is imparted, not exactly to the article itself, but to the manufacture of the article. It is the thing made that is patentable or not. The use made of it is not patentable. The right to make the thing involves the right to use it, when made, at the pleasure of its owner. To make and sell a part of a known thing, as a separate article, is not patentable. If knife blades had never been made and sold separately from their handles, or the handles separately from the blades, it would not be patentable to introduce either of those manufactures. Upon the affidavits as they stand, it appears to me that the plaintiff's claim is merely to the making and selling a part of an old and known manufacture, as a new way of trade, and that this is not, in its nature, the subject of a patent. The motion for a preliminary injunction must, therefore, be denied.

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge; reprinted in 2 Ban. & A. 467; and here republished by permission. Merw. Pat. Inv. 271, contains only a partial report.]

SELIN (RHOADES v.). See Case No. 11,740.

SELKIRK, The (PROVOST v.). See Case No. 11,455.

SELLER (MERCHANTS' INS. CO. v.). See Case No. 9,444.

Case No. 12,644.

SELLER v. The PACIFIC.

[Deady, 17; [1] 1 Or. 409.]

District Court, D. Oregon. July 17, 1861.

CARRIERS OF GOODS—LIMITATION OF LIABILITY—EXPRESS AGREEMENT—NEGLIGENCE OF SERVANTS—"RECEIVED IN GOOD ORDER"—SUIT IN REM—BURDEN OF PROOF.

1. In a suit against a common carrier, the libellant makes a prima facie case by producing the receipt of the carrier—"Received in good order;" but these words do not constitute an agreement; they are a mere admission, and may be explained or contradicted by the carrier.

[Cited in The Live Yankee, Case No. 8,409; The Nith, 36 Fed. 87.]

2. In the national courts the rule is, that a common carrier may limit his liability by an express agreement—so far as the common law makes him an insurer—but not for the negligence of himself or servants.

3. Nothing short of an express stipulation will constitute such an agreement; it must not depend upon implication, or inference, or conflict-

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

ing or doubtful evidence; and mere notice to the shipper is not sufficient.

4. Where the drayman of the shipper, on the delivery of a package, takes a receipt from the freight clerk of the ship for the same, containing the words—"not accountable for contents," this of itself does not constitute such an agreement; it is a mere ex parte proposition on the part of the carrier after the receipt of the package, to which there must be direct and unequivocal evidence of the assent of the shipper to exonerate the carrier.

5. In a suit in rem, it is not necessary to charge the defendant as a common carrier, but the rule is otherwise where the suit is in personam; but in the former case it must appear from the evidence that the ship was employed in the business of a common carrier.

6. The burden of proof, to show the value of goods injured or not delivered, lies upon the shipper.

In admiralty.

George H. Williams and E. Nugent, for libellant.

Erasmus D. Shattuck, for claimant.

DEADY, District Judge. The libel in this cause was filed April 22, 1861, and alleges that on or about January 25, 1861, the steamship Pacific—being about to depart from the port of San Francisco on a voyage to the port of Portland—received from the libellant, Moses Seller, in good order, one case containing two looking-glasses, of the value of $450; and that the master of said ship, in consideration of certain freight and average to be paid by said libellant, agreed to convey said case and its contents to Portland, and there deliver the same to the libellant in good order. That the said master caused a receipt to be given to said libellant, whereby it was acknowledged that the said case and contents—marked "M. S., Portland, looking-glasses"—were received on board said ship "in good order." That the said ship shortly afterwards departed on said voyage, and that by the negligence of said master, the mariners and servants under his charge, said looking-glasses were so damaged as to be wholly lost to the libellant, to his damage $450. The answer of the claimant, Samuel J. Hensley, filed April 27, alleges substantially, that upon information and belief he denies all the allegations of the libel in the manner and form pleaded, but admits the receipt of the case; and avers that the contents of the case were in bad order at the time of delivery, and that the officers of the ship observed it and refused to give the drayman who delivered the case at the wharf a receipt as for goods in good order, but gave him one containing the words "not accountable for contents."

From the evidence it appears that a Mr. Adler, a short time before the sailing of the ship, purchased in San Francisco for the libellant two large fancy looking-glasses, about eight feet in length and three in width. That Adler sent the glasses to the house of R. A. Swain, a crockery and looking-glass dealer, to be packed for shipping, where they were packed in a redwood case in good condition, and in a manner well calculated to resist the ordinary incidents of a voyage to Portland. That from the house of Swain they were taken with ordinary care on a spring-dray to the wharf where the ship was loading, and that then the case was taken from the dray by the drayman —Frederick Beeson—with the assistance of the freight clerk of the ship—Philips—and placed on the wharf alongside the ship. Philips then gave the drayman a receipt in these words: "Received from A. Frank, in good order, on board steamer Pacific, for Portland, the following packages, marked 'M. S., Portland,' one case of looking-glasses; not accountable for contents." The A. Frank spoken of in the receipt was the boss drayman, and Beeson was in his employ. At the time of giving the receipt, Philips said that he put the words "not accountable for contents" on it because the case contained looking-glasses, saying that was the customary way of receipting for such articles. The case was in good order at the time of the delivery, and also the contents, so far as either the drayman or clerk observed; and there does not appear to have been even a suspicion by them to the contrary. The case laid upon the wharf about twenty-four hours, when it was stowed between decks. On January 27, the ship sailed for Portland, where she arrived after an ordinary voyage on Sunday morning following. The case was discharged upon Couch & Flander's wharf, and upon turning it over, as it was being discharged, a rattling was heard inside, as of broken glass. On Monday morning Miller, the libellant's drayman, went to the wharf to get the case, and as soon as he got there he heard from some one that the glasses were broken. The case was standing on end at the time, and the wharfinger, Flanders, was delivering freight for Philips, who was temporarily absent. Miller looked at the case, and observed that on one side, about eighteen inches from the end, there appeared to have been a sharp instrument, or thing like a crow-bar, thrust through the boarding of the case, which splintered the board inwardly. Upon looking through the crack or hole in the board, he saw that the glass was broken—that the pieces were wedge-shaped—and that the cracks radiated from a common centre, as if the glass had been struck by some sharp-pointed instrument. Miller refused to receipt for the case in good order; whereupon Flanders proposed that it should be taken to the store of the libellant and examined in the presence of one of the ship's officers, and the damages ascertained. Thereupon the case was put upon the dray, when Poole, the purser of the ship, came up and said, that case should not go until the freight was paid. This was contrary to the usual custom of the ship with well known consignees in Portland, such as the libellant appears to

be. The result was that the case was taken by Miller, under the direction of Flanders, to the warehouse of the wharfinger, where it still remains. The board that had the hole made in it was brought into court and exhibited. It came into two parts on being taken from the case. It appears to have been broken by a blow from the outside, and upon either side of the opening is a bruise about two inches in length, as if made by some hard substance pressing between the edges, and stained with that dark iron color which iron imparts to fresh wood when pressed hard against it. The glass is between ¼ and 3/16 of an inch thick. No fragments of the ornaments have been observed among the pieces of glass in the case, and there is no evidence that any of the inside fastenings used to secure and keep the glasses in position, have given way.

The only witness whose testimony differs from this statement of the facts is Burns, the first mate. He testifies that he was present when the case was brought to the wharf in San Francisco, and that he assisted to remove it from the dray. That he heard a rattling among the contents at the time, and that the clerk gave the receipt with the words—"not accountable for contents"—by his direction, because the contents appeared not to be in good order. That he superintended the stowing of the case, and that it was done carefully, but that every time it was moved on the voyage the contents rattled as if broken. Philips and Beeson directly contradicted Burns as to what took place upon the delivery of the case at the ship. Both were interrogated upon this point directly, and both say in unqualified terms, that he was not present, and that Philips gave the qualified receipt not on account of the condition of the package or its contents, but because of their kind and quality. The receipt supports the statement of the clerk and drayman, and directly contradicts that of Burns. It does not state that the goods are damaged, but the opposite—that they are in good order. Philips heard no rattling in the case until it was put on the wharf at Portland, when Burns called his attention to the fact. At the time of taking the case on board, Philips remembered that Burns called out to him and asked what was in it. Burns testifies that he then replied to Philips that there was something rattling in the case, but Philips testifies that he did not hear it. The case was a large one, and seems to have been the only one of the kind shipped on that voyage. It is hardly credible that if Burns had assisted in taking the case off the dray and observed the words "looking-glasses" on it, and heard a rattling as if the contents were broken or loose and on that account dictated an unusual receipt against the remonstrance of the drayman, that he would on the next day when superintending the stowing of the case, with the case before him, call out to the freight clerk on the wharf and ask him what was in it. The testimony of Burns must be disregarded as unworthy of credit on account of its improbability, and because it is directly contradicted by that of Philips, Beeson and the receipt.

The receipt and non-delivery of the package being admitted, the rule of law is, that the libellant makes a prima facie case upon proving the receipt of the carrier containing the words—"received in good order." It has been contended that the claimant cannot contradict this admission, but the law is otherwise. The words "in good order" in a shipping receipt are, like the admission of any fact in any ordinary receipt for money, open to explanation or contradiction. They do not constitute an agreement, although they may be contained in one. But the burden of proof in this respect is upon the claimant; he must show the facts that the goods were not in good order, or he is bound by the admission in the receipt. This he has utterly failed to do, while on the contrary the libellant has satisfactorily shown, aliunde the receipt, that the package and contents were in good order when delivered to the ship. But it is maintained for the claimant that the words on the receipt—"not liable for contents"—constitute a special agreement by which the carrier is exempted from all liability as an insurer, and only required to exercise that ordinary diligence and care which the law exacts from any ordinary bailee for hire.

The question of how far a common carrier can limit his common law liability, by special agreement with the shipper, has been thoroughly and ably argued by counsel. The authority of the courts of New York has been relied on by counsel for the libellant, in support of the common law rule, that common carriers are insurers — that the law makes them so on grounds of public policy—and that any agreement which diminishes this liability is void as contrary to such policy, encouraging fraud and production of litigation. While I think that any innovation upon the common law rule on this subject, will always be the cause of more harm than good, yet this court is bound by the authority of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344. In that case the supreme court held, that a common carrier might, by special agreement with the shipper, limit his liability as an insurer, but not for the negligence of himself or servants. The court also held that "the burden of proof lies on the carrier" to show such an agreement, and that nothing short of an express stipulation, by parol or writing, should be permitted to discharge him from the duties which the law annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful or conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties.

Tried by this rule, do the words in the receipt, taken in connection with the circumstances, constitute such an agreement? If they do, then, although the case was in good order when delivered to the ship, the

burden of proof is upon the shipper to show that the injury resulted from the negligence of the carrier and not from unavoidable accident. Under such circumstances, the shipper takes all the risks except those which arise from or are incurred by the want of ordinary care and diligence on the part of the carrier. No mere notice to the shipper of intention on the part of the carrier to limit his liability is sufficient to constitute such an agreement, or raise the presumption that the shipper acquiesced in or consented to the terms of such notice. The obligation and liability of an insurer—acts of God and the public enemy only excepted—are imposed upon the common carrier by law, and cannot be avoided by any expression of intention on his part so to do, without the express assent of the shipper to such intention. As the court says in the case just quoted:—"If any implication is to be indulged in from the delivery of goods under the general notice"—that the carrier would not be responsible—"it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification." See, also [New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344],[2] Hollister v. Nowlen, 19 Wend. 234. When Philips inserted in the receipt to the drayman the words, "not accountable for contents," the act amounted to nothing more than an ex parte proposition by the carrier after the receipt of the goods, and without the knowledge or assent of the shipper. The drayman Beeson was a mere bailee, for hire, to take the package to the wharf and deliver it to those in charge of the ship and take a receipt for it. Such employment of itself gave him no authority to make any contract for the shipper or give his assent to any proposition on the part of the carrier to limit his liability. Then, the evidence shows that the drayman informed the shipper of the terms of the receipt immediately, and because the latter did not reclaim the case, but allowed it to remain with the carrier, it is claimed that he assented to the proposition and is bound by it. But this would be to establish such an agreement "by implication and inference" when the "implication and inference" is just as strong that the shipper intended to insist upon his rights and the liability of the carrier.

Besides, the evidence also shows, that the shipper was not merely passive, but that he at once expressed his dissatisfaction to the drayman in strong terms, with the qualification in the receipt, and that the latter communicated this fact to the clerk soon after, and while the case was yet on the wharf.

As to the custom "not to sign for looking-glasses," unless the words "Not responsible for contents" were inserted in the receipt, of which Philips testifies, as a matter-of-fact it appears to have depended, so far as it had any existence, upon the whim or caprice of the person receiving goods at the time. But if this were otherwise, it makes no difference. The law and not such a custom ascertains and limits the rights and liabilities of shippers and common carriers. Such pretences of custom as this appears to be, if allowed to be set up to control or modify the law on this subject would place it in the power of common carriers to make and unmake the law as they chose.

My conclusion is that the words in the receipt—"not accountable for contents"—were not assented to by the shipper, and therefore under the circumstances do not amount to an agreement to limit the common law liability of the carrier. This being so and it appearing that the articles were "received in good order" the burden of proof lies on the carrier to show that the injury resulted from either the act of God or the public enemy. Nothing of this kind is pretended. This view of the matter makes it unnecessary to determine, how, as a matter-of-fact, the glasses were broken. It is probable that either by accident or wantonly some iron instrument, as a crow-bar, was thrust through the board produced in court, and that it passed through the openings in the top-mounting of the frame of the glass next to that side of the case, without harming them, and then struck the plate of the other glass near to the base and broke it in fragments; and that this happened during the 24 hours that the case was lying on the ship's wharf at San Francisco. The glasses were packed in the case in a reversed position so that the lower end of each plate was over or under the scroll work which constituted the top of the frame of the other. The case has remained in the possession of the ship's agent, and if the claimant or he thought it would tend to establish the fact that the contents were not in good order when received, they might have had an examination made of the internal condition of the package.

Upon the argument, a point was made for the claimant that the libel did not charge that the ship was employed at the date of this voyage as a common carrier, and, therefore, it can only be held liable as a private carrier. Upon examination of the authorities and precedents within my reach, I find the practice to be, that when the suit is in personam, it is necessary to charge the defendant in the libel as a common carrier, or he will only be held to the liability of a private carrier. Story, Bailm. § 504. But when the suit, as in this instance, is in rem, the rule seems not to apply, because, as I suppose, it would, to say the least, be inaccurate to charge an inanimate thing, as a ship, which is only a means of transportation, as a common carrier. The suit proceeds against the ship as such, by reason of

[2] [From 1 Or. 409.]

the peculiar jurisdiction of the admiralty court; but to hold her to the responsibility of a common carrier, it must appear in the proof that she was so employed at the time. No testimony appears to have been directly taken for this purpose, but enough appears incidentally in the evidence to establish the fact beyond a doubt.

The only remaining question is the amount of the damages. Without determining at what port the value of the goods should be estimated, I have concluded to take the testimony of Leopold Greenbury on this point. He is the only witness who speaks of the value of the glasses who saw them. He was the salesman in the house where the glasses were packed. Selling looking-glasses is his business, and in the market where these were shipped. All the rest of the evidence upon this point is the mere guesswork of persons without any special knowledge of the trade or these particular articles. The burden of proof is on the libellant to show the value of the goods. The carrier is not presumed to have any special knowledge or means of information on this subject. The libellant knows at what price he purchased the glasses, and there is no difficulty in proving it. The testimony of Adler, the libellant's agent in purchasing the glasses, might have been taken on this point. The omission on the part of the libellant to do this is calculated to make the impression that such evidence would not support his claim for damages to the amount of $450. Greenbury swears that the glasses were worth $150 at wholesale and $200 at retail in San Francisco—owing somewhat to the customer. The mean between these two sums, with interest on that amount for six months at ten per centum per annum, gives $367 for both glasses.

Decree, that the libellant recover of the claimant and his sureties $367 and his costs.

Case No. 12,645.

SELLERS v. PANAMA R. CO.

Circuit Court, S. D. New York. Sept. 23, 1857.

NEW TRIAL—COSTS—WEIGHT OF EVIDENCE.

This was an action to recover damages for breach of contract. Verdict for plaintiff. Heard on motion for new trial. Granted, on the ground that the verdict was against the weight of the evidence. NELSON, Circuit Justice, in disposing of the case, said: "It seems to me a proper case for the consideration of the jury; but the new trial must be on payment of the costs of the circuit at which the trial was had, and upon the case at the term."

Mr. Cutting, for plaintiff.
Mr. Parter and Mr. Lord, for defendant.

[NOTE. No opinion can be found in this case. The statement of the decision given is from N. Y. Times, Dec. 9, 1858.]

SELLICK (PHELPS v.). See Case No. 11,079.

Case No. 12,646.

SELLON v. REED.

[5 Biss. 125.] [1]

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

HUSBAND AND WIFE—DIVORCE—HOMESTEAD.

1. The homestead act [12 Stat. 392] should be liberally construed, and where a decree of divorce gave the custody of a child to the mother, and she was then in possession of the homestead, ejectment will not lie by the husband to recover it.

[Criticised in Rosholt v. Mehus (N. D.) 57 N. W. 785. Cited in Stanton v. Hitchcock, 64 Mich. 330, 31 N. W. 401; Sherrid v. Southwick, 43 Mich. 519, 5 N. W. 1030. Cited in brief in Stahl v. Stahl, 114 Ill. 377, 2 N. E. 160.]

2. During the pendency of a bill for divorce, the husband and wife have no power to make an arrangement about the property which shall be binding, unless embodied in the decree.

This was an action of ejectment [by Brodie Sellon against Fidelia D. Reed] to recover the possession of lot 4, block 5, in Galva, Henry county, tried before the court without a jury. The facts shown by the proofs are substantially these: On and for some time after October 25, 1867, the premises in question were owned, as of an estate in fee, by Elias O. Reed, who occupied the same as his homestead, the defendant, Fidelia D. Reed, being his wife and residing with him on said premises, his family consisting of himself, wife and one child, a daughter about eleven years old. On the 24th of September, 1868, defendant filed her bill in the Henry county circuit court, against said Elias O. Reed, for a divorce on the charge of adultery. The case came on for hearing at the October term, and on the 9th of October, 1868, the court made its final decree in said cause, divorcing said Fidelia D. from said Elias O. Reed, awarding her the care and custody of the child, and $500 alimony. At the time of filing her bill, said defendant was in possession of the premises, and continues to remain in possession thereof and to occupy the same as her home. After the entry of said decree of divorce, said Elias O. Reed conveyed the premises to Ira C. Reed, and he conveyed the same to the plaintiff. Defendant claimed a right of possession under the homestead acts of this state, which was the only defense interposed to the title made out by the plaintiff.

BLODGETT, District Judge. I do not find the precise question raised by these facts to have been decided by the supreme court of this state, or of any other state having an analogous statute; but, following the spirit of the adjudications so far made by the courts of this state, I think the defense

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

set up is made out by the facts. The principle of those decisions seems to be that the homestead estate is carved out of the general estate, and vested in the head of the family. The wife cannot be divested of her homestead right without a deed solemnly executed and acknowledged by her in the manner pointed out by the statute. In this case, the wife acquired her homestead right in the property, and at the time the divorce was applied for, was living thereon as her home. By the decree of divorce, she is charged with the custody and care of the child, and thus continued as the head of the family. She has done no act to divest herself of her right. It is true, the decree allows her $500 alimony, to be paid by the husband, but there is no evidence that the court intended that in lieu of her homestead right, even if a decree would have been effective for that purpose.

In the case of Vanzant v. Vanzant, 23 Ill. 485, the supreme court of this state says, "The intention of this act is manifestly to save the homestead for the family. * * * The natural death of the householder would not destroy it, nor would his civil death for crime. If this was not so, the object of the act would be defeated, and the beneficence of the legislature of no avail. The wife was the meritorious cause of the divorce. The children composing the family were committed to her care and nurture, and have, in our judgment, an undoubted right to occupy the homestead. As a home, and as their home, it has never been granted away, or the right to occupy it released by any one competent to release it. The spirit and policy of the homestead act seem to demand this concession and to regard the complainant, for this purpose, as a widow and the head of a family."

It is true, that case differed from this in many material features. There the wife by her bill alleged that she furnished the money for the purchase of the homestead, and the court, by its decree, awarded it to her. But the rule laid down in that case seems manifestly to tend to the conclusion I have arrived at in this.

Proof was offered on the trial to show that before the divorce was granted, and while the bill was pending, a parol arrangement was entered into between Reed and his wife by which he agreed to pay her $1,000,—$500 of which was to be cash and the balance in certain notes,—he agreeing not to resist her application for divorce, and on receipt of that amount she was to give up possession of the house. This agreement or stipulation, however, was not embodied in the decree, and was undoubtedly void, the husband and wife having no power to make a contract of that nature during the coverture. I do not, therefore, deem the legal rights of the defendant affected by this arrangement or the evidence of it.

Judgment for defendant.

Case No. 12,647.

The SELMA.

[1 Lowell, 30;[1] 1 Am. Law Rev. 84.]

District Court, D. Massachusetts. Dec., 1865.

PRIZE—RIGHT TO SHARE—VESSEL WITHIN SIGNAL DISTANCE.

It is not sufficient, in order to entitle a vessel to share in the distribution of a prize, that it was within signal distance, and formed part of the force commanded by the officer who made the capture, if its situation was such that it could not have rendered any assistance in the actual conflict in which the prize was taken.

[Cited in Re Perry, Case No. 10,999.]

This case arose out of the memorable action of the 5th of August, 1864, in the Bay of Mobile. After the ships under the immediate command of Admiral Farragut had succeeded in passing Forts Morgan and Gaines, which guarded the main ship-channel into the bay, they had an obstinate engagement with the rebel iron-clad ram, the Tennessee, which resulted in her surrender; and soon after captured, with little or no trouble, the Selma and other vessels, which are the subject of this proceeding. The case of the Tennessee was sent to another court. Those of our vessels which were not adapted to passing the batteries, were stationed, some of them near the main channel, and others in Mississippi Sound, about twenty miles distant by water from that entrance, but much nearer the bay by way of Grant's Pass, had that passage been open; but it had been wholly obstructed for the time by barriers put there by the rebels. The duties of these divisions were to aid the troops in landing and besieging the forts, and to pursue any hostile vessels that might approach their stations from without or from within the bay; and the first division, besides, was to assist any of our ships that might fail to pass the batteries, and put back in distress. The question which arose upon this state of facts, was whether both or either of these divisions stationed outside the bay were entitled to share in the captures above mentioned.

LOWELL, District Judge. Upon this new and difficult question, I have thought proper, in the absence of full reports of most of the cases in our own courts upon analogous points, to seek for light, not only in such of them as have come to my knowledge, but also in the judgments of the prize courts in England, where questions of joint capture have been much considered.

By the English law, as applied to ordinary cases of prize, the term captors, or more strictly takers, includes not only those who actually make a prize, but also all who are associated in the taking. The association may be casual, as where several vessels happen to join in a chase, or to be in sight of a capture; or it may be more permanent, and imposed by superior command, as where several vessels are

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

engaged in a blockade or other enterprise in common. In the former case, there is by the English law a presumption of fact, that all king's ships in sight, during the chase or at the time of the capture, did by their presence encourage the friend and discourage the enemy; and that such was their intent. But, if it turn out that they could not have been seen by one or other of the belligerents, or that they had no intent to aid, but were engaged upon some duty or business inconsistent therewith, the presumptions are rebutted, and they cannot share. The Galen, 2 Dod. 24; The Rattlesnake. Id. 32; La Melanie, Id. 125; The Forsigheid, 3 C. Rob. Adm. 316; The Lord Middleton, 4 C. Rob. Adm. 153.

In the case of a common enterprise, duly authorized, it is only necessary to show, that the claiming vessel was one of the associates, and that the capture was made by another of them, and was within the purpose of the association; and, if these facts are shown, the actual position of the claiming vessel at the time of capture is unimportant. La Henriette, 2 Dod. 98; The Harmonie, 3 C. Rob. Adm. 318; The Guilliaume Tell, Edw. Adm. 6; The Naples Grant, 2 Dod. 286.

In both classes of cases, the association of vessels has been looked upon as a sort of commercial adventure or partnership, more or less permanent, to which each contributed such share of time and effort as chanced to fall to him to render, and in the gains of which each ought to have his equitable dividend. The doctrine is incidentally but well expressed by Lord Stowell in the phrase, that, in such cases, privity of purpose creates community of interest. The Dordrecht, 2 C. Rob. Adm. 64.

It has often been doubted by eminent English judges, whether by this construction the plain language of the statutes, giving prizes to the takers, had not been unwarrantably extended. And it is a singular fact, that the word takers, in another part of the acts, has received from the courts a totally different interpretation. The English prize acts have usually contained a provision for giving head-money, or a reward reckoned according to the number of persons on board the hostile vessel, to the takers of any ship of war. In cases arising under this part of the statutes, it is held that the object of the legislature was to encourage personal gallantry and exertion, and constructive captors are, as a general rule, excluded from sharing in this bounty; although, under the same statutes and concerning the same vessel, they may come in as takers of the prize itself. Accordingly, it has been decided that joining in a chase, or being in sight of a capture, raises no presumption of a joint taking, so far as head-money is concerned; but it is for the claiming vessel to show, that the surrender was in fact partly due to her presence or co-operation. L'Alerte, 6 C. Rob. Adm. 238; L'Hercule, Id., note; La Gloire, Edw. Adm. 280. And parliament afterwards ratified and adopted this distinction.

When our prize acts came under discussion in the course of the war, now happily ended, the courts with much uniformity gave to the word captors a meaning more nearly like that established in England for cases of head-money than that there followed in ordinary prize causes. This course of decision is ably vindicated by my eminent predecessor, in the case of The Cherokee [Case No. 2,640], in 1864. His opinion is founded upon the usual and obvious meaning of the language of the statutes, as well as upon their general purpose. And it may be added to the reasons given in that judgment, that the intent of our law clearly is to encourage personal gallantry, enterprise, and perseverance, whether applied to the capture of armed or of unarmed vessels. Thus the whole net proceeds of a prize are given to the captors, when she is of equal or superior force to the vessel or vessels making the capture, but only one-half where she is of inferior force. Again, the head-money which our law grants is larger, when the hostile force is equal or superior. But no head-money at all is given, excepting for hostile vessels of war sunk or destroyed; and, when due, it is to be distributed like prize-money: showing that the grant is intended as a substitute for the prize itself. St. 1864, c. 174, §§ 10, 11; 13 Stat. 300.

The principle of distribution, therefore, is not varied by any difference in the character of the prize; and our courts, as I have said, have adopted the narrower and more obvious of the constructions which the English tribunals have applied to the subject; and have held that neither a whole fleet, engaged in the closest association known to the English law, that of an authorized blockade, nor such parts of that fleet as may by orders, general or special (for such orders may always be presumed), give chase to a vessel violating the blockade, are entitled to be considered as constructive captors; but only those which fulfil the statute definition by being within signal distance of the actual captor at the time of the capture. That the government and the navy have acquiesced in this view is shown by their action in their several spheres of duty, and by the fact that no appeal has been taken from any of these decisions to the supreme court. And, since these judgments were promulgated, congress has amended the law in other particulars, and has restricted rather than enlarged the class of constructive captors by adding to the former requirement—that the vessels claiming as such captors should be within signal distance—the further qualification that they should be "under circumstances, and in such condition, as to be able to render effective aid if required." St. 1864, c. 174, § 10. It may therefore be taken as the policy of our government, in all its departments, to construe these statutes in the general sense above indicated.

In the present case, it is in proof that all the vessels were within signal distance of all the others. But the vessels outside the bay were not so situated as to give effective aid

in the naval engagement, which took place wholly within, because they could not pass the forts and other obstructions which guarded the channels. The case, therefore, stands upon the same footing as it would had the capture been made out of the sight of these vessels. And the question is, whether the association was such between all the vessels, that those now claiming can be considered actual captors. And I am of opinion that they are not to be so held.

I am far from saying, that, in a general naval combat, the part which each vessel takes is to be scrutinized by the court, and particular rewards to be meted out, where the overwhelming presumption is, and always must be, that all have done the duty assigned them; not even if that duty should happen to be only to stand and wait. But in this case, upon a careful examination of the candid and wholly impartial testimony of the distinguished commander of the fleet, I am not satisfied that the disposition made of the vessels, which were stationed outside the bay, was made with a view to the naval engagement. It seems rather to have been forced upon him by the fact that they could not take part in that engagement.

In the only American case which I have seen reported that touches this question, Judge Sprague decided that a vessel within sight and easy signal distance of the combatants, and ready and willing to afford aid to her own side, was not to be counted as one of the actual takers, in estimating whether the force was superior or inferior, if she was under orders not to join in the action without a special signal to that effect; though she was held entitled to share in the prize-money. The Atlanta [Case No. 619].

Suppose it had happened in the case now before me, as once occurred on the Mississippi under the same great captain, that only a small number of vessels had made good the passage of the forts; and that they had found themselves only equal or inferior in force to the enemy within, and had then succeeded by their skill and gallantry in making this capture. It would be impossible, I think, under the case of The Atlanta [supra], or on principle, to hold that the vessels outside were actual takers, and to reduce the credit and reward of the conquerors to the level of a capture by superior force. And it will not be easy under our law to define actual captors in such a way as not to require of them at least the qualifications of position and power to do service which the statute peremptorily imposes on constructive takers.

So far for the naval contest. But it is said that the claiming vessels performed important service, in conjunction with the army, in the capture of the forts; and that without this capture the prizes might never have been brought off in safety. This service was highly important, especially in its effect on the general fortunes of the campaign; but it is too remote to entitle the vessels or the army to be considered as actual takers of these prizes. Whether they could have been brought off or not, it is now impossible to say, though it may be inferred with some probability, that, being iron-clad, our fleet, which fully commanded the bay, could have run them out at some convenient season, or could have held them even to the end of the war. The naval capture, however, which was in no sense a surrender to conjoint forces, must stand upon its own merits, and be considered to have been complete when the last flag was struck; and subsequent aid, not directly in the nature of a salvage service, cannot confer a title by relation which did not arise out of the facts of the original taking.

The decree will therefore be for those vessels only that passed the forts. The case of The Tecumseh [3 W. Rob. Adm. 146], creates no difficulty, because she was destroyed by a torpedo while gallantly leading the way towards the enemy's vessels, and after having successfully passed the direct line of the land batteries.

I have considered this question with the more care, and arrived at its solution with the greater diffidence, because it is opposed to that of my friend the learned judge of the district court of the United States for Louisiana, by whom the proceeds of the ram Tennessee were distributed to the whole fleet. I have some reason to suppose that his decision, which has not been reported, was founded upon the apparent and attractive equity upon which the English cases of associated action have been put. But, while acknowledging the force of this consideration, I am constrained to believe that the stricter construction which I have given to the statute is more consistent with its language and intent, as well as with the judgments heretofore rendered upon it.

Neither class of captors was represented by counsel in the case before me; but I have had the benefit of a full and impartial statement of the facts, and analysis of the law, by the learned district attorney (Hon. R. H. Dana, Jr.), whose position and tastes have led him to give the subject of prize much thought and study.

Case No. 12,648.

SELMAN et al. v. DUN.

[13 Leg. Int. 321; 10 West. Law J. 459; 1 Quart. Law J. 251; 29 Hunt, Mer. Mag. 586.]

Circuit Court, E. D. Virginia. 1856.

PAYMENT—SENDING MONEY BY MAIL—USAGE.

[Enclosing money in a letter, and depositing the same in a post-office, for the purpose of paying a debt, is a payment, though it never reaches the creditor, if, from his letters demanding payment, taken in connection with an alleged usage of making remittances in this manner from the region of the debtor's residence, the debtor had reasonable grounds to believe that the creditor expected the remittance to be made by sending money through the mail.]

The plaintiffs in this suit, Selman & Son, were merchants in Baltimore, and the defendant, Dun, resident in Essex Co., Va. In the course of trade, the defendant gave to the plaintiffs his note for the sum of $699.47, payable at the Farmers' Bank of Virginia, at Richmond, on the 1st day of May, 1850. Before the note became due the defendant, Dun, went to Baltimore and requested the plaintiffs, who had sent the note to Richmond for collection, to withdraw it and hold it at Baltimore, as he did not know whether he would be able to take it all up at the time it fell due. The plaintiffs accordingly withdrew the note from the bank at Richmond and held it in Baltimore. On the 22d of April, 1850, the plaintiffs wrote to the defendant that they had withdrawn his note as requested, that they had it in Baltimore and requesting him to remit the money to take it up. On the 20th of May, they again wrote to him, requesting him to attend to the matter. On the 27th of May, Dun replied that he had received but one (the last) letter, that he called at the bank in Richmond on the 3d of May and found no such note there, and requesting to know where the note was, and at what point payment was expected. In reply, the plaintiffs wrote that they held the note in Baltimore, adding, "If you will forward us the amount, we will send you the note." On the 24th of June, the defendant inquired by letter, of the plaintiffs, why they had not returned him the note, as he had forwarded the money according to request, and urging them to do so. The facts agreed by the counsel for both plaintiffs and defendant were: "That about the 7th of June, the sum of $700 was enclosed in a letter to the plaintiffs, and sent to Baltimore by mail to their address. That the usage and custom for persons in Essex county, purchasers and others, dealing with merchants in Baltimore and other Northern merchants was general, when they sent money to make payments, to send it by mail to such Northern merchants, and was known generally to such merchants in Baltimore and other places. That the $700 was sent after the receipt of Selman's letter of 30th May, directing the defendant to forward the amount, and, as Dun supposed, in pursuance and for the purpose of complying with that letter. That Dun borrowed the money for the purpose of bringing it down to Richmond to take up the note due the plaintiffs, and did bring it to Richmond for that purpose. That Essex county, where Dun resides, is about 43 miles from Richmond, 56 miles from Fredericksburg, and farther still from Norfolk, and these are the nearest points at which bank-drafts could be obtained, and that this was known to the plaintiffs." It was proved by the plaintiffs, that they never took the risk of remittances by mail from their customers upon themselves, that they never received the money or the letter containing it, that immediately upon the receipt of Dun's letter informing them that he had sent the money by mail, they made diligent investigation and search, but that neither they nor the officers of the post-office department could get any clue to it, and that upon the receipt of Dun's letter, they immediately sent a messenger to him demanding the payment of the note.

Griswold & Claiborne, for plaintiffs.
Patton & Patton, for defendant.

TANEY, Circuit Justice (charging jury). 1. If the letters of the plaintiffs to the defendant, urging the payment of the note, gave him reasonable grounds to believe that they desired and expected the money to be remitted to them by mail, he was authorized to make the remittance in that manner, at the risk of the plaintiffs.

2. It is for the jury to determine whether the language of the plaintiffs' letter gave to the defendant such reasonable ground of belief; and in forming their judgment, they are to take into consideration the whole correspondence and intercourse between the parties and the usages of trade in this respect, between the district or county in which the defendant resided, and the city of Baltimore, as well as the parol evidence offered by the respective parties.

3. And if upon the whole evidence, they find that the letters of the plaintiffs were sufficient to create such belief in the mind of a man of business and competent capacity, and that they did create that belief in the mind of the defendant, then the deposit of the letter enclosing the money, in good faith, in a post-office, through which correspondence was usually at that time carried on from his neighborhood to the city of Baltimore (the letter being sealed and properly directed), was payment of the note, although, from the fraud or negligence of the officers of the government, the money may never have reached the hands of the plaintiffs.

SELMA, MARION & M. R. CO. (BLACKBURN v.). See Case No. 1,467.

Case No. 12,649.

The SELT.

[3 Biss. 344; [1] 17 Int. Rev. Rec. 22; 5 Chi. Leg. News, 109.]

District Court, E. D. Wisconsin. Oct. Term, 1872.

MARITIME LIENS—REPAIRS—HOME PORT — WHO MAY APPEAR AS CLAIMANT—ADMIRALTY RULES.

1. Under the twelfth rule in admiralty, as amended by the supreme court at the December term, 1871, a libel can be maintained for repairs and supplies furnished to a domestic vessel at the home port.

[Cited in Whittaker v. The J. A. Travis, Case No. 17,599.]

2. Obiter, the lien would only attach at the date of seizure.

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

3. In the absence of the owner, a mortgagee may be permitted to appear as claimant.

4. The alteration of rule 12 was intended to place contracts for repairs and supplies for all vessels on an equality as to proceeding in admiralty, not to abrogate the distinction between a domestic contract and a maritime lien. The alteration applies to the character of the process to be used, not to the question of jurisdiction.

[Cited in Whittaker v. The J. A. Travis, Case No. 17,599.]

5. The rules established by the supreme court are rules of practice, not of decision.

[Cited in The H. E. Willard, 53 Fed. 600.]

In admiralty.

This was a libel by William H. Wolf and Thomas Davidson, ship-builders and proprietors of dry docks in the city of Milwaukee, to recover for repairs and supplies furnished during the year 1872 to the scow Selt, a vessel owned in said city. The owner of the vessel not appearing, Osuld Torrison, a mortgagee, was allowed by the court to appear as a claimant, and answer the libel. The answer alleged that the libellants had no maritime lien upon the vessel, and no lawful right to bring or maintain their libel, the said vessel being owned at the port of Milwaukee by a resident of said city, and that the repairs and materials were performed and furnished in said city, at the instance and request of the owner of the vessel. The respondent further alleged and propounded that one Patrick Hoye, by a mortgage dated December 23, 1869, conveyed said vessel to him to secure a portion of the purchase price of the vessel, and that the mortgage was recorded in the office of the collector of customs, in the city of Milwaukee, on the 24th of the same month, under which mortgage he claimed title to said vessel paramount to the claim of the libellants. The facts pleaded were not disputed.

H. H. Markham, for libellants.
Emmons & Hamilton, for respondent.

MILLER, District Judge. A maritime lien was considered the foundation of proceedings in rem when admiralty and maritime jurisdiction was conferred upon the federal courts. Such proceeding was to make perfect a right inchoate from the moment the lien attached. When a maritime lien existed, a proceeding in rem was the proper course to carry it into effect. An act of congress, approved September 29, 1789, entitled "An act to regulate process in the courts of the United States" (1 Stat. 93), directed that the forms and modes of proceeding in causes of admiralty and maritime jurisdiction should be according to the course of the civil law. By the act of May 8, 1792 (1 Stat. 275), it is provided, "That the forms of writs, executions and other process, except their style and the forms and modes of proceeding in suits in those of common law, shall be the same as are now used in the said courts respectively, in pursuance of the act entitled 'An act to regulate processes in the courts of the United States,' in those of equity, and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity, and to courts of admiralty, respectively, as contradistinguished from, courts of common law, except so far as may have been provided for by the act to establish the judicial courts of the United States, subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same."

The power here conferred on the supreme court was enlarged by an act of congress, approved August 23, 1842. 5 Stat. 517, § 6. Pursuant to the authority of these two acts of congress, the supreme court of the United States at the January term, 1842, adopted rules of practice for the courts of admiralty. One of these rules is this rule 12. "In all suits by material men for supplies or repairs, or other necessaries, for a foreign vessel or ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight in rem, or against the master or the owner alone in personam. And the like proceeding in rem shall apply to cases of domestic ships where, by the local law, a lien is given to material men for supplies, repairs or other necessaries."

At the December term of the supreme court, 1858, the said twelfth rule of practice was repealed, and the following rule was substituted in its place: "In all suits by material men for supplies or repairs, or other necessaries, for a foreign ship or for a ship in a foreign port, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam. And the like proceeding in personam, but not in rem, shall apply to cases of domestic ships for supplies, repairs, or other necessaries." If this rule had not been repealed nor modified, these libellants could not maintain this libel in rem. But at the December term of the supreme court of 1871, the said twelfth rule was amended so as to read: "In all suits by material men for supplies or repairs, or other necessaries, the libellants may proceed against the ship and freight in rem, or against the master or owner alone in personam." This libel is brought under this last rule.

The ninth section of the act to establish the judicial courts of the United States (1 Stat. 73), confers upon the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." The English rules, that were supposed to exist at the date of the adoption of the constitution of the United States, and when the above mentioned act was passed by congress, that the admiralty jurisdiction did not extend beyond tide waters, and that proceedings in rem could only be sustained for the adjudication of a maritime lien, have been exploded. The admiralty and maritime jurisdiction granted to the federal government by the constitution of the United States, is not limited to tide waters, but ex-

tends to all public navigable lakes and rivers where commerce is carried on between different states and with foreign nations. The Genesee Chief, 12 How. [53 U. S.] 443, and many subsequent decisions. Liens by bottomry bonds, for seamen's wages, salvage service, and for supplies or repairs in a foreign port, are supposed to be founded on contracts upon the credit of the vessel, and are distinguished from contracts at the home port of the vessel, which are contracts on shore on the credit of the owner. Contracts at the home port for repairs, supplies or the use, or insurance of a vessel, are now considered as maritime contracts cognizable in the admiralty. In the case of The Moses Taylor, 4 Wall. [71 U. S.] 411, it is announced that the distinguishing and characteristic feature in a suit in admiralty is that the vessel proceeded against is itself seized and impleaded as a defendant, and is judged and condemned accordingly. And in The Hine v. Trevor, Id. 555, and in New England Mutual Marine Ins. Co. v. Dunham, 11 Wall. [78 U. S.] 1, it is stated that the true criterion, whether contracts are within the admiralty and maritime jurisdiction, is their nature and subject-matter, as whether they are maritime contracts having reference to maritime service, maritime transactions, or maritime casualties, without regard to the place where they are made. In view of these principles it was held in this case that the contract of marine insurance is a maritime contract within the admiralty and maritime jurisdiction, in personam.

I think it is now settled that these libellants can maintain their libel in rem, for the recovery of their claim for repairs and supplies. The question is not presented in this case whether the lien attached at the date of the work done and the supplies furnished, or by the attachment under the monition. My impression at present is that the rule merely extends a remedy to a domestic creditor, and that his lien attaches by the seizure.

It is clear that a mortgagee of a vessel has no maritime lien, nor remedy in rem, in the admiralty courts. The mere mortgage of a vessel, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it without reference to navigation or perils of the sea. The John Jay, 17 How. [58 U. S.] 399. The record of the mortgage set up in the answer makes it a legal lien, but not a maritime lien. The mortgagee, as such, cannot proceed in this court in rem for the condemnation and sale of the vessel. After a sale of a vessel under an admiralty decree, the mortgagee can petition the court for payment out of remnants and surplus. A legal title passes conditionally by the mortgagor to the mortgagee, and it is more equitable to pay out of the registry the surplus of proceeds of sale of a vessel to a mortgagee, than to the owner of the equity of redemption. The mortgagee was allowed as the conditional owner of the vessel, and in the absence of the mortgagor, to appear and set up his mortgage, and claim that it is a legal lien on this vessel, prior in date to the attachment under the libellants' monition, and also prior to their contract propounded in their libel.

The state law provides for a lien for supplies and repairs upon boats and vessels used in navigating the waters of the state, and authorizes proceedings in rem against said boats and vessels. Whether this law has any validity as authority for such proceedings in the state courts, I need not decide. Since the cases of The Belfast, 7 Wall. [74 U. S.] 624, The Moses Taylor [supra], and The Hine v. Trevor [supra], it is nugatory as authority for such proceeding in this court. The states can neither enlarge nor limit the admiralty and maritime jurisdiction of the federal courts. The constitution and laws of the United States necessarily conferred exclusive admiralty and maritime jurisdiction upon the federal courts for the protection of commerce and for the preservation of amicable commercial relations with foreign nations. This vessel is libelled as a national enrolled and licensed vessel used in navigating the lakes, and is not within the scope of the state law.

The libellants might have proceeded in the state court against the owner of the vessel, or in this court, in personam, and before the modification of the rule, they would have had to make choice of these remedies.

A sale of the vessel under an execution against the owner, issued from either of the courts, might not disturb the mortgagee's interest. The modification or alteration of rule 12 was no doubt intended to place contracts for repairs and supplies for all ships and vessels on an equality as to proceeding in the admiralty, whether foreign or domestic. All distinction in regard to proceeding in rem is abolished; but I do not suppose it was intended by the supreme court to abrogate the distinction between a domestic contract for supplies and repairs and a maritime lien upon a foreign vessel. The alteration of the rule, in my opinion, applies to the character of the process to be used, and has no relation to the question of jurisdiction. The rules established or altered by the supreme court, under legislative authority, are not rules of decision, but are merely rules of practice, prospective in their operation. The St. Lawrence, 1 Black [66 U. S.] 522. In that case it is decided that the change of the rule in the year 1844, prohibiting a proceeding in rem on domestic contracts, could not interrupt the prosecution of a libel pending on such a contract. But in this case the mortgagee rested upon his mortgage and its record, without having either instituted proceedings for the recovery of the amount secured, or having taken possession of the vessel under his mortgage. The mortgagee had knowledge of the repairs being made on the vessel by the libellants, who thereby made her a more valuable security. And it appears that the libellants, with knowledge of the mortgage, expended a large amount in sup-

plies and repairs, under the belief that they had a right to attach the vessel.

By the ruling in the case of The Island City [Case No. 7,109], the mortgage would be postponed to the claim of the libellants, upon the ground of a lien created by the state law. But in this case there is no such lien. It appears that the vessel was a wreck, affecting the security of the mortgage, and that the repairs have restored her to usefulness. I think, upon principles of equity, these parties should be placed on an equality as to the distribution of the proceeds of sale. The proceeds of the sale of a vessel are not appropriated to liens, according to their priority in date. The seamen who brought a vessel into port are paid before a bottomry bond, and a bottomry bond before a lien on a contract of affreightment. Maritime liens are usually preferred on the score of merit and necessity, for the advancement and protection of commerce.

Salvors are first paid out of the property saved.

Decree for libellants.

NOTE. For a full citation of authorities on the question of lien on domestic vessel, examine The Celestine [Case No. 2,541]; The Lady Franklin [Id. 7,982]; The Eclipse [Id. 4,268]. For a full discussion of admiralty rule 12, with special reference to the amendment of May 6, 1872, consult 7 Am. Law Rev. 1; also opinion of Deady, J., in The Augusta [Case No. 647], and opinion of Blatchford, J., in The Circassian [Id. 2,720a].

SELT, The (WOLF v.). See Case No. 12,649.

SELTINIUS v. UNITED STATES. See Case No. 13,387.

Case No. 12,650.

SELZ v. UNNA.

[1 Biss. 521.] [1]

Circuit Court, N. D. Illinois. July Term, 1866.[2]

EQUITY — RELIEF AGAINST JUDGMENT AT LAW — SECRET AGREEMENT — FRAUD UPON COLITIGANTS — CONTRIBUTION.

BY THE COURT. 1. Where a judgment has been regularly entered against joint defendants, and some have paid their pro rata, on a bill filed by others, setting up a secret agreement between themselves and plaintiffs that if they would abandon the defense, plaintiffs would not call upon them for any part of any judgment they might recover, a court of equity will not grant relief. Such an agreement is a fraud upon their co-litigants, and will not be sustained.

2. Although, generally, contribution cannot be enforced between wrong-doers, still this court will not interfere to assist some of them in escaping such part of the common burden as they are equitably bound to pay.

3. The marshal having collected part of the judgment from some of the defendants, will be permitted to collect the balance from the others, notwithstanding this secret agreement.

4. Although the assignee of a judgment takes it subject to all existing equities, yet such an agreement constitutes no defense against an assignee in good faith, without notice.

NOTE. This case was affirmed by the supreme court, in 6 Wall. [73 U. S.] 327, in an opinion closely following the reasoning and conclusions of the circuit judge, and as the facts are fully stated in the reported case, it is not deemed necessary to publish anything further here. [The opinion of the circuit judge is nowhere reported.]

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

[2] [Affirmed in 6 Wall. (73 U. S.) 327.]

SEMMES (BURNS v.). See Case No. 2,183.

Case No. 12,651.

SEMMES v. CITY FIRE INS. CO.

[6 Blatchf. 445; [1] 8 Am. Law Reg. (N. S.) 673; 36 Conn. 543; 2 Am. Law T. Rep. U. S. Cts. 179; 2 Chi. Leg. News, 17.]

Circuit Court, D. Connecticut. June 12, 1869.[2]

WAR — EFFECT UPON CONTRACTS — LIMITATIONS OF ACTIONS — WHEN CIVIL WAR COMMENCED AND TERMINATED.

1. A state of war, recognized as such by and between the belligerent parties, suspends all contracts in existence between the citizens of the respective belligerents at the time the war commenced.

[Cited in Brown v. Hiatt, Case No. 2,011.]

2. Upon the termination of the war, obligations contracted before its commencement, between the respective citizens, though the remedy for their recovery is suspended during the war, are revived.

3. Where a policy of insurance against fire was issued by C., in Connecticut, in August, 1860, to L., a resident of Mississippi, on a building in the latter state, and a total loss occurred in January, 1861, during the life of the policy, and the policy contained a condition that no suit should be sustainable on it unless brought within twelve months after a loss, and this suit was brought on it in October, 1866, *held*, that the contract of insurance, with all its incidents, including said condition, and all rights of action under the policy, were suspended during the continuance of the war which commenced, after said loss, between the so-called Confederate States, of which Mississippi was one, and the United States.

[Cited in Brown v. Hiatt, Case No. 2,011; Kanawha Coal Co. v. Kanawha & O. Coal Co., Id. 7,606.]

4. In determining when the rights suspended by such war revived, recourse can only be had to the government of the United States, as the war was a civil war, in which the so-called Confederate States were defeated, and their organization, as a de facto government, was politically annihilated.

5. The courts of the United States, in ascertaining when such war ceased, must look exclusively to the action of the president, or congress, or both.

6. The president had authority to issue his proclamation of June 13, 1865, (13 Stat. 763), removing the restrictions upon intercourse with the

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

[2] [Reversed in 13 Wall. (80 U. S.) 158.]

states east of the Mississippi river, which had been in rebellion.

7. By virtue of that proclamation, the said contract of insurance, though suspended during the war, revived on the 13th of June, 1865, and was, from that date, in full force, with the right to sue upon it.

[Cited in Perkins v. Rogers, 35 Ind. 156; Seymour v. Bailey, 66 Ill. 300.]

8. This suit, not having been brought within the time limited by the policy, exclusive of the whole period of disability, was held not to be maintainable.

This was a suit, commenced October 31, 1866, on a policy of insurance against fire, issued by the defendants to William R. Luckett, of Mississippi, August 3, 1860, upon a building situated at the Artesian Springs, in Madison county, in that state. It was tried before the court, without a jury. It was conceded that a total loss occurred on the 5th of January, 1861, during the life of the policy, that the assured subsequently died, and that the defendants were liable to his administrator [John T. Semmes], in this suit, unless the right to recover was barred by lapse of time. Among the conditions attached to, and making part of, the policy, was the following: "It is furthermore expressly provided, that no suit or action of any kind against said company, for the recovery of any claim upon, or by virtue of, this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and, in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed conclusive evidence against the validity of the claim thereby so attempted to be enforced." The defendants pleaded in bar the above condition in the policy. To this plea the plaintiff replied, setting up the following matters, by way of answer thereto: (1) That, though the loss happened on the 5th of January, 1861, yet the defendants were, by the terms of the policy, to have sixty days after notice and proofs of loss within which to make payment, and that the assured, though then in life, could bring no action on the policy till after the lapse of the sixty days. (2) That the policy was delivered, and the contract therein was made and to be performed, in the state of Mississippi, where the assured continued to reside until his death, and where his administrator had since resided; that the policy was made under, and with express reference to, a certain statute of said state, whereby it was the duty of the defendants to keep, during the life of the policy, an agent in that state, upon whom service of process might be made, and also funds in the same state, from which any loss which might occur might be paid or collected; that the defendants, in January, 1861, wrongfully revoked and discontinued their agency in that state, and withdrew all their funds therefrom, and, from that time to the commencement of the suit, had had neither agent nor funds therein, whereby the plaintiff had been wrongfully deprived of all means of instituting or prosecuting any action in that state, and of procuring therein any adjustment or satisfaction of the loss. (3) That the assured, down to the time of his death, was a resident and citizen of the state of Mississippi, and that the plaintiff, during his whole life, had been and still was a resident and citizen of the same state; and that, from April 15, 1861, to April 2, 1866, a state of war between the so-called Confederate States, including the state of Mississippi, and the United States, existed, whereby all right of the assured during his life, and of his administrator since his death, to maintain any action against the defendants, was by law suspended, during all that time. The defendants traversed the replication.

The court found the following facts: (1) That the assured, from the date of the policy until his death, April 6, 1865, was a citizen of, and actually resided in, the state of Mississippi; and that the plaintiff was his administrator, duly appointed and qualified in said state, and had, during all his life, been a citizen thereof, and an actual resident therein. (2) That the plaintiff had taken out ancillary letters of administration in the state of Connecticut. (3) That the loss against which the policy provided occurred on the 5th of January, 1861, and had never been paid. (4) That the notice and proofs of loss required by the policy were duly furnished to the defendants; and that the sixty days therefrom expired April 11, 1861. (5) That, from the date of the policy to the 23d of January, 1861, the defendants had an agent and funds in Mississippi, as required by the law of that state; that, on the last-named day, they revoked the powers of their agent, so far as they could legally revoke the same, and had never appointed any other; and that, on the same day, they withdrew all their funds from said state, and since then had had therein no funds, nor any agent authorized to accept service of process, unless that power of their former agent continued, notwithstanding the defendants' formal revocation thereof.

William Hammersley and Henry K. W. Welch, for plaintiff.

Charles R. Chapman and Alvan P. Hyde, for defendants.

SHIPMAN, District Judge. I pass the question whether the year in which the plaintiff, or his intestate, was bound, by the condition in the policy, to commence suit or be barred a recovery, commenced to run upon the lapse of sixty days after the proofs of loss were furnished, as the result at which I have arrived renders that question immaterial.

The fact alleged in the replication and found by the court, that the defendants revoked, or rather attempted to revoke, the power of their agent in Mississippi to accept service, may, also, be dismissed. If I should assume, as the plaintiff claims, that the law of Mississippi on

the subject controlled the rights of the parties under the contract on this point, it would not support the inference which the plaintiff seeks to draw. There is no allegation that the agent personally left the state. The presumption, therefore, is that he remained there. If the law of Mississippi was binding on the defendants, requiring them to continue an agent in that state empowered to accept service, or upon whom service might be made, during the life of this policy, and until the loss under it should be paid, then the agent in question must be deemed to have possessed that power. The defendants conferred it upon him, and he continued to represent them in that capacity till January 23, 1861, as is conceded on all hands. But it is found that they revoked this power of their agent on the last-named date, so far as they could. Yet, if the plaintiff's claim, that the statute of Mississippi on this subject made part of this contract of insurance, is good, then the defendants could not revoke this part of the agent's authority. One party alone cannot change a stipulation in a contract, either express or implied, which is to enure to the benefit of another. Assuming, then, merely for the purposes of this question, that the main legal proposition of the plaintiff on this point is correct, it follows that the power of the agent, or, to speak more accurately, his character as the representative of the defendants in this matter, still remained, notwithstanding their attempt to revoke it. Service that would have bound the defendants could still have been made on him. The suit could have been brought in Mississippi within the twelve months, as provided in the condition, free from any difficulty on this point.

Then, as to the withdrawal of their funds by the defendants. Whatever embarrassment this would have caused to the plaintiff or his intestate, it could not prevent or delay him from bringing his suit, and thus complying with the condition. He could have merged his claim in a judgment, and then pursued satisfaction in any other forum where property could have been found, unembarrassed by this twelve months' restriction. I advert but briefly to these points, as they were not pressed on the argument.

But a question of much more magnitude and difficulty remains to be considered. The replication sets up the late Rebellion, and alleges that a state of war existed between the organization known as the Confederate States, including the state of Mississippi, and the United States, from the 15th of April, 1861, to the 2d of April, 1866, whereby it is claimed that this contract, and all right to sue upon it, was, during all that time, suspended. There is no allegation that the courts of Mississippi, or the national courts in that state, were closed for any specific length of time, or that the plaintiff, or his intestate, labored under any personal disability, arising out of his actual participation in the war, or that he was under the control of any vis major, beyond what the law implies from the state of war. The whole question, therefore, turns on the legal consequences of the war, in their operation on this contract, and the length of time these consequences continued.

It is, of course, conceded, that a state of war, recognized as such by and between the belligerent parties, suspends all contracts in existence between the citizens of the respective belligerents at the time the war commences. The authorities are uniform on this subject. The general rule is well stated by Mr. Justice Nelson, in the Prize Cases, 2 Black [67 U. S.] 635, 687: "The legal consequences resulting from a state of war between two countries at this day, are well understood, and will be found described in every approved work on the subject of international law. The people of the two countries become immediately the enemies of each other—all intercourse, commercial or otherwise, between them, unlawful —all contracts existing at the commencement of the war suspended, and all made during its existence utterly void." This doctrine has been repeatedly recognized and applied to our late civil war by the courts of this country, both state and national. Hanger v. Abbott, 6 Wall. [73 U. S.] 532; Tucker v. Watson, 6 Am. Law Reg. [N. S.] 220; Jackson Ins. Co. v. Stewart [Case No. 7,152]; Conn. Mut. Life Ins. Co. v. Hall [68 Ill. 357].

It is equally well settled, that, upon the termination of the war, obligations contracted before its commencement between the respective subjects, though the remedy for their recovery is suspended during the war, are revived. Lawr. Wheat. (2d Ed.) p. 877, pt. 4, c. 4, and the cases above cited. In Hanger v. Abbott and Jackson Ins. Co. v. Stewart this doctrine was applied to statutes of limitation. In the former case, Mr. Justice Clifford, speaking for the court, says: "Where a debt has not been confiscated, the rule is undoubted, that the right to sue revives on the restoration of peace; and Mr. Chitty says, that, with the return of peace, we return to the creditor the right and the remedy. Unless we return the remedy with the right, the pretence of restoring the latter is a mockery, as the power to exercise it with effect is gone by lapse of time during which both the right and the remedy were suspended."

Applying these doctrines to the present case, it follows, that the war in which the people of Mississippi on one side, and those of Connecticut on the other, participated, suspended this contract with all its incidents, including the condition set up in bar of this action, and all rights of action under it. In view of the result to which I have come, it is unnecessary to determine the precise date of the beginning of the war, when this suspension commenced. It is immaterial whether we take the 15th of April, 1861, as stated in the replication; or the date of the president's proclamation (12 Stat. 1258), calling for volunteers; or the 19th of April, 1861, when, by proclamation (Id.), he declared that an

insurrection had broken out in certain states, including Mississippi, and declared his purpose to blockade their ports; or the 16th of August, 1861, when, in pursuance of the act of congress of July 13, 1861 (12 Stat. 255), he, by proclamation (Id. 1262), formally declared the inhabitants of those states in insurrection, and announced the prohibition of all commercial intercourse between them and the inhabitants of the other parts of the United States. It is conceded, on all hands, that, at least from August 16, 1861, this contract was suspended, both by the inevitable legal effect of the state of war, and by the interdiction of intercourse announced by the proclamation of that date. The rules of public law, as well as the act of congress referred to, lead to this result. Therefore, as the twelve months within which a suit could be legally brought on this policy had not expired when the war commenced, and thus imposed a disability on the assured, it becomes essential to determine whether this disability has been removed, and, if so, when that removal took place. It is conceded, in this case, that the disability has been removed, and the right to sue revived. The plaintiff not only admits, but must maintain, that this took place before October 31, 1866, when he brought this suit. Otherwise, he could have no standing in court. As the contract, and all remedies under it, were absolutely suspended by the war, no suit could have been brought while that suspension continued. But the plaintiff goes further, and alleges, in effect, in his replication, that the war ended, so far as the state of Mississippi and its inhabitants are concerned, on the 2d of April, 1866, the date of the president's proclamation (14 Stat. 811), to that effect, and not before. On the other hand, the defendants insist, that it ended as early as June 13, 1865, when the president, by proclamation (13 Stat. 761), appointed a provisional governor over the state of Mississippi, and directed the United States district judge for that judicial district to proceed to hold the courts.

Now, it must be remembered, that, though this was a war between belligerents, attended, while it continued, by those legal consequences which public law always attaches to legitimate warfare, yet it was a civil war, in which the revolted party was defeated, and its organization as a de facto government, under the name of the Confederate States of America, politically annihilated. No treaty of peace, in the ordinary sense of that term, could have been negotiated, as but one of the parties which had waged the war was in existence, at its close, as a treaty-making power. Therefore, no such treaty has drawn the line where the war ended, and suspended contracts revived. We must, therefore, look to the acts of the only surviving party, to ascertain when those disabilities, legally imposed by the state of war, ceased. It is hardly necessary for me to say, that the principle here stated lends no support to the doctrine put forth in some quarters, and which that distinguished jurist, Mr. Justice Sprague, characterized as a "grave and dangerous error"—that the suppression of the Rebellion conferred upon the United States the rights of conquest—the right to treat the states included in the Rebellion as foreign territory acquired by arms, and to permanently divest them and their inhabitants of all political privileges. The Amy Warwick [Case No. 342]. That notion has nothing to do with the point now under consideration. The United States, in suppressing the Rebellion, destroyed the political organization known as the Confederate States, and not the individual states as political communities. But, though the states remained after the contest ended, the belligerent power known as the Confederate States, which had represented them in the war, disappeared at its close. Neither of the states which remained had the power, or attempted, to negotiate a treaty of peace with the United States. In determining, therefore, when the rights suspended by the war revived, we must look to the action of the only power in existence which could effectually deal with that subject. This power was the government of the United States.

It is a settled rule with the courts of the United States, in ascertaining whether or not war exists, to look to the action of those departments of the government to which that subject is confided by the constitution. Courts never inquire, when investigating questions of this character, when active hostilities ceased. The termination of war, and the establishment of the relations of peace, are political acts, to be performed exclusively by the departments of the government to which political powers and duties are entrusted. The action of those departments, when within the authority conferred by the constitution, is conclusive and binding on the courts as well as on citizens. When war has existed between the United States and a foreign country, its termination is easily ascertained by a reference to the treaty of peace which follows it, and which is consummated by the president, acting by and with the advice and consent of two-thirds of the senate. As no such treaty did, or could, mark the close of this civil war, we must look to the action of the president, or congress, or both, and from that action ascertain when the war ended, and when the legal consequences which flowed from it ceased to act in any given case.

I have already shown, that, by the rules of public law universally recognized among civilized nations, as well as by the decisions of our own courts, the existence of this war suspended all contracts between the citizens of the respective belligerents, entered into before it commenced. It rendered, for the time being, all commercial intercourse between the citizens of the two sections unlawful, and converted them into enemies. But, in addition to this, congress, on the 13th of July, 1861, pass-

ed the act, before mentioned, authorizing the president, in certain cases, by proclamation, to declare the inhabitants of a state in insurrection against the United States, whereupon all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States, should become unlawful. In pursuance of that statute, the president, on the 16th of August, 1861, issued the proclamation before mentioned, declaring the inhabitants of certain states, including Mississippi, in insurrection against the United States. By force of this proclamation, then, and the statute authorizing it, as well as by the legal effect of the war then existing, all pre-existing contracts between the people of the respective belligerents, including the right to enforce them by judicial proceedings, were thenceforth suspended. In progress of time, hostilities ceased, and the executive department of the United States commenced a series of acts recognizing a change in the relations of the government towards the inhabitants of the states lately in rebellion. On the 22d of May, 1865, the president issued a proclamation (13 Stat. 757), raising the blockade of most of the closed ports, and removing "all restrictions upon trade heretofore imposed in the territory of the United States east of the Mississippi river, save those relating to contraband of war, to the reservation of the rights of the United States to property purchased in the territory of an enemy, and to the twenty-five per cent. upon purchases of cotton." The same proclamation declared that all provisions of the internal revenue law should be carried into effect under the proper officers. On the 29th of May, 1865, the president proclaimed (Id. 758) amnesty and pardon to all persons in the late revolted states, except certain specified classes, with restoration of all rights of property, except as to slaves, and except in cases where legal proceedings had been commenced for the confiscation of property of persons engaged in rebellion, on condition that they should take and subscribe a certain oath. On the same day he issued a proclamation (Id. 760), appointing a provisional governor for North Carolina, and prescribing his duty and authority. On the 13th of June, 1865, he issued a similar proclamation, before referred to, relating to Mississippi. On the same day he issued a proclamation (Id. 763), appointing a provisional governor over Tennessee, and declaring, among other things, "that all restrictions upon internal, domestic, and coastwise intercourse and trade, and upon the removal of the products of states heretofore declared in insurrection, reserving and excepting only those relating to contraband of war, as hereinafter recited, and also those which relate to the reservation of the rights of the United States to property purchased in the territory of an enemy, heretofore imposed in the territory of the United States east of the Mississippi river, are annulled, and I do hereby direct that they be forthwith removed." The other provisions of this proclamation it is not necessary to notice here. On the 2d of April, 1866, the president issued a proclamation, before cited, formally declaring the insurrection that had existed in certain states, including Mississippi, at an end, and to be thenceforth so regarded. It should be remarked, that there was no executive declaration, before that of April 2, 1866, that the insurrection was ended in any state, except Tennessee. On the 13th of June, 1865, the president did, in the proclamation already cited, declare it terminated in the last-named state. In the proclamation of the same date relating to Mississippi, and in the one of May 29, 1865, relating to North Carolina, he spoke of the armed forces of the Rebellion as having been "almost entirely overcome."

We must now inquire into the legal character of the proclamations of the president restoring commercial intercourse between the states which had been engaged in the Rebellion and the rest of the United States. And, first, as to his authority to issue such proclamations. I think there can be no doubt on that point. The supreme court of the United States has recognized the power of the president to, in effect, declare the inhabitants of the disaffected states in a state of insurrection as early as April 19, 1861, when he set on foot the blockade of certain ports, including those in Mississippi. Prize Cases, 2 Black [67 U. S.] 635, 670. In the opinion in those cases, Mr. Justice Grier, speaking for a majority of the court, says: "Whether the president, in fulfilling his duties, as commander in chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions, as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this court must be governed by the decisions and acts of the political department of the government to which this power was entrusted. He must determine what degree of force the crisis demands. The proclamation of blockade is itself official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure, under the peculiar circumstances of the case." There had been no declaration of war. Congress alone can declare war; but the court held, in the same cases, that that body could not declare war against a state, or any number of states, by virtue of any clause in the constitution. It also held, that the president had no power to declare or initiate a war, either against a foreign nation or a domestic state. It distinctly decided, however, that the president could, and did, recognize a state of war as actually existing, and that the courts were bound to accept such recognition of the fact as conclusive. Of course, they must recognize the legal consequences which flow from the state of war. It would seem to follow, that, if the president has the power to recognize a state of war as an existing fact, and that this recognition is binding on the courts, he must equally have the power to rec-

ognize a state of peace as an existing fact, and that the courts are equally bound by such recognition. Especially would this seem to be the case in this civil war, where no formal treaty of peace could mark the line where war ended and peace commenced, and where there was no declaration of the legislature inconsistent with the proclamation of the executive.

But, whether this is the true doctrine or not, it must be remembered, that the act of congress of July 13, 1861, authorized the president to declare certain states in insurrection, whereupon all commercial intercourse was to become unlawful. On the 16th of August following, he issued such a proclamation. From that time forward, the interdiction of commercial intercourse had the double sanction of public law and a special act of congress, operating from the date of the proclamation. Now, it may be said with some force, that, inasmuch as commercial intercourse became unlawful under this act of congress, ipso facto, on the declaration of the president of the fact of insurrection, it must have continued unlawful until the insurrection was, by him or congress, declared ended; and that, therefore, he could not legalize free intercourse between the citizens of the two sections, without first declaring the rebellion suppressed. But this would be a very narrow and technical view to take of a great public question, relating to an anomalous condition of public affairs, and bearing upon interests of infinite diversity and great magnitude. The act of July 13, 1861, was, by its express terms, to be operative as an interdiction of intercourse, only through a proclamation of the president. Congress left it to his discretion to put the interdiction in force. I think, by fair implication, it left with him the power to withdraw it. There were reasons of the highest public import why this power should remain with him. The war had commenced during a recess of congress. It was necessary for the president to act promptly, and he called for troops, and set on foot a blockade, some time before congress could assemble. Hostilities might cease, and the war be substantially terminated, during a recess of congress, when prompt action by the president might be of the highest importance to our foreign and domestic commerce. This power of the executive to restore pacific intercourse seems to have been practically conceded, without dissent from any quarter. Neither congress, nor the executive, nor the people have acted upon the assumption that intercourse between the people of the two sections in private civil affairs has been unlawful since June 13, 1865. On the contrary, by the common consent of all departments of the government, such intercourse was substantially free and unrestrained after that date as well as after the 2d of April, 1866. Business began to seek its old channels, new contracts were made, old ones were litigated and enforced in the courts of both sections, and money was invested at the South in various enterprises. No doubt would ever have arisen as to the validity of the president's proclamation removing all restrictions upon ordinary pacific intercourse between the people, but for the subsequent struggle between congress and the executive department as to the political status of the Southern states. But that controversy has no proper relation to the question now under consideration. Congress has never, even by implication, declared commercial and pacific intercourse of any kind unlawful since the president assumed to remove the restriction, on the 13th of June, 1865. On the contrary, its silence on this subject, when legislating on the purely political questions involved in what is called "reconstruction," supports the inference, that the ordinary civil pursuits of the people, and all the rights incident to them, including the right to free intercourse between the citizens of both sections, and the right to resort to legal civil remedies, were considered by congress itself as no longer under the ban of war. I am, therefore, satisfied, that the authority of the president to issue the proclamation of June 13, 1865, restoring free intercourse, was full and ample, and that its exercise has been acquiesced in by the national legislature.

We are next to consider what was the legal effect of that proclamation. Its language has already been cited. Beyond all question, it embraces all contracts thereafter to be made, and delivers them from the invalidating effect of public law, as well as from the effect of the statute of July 13, 1861, and the proclamation made in pursuance thereof, August 16th, following. Such contracts being valid, the right to enforce them in the courts necessarily followed. A citizen of one section could sue a citizen of the other on such a contract, without having his suit defeated on the ground that it was invalid, either by public or statute law, or abated under the plea of alien enemy. Both the right and the remedy on such a contract were complete.

The question then arises—in what condition were the numerous contracts, existing when the war commenced, left by the proclamation of June 13, 1865? Were they still suspended, and the parties without any right to enforce them? Undoubtedly, unpaid debts, contracted before the war, could have been lawfully paid by citizens of one section to those of the other, at any time after the date of that proclamation. This would be exercising one of the privileges of "domestic intercourse," restored in express terms by that proclamation. It would seem to follow, that the right to enforce payment through ordinary legal remedies must have been restored also. It would be absurd to contend that the proclamation removed the prohibition to enter into new contracts, and left those entered into before, and existing at, the commencement of the war, suspended. Such a distinction would be unjust as well as absurd. It would be a distinction between rights of the same class, and could rest upon no principle of natural justice, good sense, or sound policy. No such construction should be given to a state paper like this proclamation. It was

made in the interests of peace and its ordinary beneficent pursuits, and in furtherance of the rights of the people of both sections of a common country. No possible advantage in the way of convenience, interest, or security to the public or to individuals, consistent with justice, requires that its operation and legal effect should be thus contracted. It should, therefore, receive a liberal, rather than a narrow and technical, interpretation.

It follows, from these principles, that the contract upon which this suit is founded, though suspended during the war, while intercourse between the citizens of the belligerent sections was unlawful, revived on the 13th of June, 1865, and was from that date in full force. From that time there has been no legal obstacle to its enforcement. Whether Mississippi was without civil tribunals during any portion of the time since the contract revived, is not averred in the replication, nor was it proved on the trial. This court cannot have judicial knowledge on that point. But it is immaterial. The plaintiff could have resorted to the state tribunals of Connecticut, or to this court, at any time after his appointment as administrator. Not having brought his suit within the time limited by the policy, exclusive of the whole period of disability, the plea in bar is a conclusive answer to his right to recover. Judgment must, therefore, be entered for the defendants.

[This judgment was reversed by the supreme court, where it was carried by writ of error. 13 Wall. (80 U. S.) 158.]

Case No. 12,652.

SEMMES v. LEE.

[3 Cranch, C. C. 439.] [1]

Circuit Court, District of Columbia. May Term, 1829.

PLEADING AT LAW—ACCOUNT—WAIVER.

If one of the counts be "for matters properly chargeable in account, according to an account therewith filed," according to the Maryland practice; and there be no account filed, and nor assumpsit be pleaded to all the counts, the plaintiff may give evidence upon that count: the defendant by his plea having waived the objection to the same.

Indebitatus assumpsit, 1st, for matters properly chargeable in account, "as by a particular account thereof, herewith into court exhibited, appears;" but no account was therewith exhibited. 2d. General indebitatus assumpsit for goods, wares, and merchandise sold and delivered. 3d. Quantum meruit for goods, &c. sold and delivered. 4th. The common money counts; and 5th. Insimul computasset.

The plaintiff offered evidence that the defendant boarded and lodged at the plaintiff's house six months. The defendant objected that that evidence did not support either of the counts. And of that opinion was THE COURT (MORSELL, Circuit Judge, dissenting).

The plaintiff then offered an account in evidence, and proved that it had been for a considerable time in the defendant's possession, and that in a conversation between the witness and the defendant, he did not object to the items of the account, except that he was charged daily board for part of the time, when he ought to have been charged for yearly board only; and that the prices were too high.

Mr. Redin, for plaintiff, contended that this account was evidence upon the insimul computasset, and on the count for goods sold and delivered, and upon the count for matters properly chargeable in account.

THE COURT (nem. con.) was of opinion that it did not support the count upon insimul computasset, but that it was evidence upon the count for goods sold and delivered, so far as it consisted of charges of that kind; and also (CRANCH, Chief Judge, contra) that it was evidence upon the first count for matters properly chargeable in account.

CRANCH, Chief Judge, was of opinion that no evidence could be admitted upon the first count, because it was an imperfect count,—the matters chargeable in account not being in any manner specified,—no account having been exhibited with the declaration; and that it was not competent for the plaintiff to supply the defect after the jury was sworn.

MORSELL, Circuit Judge, was of opinion that the objection to the first count came too late. It ought to have been taken advantage of by demurrer; and that the plea of non assumpsit, being general to all the counts, the objection was to be considered as waived; and that it was competent to the plaintiff to give, under that count, evidence of any matter properly chargeable in an account. And that to the objection of surprise, for want of notice, it was a sufficient answer to say, that the account now offered in evidence was delivered to the defendant, and remained some time in his possession.

Verdict for the plaintiff. A motion for a new trial was made and overruled; THE COURT being of opinion that substantial justice had been done.

Case No. 12,653.

SEMMES v. McKNIGHT.

[5 Cranch, C. C. 539.] [1]

Circuit Court, District of Columbia. March Term, 1839.

LANDLORD AND TENANT—LEASE—REPLEVIN—ADVERSE CLAIM — SALE FOR TAXES — VOID SALE—COLLUSION.

1. A lease for twenty years, not acknowledged or recorded, is not a lease at will; and the landlord may distrain for rent, although the original lessee should not have been in possession for several years next before the distress, or should have died.

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

2. The tenancy does not cease by the tenant's setting up an adverse claim more than six months before the distress.

3. A bonâ fide purchaser at a tax sale without collusion with the tenant, may enter under his purchase, and convey to a third person, who will not thereby become tenant of the original landlord; but if there be collusion between the tenant and the purchaser, to suffer the taxes, which it was the duty of the tenant to pay, to remain unpaid, and thereby to cause a sale by the collector of taxes, so as to enable the purchaser to buy in the property for the benefit of the tenant; the title of the property is not changed by such tax sale, and the tenant remains tenant to the original landlord.

4. The assessment and advertisement of property in a wrong name, does not make the tax sale void, since the act of May 26, 1824 [Davis, Laws D. C. 379].

5. If an improvement extend over divers lots, personal property found on any of those lots is liable for the taxes on all the lots so improved.

6. Under a reservation of twenty dollars rent "clear of all taxes and charges," the tenant is bound to pay the taxes as well as the rent; although there be a clause of re-entry for the nonpayment of the rent.

Replevin [by Basil Semmes against George B. McKnight]. Avowry for $90 rent arrear, under an indenture of lease from W. Prout to John Chalmers, Jr., dated December 1, 1816, for twenty years, of the whole square, No. 876, in the city of Washington, at $20 a year, clear of "all taxes, charges, rates, or assessments whatsoever, which may become due on said piece of ground," with a clause of re-entry. "If the said yearly rent of $20, hereby reserved, or any part thereof, shall be unpaid at the expiration of sixty days after the same shall become due, and not sufficient effects on the premises whereon to levy the said rent." This lease was not acknowledged or recorded. The avowry set forth the lease, the death of Mr. Prout, seised of the rent and the reversion in fee, the descent to his heirs as tenants in common, their entry and partition, and the allotment of the square, No. 876, with the rent, to the wife of the defendant, one of the coheirs, the seisin of the defendant and wife, and the nonpayment of five years' rent ending on the 1st of December, 1835. The plaintiff pleaded non tenuit, non dimisit, and no rent arrear, upon which pleas issues were joined. Evidence was offered at the trial to show that Joel Cruttenden was the agent of Chalmers for paying the rent to Mr. Prout; that he suffered the taxes to remain unpaid, whereby the property was sold, in December, 1827, and bought in by Mr. Cruttenden, who, however, continued to pay the rent to Mr. Prout, until 1830; that Mr. Prout died, and Mr. Cruttenden, in 1835, obtained a deed from the mayor of Washington, in confirmation of his purchase at the tax sale, and in the same year, conveyed the same to the plaintiff; that Chalmers died in 1834. The plaintiff claimed under the tax sale to Mr. Cruttenden.

Mr. Bradley, for the defendant, contended that that sale was void by the collusion between Mr. Cruttenden and Mr. Chalmers, and that the tenancy still continued, notwithstanding the sale.

R. J. Brent, for plaintiff, prayed the court to instruct the jury that the lease from Prout to Chalmers only operated as a lease at will, and that if they should believe from the evidence that Chalmers was not in possession, either by himself or by his tenant, for several years before the distress; or if they find that Chalmers was dead in 1834, then the plaintiff is entitled to recover.

But THE COURT refused to give the instruction. They also refused to instruct the jury that if they should find that more than six months before the distress laid, the plaintiff held adversely to the claim of the defendant, and that such adverse claim was known to the heirs of the said W. Prout, or to their agent, or to the defendant, then the plaintiff is entitled to recover.

Mr. Brent then prayed the court to instruct the jury that, if they should be of opinion, from the evidence, that the said Joel Cruttenden fairly and bona fide purchased the property at a tax-sale made by the corporation in 1827, without any collusion with the said Chalmers, the tenant, who was bound to pay the taxes, and that when he entered upon the same, he did so in virtue of that purchase, and not as tenant of the said Chalmers, or of the heirs of Prout, under whom the defendant claims; and that afterwards, and while he so possessed the property, claiming it in fee simple, in virtue of the said sale, he put the plaintiff in possession under a contract to convey the same to him, and did actually convey the same to the said plaintiff after the corporation had made the deed to the said Cruttenden, and about eight months before the distress was levied, then the plaintiff is entitled to recover in this action.

Which instruction THE COURT gave, but also, at the prayer of Mr. Bradley, gave the following instruction, namely, that if from the evidence, the jury shall find that the said Chalmers entered into possession of the premises under the said lease from W. Prout, and remained and continued in such possession up to, and after the time of the said tax sale, in 1827, and that the said Joel Cruttenden, as the agent of the said Chalmers, paid rent to the heirs of the said Prout, which had accrued after such tax sale, or that he was such agent before the said tax sale, and did not then set up, or pretend to any title to the said premises under the said sale, and that the said Cruttenden had notice of the terms of the said lease from Prout to Chalmers, and that the said Chalmers was thereby bound to pay the taxes on the property, then the said Cruttenden did not acquire any title to the said premises by reason of the said tax sale, and the said Chalmers continued the tenant of the said premises, and the plaintiff is not entitled to recover.

Mr. Bradley prayed the court to instruct the jury that, if they found from the evidence, that the premises were assessed in the name of "John Chalmers, or the Bank of Washington," the assessment was not in compliance with the terms of the charter, and the tax sale in 1827 was, for that reason, void.

But THE COURT, upon considering the act of May 26, 1824, § 2, supplementary to the charter of 1820, refused to give the instruction.

Mr. Brent then prayed the court to instruct the jury that, after the 1st of December, 1823 (namely, after the expiration of the first seven years of the lease), the lease operated only as a lease from year to year, and if they find, from the evidence, that the said Chalmers died in the year 1834, and that the plaintiff from that time and before has been in possession of the premises, claiming adversely to the defendant, then there was no tenancy subsisting at the time of the distress laid, and the plaintiff is entitled to recover.

But THE COURT refused to give the instruction; the defendant having offered evidence that the square No. 876, the premises in question, contained 13 lots, and that a ropewalk was erected thereon, extending across several lots, and that upon one of those lots there was personal property enough, at the time of the tax-sale to pay the taxes.

Mr. Brent prayed the court to instruct the jury, in effect, that goods, found upon one of the lots, are not liable for the taxes upon the other lots.

But THE COURT refused to give the instruction, and said: The words of the charter of 1820, § 10, are, "Provided that no sale shall be made of any improved property, whereon there is personal property sufficient to pay the said taxes." If an improvement extend over divers lots, such lots are improved property; and personal property found on any part of that improved property is liable for the taxes due thereon.

THE COURT also decided that, under a reservation of "$20 a year rent clear of all taxes and charges," the tenant is bound to pay the taxes as well as the rent, although the lease contain a clause of re-entry, "in case the said rent of $20, or any part thereof, should remain unpaid for 60 days," &c.

Verdict for defendant.

Case No. 12,654.

SEMMES v. ONEALE.

[1 Cranch, C. C. 246.] [1]

Circuit Court, District of Columbia. July Term, 1805.

REPLEVIN—AMENDMENT TO PLEA.

After plea of property in the defendant in replevin, the court will permit the defendant to amend by pleading property in a stranger, on payment of all antecedent costs, and a continuance of the cause.

Replevin. Plea, property in defendant. Leave given to plead property in a stranger, on payment of all antecedent costs, and a continuance, if requested.

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

SEMMES (POWER v.). See Case No. 11,360.

Case No. 12,655.

SEMMES et ux. v. SHERBURNE.

[2 Cranch, C. C. 534.] [1]

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

PLEADING AT LAW—TROVER—DECLARATION—CONCLUSION.

In trover by husband and wife for a conversion of the wife's goods before marriage, the declaration must conclude ad damna ipsorum.

Trover by husband and wife for the wife's slave. The declaration averred the trover and conversion to have been before the intermarriage, and concluded to the damage of the husband alone.

After verdict for the plaintiffs [Jesse M. Semmes and wife], with $300 damages, at April term, 1824, Mr. R. S. Coxe, for the defendant [J. H. Sherburne], moved in arrest of judgment that the declaration should have concluded ad damna ipsorum; and cited 1 Chit. Pl. 60, 61, 398; 2 Chit. Pl. 49, 50, 59, 374; Nelthrop v. Anderson, 1 Salk. 114.

Mr. Morfit, contra, cited 2 Esp. N. P. 186; Blackborne v. Greaves, 2 Lev. 107; Esp. N. P. 201; Countess of Rutland's Case, Cro. Eliz. 377; 2 Bl. Comm. 433; Bloxam v. Hubbard, 5 East, 407.

This objection had become important, as the husband had died before verdict, and his death had been suggested upon the docket at October term, 1823.

THE COURT (THRUSTON, Circuit Judge, absent) arrested the judgment. The surviving plaintiff had leave to amend, and a venire de novo was awarded, at May term, 1825 [Case No. 12,656].

[See Case No. 12,760.]

Case No. 12,656.

SEMMES v. SHERBURNE.

[2 Cranch, C. C. 637.] [1]

Circuit Court, District of Columbia. Dec. Term, 1825.

SLAVERY—LOSS OF SLAVE—JUDGMENT — HIRE OF SLAVE—ESTOPPEL.

1. If the plaintiff's slave be hired to the defendant in the District of Columbia, who carries her to New Hampshire without the consent or

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

authority of the plaintiff, by means whereof she is lost to the plaintiff, he may, in trover, recover the value of the slave. But if the plaintiff assented to the defendant's taking the slave to New England either before or after he took her, and she was lost without any negligence or omission of the defendant, the plaintiff is not entitled to recover.

2. In trover for a slave, the plaintiff cannot recover if he has obtained judgment against the defendant in a previous suit for the hire of the slave to a period subsequent to the commencement of the action of trover; but if, in making his claim for the hire of the slave, he did not mean to charge for the hire to a period later than the commencement of the action of trover, then such mistaken claim and the judgment thereon are not conclusive evidence against the plaintiff in the action of trover.

Trover for a slave. This cause having come on to trial again upon the amended pleadings [Case No. 12,655].

Mr. Key and Mr. Morfit, for plaintiff.
Mr. Coxe, for defendant.

THE COURT, at the prayer of the plaintiff's counsel, instructed the jury, that if they believed from the evidence that the defendant, without the consent or authority of the plaintiff carried his female slave away to N. Hampshire and did not bring her back again and return her to the plaintiff, and that by reason of her being so carried away, the plaintiff has lost her, the plaintiff is entitled to recover the value of the slave. But at the prayer of the defendant, further instructed the jury that if they should find from the evidence that the plaintiff had claimed and recovered judgment against the defendant for the hire of the slave up to a time subsequent to the institution of this suit, such claim and judgment are conclusive evidence of a waiver, by the plaintiff, of any unlawful conversion by the defendant prior to the commencement of this suit, and the plaintiff is not entitled to recover in this action. But if the plaintiff, in making his claim for the hire of the slave, upon which he had recovered judgment, did not mean to charge for the hire of the slave to a period later than the commencement of this suit. then such mistaken claim so made by the plaintiff, and the judgment thereon, are not conclusive against the plaintiff in this action.

THE COURT further instructed the jury, at the prayer of the defendant, that if they should find from the evidence that the plaintiff assented to the taking of the slave to New England, either before or after the defendant took her, and that such slave was lost without any negligence or omission of the defendant, the plaintiff is not entitled to recover.

Verdict for the plaintiff, $360, and judgment.

[See Case No. 12,760.]

SEMMES (SHERBURNE v.). See Case No. 12,760.

Case No. 12,657.

SEMMES v. SPRIGG.

[4 Cranch, C. C. 292.] [1]

Circuit Court, District of Columbia. March Term, 1833.

LANDLORD AND TENANT — RENT — DISTRESS — APPRAISEMENT.

Messrs. Turner and Redin, for plaintiff.
Messrs. Key and Dunlop, for defendant.

THE COURT (THRUSTON, Circuit Judge, absent) decided that the appraisement, made at the time of levying the distress, is prima facie evidence of the value of the goods distrained.

Case No. 12,658.

SEMMES et al. v. WILSON.

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

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

NOTES—SALE OF OVERDUE FORGED NOTE—CONSIDERATION.

1. The jury cannot infer that the plaintiffs agreed to run the risk of a note's being a forgery, because it was passed to them long after it was dishonored, and at a discount of 10 per cent. and interest less than its nominal amount.

2. A person who sells a note is always understood as affirming that it is what it purports to be, namely, a genuine note.

3. If it is not what it purports to be, it is nothing, and may be treated as a nullity; and it is not material whether it be given in payment of an antecedent debt, or in exchange for goods immediately sold and delivered, or to be sold and delivered at a subsequent day.

[Cited in brief in Boyd v. Mexico Southern Bank, 67 Mo. 539.]

4. In the first case, it would be no payment; in the second and third cases, there would be a total failure of the consideration; and the person who has parted with his property, in expectation of a consideration, which has failed, may resort to his original cause of action.

5. To enable a plaintiff, who has received from his debtor a forged note, in payment of a precedent debt, to recover upon his original cause of action, it is not necessary for the plaintiff to prove that the defendant knew that the note was forged, when he passed it to the plaintiff, or that he passed it fraudulently.

6. It is only necessary for him to prove that the note was forged, and was passed to him by the defendant, for a valuable consideration, after it was dishonored.

7. It is not necessary that the plaintiff should prove, that he had instituted suits against the maker and indorser of the note, and failed to recover in such suits.

8. He has a right to establish the forgery in a suit directly against the party who passed the note to him.

9. If the innocent bona fide holder of a forged note, which he has received for a valuable consideration, passes it to another innocent person, bona fide, and for a valuable consideration, without indorsing it; although not liable upon the note, he is liable for the amount he has received for it, provided the other party has not been guilty of such negligence as would deprive the person from whom he received the note, of his remedy

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

against prior parties who might be liable to him, and has given notice and offered to return the forged paper in a reasonable time.

10. The person, who passes away a forged note which has lain a long time dishonored in his hand, is not wholly free from blame in not having discovered the forgery; and on that ground may be liable to refund to the person to whom he passed it, the consideration which he received.

Assumpsit, for lumber, sold and delivered. The evidence was, that the defendant [William Wilson], in payment of a debt, due to him, received a note purporting to be made by one W. Lancaster, dated February 9, 1833, for $150, at 60 days, payable to and indorsed by one Eleanor Gardiner in blank; and due on the 10th-13th of April, 1833. The defendant indorsed it in blank, and put it into a bank for collection. It was not paid at maturity, and the defendant withdrew it from bank, erased his indorsement, and offered it to the plaintiffs for $136.75, payable in lumber. The plaintiffs accepted the offer, received the note, and gave the defendant the following due-bill: "Due William Wilson $136.75, payable in lumber. $136.75. Shepard and Mudd. May 27, 1833." Lumber to the amount of $179.94, was delivered by the plaintiffs to the defendant, from time to time, as he wanted it, commencing on the 28th of May, and ending on the 4th of October, 1833. On the 4th of January, 1834, the account was settled by crediting the defendant $136.75 for the note, and $43.19 in cash for the balance. It was afterwards discovered that the note was a forgery; the names of the maker and first indorser being forged. The defendant was ignorant of the forgery when he passed it to the plaintiffs, although it had then been dishonored, and had laid over, at least, forty-four days. It did not appear that the note had been protested.

Upon the trial, Mr. Bradley, for defendant, prayed the court to instruct the jury that if, from the evidence, they should be of opinion that the note was sold by the defendant to the plaintiffs, long after it became due, at ten per cent. and the interest less than the real amount of the note, then it is competent for them to infer that the said discount was intended to cover all risks upon the note, including the risk of its being forged. Which instruction THE COURT (nem. con.) refused to give.

The defendant's counsel then prayed an instruction to the jury that unless they should believe, from the evidence, that the said note was a forged note, and that the forgery was known to the defendant when he passed it to the plaintiffs, and not known to the plaintiffs; and that so knowing the same, the defendant fraudulently passed the said note to the plaintiffs, after the same had been due and unpaid for the space of nine months and upwards; and the plaintiffs paid him the sum of $136.75, being the amount due, after deducting the interest and ten per cent. on the gross amount of the note, then the plaintiffs are not entitled to recover. Which instruction, THE COURT, also, (nem. con.) refused to give.

The counsel for the defendant, then prayed the court to instruct the jury, that the plaintiff is not entitled to recover in this action, unless the jury shall be satisfied by the evidence, that suits were instituted by the present plaintiffs against the drawer and indorser of the said note; and that, in such suits, the plaintiffs failed to recover. Which instruction, THE COURT (THRUSTON, Circuit Judge, contra,) refused to give.

The verdict being for the plaintiff, the defendant's counsel moved the court for a new trial, and assigned the following reasons: 1. Because the court misdirected the jury upon the questions of law submitted to them on the part of the defendant. 2. Because the court permitted testimony to go to the jury, after the same had been objected to by the defendant, to prove the forgery of the names of the maker and indorser of the promissory note offered in evidence by the plaintiffs. 3. Because the court permitted the said promissory note to be given in evidence to the jury. 4. Because the verdict was against the law, and against the evidence.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent). The first prayer required the court to instruct the jury that they may infer that the plaintiffs agreed to run the risk of the note's being a forgery, because it was passed to them long after it was dishonored, and at ten per cent. (and interest) less than its nominal amount; and in refusing that instruction, it is said the court erred. When a person sells a note he is always understood as affirming that it is what it purports to be; that is, that it is a genuine note. If it is not what it purports to be it is nothing, and may be treated as a nullity; and it is not material whether it be given in payment of an antecedent debt, or in exchange for goods immediately sold and delivered, or to be sold and delivered at a subsequent day. In the first case it would be no payment; in the second and third cases there would be a total failure of the consideration; and the party who has parted with his property in expectation of a consideration which has failed, may resort to his original cause of action. A deduction of ten per cent. and interest upon a dishonored note, not indorsed by the party who offers it for sale, would only justify an inference that the party who purchased it had agreed to take the risk of the responsibility of the parties whose names appear upon the note. No one who purchases a note ever thinks of taking upon himself the risk of its being a forgery; nor does he ask the vendor whether it is, as it purports to be, a genuine note. The question, among merchants, would be deemed an insult. It would imply that the vendor knew whether it was or not a forgery; and that if it was, he must be a knave to offer it. He must be considered, therefore, as offering it as a genuine note; and ten per cent. is a moderate discount upon a dishonored note, even if it be a genuine note of solvent parties. The longer

the note remained in the hands of the defendant after it was dishonored, the greater right had the plaintiffs to suppose it to be a genuine note; for it would be reasonable to infer that the defendant would inquire why the note was not paid at maturity; and that if it were not genuine, the forgery would have been discovered. The plaintiff could not suppose that the defendant intended to sell him a counterfeited or a forged note; and as the defendant had had time to discover the forgery, if it was one, the plaintiff must have had full confidence in the genuineness of the note. Neither the length of time since the note became payable, nor the rate of discount, would have justified the jury in inferring that the plaintiffs took on themselves the risk of the note being forged. The plaintiff was not put upon inquiry, by the defendant, as to the genuineness of the note; on the contrary, the length of time that it remained in the hands of the defendant, after it was dishonored, tended to lull him into security upon that point. We think, therefore, that the first instruction prayed by the defendant, was correctly refused.

The second instruction prayed by the defendant's counsel was, that the plaintiffs were not entitled to recover "unless the jury should believe, from the evidence, that the said note was a forged note; and that such forgery was known to the defendant at the time he passed it to the plaintiffs, and not known to the said plaintiffs, and that so knowing the same, the defendant fraudulently passed the said note to the plaintiffs after the same had been due and unpaid for the space of nine months and upwards, and that the plaintiffs paid him the sum of $136.75, being the amount due, after deducting the interest and ten per cent. on the gross amount of said note." This instruction was refused by the court, because they were of opinion that it was not necessary to the plaintiffs' right of action, in this case, that they should prove any of the facts stated in this second prayer, other than that the note was a forged note, and passed, by the defendant, to the plaintiffs for a valuable consideration after it was dishonored. There was no evidence that nine months had elapsed, after the dishonor of the note before it was passed to the plaintiffs. The note fell due on the 10th-13th of April, and it appears from the due-bill given by the plaintiffs to the defendant for lumber, that it was passed to the plaintiffs on the 27th of May, forty-four days after it fell due. The court, however, do not deem the length of time material; except, that the longer it was the less excuse had the defendant for not having discovered the forgery. The court is still of the opinion that the plaintiffs' right to recover in this action, does not depend upon their proving fraud in the defendant, and that this second instruction was properly refused.

The third instruction prayed by the defendant's counsel, was, "that the plaintiffs are not entitled to recover in this action unless the jury shall be satisfied, by the evidence, that suits were instituted by the present plaintiffs against the drawer and indorser of the said note, and that in such suits the plaintiffs failed to recover." Among the cases cited, and many others which have been examined, where suits have been brought to recover money paid upon forged instruments, not one has been found to support the doctrine contained in this prayer. In all of them the forgery has been primarily and directly proved, or attempted to be proved, in the action against the party who passed the forged paper to the plaintiff; and no intimation or suggestion that there should be a suit first brought against the parties whose names were forged. We think this instruction also was correctly refused; and that the plaintiffs had a right to give the note in evidence, and to prove the forgery in this action. The specific grounds alleged for a new trial are, therefore, overruled.

But there is a general allegation that the verdict was against law and evidence. The whole evidence is not stated, but we believe the facts which it tended to prove were as before mentioned. It did not appear at what time the plaintiffs first discovered the forgery, nor when they first gave notice of it to the defendant. It seems to be well settled by the cases which have been cited and examined, that if the innocent, bonâ fide, holder of a forged note which he has received for a valuable consideration, passes it to another innocent person, bonâ fide, and for a valuable consideration, without indorsing it, although not liable upon the note, he is liable for the amount he has received for it, provided the other party has not been guilty of such negligence as would deprive the person, from whom he received the note, of his remedy against prior parties who might be liable to him, and has given notice, and offered to return the forged paper in a reasonable time. See Jones v. Ryde, 5 Taunt. 488; Wilkinson v. Johnson, 3 Barn. & C. 428, 5 Dowl. & R. 403; Fuller v. Smith, Ryan & M. 49, 1 Car. & P. 197; Chit. Cont. 191, who cites the above cases; Gloucester Bank v. Salem Bank, 17 Mass. 33; Markle v. Hatfield, 2 Johns. 455; Young v. Adams, 6 Mass. 182; Smith v. Chester, 1 Term R. 654; Price v. Neal, 3 Burrows, 1354; Puckford v. Maxwell, 6 Term R. 52; Owenson v. Morse, 7 Term R. 64; Bank of U. S. v. Bank of Georgia, 10 Wheat. [23 U. S.] 333. In Wilkinson v. Johnson, 5 Dowl. & R. 411, the court said, "And though, where all the negligence is all on one side, it may, perhaps, be unfit to inquire into the quantity, yet where there is any fault in the other party, and that other party cannot be said to be wholly innocent, he ought not, in our opinion, to profit by the mistake into which he may, by his own prior mistake, have led the other party; at least, if the mistake is discovered before any alteration in the situation of any of the other parties; that is, while the remedies of all the other parties entitled to remedy are left entire, and no one is dis-

charged by laches." "We think the payment in this case was a payment by mistake, and without consideration, to a person not wholly free from blame, and who ought not, therefore, in our opinion, to retain the money." In the case of Fuller v. Smith, Ryan & M. 49, Abbot, C. J., said: "If you take a bill without indorsement, you cannot sue the person from whom you receive it," (meaning, no doubt, upon the bill) "but then you take it as a bill; but here, in fact, the instrument, on the faith of which the money was advanced, turns out not to be a bill of exchange as it was represented, being altogether a forgery; and that I take to be the distinction." Chitty (Cont. 191) says: "A person who discounts a forged navy-bill, bank-note, or similar instrument, for another who passed it to him without knowledge of the forgery, may recover back the money as paid by mistake. In such case also there is a failure of the consideration." He cites the cases from 5 Taunt. 488; 1 Ryan & M. 49; 3 Barn. & C. 428; 6 Taunt. 76; 3 Burrows 1354. In the case of Bank of U. S. v. Bank of Georgia, 10 Wheat. [23 U. S.] 344, Mr. Justice Story says: "Even in relation to forged bills of third persons received in payment of a debt, there has been a qualification ingrafted on the general doctrine, that the notice and the return must be in reasonable time, and any neglect will absolve the payee from responsibility." In the case of Gloucester Bank v. Salem Bank, the plaintiffs had received forged notes purporting to be notes of their own bank, and paid them; and, fifteen days afterwards, gave notice to the defendants from whom they had received them, and then brought suit to recover back the money.

Parker, C. J., said, "The true rule is that the party receiving such notes" (forged bank-notes) "must examine them as soon as he has opportunity and return them immediately; if he does not he is negligent; and negligence will defeat his right of action. This principle will apply in all cases when forged notes have been received; but certainly with more strength when the party receiving them is the one purporting to be bound to pay; for he knows, better than any other, whether they are his notes or not; and if he pays them, or receives them in payment, and continues silent after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own." In the present case, it has been before observed that it does not appear when the forgery was first discovered, nor at what time the plaintiffs gave notice of the forgery to the defendant. If the plaintiffs kept the note a long time without inquiry, it may have been that they were lulled into security by the defendant's having kept the note so long after it was dishonored; and if there was negligence on their part, there was at least as much (we think more) on the part of the defendant. And we should say, with the court of king's bench in Wilkinson v. Johnson (5 Dowl. & R. 411): "We think the payment" by the plaintiffs, "in this case was a payment by mistake, and without consideration, to a person not wholly free from blame, and who ought not, therefore, in our opinion, to retain the money."

We think, therefore, the motion for a new trial must be overruled. Judgment for the plaintiff.

Case No. 12,659.

SEMPLE v. BANK OF BRITISH COLUMBIA.

[5 Sawy. 88; 6 Reporter, 9.] [1]

Circuit Court, D. Oregon. March 25, 1878.

FOREIGN CORPORATION — REPEAL OF STATUTE — CONSTRUCTION OF STATUTE — RES JUDICATA — PURCHASE AT SALE ON DECREE—MORTGAGOR — MORTGAGEE.

1. A foreign corporation is not authorized to transact business in Oregon without first appointing a resident agent, upon whom process may be served in actions against it, and all acts done by it without such appointment are void. In re Comstock [Case No. 3,078] affirmed.

[Cited in Northwestern Ins. Co. v. Elliott, 5 Fed. 227; Orange Nat. Bank v. Traver, 7 Fed. 147; Oregonian Ry. Co. v. Oregon Ry. & Nav. Co., 23 Fed. 237.]

[Cited in Dudley v. Collier (Ala.) 6 South. 306. Cited in brief in Dearborn Foundry Co. v. Augustine (Wash.) 31 Pac. 328.]

2. An amendment to sections 2 and 3 of the Oregon foreign corporation act, relieving a foreign banking corporation from making a deposit before doing business in the state, does not repeal or affect sections 8 and 9 of said act, requiring such corporation to appoint a resident agent before doing business here.

3. A provision in one section of an act, that a foreign corporation shall, before doing business in Oregon, appoint a resident agent herein, is not limited in its operation to certain corporations enumerated in a prior section of the same act, requiring such specified corporations to also make a deposit before doing business in the state.

4. In a suit to enforce the lien of a mortgage in the state circuit court the decree of said court directing the sale of the mortgaged premises, for the purpose thereof, necessarily determined the capacity of the plaintiff to maintain such suit and the validity of the note and mortgage sued upon, and the same thereby became, as to the parties thereto and their privies, res judicata.

[Cited in Alexander v. Knox, Case No. 170.]

5. Such decree, when made in favor of a foreign corporation prohibited from doing business in this state, does not authorize or empower such corporation to purchase said mortgaged premises at the sale thereof or to receive a conveyance thereof from the sheriff.

6. In a suit to enforce the lien of a mortgage the title to the mortgaged premises remains in the mortgagor until a conveyance is made by the officer authorized to make the sale; and a conveyance to the defendant, it being a foreign corporation not authorized to do business in Oregon, is void, and the title remains in the mortgagor.

7. A mortgage in Oregon is only a security, and the mortgagee is not entitled to the possession of the premises without the consent of the mortgagor, until the latter is divested of his title by a valid judicial sale and conveyance.

Action to recover possession of real property.

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 6 Reporter, 9, contains only a partial report.]

W. Lair Hill, H. Y. Thompson, George W. Durham, and H. T. Bingham, for plaintiff.

William A. Effinger, for defendant.

DEADY, District Judge. Ruth A. Semple, a married woman and citizen of Oregon, brings this action against the defendant, a British corporation, doing business in this state, to recover the possession of the west half of lot No. 3, in Park block No. 1, in the city of Portland; alleging that she is the owner of the same as her separate property, and entitled to the possession thereof, which the defendant wrongfully withholds from her. The cause was tried without a jury. From the pleadings and evidence the material facts appear to be as follows. At and prior to June 27, 1873, the plaintiff was a married woman and the owner in fee, as her separate property, of lots 2 and 3, in Park block 1, of the city of Portland, at which date she, together with her husband, Eugene Semple, mortgaged said lots to the defendant to secure the note of her husband, then given to the defendant for the sum of nine thousand five hundred dollars, payable on January 1, 1874, with interest at the rate of one per centum per month; that on June 17, 1874, the circuit court of the state for the county of Multnomah, in a suit then pending therein between said Bank of British Columbia as plaintiff and said Ruth A. Semple and her husband as defendants, pronounced a decree, whereby it was adjudged that said bank recover of said Eugene Semple the sum of ten thousand two hundred and twenty-eight dollars, the balance then due upon said note, and that said lots be sold as upon execution, to pay said sum with accruing interest, together with the costs of said suit; that on July 18, 1874, the sheriff of said county, upon process issued out of said circuit court for the enforcement of said decree, sold said lots "to Edwin Russell, manager of the Bank of British Columbia," for the sum of ten thousand seven hundred and fifty-three dollars and seventy-five cents; that on August 3, 1874, said circuit court, upon motion of the attorney for said bank, subscribed "Attorney for Plaintiff and Edwin Russell," made an order confirming said sale, reciting therein that said lots had been sold as aforesaid "to Edwin Russell, manager of the Bank of British Columbia;" that on May 20, 1875, the sheriff of said county, but not the one who made the sale aforesaid, executed a conveyance in due form of law of said lots, to said bank; that said Edwin Russell at and from the date of such sale to the execution of said conveyance was the manager of said bank, and as such and on account thereof bid in said lots at said sale, and such manager directed the conveyance thereof aforesaid, to be made to said bank; that at and from the date of the execution of the mortgage aforesaid to the date of the conveyance aforesaid the defendant was a foreign corporation formed under the laws of Great Britain and had not complied with the laws of Oregon (Laws Or. 1874, p. 617) requiring such corporation to appoint a resident of the state its attorney with authority to accept service of all process necessary to give the courts of said state and the United States therein jurisdiction of said corporation, and upon whom such process might be duly served, and, therefore, was not authorized or empowered during such period to transact any business within said state.

Upon this state of facts the plaintiff contends that the note and mortgage, being made while the defendant was prohibited from doing business in this state, are illegal and void. Such was the ruling of the district court for this district in Re Comstock [Case No. 3,078]. Since that decision the question has been before the supreme court of the state, where it was held that a mortgage taken by this defendant under like circumstances was void as against a junior mortgage made to a third person; but the mortgagor not making any defense to the suit for foreclosure by the bank it was not determined whether he was estopped to set up the illegality of this transaction as against it or not. Bank of British Columbia v. Page, 6 Or. 431.

The ruling in Re Comstock [supra] has been characterized by the learned counsel for the defendant as harsh and "to the great damage and injury of the large foreign capital represented in our state by the various foreign corporations doing business therein." Whether there are any other foreign corporations than the defendant that have undertaken to transact business in this state in disregard of its legislation upon this subject does not appear, and the court is not advised. But if there are, it furnishes no reason why this plain and wholesome statute should be refined and construed out of existence, but rather the contrary. Nor does it appear wherein consists the harshness of the ruling in question. The effect thereof may be inconvenient and even injurious to the bank, but that alone is no reason why the court should have decided otherwise and thus refused to give effect to the plain letter of the statute and the evident purpose of its enactment. A foreign corporation which engages in business in this state in deliberate defiance of the law prescribing the conditions upon which alone it may come here, must take the consequences of such illegal conduct, and has no right to complain either of the harshness of the law or its enforcement. If this were a case in which the foreign corporation had attempted in good faith to comply with the law, but through some excusable mistake or inadvertence had failed to do so, there might be some ground for sympathy and some reason for asking a court so to construe the law, if possible, as to excuse the omission.

But it is now seriously contended "that any person dealing with an acting corporation, as such, cannot allege against it, in its suit or action, any such defense as an objection going to the regularity or perfectness of its being," citing the case of Chubb v. Upton, 95 U. S. 665, wherein the court say that "it is settled

by the decisions of the courts of the United States, and by the decisions of many of the state courts, that one who contracts with an acting corporation cannot defend himself against a claim on such contract, in a suit by the corporation, by alleging the irregularity of its origin." The actual ruling in the case was that where there was an attempted alteration of an Illinois corporation under the form of law, and the defendant took part in the proceedings, subscribed for the increased stock, paid a percentage thereon and acted as an officer of the new company, he could not, in an action by the assignee in bankruptcy of such company to compel the fulfillment of his contract of subscription, deny the regularity of the organization of the new company. In support of this conclusion the court cited the similar cases of Upton v. Tribilcock, Sanger v. Upton, and Carver v. Upton, 91 U. S. 45, 56, and 64.

But surely these cases are not in point, and the doctrine of them has no application to the case under consideration. This is a case of an illegal act done by the defendant, not only without authority of law, but in direct violation of a positive legislative prohibition. The case of Chubb v. Upton was that of a duly organized domestic corporation that had attempted in good faith to increase its stock according to the forms of law, and in so doing had innocently omitted some intermediate step, or deviated from some non-essential direction, which the court characterized as a mere irregularity—while the party who made the objection was a stockholder and director in the company during the very time of the transactions complained of. Here the party alleging the illegality of the contract is a stranger to the defendant, and in no way responsible for the legality of or a participant in the illegality of its contract. The defendant, as to this state, or any transaction therein, is neither a corporation de jure nor de facto. It has never acquired the right to exist here, or even attempted it. Whatever it may be in the place of its creation, here, at least, it is a mere nullity, a nonentity. The question of mere irregularities in its organization does not arise. For there is not the slightest ground for claiming that it has ever, regularly or otherwise, become clothed with the form or power of a corporation in this state or attempted to do so. Indeed, it was expressly prohibited from existing or exercising its corporate functions in Oregon, except upon the condition precedent, that it shall first comply with the law of the state in the appointment of a resident agent. As well say that any fortuitous assemblage or association of persons not having in any way attempted or intended to become a corporation under the laws of this state, might nevertheless, by simply calling themselves such and acting as such, become one de facto. As was said in In re Comstock, supra: "The doctrine of estoppel in pais has never been carried so far as to prevent a party from showing that a corporation, even if it be one de jure, had not the power to do a particular thing, or that it was done in violation of a statute." No one is estopped to show that an act upon which a party claims a right is illegal simply because he was a party to it—even in pari delicto. If the matter concerned the parties to the transaction alone the rule might be otherwise, but the interest of society in whose behalf the act is prohibited is paramount to private equities. As was said in Steadman v. Duhamel, 1 C. B. 888: "There cannot be an estoppel to show a violation of a statute, even to the prejudice of an innocent party;" and in Keen v. Coleman, 39 Pa. St. 299: "Legal incapacity cannot be removed by fraudulent representation, nor can there be an estoppel involved in the act to which the incapacity relates, that can take away that incapacity."

It is also contended by counsel for defendant that as the foreign corporation act of October 21, 1864, was so amended on December 19, 1865, as to omit therefrom foreign banking and exchange corporations so far as the same required such corporations to make a deposit in Oregon and pay a tax on the same, therefore the defendant ought not to be held to be within the purview of sections 8 and 9 of such act (Laws Or., supra) requiring a foreign corporation to appoint a resident agent before transacting business here. But the deduction sought to be made from this fact seems to be the very reverse of the most reasonable. The argument as I comprehend it, is this—because the legislature were induced to relieve the defendant as a foreign banking corporation from the duty of making a deposit here for the security of its local creditors and from paying a tax on the same, that therefore they intended and by implication did, relieve it from the duty of appointing a resident agent here upon whom process could be served and thereby compel the citizens of Oregon who might have causes of action, or suit against such corporation, to follow it into the courts of Great Britain for redress. The mere statement of the argument seems a sufficient refutation of it. The two subjects of agents and deposits are separate and distinct. Although in the same act, they have no other relation with or any dependence upon each other. The provisions concerning the one may be stricken out of the act without affecting the other. Indeed, as was shown in Oregon & W. Trust Inv. Co. v. Rathbun [Case No. 10,555], these matters were introduced into the assembly in two separate acts, which in the course of their passage through that body were stuck together and passed as one. Independently of the well established rule, that repeals by implication are not favored by the law (Smith, Com. Law, § 758), it would be a clear case of judicial legislation to assume that because the legislature specifically repealed an act requiring the defendant to make a deposit before doing

business in this state and was silent as to the act requiring it to appoint a resident agent here, that therefore it repealed the latter one also.

It is also claimed that said sections 8 and 9 of the foreign corporation act, which declare and provide that "A foreign corporation before transacting business in this state must duly" appoint a resident agent here, are a mere general expression following sections 2 and 3 thereof requiring the deposit to be made, and are therefore only applicable to such corporations as are therein specially enumerated upon the familiar rule in the construction of penal statutes, cited in U. S. v. Irwin [Case No. 15,445], "Where general words follow an enumeration of particular cases, such general words are held to apply only to cases of the same kind as those which are expressly mentioned;" and that since banking and exchange corporations were, by the amendment of December 19, 1865, stricken out of said sections 2 and 3, said sections 8 and 9 are not applicable to the defendant. The case of U. S. v. Irwin [supra], was this: The act of 1825 made it a crime to forge any "indent, certificate of public stock, treasury note, or other public security of the United States." Upon motion to quash an indictment for forging a land warrant the court held that such instrument was not one of those enumerated in said act, and that the general phrase "public security" ought not to be construed to include it, because the sense of such phrase, if otherwise broad enough to cover the warrant, was limited in its operation to the kind of instruments which immediately preceded it, and that these all referred to evidence of "pecuniary indebtment," to which class or kind the warrant, being a mere certificate that the holder thereof was entitled to locate one hundred and sixty acres of the public land, did not belong. But certainly this rule has no application to the case under consideration. The title of the act declares that its purpose is to regulate and tax certain foreign corporations doing business in this state, of which the defendant is one. The regulation consists in requiring the appointment of a resident agent, as provided in sections 8 and 9. That is one matter, and the taxing of such corporations, as provided in sections 2 and 3, is another. They are separately and distinctly provided for, and are in no sense parts of the same expression, provision or enumeration in which the operation of the more general words is to be restrained within the significance and applicability of the particular ones. Neither is the act under consideration within the rule invoked—not being a penal one. Smith, Com. Law, § 740. The first part of the act provides for raising public revenue and providing a security for any claims of the people of the state against certain foreign corporations, while the latter part prescribes the conditions, upon the performance of which foreign corporations may in any case transact business in the state. The defendant is included in the title of the act, which has never been changed, as well as sections 8 and 9 thereof, and therefore the latter cannot be restrained in their operation so as not to include the defendant, as in the case of Oregon & W. Trust Inv. Co. v. Rathbun, supra, which was held by this court not to be within the purview of the act, because not included in the title thereof.

It is admitted, as claimed by counsel for the defendant, that while the title may restrain the operation of an act, it cannot enlarge it. But there is no attempt here to enlarge the act by means of the title. On the contrary, the act in sections 8 and 9 is really broader than the title, but the defendant being specially mentioned in the title and plainly comprehended in the language of said sections—"a foreign corporation"—so far as it is concerned, the title and act exactly coincide. But passing this point, it is insisted by the defendant that the decree in the foreclosure suit established its right to maintain the same and the validity of the debt and security sued on. This is questioned by the plaintiff, but I think without sufficient reason. The Oregon Code (section 726) gives the rule for ascertaining what was determined by a judgment or decree, as follows: "That only is deemed to have been determined by a former judgment, decree or order, which appears upon its face to have been so determined, or which was actually and necessarily included therein, or necessary thereto." It may be admitted that it does not appear upon the face of the decree in the foreclosure suit that the validity of the note and mortgage was called in question and determined upon the point now raised, namely, that the defendant was a foreign corporation doing business in the state in violation of its laws. There was a demurrer to this complaint upon the ground that the defendant had not capacity to sue because it was not a corporation formed under the laws of Oregon. This demurrer was overruled by consent and an answer filed alleging usury in the contract. But the court, even if there had been no defense interposed, must, in giving its decree, have determined that the bank had capacity to sue and that the note and mortgage were valid. This much at least was necessarily included in the decree, and without determining these two questions in this way the court could not have pronounced it. It is not necessary to say that the circuit court as a matter of fact actually and consciously passed upon these questions in the light and upon the grounds on which they are now presented to this court. On the contrary it may be admitted that it did not, because the point—that in taking this note and mortgage the bank was a foreign corporation not authorized to transact business in this state—was not presented to it. But in contemplation of law the court, in determining these questions in favor of the plaintiff therein, did

so as to any and all matters which the defendant might have alleged in objection thereto. In Cromwell v. County of Sac, 94 U. S. 352, Mr. Justice Field, in discussing this subject, says: "A judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is conclusive, so far as future proceedings at law are concerned, as though the defenses never existed." This decree is the determination of a court of general and concurrent jurisdiction and cannot be questioned collaterally. Between these parties and upon these points the decree is conclusive in every other court. The matter is res judicata. 1 Greenl. Ev. § 528.

Admitting this conclusion, however, the plaintiff claims that the defendant could not purchase the premises at the sheriff's sale or receive the title thereto by his conveyance, and therefore the title is still in the plaintiff and, of course, she may maintain this action. In answer to this proposition counsel for the defendant insists that upon the testimony the sale was made to Russell, who had capacity to purchase, and not the bank, and that the subsequent conveyance to the latter by the assignment or direction of the former are res inter alios acta, which do not concern the plaintiff and about which she cannot inquire. The court has found that sale was made to the bank and not Russell. Upon the evidence, and in the nature of things it is plain that "Edwin Russell, manager of the Bank of British Columbia," in bidding upon property sold upon a decree in favor of his principal, the exact amount due his principal and to which the sheriff's deed was made by his verbal direction to the bank's attorney, was simply acting as the agent of the bank. Upon their face, the words "manager," etc., appended to the name of Russell, are not to be taken as a mere descriptio personæ, but rather as a declaration that he was acting—managing—for the bank and not himself; and there is nothing in the evidence or the circumstances of the case that indicates the contrary. But it is immaterial what the fact is in this respect. In either case the question recurs: Did the bank take title by the conveyance? Because, if it did not, the title is still in the plaintiff. The cases cited by the counsel for the defendant (Bailey v. Le Roy, 2 Edw. Ch. 515; Frizzle v. Veach, 1 Dana, 211; Ehleringer v. Moriarty, 10 Iowa, 78; McClure v. Englehart, 17 Ill. 47; Voorhies v. U. S. Bank, 10 Pet. [35 U. S.] 449) to show that upon a judicial sale, when the conveyance is made to a third person by the direction of the purchaser, the judgment-debtor or mortgagor cannot question the sufficiency of such direction or the right of such third person to have such conveyance, are not in point. The law of these cases is undoubtedly sound. But the fact is implied, if not expressed, in all of them, that there was a valid sale, and that the person to whom the conveyance was ultimately made was capable of taking the title thereby. This being premised, the only question decided in any of these cases was, that the sufficiency of the assignment, in pursuance of which the officer made the conveyance to a third person rather than the purchaser, was a question solely between such person and purchaser. In none of them does it appear that the grantee in the conveyance was incapable of accepting it or taking anything by it. Admitting then that the sale was made to Russell and not to the bank, the question arises here, not whether Russell duly assigned his right to the bank, so as to entitle it to the conveyance, but whether the bank could take the conveyance either as a bidder or the assignee of Russell.

It is assumed in this argument by the defendant that the mere sale by the sheriff upon the decree of the circuit court divested the plaintiff of her title to the premises. But upon a careful examination of the matter I am satisfied, both upon reason and authority, that the law is otherwise. In Freeman on Executions (section 324) it is said that, "In order to divest the legal title held by the defendant in execution a conveyance must, in most of the states, be made by the proper officer, in pursuance of a prior levy and sale." The purchaser, "though he is entitled on demand to receive a conveyance, cannot be treated as the owner of the property till it has vested in him by a deed executed by the proper authority." See, also, Id. § 333. To the same effect is Ror. Jud. Sales, § 357; Bouv. verba "Sale," 19. By the Oregon Civil Code (sections 296, 301, 304), it is provided that a sale of real property upon execution—except leaseholds of less than two years, is conditional—subject to redemption within sixty days from the confirmation of sale. But if no redemption is made within the time prescribed, the purchaser is entitled to a conveyance and also the possession of the premises in the meantime. A sale of real property, whether judicial or voluntary, does not pass title but only gives a right to a conveyance of the same according to the terms thereof. A sale by a sheriff is within the statute of frauds, and no title passes except upon the execution of a deed by him. 4 Kent, Comm. 434. In some of the New England states no conveyance is necessary upon a forced sale, as the sheriff's return, in analogy to his return upon an elegit in England, constitutes the title of the purchaser. But wherever, as in this state, a conveyance is required, or rather wherever it is not expressly otherwise provided, no title vests in the purchaser at a judicial sale until the officer making the same executes a conveyance to him. In

Schemerhorn v. Merrill, 1 Barb. 517; Smith v. Colvin, 17 Barb. 157; McMillan v. Richards, 9 Cal. 412; People v. Mayhew, 26 Cal. 656; Page v. Rogers, 31 Cal. 300,—it was held under statutes substantially the same as that of Oregon, that a sale by a sheriff did not vest the title to the premises in the purchaser, but the execution and delivery of his deed therefor. This being so, the title to the premises at the date of the execution of the sheriff's deed to the defendant was, notwithstanding the sale, in the plaintiff, and the defendant being then forbidden to transact any business in this state, and therefore incapable of accepting said conveyance or receiving any right under it, the same, so far as it is concerned, was and is void and of no effect, and the title remains and is in the plaintiff. And this is so, even upon the assumption that the sale was made to Russell; but the fact being that it was made to the defendant, the conveyance is also void for want of a valid sale. A sale is a contract to which there must be two parties capable in law of contracting. But the defendant was incapable of either buying or selling in Oregon, and a purchase by it or in its name was of no more effect here than if it was actually then nonexistent. Neither did the confirmation of this supposed sale operate to validate the contract or to enable the defendant to take anything under it. True, the Code declares that "the order of confirmation is a conclusive determination of the regularity of the proceeding concerning such sale." Civ. Code Or. § 293. But certainly a determination that the proceedings of the sheriff in conducting the sale in obedience to the process are regular does not include the question of the bidder's capacity to purchase and receive the title. The purchaser may be an infant, a married woman, or an alien enemy, but if he pays the price bid, and the proceedings by the sheriff are according to law, the sale will be confirmed. The question of the capacity of the purchaser to contract or receive the title is not before the court upon a motion to confirm a sale, at least unless specially made, which is not claimed to have been done here. This a matter which could concern no party to the proceeding but himself, and therefore, in this respect, he buys at his peril. Neither did the decree of sale give the defendant any right in or to the premises, but only the right to have the same sold according to law to satisfy its demand. McMillan v. Richards, 9 Cal. 411.

But it is further maintained by counsel for the defendant that the question of the validity of the mortgage having been determined by the decree of sale, and the mortgagee, the defendant, being in possession of the mortgaged premises, the mortgagor, the plaintiff, cannot maintain an action to recover possession, citing Brobst v. Brock, 10 Wall. [77 U. S.] 519. This case went to the supreme court from Pennsylvania, and so far as the right of a mortgagee in possession is concerned, was decided upon the rule of the common law which upon this point still prevails in that state. The court states it to be that as between the parties to a mortgage "it is a grant which operates to transmit the legal title to the mortgagee, and leaves the mortgagor only a right to redeem." After breach of the condition, the mortgagee may enter or maintain an action for the possession, and having entered, he cannot be dispossessed by the mortgagor while the mortgage is in force. It is not necessary to stop here and inquire whether the defendant, being incapable of holding or possessing any property in this state under any circumstances, could avail itself of this defense, even if the common law were in force in this state upon this point. But what is called the equitable doctrine in regard to the rights of parties to a mortgage, is now the law of this state. In Anderson v. Baxter, 4 Or. 110, and Roberts v. Sutherlin, Id. 222, the supreme court of the state held that a mortgage was a mere security, that therefore the mortgagee is the owner of the premises, and entitled to the possession thereof until a sale under a decree to enforce the lien of the mortgagor; and this rule was followed by this court in Witherell v. Wiberg [Case No. 17,917], wherein it was held that prior to such sale the mortgagor could not, under any circumstances, hold the possession of the mortgaged premises for the satisfaction of his debt without the consent of the mortgagee. It also appears that the conveyance to the defendant was executed by a sheriff, other than the one who made the sale. This appears to be in direct violation of both the general rule and the statute of the state upon the subject, which latter provides that a sheriff going out of office shall nevertheless "complete the execution of all final process which he has begun to execute." Civ. Code Or. § 986. See, also, Freem. Ex'ns, § 327. And therefore it must be void for this reason. But as this point was not made by counsel the decision of the case will not be rested upon it.

The plaintiff is entitled to recover, and there must be a finding of fact and law in accordance with this opinion.

[For an action for use and occupation, see Case No. 12,660.]

Case No. 12,660.

SEMPLE et mar. v. BANK OF BRITISH COLUMBIA.

[5 Sawy. 394.] [1]

Circuit Court, D. Oregon. Feb. 10, 1879.

JUDGMENT—RES JUDICATA—WIFE'S SEPARATE ESTATE—ACTION FOR RENTS AND PROFITS.

1. The judgment or order of a court is not an estoppel, unless the matter decided was within

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

the purview of the proceeding before the court, and directly within the issue made and tried therein.

2. Where a wife mortgaged her separate property to secure the debt of her husband, and the mortgagee, before the sale of the same, to satisfy the debt entered and took the rents without the consent of the wife, he was not entitled to credit the same on the husband's debt, but was liable to her, as for the use and occupation of the premises.

3. In an action for mesne profits, the amount expended by the defendant while in the occupation of the premises for necessary repairs and legal taxes ought to be deducted from the gross rents or value thereof, and the balance is the damage which the plaintiff has sustained and which he is entitled to recover.

Action for use and occupation [by Ruth A. Semple against the Bank of British Columbia].

H. Y. Thompson and Todd Bingham, for plaintiffs.

William H. Effinger and Joseph N. Dolph, for defendant.

DEADY, District Judge. This action is brought to recover the sum of four thousand four hundred dollars for the use and occupation of lots 2 and 3 in Park block No. 1, in the city of Portland. The complaint alleges that the defendant is a foreign corporation doing business in Portland, and that the plaintiffs are husband and wife and citizens of Oregon; that the defendant on July 18, 1874, entered into the possession of the premises and received the rents and profits of the west half of said lot 3 until May 1, 1878, and of the remainder of said premises until the commencement of this action—May 11, 1878; that during all said period the plaintiff, Ruth A. Semple, "was and now is the owner in fee in her separate right" of said premises; and that the reasonable value of said rents and profits during the period aforesaid is one hundred dollars per month.

The answer of the defendant, filed January 1, 1879, denies the ownership of Ruth A. Semple; admits the possession of the premises by the defendant as alleged; denies that they were worth one hundred dollars per month, but admits that the defendant received rents from the premises during the period aforesaid of the value of four thousand two hundred and ninety-seven dollars and fifty-seven cents, and alleges that it expended thereon during the same period for necessary repairs one thousand and forty-nine dollars and eighty-five cents—paid taxes duly assessed thereon six hundred and seventy-four dollars and forty-eight cents, and for "insurance against loss by fire," five hundred and thirty dollars and fifty cents—in all two thousand two hundred and fifty-four dollars and eighty-three cents, which, being set off against the rent, leaves a balance of two thousand and forty-two dollars and seventy-four cents. The answer also contains a plea of a former adjudication, to the effect that on July 8, 1878, the circuit court for the county of Multnomah, in "a bill or suit and proceeding in equity" then depending therein between the same parties, duly made a decree "whereby the whole matter and thing in litigation here was finally determined;" and that the same is still in full force and effect.

The plaintiffs by their reply specially deny the affirmative allegations of the answer, including the defense of a former adjudication. The "proceeding" referred to in the plea of a former adjudication arose in this way: On June 27, 1873, the plaintiff, Eugene Semple, made and delivered his promissory note to the defendant in the sum of nine thousand five hundred dollars, payable on or before January 1, 1874, with interest at one per centum per month, and on the same day said Semple and the plaintiff, Ruth A. Semple, executed a mortgage of the premises to the defendant, as security for the payment of said note; that on March 10, 1874, suit was brought in the circuit court aforesaid to enforce the lien of said mortgage, which resulted, on June 17, 1874, in a decree against said Eugene upon said note for the sum of ten thousand two hundred and twenty-eight dollars, with interest as above from said date, and that the premises which were admitted and declared to be the separate property of Ruth A. should be sold as upon execution to satisfy the same, with the costs and expenses of suit; that upon July 18, 1874, said premises were sold to the defendant in pursuance of said decree, which sale was confirmed on August 3, 1874, and a conveyance thereof made to the defendant by the sheriff on May 20, 1875; that afterwards, on May 1, 1878, the defendant filed a motion in said circuit court, based upon the proceedings in said suit and an affidavit of Mr. W. W. Francis, its manager, asking the court "to set aside the return of the execution issued upon the decree in said suit, and all subsequent proceedings thereon had, and for leave to issue a new execution upon the said decree," or for such other relief as the court might think proper to grant.

The affidavit of said manager gave the outline of the proceedings in said suit as above, and then stated that the defendant "took possession of said property under said sale and conveyance," and still retains the same; that in 1877 said Ruth A. commenced an action in the circuit court of the United States for this district against the defendant, for the recovery of the possession of the west half of said lot 3, claiming to be the owner thereof in fee, upon the grounds that the sheriff who executed the conveyance thereof to the defendant, not being the sheriff who made the sale, was without authority; and, also, that the defendant being a foreign corporation, and not having appointed an attorney in the state to accept service of process against it, as provided by the statute of the state, was not authorized to make said purchase or receive said conveyance, and that said circuit court, upon the trial of said cause without a

jury, found said purchase and conveyance to be a nullity; that said decision in effect decides that the defendant has no title to any part of said premises, whereby the defendant obtained no satisfaction of said decree; and that the rental value of said premises is less per month than the interest upon said decree. [Case No. 12,659.]

Notice was given of the motion, and after hearing the parties, the court, on June 11, 1878, set aside the entry of satisfaction on the lien docket, the return on the execution, and authorized an alias execution to issue to enforce the decree, and sell the premises to satisfy the same. The order further provided—and it appearing that the defendant "hath for some time been holding and using the property," it is further ordered that it "do bring into court the whole amount of rent money taken by it from said property," to abide the future order of the court; and leave was given to the plaintiffs within ten days to file affidavits or make further defense to the proceeding. The plaintiffs made no defense—that is, filed no allegations or affidavits, but on July 8, 1878, the court made an order, stating therein that the defendant was in possession of the premises as mortgagee of the plaintiffs, and should account to them accordingly; that the receipts and expenditures of the defendant in connection with the premises were as stated above, and applied the balance due from the defendant, two thousand and forty-two dollars and seventy-four cents, upon said decree, discharging the defendant from all liability to the plaintiffs therefor, and directed that execution issue for the balance of the decree, thirteen thousand two hundred and sixty dollars and six cents, from which order the plaintiffs appealed, and said appeal is now pending in the supreme court of the state.[2] On August 10, 1878, the premises were sold on the alias execution to said Francis, for the amount of said decree, and on October 18, following, said sale was confirmed.

The plaintiff, Ruth A., claims title to the premises from the United States, under section 4 of the donation act of September 27, 1850 [9 Stat. 497], as the child of Nancy Lownsdale, the wife of Daniel H. Lownsdale, a settler upon the premises under said section. The patent for the donation, issued to said Daniel H. and Nancy on June 6, 1865, the latter having died in 1854, and the former in 1862, both intestate. Under the circumstances the patent inured to the benefit of the parties who were entitled to take the donation upon such a contingency, of which the plaintiff, Ruth A., was one. See Fields v. Squires [Case No. 4,776]; Lamb v. Starr [Id. 8,022]; Lamb v. Wakefield [Id. 8,024]; Davenport v. Lamb, 13 Wall. [80 U. S.] 427. Afterwards, on August 12, 1865, in a suit for partition of the west half of said donation, the same being the part thereof designated by the surveyor-general as inuring to said Nancy, the circuit court for the county of Multnomah, set apart the premises in question in severalty to the said Ruth A. See Fields v. Squires, supra; Lamb v. Starr, supra.

Some question was made upon the admission of the evidence, by the defendant, as to the title of Ruth A., and therefore this statement of the grounds of it. But I apprehend the point is not seriously relied on. Indeed, a sufficient answer to it is found in the fact that the defendant claims under her and, therefore, is not at liberty to question her title, subject to the mortgage and sale thereunder, upon the alias execution. 2 Greenl. Ev. §§ 304, 307; Gaines v. New Orleans, 6 Wall. [73 U. S.] 715.

Upon this state of facts the plea of a former adjudication has not a leg to stand on. The proceeding before the circuit court, in which it was attempted to apply the money due from the defendant to the plaintiff, Ruth A., upon its decree against Eugene Semple, was neither an action nor a suit, but a mere motion to correct an error in the proceedings to enforce such decree to set aside the return of the officer upon the execution and the entry of satisfaction in the lien docket made in pursuance thereof, because, as it turned out, the supposed sale of the premises to the defendant was no sale, for want of capacity in it to purchase the same or receive the title thereto. The power of the court to make the order asked for is not questioned, and the subject and the parties were properly before it upon this motion.

But all that was done after this appears to have been done by the court, sua sponte, without either allegations or proofs upon the part of the defendant, except this motion and the statement of the account for the occupation of the property by its manager, and none whatever on the part of the plaintiffs. It seems to me, that the court might as well have attempted to settle or adjust any other account or controversy between these parties upon that motion, as this matter of the rent due the plaintiff, Ruth A., from the defendant for the use of her property. It is a fundamental rule of law, that a party is not bound or estopped by the judgment of a court as to a matter, point or fact not within the purview of the proceeding before it, or directly put in issue therein.

In Woodgate v. Fleet, 44 N. Y. 13, it is laid down that "a judgment is conclusive upon the parties thereto only in respect to the grounds covered by it and the law and facts necessary to uphold it; and, although a decree, in express terms, purports to affirm a particular fact or rule of law, yet if such fact or rule of law was immaterial to the issue, and the controversy did not turn upon it, the decree will not conclude the parties in reference thereto." To the same effect are People v. Johnson, 38 N. Y. 63; Gilbert v. Thompson, 9 Cush. 350, 99 Mass. 557; Manny v. Harris, 2 Johns. 29; Banks v. Moreno, 39 Cal. 238; Fulton v. Hanlow, 20 Cal. 482, 486; 1 Greenl. Ev. § 528; 1 Phil. Ev. 333; Freem. Judgm. § 271.

If this rent had been due Eugene Semple, the debtor in the decree, and he had, in reply to the motion for leave to issue an alias exe-

[2] [No report of this case can be found.]

cution, answered and asked that the rent received by the defendant, while a mortgagee in possession, subsequent to the rendition of the decree, might be applied thereon, and that execution issue only for the balance, there would have been some show of legality and justice in the proceeding. But as it was, the plaintiff made no claim or demand in regard to the rent, unless it was to assert, arguendo, that it did not belong to Eugene Semple, and, therefore, could not be applied upon his debt.

The application of the defendant, although it stated the irrelevant fact that the rental value of the property during the time it was in its possession was less than the accruing interest on the decree, asked for nothing more than leave to issue an alias execution, because the proceedings on the first were found nugatory.

The plaintiffs made no other answer to the application than to ask to have it stricken from the files, which being denied, the prayer of the motion was allowed, of course; but all that followed in regard to the application of the rent due the plaintiff, Ruth A., upon the debt of Eugene Semple, was done without any procedure to base it upon, and rests upon nothing but the will of the court. It was not necessary, to give the desired relief to the defendant, that any action should have been taken in regard to this rent. When an execution was allowed to enforce the decree, the defendant could ask no more. The money received for the rent of the property was already in its possession. If the plaintiff, Ruth A., desired to reclaim it or recover the value of the use and possession of the premises, she could not be compelled to litigate the matter upon ex parte affidavits on the defendant's motion for an alias execution, but she had a right to bring an action against the defendant therefor when and where she chose and the law permitted, in which the questions of what was the value of the use and occupation of the premises, and was the defendant a mortgagee in possession with her consent, and therefore entitled to apply the rents and profits, during such possession, on its debt, could, upon proper pleadings and proofs, be formally tried with a court and jury. The proceeding and order in this respect were clearly coram non judice.

On the other hand, the extra-judicial character of this order is only equaled by its injustice. To fully appreciate this, it is necessary to premise that in this state the equitable doctrine prevails—that a mortgagee has no interest in the mortgaged property, and no right to the possession thereof—that the mortgage is a mere security for the debt, and the right of the mortgagor is limited to a sale of the property and the application of the proceeds upon his debt. Anderson v. Baxter, 4 Or. 110; Roberts v. Sutherlin, Id. 222; Witherell v. Wiberg [Case No. 17,917].

The plaintiff, Ruth A., never owed the defendant anything, nor promised to pay it anything. No decree was "recovered" against her for the debt due the defendant, as stated in the affidavit of the manager, and if there had been it would have been void. She did not join in the note of her husband, but simply mortgaged her property as a security for the payment of the same, and the only right that gave the defendant as against her was the right to have the property sold to satisfy the debt upon the decree of a proper court. In the meantime, and until that was lawfully accomplished, the property was hers and she had the same right to the occupation and enjoyment of it as if it had never been mortgaged.

True, she might, with her husband's consent, agree that the defendant might enter into possession and apply the rents and profits upon the debt for which the property was a security. But the defendant could not enter upon the premises as such mortgagee, and take the rents and profits without such consent, and this must appear and be shown by the defendant by some matter independent of, and collateral to, the mortgage. [Witherell v. Wiberg] supra.

In this case the defendant, having attempted to dispose of this property by a judicial sale, failed to do so because it attempted to purchase the same, when by law it was prohibited from doing business in this state. But the plaintiff, Ruth A., was not a party to this unlawful act, and was not affected by it. The property remained hers, just as though there had been no attempt to sell. Yet the defendant, wrongfully assuming that it had become the owner of the premises, entered thereon and took the rents and profits as its own. In its order the circuit court says that the defendant was in possession of said premises as the "mortgagee" of the plaintiffs. If, by this, it was meant to declare that the defendant was in possession by virtue of the mortgage, or with the consent of such plaintiffs or either of them, then it is a manifest error, because, in the affidavit aforesaid of the manager, which is the only evidence that appears to have been before the court, it is distinctly asserted that the defendant "took possession of said property under said sale and conveyance, and has retained possession ever since"; meaning thereby said void sale and conveyance of July 18, 1874, and May 20, 1875, respectively.

Upon this statement of the case, which is the most that can be said for the defendant, it did not enter as mortgagee at all. It entered without the consent of the mortgagors, and as owner, upon the assumption that it had purchased the property, but in fact without any right and as a trespasser. It became liable then to the true owner, Ruth A. Semple, as for the use and occupation of the premises, until the subsequent valid sale upon the alias execution. The amount due for such occupation was due her and not her husband. It was her separate property, and in no way liable for his debts or contracts. She was under no obligation, either legal or moral, to pay her husband's debt. True, she had pledged certain prop-

erty for that purpose, but this did not include the use and occupation thereof, which belonged to her, until her title was divested by a valid sale in pursuance of the mortgage.

It only remains to ascertain what the value of the premises was during the period. The defendant admits that it actually received four thousand two hundred and ninety-seven dollars and fifty cents rent from the property, exclusive of commissions to agents. But the proof is that the property was worth one hundred dollars per month. At this rate, from July 18, 1874, to May 1, 1878, when the defendant ceased to receive the rent on one fourth of the property, the rent would amount to four thousand five hundred and fifty dollars; and from thence to August 8, 1878, the date when the property was purchased by the manager, the rent at the same rate for the remaining three fourths would amount to two hundred and fifty dollars. Interest upon this sum, four thousand eight hundred dollars, at ten per centum per annum, counting from the end of the year in which the rent accrued, is six hundred dollars, which added to the principal, makes the sum five thousand four hundred dollars. From this must be deducted the amount expended during this period by the defendant for legal taxes and necessary repairs. The action for mesne profits is said to be an equitable one, intended to do justice to the plaintiff by putting him in as good a situation as he would have held provided he had not been dispossessed. Tyler, Ej. 848. Taxes paid by the defendant during his wrongful occupancy are to be deducted from the gross rents in ascertaining the actual damage which the plaintiff has sustained by the loss of the possession. Stark v. Starr [Case No. 13,307]. The amount paid for taxes and repairs was one thousand seven hundred and twenty-four dollars and thirty-three cents, to which add two hundred and fifty-eight dollars and sixty-five cents interest on the same, and the sum is one thousand nine hundred and ninety-two dollars and ninety-eight cents, leaving a balance due the plaintiff of three thousand four hundred and seven dollars and two cents.

The defendant also claims to deduct from this sum the amount paid for insurance—five hundred and thirty dollars and fifty cents. But this expense was not incurred for the benefit of the property, but the defendant. Insurance does not protect property from fire; and it is said, sometimes enhances the exposure thereto. This sum was expended by the defendant in his own interest to indemnify itself against a loss of its security by fire, and did not, nor does not, meliorate or improve the condition of the property.

There must be a finding for the plaintiff for the sum of three thousand four hundred and seven dollars and two cents.

SEMPLE (HOME v.). See Case No. 6,658.

Case No. 12,661.

SEMPLE v. UNITED STATES.

[Chase, 259.] [1]

District Court, E. D. Virginia. May Term, 1868.

CONFISCATION—PROCEEDINGS—DEFAULT—FORM OF PROCEEDINGS.

1. Inasmuch as the confiscation acts of August, 1861, and July, 1862, have been several times considered by the supreme court in reported cases, and no question has ever been made by counsel or court of the constitutionality of those statutes, it is a fair conclusion that neither the bar nor bench doubted their constitutionality.

2. This court will hold, therefore, for the present, those acts to be constitutional, but will be gratified to have the question submitted to the supreme court, and adjudged upon direct argument and consideration.

3. Proceedings for condemnation of lands under these statutes, may be according to forms used in admiralty, but they must conform to the course of the common law in respect to the trial of issues of fact and exceptions to evidence, and can only be reviewed after final judgment or decree on writ of error, that writ being the process by which common-law proceedings are reviewed—appeal being the appropriate method in causes of admiralty and maritime jurisdiction.

4. In this cause the proceeding has properly been by writ of error.

5. But there being no appearance in the court below, there could be no issue of fact, nor direction for trial by jury, and therefore judgment was properly entered by default.

6. If it appeared by the record that an issue had been made and tried by the court without a jury, and without submission by the parties, the judgment would have been reversed.

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

Semple owned property in Elizabeth City county, Virginia, almost under the guns of Fortress Monroe, and adhering to Virginia during the Civil War, necessarily followed her flag, and remained within her military lines. While so absent from his home, it was seized under the process of the district court of the United States by virtue of the confiscation acts of congress, and a due notice stuck up at the court-house door for him to appear and defend his property. It being the decision of that court that no person adhering to "the Rebellion," should appear there in person or by attorney to defend his property, and Semple being likewise within military lines where it was illegal and impossible for him to hear what was transpiring in and about the district court of the United States for Virginia, he never did appear and defend in the proceeding. Whereupon evidence was heard and a decree of confiscation rendered against him by default, and the property sold under a writ of venditioni exponas. [Case unreported.] The record was now brought into this court on writ of error, for the purpose of obtaining a decision here that the proceedings below hav-

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

ing been in admiralty were void, and therefore the sale of Semple's property would fall with the decree on which it rested.

CHASE, Circuit Justice. This case comes before us upon a writ of error to the district court for the district of Virginia. The proceedings in that court were by seizure and libel of information for the condemnation, under the act of July 7, 1862, of certain real estate of the plaintiff in error, situated in Elizabeth City county, within the district of Virginia.

The seizure and libel were followed by an order fixing a short day for trial, and directing the issue of monition and publication of notice according to the ordinary course of admiralty. There was no appearance, and the decree of confiscation or forfeiture after examination of witnesses, was made upon default, and the property was sold under a writ of venditioni exponas.

Three points were made in argument for the plaintiff in error.

The first is that the act under which the proceedings for condemnation were had, is unconstitutional. Several cases arising under this act and that of August, 1861, of like tenor, have been considered by the supreme court. Union Ins. Co. v. U. S., 6 Wall. [73 U. S.] 763, and other cases in same volume.

In neither of these cases was this point made, either by counsel or by the court; and it is a fair conclusion that neither at the bar nor upon the bench, was the constitutionality of the act doubted.

We, at least, unless clearly satisfied that the act is unconstitutional, and satisfied also that the point passed without observation in the supreme court, are bound here by the action of that court.

We shall hold, therefore, for the present, that the act is warranted by the constitution; but shall be gratified if the question is again submitted to the supreme court, and adjudged upon direct argument and consideration.

The other point made for the plaintiff in error is, that the suit in the district court was in admiralty; whereas, being for condemnation of a seizure of land, the remedy should have been sought in the common-law side of the court.

But in Union Ins. Co. v. U. S. [supra], it was held that a proceeding for condemnation might well be according to forms used in admiralty, although it must be conformed to the course of the common law, in respect to the trial of issues of fact and exceptions to evidence; and, regularly, could only be reviewed after final judgment or decree upon writ of error.

In that case there had been an appearance and claim, but no trial by jury and no exceptions to evidence; and the cause was brought into the supreme court by appeal.

The court took jurisdiction of the cause upon the appeal only, for the purpose of reversing the decree as irregular, and remanding the cause for further proceedings. In this case the cause is brought before us by writ of error, not by appeal; and this mode of invoking the appellate jurisdiction is peculiar to civil actions as distinguished from causes of admiralty and maritime jurisdiction. It is evident, therefore, that the plaintiff in error did not regard the proceedings below as a cause in admiralty; and he was right, for though in the form of admiralty, it was, in substance, a proceeding at common law. If it appeared from the record that an issue had been made and tried by the court without a jury, and without submission by the parties, it would be our duty to reverse the judgment or decree in conformity with the principles settled in Union Ins. Co. v. U. S., but nothing of this sort appears. The cause was suffered to go by default, and there can be no direction of trial by jury where no issue is made and no such trial demanded. On the contrary, it is the constant practice to render judgment of forfeiture in such cases by default, without the intervention of a jury. Conk. Prac. 568. We see, therefore, no error in the judgment or decree of the district court, and it must be affirmed.

Case No. 12,662.

SEMPLE v. UNITED STATES.

[Hoff Land Cas. 37.] [1]

District Court, N. D. California. June Term, 1855.

MEXICAN LAND GRANT—BOUNDARIES—CERTAINTY OF LOCATION.

Under the decision of the supreme court in Fremont v. U. S. [17 How. (58 U. S.) 542], this claim is entitled to confirmation.

Claim for two leagues of land on the Sacramento river, rejected by the board, and appealed by the claimant [Charles D. Semple].

Thornton & Williams, for appellant.

S. W. Inge, U. S. Dist. Atty., for appellees.

HOFFMAN, District Judge. The evidence in this case shows that on the twenty-eighth of June, 1845, John Bidwell petitioned the governor for a grant of land. After the usual reference for information and reports thereon, a grant was issued on the fourth of October, 1845, by the governor, Pio Pico, subject to the approval of the departmental assembly, which approval was given four days afterwards. The genuineness of the grant is not disputed. The land solicited is described in the petition as "the tract of land known by the name of 'Colus,' on the bank of the river Sacramento, which tract is vacant, and contains two sitios, bounded thus: on the north-west by vacant land; on the north-east by the river Sacramento; on the south and south-west by vacant land, as shown by the drawing annexed to this peti-

[1] [Reported by Hon. Ogden Hoffman, District Judge, and here reprinted by permission.]

tion." In the grant the land granted is described as the tract of land known by the name of "Colus," on the bank of the river Sacramento, to the north-east direction. Under the evidence submitted to the board, this claim was rejected for want of definiteness of boundaries, or any description sufficient to enable a surveyor to locate it. It was considered by the board "that the only thing which is certain in this description is, that the land is bounded on one side by the Sacramento river. That there is nothing to fix the place along the river where it is located, or to identify a single point where it touched that stream." It was further considered by the board that this defect was unaided by the map which accompanied the petition and forms a part of the expediente, as nothing appeared in the evidence to show why the lines were placed in the position they occupy on the map, or how they are to be found by a surveyor. "They are," say the commissioners, "mere lines on paper, having no monuments or landmarks to indicate the locality. The three sides of the tract which are not identical with the Sacramento river have no description which will not as well be answered by a line drawn in one place as in another through the vacant lands, and there is no description which fixes the front on any specified portion of the length of the Sacramento." To meet the objections stated in the above extracts from the opinion of the commissioners, additional testimony has been taken in this court. By the evidence of John Bidwell, the original grantee, it appears that the original of the map contained in the expediente was made by him in 1845, and presented with his petition to the governor. That there is a very noted point on the Sacramento river, being a high mound, the site of the rancheria, "Colus." The northern boundary begins on the Sacramento at a point just one league above said "Colus" rancheria, and runs directly back from the river at right angles with its general course one league—thence parallel with the general course of the said river and down said river so far as to include two square leagues of land. The tract was intended to be as expressed in the map, two leagues long and one wide. The witness adds, that with the aid of the map and establishing the beginning point as stated, he or any other surveyor could locate it accurately. The testimony of this witness is confirmed by O. M. Wozencraft and L. B. Mizner. The former of these witnesses was, in 1851, United States Indian commissioner, and as such acquired full knowledge that the "Colus" Indians had been on the Rancho de Colus a very great number of years. The tribe, which is the only one of that name in California, inhabited a large mound or rancheria about one hundred and fifty yards from the steamboat landing in the present town of Colusa, between six and eight miles from the Buttes, in a west by north direction, on the west bank of the Sacramento river. These Indians, known as the "Colus" tribe, were still inhabiting their rancheria on the mound spoken of, as late as 1849, as appears from the testimony of L. B. Mizner. The map, which forms a part of the expediente, indicates the general form of the land solicited, precisely as testified by the witness, Bidwell. It is made with some skill, and is much superior to the rude delineations which accompany most of the Mexican expedientes. The mound, or Rancheria de Colus, is distinctly indicated on this map, and in a position entirely corresponding with that described in the testimony of the witnesses, as appears from the scale attached to the map. It is evident, from an inspection of the map, that if the Rancheria de Colus can be found, a surveyor with the aid of the map could have no difficulty in locating the land. That the rancheria and the mound on which it was situated can be found, the testimony leaves no room to doubt.

We think that the objection of the commissioners, that there are no monuments or natural landmarks to indicate the locality of the grant, and no description which fixes the front on any specified portion of the length of the Sacramento river, is effectually removed by the evidence taken in this court. With respect to the performance of the conditions, it appears that when the grantee first received his grant, in October, 1845, he intended to occupy his land the following summer, but was prevented from doing so by the hostilities which began in 1846, between Mexico and the United States. He, however, employed a man in that year to live upon his land and take charge of it, but he died very shortly afterwards. The witness served in the American army during the war, and in June, 1849, immediately after its conclusion, he built a corral upon his land for his cattle. In January, 1850, he conveyed the land to Semple, the present claimant, who immediately took possession of and occupied it. The excuses for not fulfilling the conditions are, it will be seen, at least as satisfactory as those decided in the case of Fremont v. U. S. [17 How. (58 U. S.) 542] to be sufficient. In this case there has been no unreasonable delay, and the reasons for not occupying the land are such as by an American court should be received with favor. There is no pretense to say that the grant was abandoned, for the grantee seems to have commenced the improvement of his land as soon as the cessation of hostilities permitted him to do so. It is to be observed in addition, that the grant in this case was approved by the departmental assembly, and a complete title passed to the grantee. His grant was thus by the regulations of 1828, definitely valid, and the Mexican title completely divested. The grant in the case of Fremont had never received the approval of the departmental assembly. Whether in any case of a grant made definitely valid by the

approval of the assembly, this court can decree a forfeiture for the breach of conditions subsequent, it is not now necessary to inquire; for the right of the claimant is clear on the principles laid down in the last, as well as on the earlier decisions of the supreme court. No other objections to the confirmation of this claim have been brought to our notice, nor do any others occur to us on an examination of the record in the case.

A decree of confirmation must therefore be entered.

SEMPLE (UNITED STATES v.). See Case No. 16,250.

SEMPLE (VOGLER v.). See Case No. 16,987.

Case No. 12,663.

SENAB v. The JOSEPHINE.

[4 Cent. Law J. 262.] [1]

District Court, D. Louisiana. 1877.

MARITIME LIENS—RELEASE OF VESSEL ON BOND—REMEDY OF LIENHOLDER.

[A vessel discharged from arrest upon admiralty process by the giving of a bond or stipulation for her value, or for the payment of the amount claimed in the libel, returns to her owner freed from the lien upon which she was arrested, and in the absence of fraud can never be seized again for the same cause of action, even by the consent of the parties.]

[Cited in The William F. McRae, 23 Fed. 558.]

In admiralty.

BILLINGS, District Judge. Where a party libeled a ship which was subsequently released on bond under act of congress of March 3, 1847 [9 Stat. 181], the libelant must look exclusively to the bond of release for the satisfaction of his claim, and can not participate in the proceeds realized from the sale of the ship under a subsequent libel, except in cases of fraud. The bond becomes the substitute for the vessel. In The Union [Case No. 14,346], an order had been made in the district court, directing the re-delivery of the vessel which had been released upon bond and stipulation. Judge Blatchford said: "This order assumes that the discharge of the vessel from the seizure, and her delivery to her owners, was not absolute, but that she is still subject to the exertion of the power of the court for the purpose of satisfying any decree. No case has been furnished in which this power of the admiralty has been exerted; and, on principle, I do not well see how it can be maintained. The vessel, after being discharged from the arrest, upon the giving of the bond or stipulation, returns into the hands of her owner, subject to all previously existing liens or charges, the same as before the seizure, except as respects that on account of which the seizure was made. She is also subject to any subsequently-accruing liens or charges in the hands of her owner, or in the hands of any person to whom she may have been transferred. The re-delivery, therefore, of the vessel, if permitted, or enforced, must necessarily be a re-delivery subject to all these existing or subsequently-accruing liens, and also to the rights of any bona fide purchasers, if a sale has in the meantime taken place. The complication and embarrassment growing out of the exercise of the power if sanctioned are apparent, and this doubtles accounts for the absence of any precedent in the books." The act of congress of March 3, 1847, provides: "It shall be the duty of the marshal to stay execution on such process, and to discharge the property arrested if the same has been levied, on receiving from the claimants a bond or stipulation." In The Wild Ranger, Brown & L. 84, the point before the court seems to have been determined by Dr. Lushington. In that case the Wild Ranger had collided with the Coleroon. Two suits were instituted against her, the one on behalf of the owners of the Coleroon, and the other on behalf of the owners of the cargo. In the first suit, that on behalf of the owners of the Coleroon, the ship was released on bail, the form of the stipulation being, "If he, the said defendant, shall not pay what may be adjudged against him in the said cause with costs, execution may issue forthwith against us, our heirs', executors' and administrators' goods and chattels, for a sum not exceeding ——." After the release the vessel was arrested at the suit of the owners of the cargo, and in that suit was sold, and the proceeds placed in the registry of the court. Both suits went to judgment. The libel on behalf of the owners of the vessel had been amended, and the decree was for £92 in excess of the damages claimed in the original libel and stipulated for in the release-bond. On the other hand, there was a surplus of £1,498 in the registry of the court, in the second suit, beyond the payment of the judgment in favor of the owners of the cargo. The application was to have this £92 paid out of the proceeds in the registry in the second suit. Dr. Lushington refused the application; the following are his reasons: "Now, the bail given for the ship in any action is the substitute for the ship; when the bail is given, the ship is immediately released from that cause of action and cannot be arrested again for that cause of action. Also, if the ship is sold in another action, the proceeds, save by the operation of some act of parliament, are liable only to the payment of liens. In this case then, after the bail was taken, the ship herself never could have been made liable for damage or interest." I am of opinion that the proceeds of a ship sold in another action are in legal consideration as the ship itself, and, therefore, can not be made available to answer this demand. It would seem that the act of congress authorizing the release of vessels on bond, providing for their re-

[1] [Reprinted by permission.]

lease, either before or after arrest, contemplates that the bail shall, in the absence of fraud, in all respects, be a substitute for the vessel. It would seem that the embarrassments and complications of the opposite rule would be very great. The authority of the cases cited sustains fully this reasoning. Upon the delivery to the claimant of the vessel, upon bail, the right of the libelant to rearrest the vessel, except in case of fraud, was lost; and since he can not resort to the vessel, he can not to her proceeds.

Case No. 12,664.

The SENATOR.

[Brown, Adm. 372.] [1]

District Court, E. D. Michigan. March, 1872.

SALVAGE—CASE OF APPARENT DERELICT—LIABILITY OF SALVORS FOR NEGLIGENCE.

1. A vessel and cargo, valued at $5,000, were found in Lake Erie, waterlogged, abandoned, and apparently, though not in fact derelict. A portion of her cargo was taken off and put upon the salving vessel, a steam barge, by which she was towed to a place of safety, the whole time occupied by the service being six hours. *Held*, that, under the circumstances, $75 was a proper salvage compensation.

[Cited in Cope v. Vallette Dry-Dock Co., 16 Fed. 926; The Mary E. Dana, 17 Fed. 357; The Ann L. Lockwood, 37 Fed. 237.]

2. Salvors are liable for damage done to the sails of the vessel saved by being negligently left exposed to sparks from the salving vessel.

[Cited in The Albany, 44 Fed. 434.]

Libel for salvage. The scow Senator was bound on a voyage from Saginaw to Toledo, with a cargo of lumber. Having encountered a storm, she was found, on the night of the 22d of April, 1869, to be leaking. When she had arrived off Monroe light, and some five to seven miles distant from it, she became so waterlogged that she could not proceed. She then, as testified by her master and crew, came to an anchor, and the master went ashore at Monroe in quest of a tug to tow the vessel to Toledo. Finding no tug at Monroe, he telegraphed to Toledo for one. The entire crew of the vessel left and went on shore with the master, for the reason that they had but one boat, and it was deemed unsafe to remain on board the vessel in her then condition, without a boat to make their escape if necessary. Libellant's vessel, the steam barge Mayflower, bound up from Toledo, made the Senator at about 10 o'clock in the forenoon of the next day, and, on coming up to her, found that a considerable portion of the top of her load of lumber had slid over to one side, causing the vessel to careen considerably, and the lumber was gradually sliding off into the water with each roll of the vessel, and floating away. Finding no one on board, the master of the Mayflower at once set about gathering up the floating lumber, and also transferring lumber from the Senator to his vessel, which he continued to do until he had so gathered up and transferred about 5,000 feet, when the Senator became so relieved that she righted. The master of the Mayflower, finding that the rudder of the Senator was broken, or unshipped, so that she could not be towed astern, lashed her alongside his vessel, and started with her for Monroe harbor. On reaching shoal water, near the harbor, the Senator, from the amount of water she drew on account of her waterlogged condition, brought up on the bottom. At about this time, or very soon after, the master of the Senator came aboard and claimed the vessel and cargo, and thereupon the lumber which had been taken on board the Mayflower was transferred back to the Senator by the Mayflower's crew. The masters of the two vessels had some conversation about settling for the services of the Mayflower, but did not agree as to the amount, and no settlement was had. The Senator was then left in possession of her own master, and the Mayflower went to Monroe. This was about 4 o'clock in the afternoon. Soon after the Mayflower left, the tug, which had been telegraphed for, arrived from Toledo, took the Senator in tow, and towed her to Toledo, where she arrived some time in the night.

W. A. Moore, for libellant.
H. B. Brown, for claimant.

LONGYEAR, District Judge. The only question in this case is as to the amount the libellants ought to receive. Claims for salvage services are among the most meritorious known to the admiralty, and hence are viewed with favor. Such services are to be encouraged, and although the degrees of merit vary widely in different cases, yet in no case should the allowance be so small as to operate as a discouragement. The amount to be allowed, however, depends entirely upon the peculiar circumstances of each case; and while it should not be made so small as to operate as a discouragement to like efforts in the future, on the one hand, it should not be made so large as to operate oppressively to owners on the other. These remarks are especially applicable to a case like the present, where the property saved or aided was not derelict. There is some conflict between the testimony of the crews of the respective vessels as to whether the Senator was actually at anchor when discovered by the Mayflower; but I think there is a clear preponderance of proof that she was at anchor. Although the wind was blowing quite briskly from the land, and the swells were considerable from the effects of the then recent storm, and there were islands a few miles to leeward upon which the vessel might drift if she were to break from her moorings or drag her anchor, yet there does not appear to have been any imminent danger of her going to pieces, breaking from her moor-

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

ing, or dragging her anchor, and from the buoyancy of her cargo there was no immediate danger of her sinking. The cargo, however, was actually escaping, and was liable to the loss of a considerable portion of it; the weather was unsettled, and the storm might be renewed at any moment, endangering a total loss of vessel and cargo; and there being no one on board, she was, considering the distance from land, prima facie abandoned and derelict. It was therefore highly proper for the master of the Mayflower to do as he did—save the cargo from loss, which was then actually taking place, and to take vessel and cargo to a place of safety. In other words, the vessel and cargo were in a condition to have a salvage service performed. I think Mr. Parsons lays down the rule correctly when he says: "If a ship or property be left, though not derelict, one who in good faith takes possession as salvor, is not a trespasser, but has his reasonable claim for salvage, according to the good he actually does." 2 Pars. Shipp. & Adm. 283, 291. See, also, Talbot v. Seeman, 1 Cranch [5 U. S.] 1.

There are not, however, in this case any of those elements which lie at the foundation of large compensation to salvors, such as peril to life, or even of great hardships and dangers to the salvors, or to the safety of the salving vessel; no detention from any voyage, nor detention of freight on the part of the salving vessel; and not so far from shore but safety from storm could be sought at any time. Add to this the fact that the vessel was not in fact abandoned, but that succor had been applied for and was even then on the way, and arrived so soon that no great additional loss could have occurred beyond a few thousand feet of lumber, and I think libellants fail to make out a case for compensation much beyond what would be full, liberal pay for the time, work and labor actually spent and performed. I think, however, that something beyond mere compensation ought to be allowed, in consideration of the fact that a portion of the cargo was actually saved which would evidently have been otherwise lost, and also that efforts of this kind, when made in good faith, as they were undoubtedly in this case, ought to be encouraged. In this case the time actually spent was about six hours. The proof shows the value of the services of the Mayflower and her crew, on ordinary occasions, to have been $10 per hour. Although, in cases of the peculiar circumstances like the present, salvage is seldom, if ever, awarded at a percentage or proportion of the value of the property saved or benefited, yet value very properly has its influence in fixing the amount. In this case the value of the vessel and cargo was about $5,000, that of the vessel being $3,500, and that of the cargo $1,500.

Under all the circumstances of the case, I think $75 is a fair salvage compensation. From this, however, must be deducted $10 for damage done to the sails of the Senator by burning, in consequence of being negligently left exposed to the sparks from the Mayflower while towing the Senator alongside.

Decree for libellants for $65 and costs.

See The C. S. Butler, 2 Mar. Law Cas. (N. S.) 237.

Case No. 12,665.

The SENATOR.

[Brown, Adm. 544;[1] 7 Chi. Leg. News, 162.]

District Court, E. D. Michigan. Jan. 25, 1875.

TOWAGE—MASTER'S CERTIFICATE—DURESS—POWER OF UNDERWRITER OF CARGO TO BIND VESSEL.

1. A master's certificate as to the amount agreed to be paid for services will not be set aside, unless it appear clearly and satisfactorily that the sum named is so unreasonable as to raise a suspicion of fraud.

[Cited in The Roanoke, 50 Fed. 580.]

2. The making of such certificate under a threat to attach the vessel is not such duress as will avoid its effect.

3. The underwriter, where there is no abandonment, has no authority to direct the master, or to contract for the vessel.

James Moffat and Alonzo N. Moffat libelled the schooner Senator upon a claim and account certified by her master as correct, for $400, for towage services August 14th, 1873. The defenses set up will appear in the opinion of the court.

H. B. Brown, for libellants.
W. A. Moore, for claimant.

LONGYEAR, District Judge. It is conceded that the master's certificate was within the scope of his authority as master, and if made voluntarily and without coercion it was binding on the vessel and owners. But it was contended that it was made under coercion and not voluntarily. The only coercion pretended was that testified to by the master, viz: A threat by libellants to libel and attach the vessel in the Eastern district of Michigan, where she then was, if he refused to sign the certificate; and that he signed it in consequence of such threat in order to avoid being detained and delayed in the completion of the voyage then in progress. Libellants testified that no such threat was made; but, if it was made, it was simply to take a strictly legal step to litigate the matter in controversy, which was, not whether anything was due libellants, but how much; and the making of the certificate by the master was simply the exercise of a choice on his part, to submit to what he was not willing to concede to be right, rather than take the risks and incur the trouble,

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

delay and expense of a law suit. Such settlements are of frequent occurrence in business matters, and are always upheld when untainted by fraud, mistake or unfair dealing, as in this case. Wilcox v. Howland, 23 Pick. 167; Waller v. Cralle, 8 B. Mon. 11; Eddy v. Herrin, 17 Me. 338; Alexander v. Pierce, 10 N. H. 494.

Another ground urged for setting aside the certificate was, that the amount was grossly exorbitant for the service rendered. In order to defeat the certificate on this ground it was necessary to make it appear clearly and satisfactorily that the amount allowed was so unreasonable as to raise a presumption, or suspicion at least, that the certificate was fraudulently or maliciously made. 2 Pars. Shipp. & Adm. 10. Have we here such a case made out? The service had already been rendered and the dispute was as to how much it was worth. The amount certified by the master was $400, and the estimates of the witnesses ranged all the way from $500 down to $75. This certainly fails to make out such a case as was necessary, under the rule above laid down, to set aside a settlement deliberately made.

Another ground urged was that the matter had been referred for settlement to one Guyle, an agent for the underwriters on the cargo, and he had instructed the master to pay no more than $50. In the first place, this is not consistent with the concession of the master's authority in the premises, already alluded to. In the next place, there is no proof of any such reference. There is some proof that Guyle was somewhat consulted in the matter, but none that it was referred to him for settlement, either formally or informally. In the next place, Guyle had no authority simply by virtue of his agency for the underwriters to direct the master what to do or what not to do in the premises, there having been no abandonment to and of course no acceptance by the underwriters. Insurers are mere strangers, and are not entitled to be heard under such circumstances. The Packet [Case No. 10,654]; United Ins. Co. v. Scott, 1 Johns. 106; see, also, The Boston [Case No. 1,673]. And finally, even if Guyle had any authority in the premises, it extended to the cargo only, and this suit is against the vessel alone.

It results that libellants must have a decree for the bill as certified, with interest from date, and costs of suit. Decree for libellants.

[Amount certified August 14, 1873...	$400 00
Interest to January 25, 1875, one year, five months and eleven days, at 7 per cent.	40 54
Decree for	$440 54[2]

SENATOR, The (McCARTY v.). See Case No. 8,686.

[2] [From 7 Chi. Leg. News, 162.]

Case No. 12,666.

The SENATOR MIKE NORTON.

The TITAN.

Circuit Court, S. D. New York.

[Affirming Case No. 12,667. Nowhere reported; opinion not now accessible.]

Case No. 12,667.

The SENATOR MIKE NORTON.

The TITAN.

[10 Ben. 440.] [1]

District Court, S. D. New York. May, 1879.[2]

COLLISION — STEAMERS IN EAST RIVER — LIGHTS — WHISTLES.

1. A collision occurred in the evening of October 1, 1875, about off pier 1, East river, in New York harbor between two steamers, the T. and S. M. N. The T. was bound from pier 5, East river, to pier 14, North river, to lay up for the night. The S. M. N. had towed a bark in from sea and anchored her between Bedloe's Island and the Battery, and was bound for pier 16, East river. Both boats had their lights set and burning. The pilot of the T. averred that a ferryboat having passed ahead of him going to the northward, he ported his wheel following her up, and as she passed him he saw both the red and green lights of the S. M. N. ahead of him about 400 to 600 yards off, his boat at the time making seven or eight miles an hour; that he at once blew one whistle and ported his wheel and kept on a port wheel till the S. M. N. came in collision with the T., striking her on the port side nearly at right angles; that the S. M. N. answered his single whistle with a single whistle, but that her pilot starboarded his wheel instead of porting it, and that when the vessels were three or four lengths apart he rang his jingle bell to give the T. more speed, and if possible, get by. The story of the S. M. N. was, that she made the green light of the T. on her starboard bow, whereupon the pilot of the S. M. N. blew two whistles and put her wheel slightly to starboard, and that the T., after waiting about a minute, answered with one whistle and ported her wheel and ran across the course of the S. M. N. and thus caused the collision. *Held*, that it is difficult to believe that, after the pilot of the S. M. N. had answered the single whistle of the T. with a single whistle, he starboarded his wheel.

2. If the account of the pilot of the T. were true, he was in fault, because as soon as he saw that the S. M. N. after having answered his whistle with one whistle, was running down on him with a starboard wheel, he should at once have stopped and backed, instead of increasing his speed.

3. On the evidence, the S. M. N. blew two whistles before the T. blew one, and at that time the green light of the T. alone was visible, and the S. M. N. did not answer the single whistle of the T. with a single whistle.

4. The T. was solely in fault for the collision.

In admiralty.

R. D. Benedict, for the Titan.

W. R. Beebe, for the Norton.

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

[2] [Affirmed by circuit court. Case unreported.]

CHOATE, District Judge. These are cross libels to recover damages caused by a collision between the two steam tugs on the evening of October 1, 1875, about off pier 1, East river. The Titan was bound from pier 5, East river, to pier 14, North river, to lay up for the night. The Norton had towed a bark in from sea and had anchored her in the North river between Bedloe's Island and the Battery, and was bound for pier 16, East river. The collision happened after dark and both boats had proper lights. The tide was the first of the flood and the night clear.

The case of the Titan, as stated by her pilot, is that when he got out into the river from pier 5 and got straightened down, a ferryboat of the Hamilton ferry or South ferry line passed ahead of him going into her slip, which is between piers 1 and 2; that as she passed he ported his wheel, following her up; that when she got clear of him he made the lights of the Norton; that he saw both the red and the green light and that the two vessels were heading head on to each other and apparently somewhere from 400 to 600 yards apart; that he was making about seven or eight miles an hour; that on making the Norton he immediately blew one whistle and ported still more and kept on a port wheel to the time of the collision; that the Norton replied with one whistle, but instead of porting she starboarded so as to cross his course; that she kept on on a starboard wheel till the time of the collision, both vessels thus curving in towards the shore; that the vessels were about three or four lengths apart when he rang his jingle bell to give his vessel more speed, intending to get across the bows of the Norton; that just before the vessels came together he rang to stop and back, and his engine was reversed when the collision took place. The libel of the Titan states and the pilot testifies that at the moment of the collision the Titan was heading nearly square on to the shore, and the witnesses agree that the Norton's stem struck the port side of the Titan nearly at right angles, and a very short distance from the stem. Both vessels were injured.

The case of the Norton is that she shaped her course so as to clear the New York shore; that just before reaching off abreast of pier 1, East river, and well off the starboard bow of the Norton, the green light of the Titan was seen; that the red light was not then in sight; that as soon as the green light was seen the Norton blew two whistles and her wheel was put slightly to starboard; that the Titan did not reply promptly to the signal, but after waiting about a minute blew a single whistle and immediately made a rank sheer to starboard, hiding her green light and bringing her red light into view and throwing herself directly across the course of the Norton; that the Norton could not by a change of course avoid a collision, but she immediately stopped and backed, but nevertheless struck the port side of the Titan.

The evidence is conflicting, but the preponderance of the evidence is clearly with the Norton. The account given by the Titan is both improbable in itself, and, if correct, shows that she was at fault. It is difficult to believe that upon a signal of one whistle in reply to the Titan's one whistle, the pilot of the Norton should have starboarded, especially if at the time the vessels were heading head on. Of course it is not impossible, but the proof should be pretty strong. But if the account given by the pilot of the Titan is correct, it shows fault on his part, since, as soon as he discovered that the Norton, after giving one whistle as if she intended to pass on his port hand, was running down on to him on a starboard wheel, he should at once have stopped and backed instead of ringing to increase his speed, and it is quite probable that if he had done so the collision would have been avoided. His course was reckless in any view of the case, since his manœuvre of driving ahead at increased rate of speed on a port wheel incurred the double risk of collision with the Titan and running into the piers, for which, as sworn in his libel and testified to by him, he was almost directly heading at the time of the collision. And the evidence shows that the collision happened a very short distance from the shore.

The evidence that the Norton blew two whistles before the Titan blew her one is, I think, satisfactorily proved by the witnesses from the Norton, some of whom were strangers to the Norton and have no interest or reason for bias in the cause. It is also sufficiently proved that at the time the Norton blew two whistles the green light of the Titan was alone of her side lights visible from the Norton. This being so, it follows that the Norton made the Titan and blew her two whistles before those on the Titan had observed the Norton. Nor is there any improbability or any serious difficulty in reconciling it with the testimony that, when the Norton made the Titan and blew her two whistles, the Titan was well on the starboard hand of the Norton and showing only her green light to the Norton, which position would have made this signal from the Norton, that they should pass each other on the starboard hand, proper. Making due allowances for inaccuracies of the witnesses, not at all improbable in respect to distances and periods of time testified to by them, and assuming that the Titan went out into the river beyond the line along and outside of the piers, which was the proper course of the Norton from Bedloe's Island to her point of destination, the Titan must have been in this relative position with respect to the Norton at some time after leaving her berth at pier 5, and before the collision. And the testimony showing that a tow was lying at piers

2 and 3, makes it not improbable that she went out a considerable distance into the river. At any rate, I consider the testimony of those on the Norton as to what they saw, sufficient to prove this point, though it is somewhat at variance with the evidence of those from the Titan as to the distance that she went out, and also is at variance with their testimony as to the bearing and the lights they saw when they made her. What the witnesses from the Norton say that they saw of the movements of the Titan, corresponds with what those on the Titan say that they did, making due allowance for differences as to time and distances. The pilot of the Titan admits that at some time after getting out into the river he ported and kept his wheel a-port till he blew the one whistle, and then still kept it a-port a little more up to the time of the collision. This corresponds with what those on the Norton say they saw; first the green light of the Titan, afterwards the green light disappearing and the red light appearing and the Titan sheering around on to the course of the Norton till the time of the collision. Assuming that the Titan went out far enough into the river to show her green light, before she began to swing around to starboard, or even a short time after she so began to swing, her movement in keeping on a port wheel until she ported still more to cross the bows of the Norton was such as her proper course into the North river around the Battery called for, and this she had entered upon, as her pilot admits, before she made the Norton. The fact testified to by the pilot of the Titan, that he made the lights of the Norton immediately upon the ferry boat crossing ahead of him so as to uncover her, does not, I think, even considering the testimony of the pilot of the Norton, that he made the light of the Titan after the ferry boat passed, have any strong tendency to affect the conclusion above drawn from the testimony as to the Norton having made the Titan first on her starboard hand, showing a green light and having given her two whistles, which she did not notice or reply to, except by shortly after blowing one whistle. This matter of the particular point of time when the ferry boat passed, the length of time after her passing and before the vessels made each other and the distance she passed ahead of the Titan is a matter involving judgment as to length of time and measure of distance peculiarly subject to error, both as matter of observation at the time and of recollection afterwards. It is not satisfactorily proved that the Norton blew one whistle after the Titan blew one, as testified to by those on the Titan.

The charge of negligence against the Titan is made out, in that she did not keep a good lookout; that she did not observe and respond promptly to the signal of the Norton; that she continued on a port wheel and gave a signal of one whistle to the Norton after the Norton had properly given her two whistles and had starboarded, as she was bound to do in accordance with the signal she gave; that she continued on her course with increased speed across the bows of the Norton after it was evident that by such course a collision was imminent; that she did not sooner stop and back.

The charge of negligence against the Norton is not proved. The testimony shows that she properly gave the signal of two whistles and starboarded; that as soon as there was any reason to suppose the Titan was changing her course so as to bring about a collision, she stopped and backed, but that the collision was then rendered inevitable by the fault of the Titan, and before the headway of the Norton could be entirely checked they came together.

Decree for the libellant against the Titan, with costs, and reference to compute damages. Libel against the Norton dismissed with costs.

[On appeal to the circuit court, the decree of this court was affirmed. Case unreported.]

Case No. 12,668.

The SENECA.

[8 Ben. 509.] [1]

District Court, E. D. New York. July, 1876.

WHARFAGE—LIEN—SEIZURE OF GOVERNMENT PROPERTY—COSTS.

1. A steamboat, owned by the municipality of the city of New York, and employed in transporting the harbor police, is exempt from liability to seizure to enforce a claim for wharfage in the admiralty.

[Cited in The Fidelity, Case No. 4,757.]

2. The libellant having asked no costs but disbursements, no costs but disbursements were awarded against him on a dismissal of the libel.

In admiralty.

Beebe, Wilcox & Hobbs, for libellant.

W. C. Whitney, for claimant.

BENEDICT, District Judge. This is an action to enforce a maritime lien for wharfage against the steamboat Seneca. The evidence shows that the vessel proceeded against is the police boat of the harbor, owned by the city of New York, and, at the time of using the libellant's wharf, was employed in the transporting of the harbor police while engaged in the discharge of their duties. The object of landing at libellant's wharf was to put ashore a policeman on duty. This vessel is then public property, devoted to a specific and public use. Consequently she is not in my opinion subject to be seized in the admiralty to enforce a demand like the present. The reasons for the rule applied in courts to such property, by which such property is exempt from seizure upon execution, appear to

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

have equal force in a case like the present. The libel must therefore be dismissed. Inasmuch as the libellant stated upon the trial that the action was brought to try the question of law, and that no costs beyond disbursements would be asked by the libellant in case of a recovery, no costs will be awarded on this decree against the libellant except disbursements.

Case No. 12,669

The SENECA.

[See Case No. 16,251.]

Case No. 12,670.

The SENECA.

[3 Wall. Jr. 395;[1] 6 Pa. Law J. 213; 18 Am. Jur. 486; 4 Haz. Reg. Pa. 248.]

Circuit Court, E. D. Pennsylvania. April Term, 1829.[2]

SHIPPING—MASTER—POWER TO APPOINT—DISAGREEMENT OF OWNERS—COMPULSORY SALE OF VESSEL.

1. Where two equal joint owners of a ship, differing as to which of the two was entitled to appoint the master, there being no difference between them, as to the destination of the vessel, and one of them insisting to undertake a voyage in person, as master, in opposition to the will and equal rights of the other part owner, the other applied by petition, asking either for the sale of the joint property, or that he might be permitted to send the vessel to sea under a master of his own appointment; *held*, that a sale of the vessel ought to be decreed.

[Cited in Tunno v. The Betsina, Case No. 14,236; The Ocean Belle, Id. 10,402; Coyne v. Caples, 8 Fed. 640; Head v. Amoskeag Manuf'g Co., 113 U. S. 23, 5 Sup. Ct. 447.]

2. The jurisdiction of the district court, under the 9th section of the judiciary act of 1789 [1 Stat. 76], embraces all cases of a maritime nature, whether they be particularly of admiralty cognizance or not: and such jurisdiction, and the law regulating its exercise, are to be sought for in the general maritime laws of nations, and are not confined to that of England, or any other particular maritime nation.

[Cited in Tunno v. The Betsina, Case No. 14,236; Kynoch v. The S. C. Ives, Id. 7,958.]

[See The Comet, Case No. 3,050; Haller v. Fox, 51 Fed. 299.]

3. The provisions of the French marine law which authorize a compulsory sale of a vessel, in case of partners disagreeing about the use of her, are part of the general law of admiralty binding on the courts of the country.

[Cited in Tunno v. The Betsina, Case No. 14,236.]

This case came before this court by appeal from the district court, in which a petition was filed on the 4th of December, 1828, by Davis & Brooks, merchants of the city of New York, stating that they were owners of one-half of the brig Seneca, then lying in the port of Philadelphia, and that the remaining half part belonged to Captain Henry Levely; that Captain Levely had had possession of the brig for several months, having the sole control thereof, and had proceeded on certain voyages to the detriment and dissatisfaction of the late part owners (from whom the brig was purchased by the petitioners), and then again threatened to take the vessel to sea without the consent of the petitioners, and to their great detriment; the petitioners further stated that finding themselves in a very inconvenient situation by the conduct of Captain Levely, they had repeatedly offered to sell their share to him at a reasonable price, or to purchase his share on sufficient terms, or to sell the entire vessel at a public sale, or to send her to sea with a master appointed by themselves; but that the said Captain Levely had obstinately refused to adopt either of these courses, and persisted in declaring that he would take the vessel to sea. In consideration of these circumstances, the petitioners prayed an attachment against the vessel, and a citation to Captain Levely to show cause, why the court should not grant an order for the sale of the said vessel; or why the petitioners should not be permitted to send her to sea with a master appointed by themselves. The attachment and citation were granted—and after argument, the judge of the district court (Judge Hopkinson) delivered an elaborate opinion against the authority of the court to order a sale of the vessel, and decreed that neither of the prayers of the petitioners could be granted and that the petition be dismissed. [Case No. 3,650]. From this decree the petitioners appealed. After the cause came into this court, the appellants obtained leave to amend their petition, which amended petition, after repeating the various offers made by them to the respondent, as set forth in the original petition, and with more precision as to the last of them, stated their offer that the brig should be sent to sea on a designated voyage, under the charge of a master to be agreed upon by both parties, all of which offers they stated were refused. That the respondent had obtained and now retains possession of the brig, in an illegal manner, and against the will of the petitioners,—that he had recently appointed a master to command her, without the assent of the petitioners, and now threatens to send her on a voyage under the person so appointed by himself, without their concurrence and against their consent, whereby they would be deprived of their moiety of the profits of the vessel. The prayer was, that the respondent might be restrained from taking or sending the brig to sea, and that a sale of the brig be decreed, or that the petitioners might be permitted to send the vessel to sea on a voyage proposed by them. The amended answer denied that the offers stated in the amended petition were made;—it stated that the respondent proposed to the petitioners that she should be fitted out and employ-

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

[2] [Reversing Case No. 3,650.]

ed, but that they refused to expend a dollar upon her, and would rather see her rot at the wharves than have anything to do with her;—that the respondent then determined to fit her for sea; and after he had fully repaired her, at a great expense, and was ready to proceed to sea, he was stopped by the process issued from the district court;—he affirmed that it never was his intention to send her to sea under the command of the person mentioned in the petition, his determination being to command her himself on the projected voyage.

The new evidence taken in this court tended to prove the following facts: 1. That the petitioners objected to incurring any expense for the repairs or outfit of the vessel for a voyage to be conducted by the respondent as her master. 2. That they expressed their willingness to take possession of the brig, and to employ her under a skilful master, and to give bonds to account for her earnings; or to sell their moiety of her to the respondent for 1500 dollars, as she stood, before she was repaired. 3. That they offered to the agent of the respondent, that the brig should go to sea under another master than the respondent, and that they sent on a person to take command of her; but possession of her was refused. That a specific voyage to Wilmington, in North Carolina, was proposed by Henshaw, under whom the petitioners claimed, and who acted as the representative of the petitioners claiming a lien on the vessel.

[Libelants moved for leave to enter an appeal, which was allowed. Case No. 3,651.]

Wharton & Sergeant, for appellants.
Binney & Chauncey, for appellee.

WASHINGTON, Circuit Justice. The novelty, as well as the difficulty of this case, well entitles it to the labor, the talents, and the learning which have been bestowed upon it at the bar. It is not my intention to follow the counsel over the whole ground which they have so ably occupied, much less to express an opinion upon many of the topics which they have discussed. In the unsettled state of admiralty jurisdiction and admiralty law in the United States, I think it is the safest course to advance step by step in deciding the many new, and often intricate questions to which those subjects may give rise. Influenced by this consideration, I shall confine my observations to the precise case before me; which, from the amended pleadings and the new evidence exhibited in this court, I find to be that of joint owners of a vessel, having equal interests in her, each willing and desirous to employ her in navigation, but upon his own terms, and neither willing to do so upon any other. The terms upon which the appellants desire it are, that she may be commanded by a master of their appointment, and, at all events that Levely should not be that master. The appellee objects altogether to those terms, and claims to take her to sea under his sole command. It is manifest, therefore, that the difference between these owners, is not, whether the vessel shall be employed, but which of them shall be entitled to appoint the master; and, that upon this point, all prospect of compromise is hopeless. They do not differ, it is true, as to the destination of the vessel, because, until this preliminary matter of disagreement was adjusted, it was unnecessary for either to propose or to discuss the expediency of any particular voyage. But I consider it to be entirely unimportant to the decision of this case, whether the subject of difference be the appointment of the master, or the particular destination of the vessel, if the consequence in either case, as to the employment of the vessel must be the same.

In this state of things, the respondent, assuming to act as master, and insisting to undertake a voyage in opposition to the will, and to the equal rights of the other part owners, the latter applied by petition to the district court to decree a sale of the joint property, or that they might be permitted to send the vessel to sea under a master of their own appointment. The important question presented by this petition was, had that court jurisdiction and authority to decree a sale, and a division of the proceeds?

As preliminary to the investigation of this question, I not only admit, but insist,

First, that the judicial power of the United States under the constitution—and the jurisdiction of the district courts, under the 9th section of the judiciary act of 1789—embrace all cases of maritime nature, whether they be particularly of admiralty cognizance or not.

Second, that this jurisdiction, and the law regulating its exercise, are to be sought for in the general maritime law of nations, and are not confined to that of England, or any other particular maritime nation.

Lastly, that the present is a case of admiralty and maritime cognizance, since it involves a dispute between part owners of a vessel, concerning the disposition and employment of her in navigating the sea.

But these positions, if they be correctly taken and admitted, overcome only a part of the difficulties which this case presents. We are still left to inquire, does this maritime law authorize a sale of the property in a case like the present? And where is that law to be found? For I cannot agree with the appellant's counsel, that if the jurisdiction of the court be established, the authority follows as a corollary. The circuit courts of the United States have a common law jurisdiction in all the cases to which it is extended by the constitution and acts of congress; but the rules by which they are authorized to decide on any given case, must be sought for in the law of the land.

Where then is the law applicable to this

case to be found? Not in the practice, or adjudications, of the admiralty court of England. The case of Ouston v. Hebden, 1 Wils. 101, and that of The Apollo, 1 Hagg. Adm. 306, are conclusive both against the jurisdiction and the authority of that court.

We next pass to those great sources of maritime jurisprudence, the Rhodian law, and the laws of Oleron and Wisbuy, in neither of which do we find any provision made for a case similar to the present.

Our attention is then invited to the civil law, or rather to the Roman Marine Code, another legitimate source of general maritime law; in which we find sundry wise provisions for adjusting disputes between part owners of vessels, from which the three following rules may be deduced.

1. That the opinion and decision of the majority in interest of the owners, concerning the employment of the vessel, is to govern, and therefore they may, on any probable design, freight out or send the ship to sea, though against the will of the minority.

2. But if the majority refuse to employ the vessel, though they cannot be compelled to it by the minority, neither can their refusal keep the vessel idle, to the injury of the minority or to the public detriment; and since in such a case the minority can neither employ her themselves nor force the majority to do so, the vessel may be valued and sold.

3. If the interest of the owners be equal, and they differ about the employment of the vessel, one half being in favor of employing her, and the other opposed to it, in that case the willing owner may send her out.

It is manifest that neither of these rules applies to the present case, in which there are no unequal interests and no unwilling owner, each being desirous, and equally so, to employ the vessel.

In the further prosecution of our inquiries, we are naturally led to an examination of the Marine Code of France,—to those celebrated ordinances of Louis XIV., published to the maritime nations of Europe as early as the year 1681. The 5th and 6th articles of this Code, cited, and learnedly commented upon by Valin (page 564) will alone be noticed. The former is substantially the same as the first rule of the Roman law before referred to. The latter is as follows:

"No person may constrain his partner to proceed to the public sale of a ship held in common, except the opinions of the owners be equally divided about the undertaking of some voyage."

There is certainly some ambiguity in the phraseology of this article, and, unexplained, it might be construed to mean no more than is expressed in the third rule of the Roman law before noticed, applying to owners having equal interests. But Valin leaves no room for doubt as to the true exposition of the article. In his first volume (page 585) he says: "The case excepted in this article is, when 'the opinions of the parties are equally divided on the undertaking of some voyage,' upon which we may remark, that the question is not of two equal opinions, of which one is to leave the vessel without any kind of voyage, and the other to undertake such and such kind of voyage, there being no doubt in that case that the opinion favorable to a voyage ought to prevail, saving the right to discuss the projected voyage; but solely, of the case of two opinions equally divided upon the particular enterprise projected by one moiety of the persons interested, and rejected by the other moiety, whether that moiety proposes on its part another voyage, or confines itself to a disapproval of it, provided, nevertheless, that it gives plausible reasons for its conduct; otherwise this would have the air of an absolute refusal to permit the vessel to be navigated, which justice could not tolerate, being contrary to the object of the vessel, to the original intention of the parties, and to the interests of commerce."

This article, thus explained, embraces the present case, unless it could be successfully contended that there is a substantial difference between a disagreement respecting the particular voyage proposed and discussed, and the appointment of the master to conduct the voyage. The reason strikes me to be the same in the one case as in the other, and the consequences to the parties, to their original intention, to the object of the vessel, and to the interests of commerce, are precisely the same. In the one case as in the other, the vessel must remain unemployed, since neither owner can, otherwise than tortiously, send her to sea, against the will of the other. And were he to persist in doing so, is there no power in a court possessed of general maritime jurisdiction, to restrain him? I am not prepared to admit so monstrous a legal solecism as the denial of this authority would seem to imply.

But the ordinance provides that the party objecting to the voyage must assign a plausible reason for his conduct, in order to repel a presumption that his objection is founded on an unwillingness to employ the vessel at all. And is it not more than a plausible reason for one owner to allege his equal right to employ the person to whose care his property is to be entrusted, and to object to the one selected by the other owner, upon the ground of his want of confidence in the skill or in the integrity of the person so selected? I am far from saying, or even believing, that, in point of fact, the objection to Captain Levely is well founded, since there is no proof in the cause to substantiate it; but if it be honestly entertained by the appellants, it is not for this court to decide that it is futile, and merely urged as a pretext for detaining the vessel in port.

Having ascertained the true meaning of this article of the French Marine Ordinances, its authority, or the influence which it

should have in deciding this cause, is next to be considered.

It is insisted by the counsel for the appellee, that this article is nothing more than a part of the local law of France, founded upon the Roman law of licitation, adopted by France, applicable to the partition of property, movable and immovable, which is held in common by two or more persons, which, without a sale, could not be otherwise conveniently divided between them; and, in support of this argument, it is remarked that the expressions of the article are all negative, and must necessarily refer to some other code whenever the excepted case shall occur.

The ingenuity and the imposing appearance of this argument are freely acknowledged; but it will not, I think, bear a close examination. For, admitting the general law of licitation to have formed a part of the local law of France, it does not follow that an ordinance restraining and qualifying that law in cases, and in relation to subjects purely maritime in their nature, should likewise form a part of the local law of that country. It would rather seem that, on account of their maritime character, it was deemed proper to withdraw such subjects from the local, for the purpose of incorporating them into the general marine code of the nation. That the 5th article is of this description, has not been questioned; it was no doubt copied from the Roman Maritime Code, which having also provided for cases of disputes between the owners of unequal interests, as well as between those having equal interests in one event only, it would seem as if the 6th article had been introduced for the purpose of perfecting the system, by affording a remedy, in another event for which the Roman law had made no provision. It is most obvious, in short, that Valin, as well as other jurists who have treated of these articles, have considered them, not as part of the common, but of the maritime law of France, and we find provisions similar to them in principle introduced into the Code de Commerce of that country.

That the ordinances of Louis XIV. are not of binding authority upon the maritime courts of other countries I freely admit; but as affording evidence of the general maritime law of nations, they have been respected by the maritime courts of all nations, and adopted by most, if not by all of them, on the continent of Europe. We are informed that this Code was compiled from the prevailing maritime regulations of France, and of other nations, as well as from the experience of the most respectable commercial men of France. And why should not such parts of it as are purely of a general maritime character, which are adapted to the commercial state of this country, and are not inconsistent with the municipal regulations by which our courts are governed, be followed by the courts of the United States in questions of a maritime nature? I leave this question to be answered by those who would restrain the admiralty jurisdiction of the district court within the limits allowed by the common law courts of England to be exercised by the high court of admiralty of that country.

And why, let me again ask, shall the 6th article of this Code be rejected in the case now under consideration? Neither justice nor policy requires it. For it is manifest that the appellants must either surrender their property in this vessel, or rather the fruits of it, to the appellee, or their equal right to appoint the master, and to decide upon her destination, or that she must remain idle in port until the subject in dispute is totally lost to both the owners. There is no other imaginable alternative, unless it be the one which the appellants ask for. For if the appellee may now legally claim the right to take this vessel to sea, and, by giving security for her safe return, may take to himself, in exclusion of the other part owners, all the earnings of the voyage, his right to employ her, on the same terms, as long as she shall be in a condition to be navigated, will continue equally valid, and the exercise of it can no more be denied then than now.

Suppose, for the purpose of further illustrating this part of the subject, these parties had filed cross petitions, setting forth the difference between them respecting the appointment of a master, and each praying to be permitted to take the vessel to sea under the usual stipulations, since neither could entitle himself to a preference, what could the court do but dismisss both petitions, and thus leave the vessel unemployed; unprofitable to both parties and to the interests of commerce, and subject to all the injury to which such a state of things would expose her. Yet this is substantially the present case; and if the court has no power to decree a sale, it is clear that neither of the parties can take the vessel to sea without a decree of the district court authorizing him to do so.

Upon the whole, considering the article of the French Code, which has so often been referred to, as constituting a part of the maritime laws of nations—that it is in itself a wise and equitable provision—that it is not inconsistent with the commercial state of this country, or with any law which should govern this court, I feel myself not only at liberty, but bound to adopt and apply it to the present case, and I shall therefore reverse the sentence of the district court, and decree a sale of this vessel.

My opinion, I acknowledge, was very different when this cause was opened, from that which I now entertain. I had read that which was pronounced in the district court by the learned judge of that court, with an entire conviction of its correctness. But the new evidence which has been intro-

duced in this court, presents, in at least one most essential particular, a different case from that which was submitted to the view of that court.

SENECA, The (DAVIS v.). See Cases Nos. 3,650 and 3,651.

SENECA, The (UNITED STATES v.). See Case No. 16,251.

SERAT (SANDERSON v.). See Case No. 12,300.

SERPENT, The (FRENCH v.). See Case No. 5,103a.

Case No. 12,671.

SERRELL v. COLLINS et al.

[4 Blatchf. 61.] [1]

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

PATENTS—PROVISIONAL INJUNCTION—RIGHT NEVER ESTABLISHED—CONDITIONS.

1. Where, on an application for a provisional injunction, to restrain the infringement of letters patent, it appeared that the right of the plaintiff to the invention patented had never been established at law, that the plaintiff had twice failed to establish his right, on trials at law, that the defendant attacked the novelty of the invention, and claimed a right to use it on other grounds, and that the plaintiff's right had not been acquiesced in by the public, the court denied the application.

2. But the court made an order requiring the defendant to be ready to try, at the next term, an action at law pending against him on the patent, and providing that, if he should not be so ready, an injunction should then issue, as prayed for.

This was an application for a provisional injunction. The plaintiff [Alfred T. Serrell] claimed to be the first inventor of a new improvement in machinery for making mouldings, for which he obtained letters patent [No. 5,575], dated May 16, 1848. That patent was surrendered, and a reissued one obtained, dated January 7, 1851 [No. 187]. The last-mentioned patent was also surrendered, and a new reissued one was obtained, dated June 21, 1853 [No. 243]. The bill set forth, that the defendants [Denmark P. Collins and Abijah Pell] were violating the rights secured to the plaintiff by the patent, and prayed for an injunction. The novelty of the invention was attacked by the defendants, and they also claimed a right to use the invention described in the patent, on various other grounds.

George Gifford, for plaintiff.

Charles M. Keller, for defendants.

INGERSOLL, District Judge. The right of the plaintiff to the invention patented has never been established at law. An action is pending before this court, on the law side thereof, in favor of the plaintiff, against the defendants, in which the validity of the patent is to be contested and tried. It was expected that that action at law would have been tried at the present term of the court, but it has gone over to the next term, when it will be tried. At the early part of the term, the defendants were ready to try it; but, during the term, in consequence of a fire which took place, by which some of the evidence relied on by the defendants, to establish their defence, was lost and destroyed, it became necessary to have the trial postponed. The rights of the plaintiff under the patent have not been acquiesced in by the public. Others besides the defendants contest those rights and insist that the plaintiff has no rights under the patent. Under these circumstances, the plaintiff must make out a case clear of all doubt, to authorize the court to grant the injunction prayed for. Such a case has not been made out. It seems that, under the first patent, and also under the first reissued one, the plaintiff failed to establish his right, when the question was tried at law. Without intimating what my opinion would be, on the proofs as exhibited, if the case were now on the final hearing, I must deny the present motion. But, while I deny it, I will make an order requiring the defendants to be ready to try the action at law pending against them in this court, at the next term thereof, whenever the same shall be called, and providing that, if they are not so ready, an injunction shall then issue against them, as prayed for.

[NOTE. An action at law was accordingly tried, when the jury found for the plaintiff, with $2,000 damages. Case No. 12,672.]

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

Case No. 12,672.

SERRELL v. COLLINS et al.

[1 Fish. Pat. Cas. 289.] [1]

Circuit Court, S. D. New York. Oct., 1857.

PATENTS — PRESUMPTIONS — MACHINERY FOR MAKING MOLDINGS—DAMAGES—PROFITS.

1. The patent, when produced in evidence, whether it be an original or a reissue, is prima facie evidence that the thing granted was new and useful, and that the patentee was the inventor or discoverer thereof.

2. The grant of a patent is a determination on the part of the commissioner of patents that the subject of it is not embraced in a prior patent.

3. The jury are to consider that the patent grants that which the court determines it to grant.

4. *Held*, that Serrell's patent is not for yielding and fixed pressure, and feed rollers, in combination with rotary and fixed cutters; but it is for the combination described for operating on an angular strip for making moldings.

5. The rule of damages is the profits which had been derived by the defendants from the use of the plaintiff's machine, over any other mode which the defendants had a right to adopt.

This was an action on the case [by Alfred T. Serrell against Denmark P. Collins and Abijah Pell] tried by Judge Ingersoll and a jury, for the infringement of letters patent

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

[No. 5,575] for "improvement in machinery for making moldings," granted to the plaintiff May 16, 1848, reissued January 7, 1851 [No. 187], and again reissued June 21, 1853 [No. 243]. The suit was founded upon the last reissue, the claims of which were as follows: "What I claim as new, and desire to secure by letters patent, is: First, the combination of a ring or rings with a cutter or cutters, for operating on an angular strip for making a molding, whether the said cutter or cutters be rotating or stationary, or both, and whether the said cutter or cutters operate on the face or on the edge of the strip, or on both the face and the edge, substantially as herein described; and, second, the combination of the adjustable bed with the ring or rings and a cutter or cutters, as aforesaid, for operating on an angular strip for making a molding; whether the cutter or cutters be rotating or stationary, or both, whether the said cutter or cutters operate on the face or on the edge of the strip, or on both the face and the edge, substantially as described."

George Gifford, for plaintiff.

Peter Van Antwerp and Charles M. Keller, for defendants.

INGERSOLL, District Judge (charging jury). This suit is brought to recover damages which the plaintiff says he has sustained, by the use, by the defendants, of a certain mode of making moldings, which the plaintiff says is a violation of his rights, secured by a certain patent, first granted to him in the year 1848, and subsequently reissued in June, 1853. By the laws of the United States, a patentee who has obtained a patent for a new and useful invention or improvement, has a right to surrender the patent which has been granted to him, if it is defective in the specification or in the claim of the thing discovered, and, in lieu of the patent surrendered, obtain a reissued patent for the original discovery or improvement made, upon an amended specification and claim, and such reissued patent is to have full effect from the time it is issued up to the expiration of the term of fourteen years from the date of the original patent. The patent, when produced in evidence, whether it be an original or a reissued one, is prima facie evidence that the thing granted was new and useful, and that the patentee was the inventor or discoverer thereof.

To enable the jury properly to understand and dispose of the case before them, it is essential that they should turn their attention to three principal questions, which are necessarily involved in the case. If they do not consider these three several questions separately and distinctly, there is danger that in the confusion that may arise in considering the evidence as it has been presented, they may come to a wrong result. These three questions are the following: First. What is the grant of right which the patent purports to make to the plaintiff? Second. Was the grant of right which the patent purports to make to the plaintiff a valid grant of right? Third. If it was a valid grant of right, have the defendants infringed upon the rights so granted by the patent to the plaintiff? In other words, have they, without the permission of the plaintiff, used that which the patent gives to the plaintiff the exclusive right to use? If these three questions should be determined in favor of the plaintiff, then another question will have to be considered and determined by the jury, and that question is this: What are the damages which the plaintiff has sustained by an infringement, on the part of the defendants, of the rights of the plaintiff, secured by his patent? If either the second or third question stated should be determined in favor of the defendants, then it will be unnecessary to give the last question stated any consideration; in such a case, the verdict of the jury must be for the defendants.

The first question, then, is: What was the grant which the patent purported to make to the plaintiff? This question is a question of law, and must be determined by the court; and the jury, therefore, will consider that the patent purports to grant that which the court shall determine it to grant. It appears from the patent itself what was granted to the plaintiff, provided the government had the right to grant what they undertook to give; and the government had a right to grant what, by the patent, they undertook to give; provided, at the time that the original application for a patent was made by the plaintiff, he was the inventor of the thing granted; and provided, also, that the invention was new and useful. If, at the time the original application for a patent was made, the plaintiff was not the inventor of the thing patented, if it were not new and useful, then the government had no right to grant what they undertook to grant.

The object of the plaintiff's machine, as appears by the specification of his patent, is to make moldings on an angular strip of wood; and one great advantage of it, as claimed, is the saving of material. The machine is particularly described in the specification. The cutter or cutters used are particularly described; the ring or rings, roller or rollers, are also particularly described. There may be one or more—no particular form or shape to the ring edge is required; no particular width is necessary. They must be so arranged and formed as to press upon that part of the wood most to be cut away by the cutting instruments; and, by the machine almost any kind of an angular strip can be operated upon so as to make most kinds of moldings.

As you have seen by the patent, the object was not only to make a molding from a bevel piece, but also to make a molding from an angular piece, hollowed out. What is purported to be granted is this: the combination of a ring or rings, with a cutter or cutters for operating on an angular strip for making moldings, whether that strip be bevel or angular;

whether the cutter or cutters be stationary or rotary, or both, and whether the cutter or cutters operate upon the face or edge of the strip, or upon both the face and edge, substantially as described in the specification of the patent; which particular description you will find set forth in the patent, and which, at your request, may be set before you. There were other grants in the patent, which it is not necessary to consider. This is what the patent purports to grant, and what it is material for you to consider in this case. The plaintiff does not claim generally, yielding and fixed pressure, and feed rollers in combination with rotary and fixed cutters; he says that such combination is old. He only claims his combination described for operating on an angular strip for making moldings, and that he says is new.

Having ascertained, gentlemen, what the patent purports to grant, it will then be necessary for you to turn your attention to the second question stated. Having ascertained what it was, the next question is whether the grant which the patent purported to make to the plaintiff was a valid grant. It was a valid grant if the thing patented was an invention made by the plaintiff prior to his application for the original patent, and if it were new and useful. The question whether the thing patented was an invention made by the plaintiff, whether it was new and useful, are questions of fact to be determined by the jury under the direction of the court; and in determining these questions of fact, the jury will bear in mind that, by the rules of law, the patent affords prima facie evidence that the plaintiff was the inventor of the thing patented, and that the invention was not only new but useful. Unless the jury find that the thing patented was, prior to the date of the patent of 1848, an invention of the plaintiff, new and useful, and then intended to be secured, the grant is not a valid grant; but if the jury find that the thing patented by the reissued patent of 1853, was, when the application for the patent of 1848 was made, the invention of the plaintiff, new and useful, and intended by him to be secured by that patent, then the grant contained in the reissued patent is a valid grant, and the reissued patent is prima facie evidence that the plaintiff was such inventor, and that he intended to have what is now granted by the reissued patent of June, 1853, secured by the patent of 1848, and this prima facie evidence must control the jury upon this subject, unless it is rebutted by countervailing evidence introduced in the case.

It is claimed by the defendants, that the specification of the patent issued to Woodworth in 1828, and the grant to him by that patent was substantially for the same thing which the plaintiff claims. If it was, then the grant to the plaintiff was not a valid grant. The commissioner of patents, when he granted the patent to the plaintiff, determined that that which was granted to the plaintiff had not been granted by the Woodworth patent. He had that particularly called to his attention, for it seems that in the specification to the grant in this patent, now under consideration, the Woodworth patent is described and the distinction claimed by the patentee between his invention and the invention claimed by Woodworth is particularly pointed out, and having that under consideration, the commissioner determined that this grant which was made to the plaintiff had not been granted to Woodworth in the patent which was issued in his favor; in other words, that it was a new combination and a new invention, for which the plaintiff was entitled to a patent. He determined that the specification of the plaintiff was for something different from that which has been described in the Woodworth specification.

The court, gentlemen, concurs in the determination of the commissioner, that the thing granted to the plaintiff was not granted to Woodworth, or described by him in his specification. It is therefore necessary, provided the defendants are to claim successfully that this invention of the plaintiff, patented to him, was not his invention, or was not new and useful, to adduce some other evidence than that contained in the Woodworth patent, and therefore it is necessary for you to turn your attention to the question of fact, whether the defendants have introduced evidence to satisfy you that prior to the specification in the patent of 1848, there was any invention known and used like that claimed by the plaintiff; in other words, to satisfy you that the invention of the plaintiff was not new or useful. Was the thing granted, therefore, known and in use before the filing of the specification of the patent of 1848?. The evidence which is most relied upon by the defendants to prove to you that that which was patented to the plaintiff was known and in use prior to the filing of the specification of the patent of 1848, is the evidence afforded by the witnesses who have testified in regard to the Seigler machine, which seems to have been in operation in 1843 or 1844, or at all events, at some time prior to the application by the plaintiff for the patent of 1848. If that machine, gentlemen, was a combination of a ring or rings, with a cutter or cutters, operating upon an angular strip, for making a molding substantially as described in the plaintiff's specification, then the thing purported to be granted to the plaintiff was not new, and the patent to the plaintiff was not a valid patent. Several witnesses have described what the Seigler machine was, and what was its construction. If I understand it, gentlemen, it was a machine intended to operate upon a bevel strip by means of certain instrumentalities. If I understand it, it was never used—and if I am wrong in this you will correct me, and I beg counsel to correct me if I should mistake any portion of the evidence—to operate upon a strip other than a bevel strip, and was never used to operate upon a strip similar to that described in the plaintiff's patent, and it was never contemplat-

ed, so far as I can judge from the evidence, to operate upon an angular strip; whereas, you see by the patent of the plaintiff, and by the drawings which accompany his patent, that the instrumentalities combined by him were intended to operate not only upon a bevel strip, but upon an angular strip; and, from those several strips, to make a molding of the desired shape.

Upon this description which has been given you by several witnesses in regard to the Seigler machine, Mr. Renwick, an eminent expert, is called upon to state, whether the invention or the machine used by Mr. Seigler, as described by the witnesses, taking their description exactly as true, and the machine to be as they have described it, is the same machine as that described by the plaintiff in his specification to the patent. He states that the Seigler machine, as described by the witnesses, is different in principle from the machine patented by the plaintiff, and he gives his reasons for that opinion. One reason which he gives is, as you will recollect, that the Seigler machine, however it might be constructed, could not operate except upon a bevel piece, whereas the plaintiff's machine is intended to operate, and can operate not only upon a bevel strip of wood, but upon a strip of wood sawed in an angular shape, and so form it as to make a complete molding. No expert is produced upon the part of the defendants to contradict Mr. Renwick in this particular. You will, therefore, gentlemen, examine the case with this view, whether this combination, this invention—if it were an invention—was new or useful, and if you are of the opinion that the Seigler machine was in principle like it, and that the plaintiff's machine was not upon a different principle, and to operate differently, and if you find it to be the same machine, you will necessarily decide that the plaintiff's was not new, and if it were not new, the patent could not be a valid patent.

There are other machines which have been introduced before you, but they have not been relied upon in argument so much by the defendants as the Seigler machine, and I will state, in regard to them generally, if any of them are upon this principle claimed by the plaintiff in his patent, that is, to operate upon an angular strip of wood by the instrumentalities used by him to make moldings; in such an event as that, it must be decided that the plaintiff's machine was not new, and the verdict must be for defendants; but if none of these, prior to the time of the application for a patent by the plaintiff, were like the plaintiff's, and if the plaintiff's was a new invention at that time, then he is entitled to the benefits of it. It is his property, and is as well entitled to protection as any other property which an individual can hold.

If, gentlemen, these two questions should be decided in favor of the plaintiff, you will turn your attention to the third question, which is: have the defendants infringed upon the rights of the plaintiff, secured by his patent? If the machine or machines which they have used were a combination of the ring-roller, or a ring, with a cutter or cutters operating upon an angular strip, for making moldings substantially as described in the plaintiff's specification, then the defendants have violated the rights of the plaintiff secured by his patent. You have before you a model of the defendants' machine; you have seen how it operates, how the ring acts in combination with the cutters, how it presses upon that part of the angular piece most to be cut out; and you are to say, from this evidence, whether it does infringe upon the plaintiff's rights; in other words, whether this machine, operated by the defendants, is identical with the machine patented by the plaintiff.

If it is, and these two other questions are decided in favor of the plaintiff, then he is entitled to recover such damages as he has sustained by such infringement, and the only remaining question for you to determine is: what are the damages which he has sustained? I will not go particularly into the testimony which has been submitted to you upon that subject. I will lay down to you, gentlemen, what I conceive to be the rule. The rule of damages is the profits which have been derived to the defendants from making moldings by means of his machine, over any other mode which the defendants had a right to adopt, deducting from them, as is agreed, ten per cent. Now I know, gentlemen, it is difficult for you to determine this matter, but you must determine the question of damages the best way you can. As to what is the amount of profits derived to the defendants from making moldings by the operating of his machine, over and above the operating of any other machine in any other mode which the defendants had a right to use, is not perfectly certain.

I believe, gentlemen, it is conceded that in operating this machine by the defendants, there is no proof adduced which goes to show that they have operated upon a bevel strip. If there was a machine known as the Seigler machine of 1843, then the defendants would have the right to operate that machine upon a bevel piece, and it seems by the patent of Woodworth, that Woodworth had a right to operate his machine so as to make moldings upon a plane; and I do not know what advantage there would be in the plaintiff's machine over that of Woodworth's, except in the great saving of material. That is the great advantage of the plaintiff's machine. You will, however, come to this question of damages, and determine it the best you can: what are the profits over and above any other mode which the defendants had a right to adopt? and after deducting the ten per cent., render your ver-

dict in favor of the plaintiff for the amount which you so find.

The jury found for the plaintiff with $2,000 damages.

[NOTE. At a hearing on motion for a provisional injunction, an order was made, June 30, 1857, requiring the defendants to be ready to try this action at law at the then next term; otherwise, an injunction to issue as prayed for. Case No. 12,671.]

SERRELL (GUYON v.). See Case No. 5,881.

SERRILL (RITTER v.). See Case No. 11,866.

Case No. 12,673.

SERROT v. OMAHA CITY.

[1 Dill. 313.] [1]

Circuit Court, D. Nebraska. 1871.

MUNICIPAL CORPORATION—LIABILITY FOR DEFECTIVE STREETS—NOTICE.

In an action against a city for an accident caused to the plaintiff by reason of a dangerous excavation in one of its public and frequented streets, the character of the excavation and of the street as described in the declaration, and the express allegation of carelessness on the part of the city in respect thereto, were held on demurrer to show a prima facie liability, without a distinct allegation that the city had notice of the defect in the street which caused the injury.

[Cited in Madison Co v. Brown, 89 Ind. 53.]

Action for damages. Demurrer to petition on the ground that the city is not liable in the absence of an averment that it had notice of the defect in the street which caused the injury, for which the plaintiff sues. The petition, in addition to the usual averments, alleged that Farnam street, where the accident happened, was one of "the principal business streets of the city, and one of the most traveled of any of the streets." * * * "That on and before the 28th day of July, 1869" (the date of the accident, which happened at night), "there was, and had been for some time, on the said Farnam street, a cut, or hole, or excavation, of the length of twenty feet, of the width of twelve feet, and of the depth of ten feet; which said hole or excavation was wrongfully and unjustly permitted to be and continue open, without notice or protection to the public, and that it was so left open through the carelessness and negligence of the said city," etc., whereby the plaintiff was injured, etc.

Mr. Elliott, for plaintiff.

Bartlett & Doane, for defendant.

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

DILLON, Circuit Judge. The petition is sufficient, as against the objection urged on the demurrer. The ground of the action is the negligence of the city. Considering the nature of the street, the character of the excavation, which could not be suddenly made, and the express allegation of carelessness, the petition alleges facts showing a prima facie liability on the part of the defendant. In what cases, in an action of this kind, knowledge by the defendant, of the defect, is essential to liability therefor, we need not discuss. Demurrer overruled.

NOTE. As to necessity of notice to city, or the lapse of sufficient time to acquire knowledge, of the unsafe condition of the street, see Ward v. Town of Jefferson, 24 Wis. 342; Griffin v. New York, 9 N. Y. 456; Requa v. City of Rochester, N. Y. App. March, 1871 [45 N. Y. 129]; Hubbard v. City of Concord, 35 N. H. 52, 74; Reed v. Northfield, 13 Pick. 94; Worster v. Canal Co., 16 Pick. 541; Hart v. Brooklyn, 36 Barb. 226; Weightman v. Washington, 1 Black [66 U. S.] 39, 62, per Clifford, J.; McGinity v. Mayor, 5 Duer, 674; Manchester v. City of Hartford, 30 Conn. 118; Howe v. Lowell, 101 Mass. 99. The house of lords, upon great consideration, have recently held that having the means of knowledge, and negligently remaining ignorant, is equivalent in creating a liability to actual knowledge. Mersey Docks v. Gibbs, 11 H. L. Cas. 687, 701, L. R. 1 H. L. 93, 1866.

Where notice is necessary, it may be inferred from notoriety and long continuance of the defect, Reed v. Northfield, supra; but should be averred, Worster v. Canal Co., supra; neglect actionable, though not willful, Erie v. Schwingle, 22 Pa. St. 384. See West Chester v. Apple, 35 Pa. St. 284; Ware v. St. Paul Water Co. [Case No. 17,172].

SERVER (NAPIER v.). See Case No. 10,010.

Case No. 12,674.

SESSIONS et al. v. PINTARD.

[Hempst. 678.] [1]

Circuit Court, Ninth Circuit. April 29, 1854.[2]

APPEAL—BOND—ORIGINAL DECREE.

1. On failure to make an appeal good, the sureties in the appeal bond become liable to the extent of the penalty of the bond, and have no right to have a pro rata application of proceeds made, under the original decree, towards the extinguishment of their liability.

2. Nature and obligation of appeal bond.

Bill in chancery [by Richard H. Sessions, Daniel H. Sessions, and Sandford C. Faulkner against John M. Pintard], for an injunction, determined before the Hon. DANIEL RINGO, District Judge, holding the circuit court. Absent the Hon. PETER V. DANIEL, Associate Justice of the supreme court.

Pike & Cummins, for complainants.

S. H. Hempstead, for defendant.

BY THE COURT. This day came the complainants by Pike and Cummins, their solicitors, and the defendant by S. H. Hempstead, his solicitor, and by agreement the answer of said Pintard is to have the like

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

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

[2] [Affirmed in 18 How. (59 U. S.) 106.]

effect as if sworn to, and the complainants enter their general replication to the said answer in short on the record by consent. And, by consent of parties, this cause was submitted to the court, and came on for final hearing on bill and exhibits, answer and exhibits, and replication to the answer. On consideration whereof it is the opinion of the court, that the appropriation of the proceeds of the sale of the land, under the original decree referred to in the bill, was rightfully and properly made, and that the judgment mentioned in this bill is not entitled to any greater credit than that given by the said Pintard, as shown by the entry made on the record; and that the complainants are not entitled to the relief prayed for in their bill, and that the injunction ought to be dissolved, and the bill dismissed, for want of equity, with costs. It is, therefore, considered, adjudged, and decreed by the court here in chancery sitting, that the injunction heretofore granted in this case be and the same is hereby dismissed; and the defendant remitted to his judgment at law, and that the bill of complaint be and the same is hereby dismissed. And it is further ordered, adjudged, and decreed, that the complainants pay all the costs of this suit and execution issue therefor as at law. And the said complainants in open court prayed an appeal from said decree to the supreme court, and which is granted by this court, upon the complainants at any time, within six months from this date, entering into an appeal bond in the penal sum of six thousand dollars, with good and sufficient security to the said John M. Pintard, conditioned that the appellants aforesaid, shall prosecute their appeal to effect and answer all damages and costs, if they fail to make their appeal and plea good, and to be approved according to law; and, upon the filing of which in this court, the clerk is hereby ordered to send a transcript of this case to the supreme court, according to law.

The record entry in the suit at law, referred to in said decree, is in the words following, namely: "This day (21 April, 1853) appeared the plaintiff by S. H. Hempstead, his attorney, and admitted and acknowledged in open court on the record, that the sale of lands mentioned in the decree in the case of John M. Pintard, complainant, against Archibald W. Goodloe, defendant, in the circuit court of the United States for the district of Arkansas, in chancery, as such sale was made by Randolph Deaton, as commissioner, on the 15th day of November, 1852, as appears by his report, amounted to eight thousand and twenty-five dollars, and which has been appropriated and disposed of as follows, namely: to pay costs in the chancery case in the supreme and circuit courts, three hundred and twenty-nine dollars; commissioner's fee, one hundred dollars; and costs of advertising and executing the commission, seventy-one dollars; making an aggregate for entire costs and expenses, five hundred dollars; thus leaving seven thousand five hundred and twenty-five dollars, applicable, as of the 15th of November, 1852, towards the extinguishment of the principal and interest of said decree in chancery, which, on that day, amounted, principal and interest, to sixteen thousand eight hundred and seventy-seven dollars; and from which, deducting said sum of seven thousand five hundred and twenty-five dollars, paid to the said complainant Pintard, leaves eight thousand nine hundred and twelve dollars, due on said decree in chancery of that date, and interest estimated on this balance to the 17th day of April, 1853, the day of the rendition of the judgment in this case, makes nine thousand two hundred and eighty-three dollars, as the amount actually due on said decree on the 17th day of April, 1853; and by reason of which premises, a credit of two thousand seven hundred and seventeen dollars ought to be and hereby is admitted as of the 17th of April, 1853, as a credit and payment on the damages assessed by the jury in this case on that day, to be noted and entered of record, and to be indorsed on any execution that may be issued on the judgment in this case."

NOTE. The appeal bond was given, approved, and filed on the 20th September, 1854, and the case removed into the supreme court of the United States, and was argued at the December term, 1855, by Mr. Pike, for the appellants, and Mr. Crittenden, for the appellee. 18 How. [59 U. S.] 106. The opinion of Mr. Justice McLean was delivered as follows:

"This is an appeal from the circuit court of the Eastern district of Arkansas. Pintard, on the 10th of April, 1847, obtained a decree against Archibald Goodloe for ten thousand five hundred and fifty-two dollars, with ten per cent. interest per annum on the amount decreed. There was also an order that a certain tract of land should be sold, and the proceeds applied to the payment of the decree. [Case No. 11,171.] An appeal was taken from this decree to this court, by which the decree was affirmed. [12 How. (53 U. S.) 24.] On the 20th of February, 1852, Pintard commenced an action against Sessions and others on the appeal bond, and at April term, 1853, obtained a judgment on the bond for the penalty thereof, amounting to the sum of twelve thousand dollars. At the same time Pintard procured an order for the sale of the land specified in the decree, which was sold on the 15th of November, 1852, for the sum of eight thousand and twenty-five dollars; which, after paying the expense of the sale, left a balance of seven thousand five hundred and twenty-five dollars as a credit on said decree, as of the 15th of November, 1852. The interest, with the sum decreed, up to that period amounted to sixteen thousand eight hundred and seventy-seven dollars. The proceeds of the sale of the land being deducted from this sum, leaves a balance on the decree of eight thousand nine hundred and twelve dollars, with interest from the 17th day of April, 1853. The interest on this sum, up to the time judgment was rendered on the appeal bond, makes the sum of nine thousand two hundred and eighty-three dollars, as the amount to be collected on the judgment. An execution was issued on the judgment the 14th May, 1853, for twelve thousand dollars, with an indorsement of a credit of two thousand seven hundred and seventeen dollars. This execution was levied on a

number of slaves, of the value of twelve thousand dollars, as the property of Sessions, the defendant. A delivery bond was taken for the slaves, with Daniel H. Sessions as security; but the slaves not being delivered on the day of the sale, an execution was issued against principal and surety on the delivery bond.

"At this stage of the proceedings a bill was filed by the appellants, complaining that the distribution which had been made of the proceeds of the sale of the land was inequitable, and that such proceeds should be credited on the judgment entered upon the appeal bond, pro ratâ, and not exclusively on the decree; and the complainants pray that Pintard may be decreed to enter a credit upon the judgment as aforesaid, as of its date, for the sum of five thousand three hundred twenty-three dollars and thirty-five cents; and that a perpetual injunction might be granted to prevent him from collecting any more than the residue of the judgment, after deducting the above sum. A temporary injunction was granted, Pintard filed his answer, and, upon the final hearing, the injunction was dissolved and the bill dismissed, at the costs of the complainants. From this decree an appeal was taken, and that brings the case before us.

"The complainants in their bill allege no fraud nor mistake, as a ground of relief. They claim that the money received under the decree for the sale of the land shall be applied, pro ratâ, in the discharge of the judgment against them, and the balance of the decree which remains after deducting the judgment. This would give to them a credit on the judgment of five thousand seven hundred and twenty-four dollars; and that Pintard, in claiming the whole amount of the judgment, seeks to recover from them three thousand five hundred sixty-eight dollars and ninety-nine cents, more than in equity he is entitled to. This claim of the appellants rests upon the ground that there was a lien on the land sold by the original decree, which operated as an inducement to them to become sureties on the appeal bond. The land, by the original decree, was directed to be sold; consequently the proceeds of the sale could be applied only in discharge of the decree. On what ground could the appellants claim a pro ratâ distribution of this fund? They were bound to the extent of the penalty of their bond, on which a judgment was entered. They had a direct interest in the application of the proceeds of the land to the payment of the original decree, including the interest and costs; and so much as such payment reduced the original decree below the amount of the judgment against them, they were entitled to a credit on the judgment. The judgment has been so made and the credit entered, and beyond this they have no claim either equitable or legal.

"In the argument a subrogation of the land or its proceeds, for the benefit of complainants, is urged; but on what known principle of equity does not satisfactorily appear. Had the appellants paid the decree in full, they might have claimed a control over the land decreed to be sold, or its proceeds. They made no payment, but assert a general equity to have the fund applied, pro ratâ, on their judgment. This would leave a large amount of the original decree unsatisfied. On what ground could Pintard be subjected to such a loss? He looked to the land and the surety on the appeal bond, which more than covered his decree, including interest and cost. The condition of the appeal bond was, 'for the prosecution of said appeal to effect, and to answer all damages and costs, if' there should be a failure to make the plea good in the supreme court.[3] There was a failure to do this, and the penalty of the bond was incurred. Whatever hardship may be in this case is common to all sureties who incur responsibility and have money to pay. Beyond that of a faithful application of the proceeds of the land in payment of the decree, the appellants have no equity. They cannot place themselves in the relation of two creditors having claims on a common fund, which may be distributed pro ratâ between them. Pintard has a claim on both funds; first, on the proceeds of the land, and, second, on the judgment entered on the appeal bond for the satisfaction of the original decree. The decree of the circuit court is affirmed, with costs."

[Annotation referred to, ante.]

Nature of Appeal Bond. The judiciary act of 1789 (1 Stat. 85) requires a party who appeals to the supreme court to give good and sufficient security to prosecute the appeal to effect and answer all damages and costs if he fail to make his plea good. This is the only condition prescribed, and must be followed, substantially, in equity and common law cases. [Catlett v. Brodie] 9 Wheat. [22 U. S.] 553. The meaning of the words "prosecute with effect," in an appeal bond, is that the appellant will prosecute the decree to a successful termination, that is to say, that he will reverse the decree. It may be considered an engagement on his part to achieve that result. Karthaus v. Owings, 6 Har. & J. 264; Fowler v. Wilson, 4 Ark. 210. The meaning of these words, furthermore, is, that if the appellant shall fail in that respect, the sureties become liable for the payment of the whole amount decreed. Thus in Evans v. Hardwick, 1 J. J. Marsh. 435, it was held that the legal effect of a bond conditioned simply "for the due prosecution of the appeal," will bind the parties for the payment of the debt as well as the damages and costs on the affirmance of the judgment or dismissal of the appeal. And so in Harrison v. Bank of Ky., 3 J. J. Marsh. 375, it was decided that where the law prescribed that an appeal bond should be conditioned for the due prosecution of the appeal, and an appeal bond was given conditioned for "the prosecution of the appeal with effect, or on failure to do so, that the obligors should pay the amount of the judgment and all damages and costs which might be adjudged against them in consequence of the appeal," that this condition was not more extensive than a fair exposition of the law would justify. Feemster v. Anderson, 6 B. Mon. 540. And to the same effect is the case of Moore v. Govin, 2 Litt. (Ky.) 186; and Talbott v. Morton, 5 Litt. (Ky.) 327.

These cases decide that a bond for the due prosecution of an appeal, is equivalent to an obligation to pay the judgment, if the same shall be affirmed on appeal. And this is the justice and good-sense of the matter. And the dismissal of an appeal has the effect of an affirmance within the meaning of an appeal bond. 1 J. J. Marsh. 436; 3 J. J. Marsh. 375; 2 Dana, 65.

The intention of the law in all these cases is to secure the payment of the debt in the event of failure to succeed. Evans v. Hardwick, 1 J. J. Marsh. 435; Butterworth v. Brown, 7 Yerg. 467; 12 B. Mon. 523. In the supreme court of Arkansas, in the case of Fowler v. Thorn, 4 Ark. 208, it was held that a bond conditioned that the plaintiff in error would prosecute the writ with effect, denoted and expressed that he would succeed in the action, and that if he did not the obligors in the bond would pay the money for his failure. And it was also said that where the condition of the bond is "that the plaintiff in error will prosecute the writ with effect, and pay the money adjudged against him by the supreme court, or otherwise abide its judgment," the mere affirmance of the judgment in the supreme court binds the parties to the bond to pay the debt, damages, and costs in both courts. And it was further said, that it was the same thing whether the supreme court adjudges the money against the party directly, or orders the circuit court to adjudge it. Now a literal construction of the bond, in the case just cited, would have precluded the recovery of any thing except the costs adjudged by the supreme

[3] [See annotation in the next column.]

court on the affirmance of the judgment; for that was all directly adjudged by the supreme court. But regarding substance, not form, that construction so well expressed in the ancient maxim, "Qui hæret in literâ, hæret in cortice," was, as it should be in such cases, repudiated. 3 T. B. Mon. 391.

The nature of the breach on an appeal bond sheds some light on the extent of the liability, and may be usefully referred to determine it. Now, in assigning a breach of an appeal bond, it is sufficient to allege that the defendant did not prosecute his suit with effect, that the judgment was affirmed, and that the debt and costs had not been paid. Wood v. Thomas, 5 Blackf. 553; Fowler v. Thorn, 4 Ark. 208; Fournier v. Faggott, 3 Scam. 349; Gregory v. Stark, 3 Scam. 612. That is a good breach, thus showing that the non-payment of the debt is the very gist of the action. And for that reason an appeal bond should be for double the amount of the debt, damages, and costs, as held in Norwood v. Martin, 3 Har. & J. 199. It must be sufficient to cover the judgment below. Shannon v. Spencer, 1 Blackf. 120. The intention of the judicial act of 1789 was to provide for and secure the payment of the judgment or decree in the event of a failure to prosecute, or after prosecution on failure to reverse the judgment or decree. This is clear. 1 J. J. Marsh. 193; 1 Stat. 87. If the law had simply provided that the condition of the bond should be for the prosecution of the writ or appeal with effect, we have seen that language of itself, according to its legal import, would oblige the parties to the bond to satisfy the judgment or decree. With these words, and no more, the sureties would be liable to the extent of the penalty of the bond at least; and the obligee it is said can recover interest on the penalty from the institution of the suit on the bond. Ives v. Merchants' Bank, 12 How. [53 U. S.] 159.

In the last case the supreme court held that the security in an appeal bond could be sued and judgment had against him without proceedings against the principal. And also that the security was positively bound to the amount of the bond. But under the act of 1789, not only does the appeal bond provide for a prosecution of the case to effect, the meaning of which has been explained; but out of abundance of caution contains the further engagement "to answer all damages and costs if he fail to make his plea good." The word "answer," in this connection, means to pay or satisfy; and that is one of the meanings of the word, and probably the most common, when the word is used in laws or judicial proceedings. Lincoln v. Beebe, 6 Eng. (Ark.) 697; 1 Bouv. Law Dict. And so, too, the technical term "plea," is used to denote the removal of the cause into a superior court, and in which the appellant assumes the attitude of plaintiff. "Plea," in its ancient sense, meant suit or action, and is sometimes used in that sense. Steph. Pl. 38, 39, note 9; 2 Bouv. Law Dict. 325. The condition of a bond under that act is broad enough to, and was in fact intended to secure and cover what had been adjudged, and what might be adjudged in the shape of damages and costs in the appellate tribunal. It was to provide for both—it was to furnish ample security for the whole debt. The word "damages," does not mean the nature of the action or kind of suit; but denotes the amount adjudged, whether called debt, damages, interest, or by any other name. The act is not, nor is the condition of the bond limited to such damages and costs as the supreme court on the appeal or writ of error shall adjudge, if any, for the delay. If this was the correct interpretation, then in cases where the supreme court dismisses, or dockets and dismisses, or does not award damages, or the party fails to prosecute the case, the opposite party is without indemnity, for the bond is worse than nothing, and affords no security for the debt at all. Now it cannot be denied that in these cases there is a remedy on the bond, and that must necessarily be for the amount of the judgment or decree complained of. Duncan v. McGee, 7 Yerg. 103. The idea here advanced has been sanctioned by the supreme court in the case of Catlett v. Brodie, 9 Wheat. [22 U. S.] 553. In that case the court repudiated the argument that the act only provided for damages and costs adjudged in the supreme court, and held that the word "damages" was there used not as descriptive of the nature of the claim upon which the original judgment was founded, but as descriptive of the indemnity which the defendant was entitled to if the judgment was affirmed. 'Whatever losses," said the court, "he may sustain by the judgment not being paid and satisfied after the affirmance, these are the damages which he has sustained, and for which a bond ought to afford good and sufficient security."

This case is conclusive of the present question, because the court required the plaintiffs in error to give bond, with good and sufficient security, in due form of law, in an amount sufficient to secure the whole judgment, conditioned to prosecute his writ with effect and to answer all damages and costs if he fail to make his plea good, and the case to stand dismissed on failure to give such bond. 1 J. J. Marsh. 193. The previous bond had been given in a small sum only sufficient to respond to such damages and costs as might accrue in and be adjudged by the supreme court, but not sufficient to secure the debt. In fact it is difficult to conceive how a different opinion could be entertained; because as the judges of the United States have no authority to take any other bond than the one prescribed by this act; and in practice, take no other, as is manifest from the case in 9 Wheat. [22 U. S.] 553, it follows, that if the debt is not embraced and secured by the bond in this case, it cannot be in any, and so congress has legislated in vain, and a person may be harassed by a long litigation, without any thing in the shape of indemnity or security from his adversary. This is against the whole policy of the law, for that is to end litigation speedily, and discourage frivolous or unfounded appeals from one court to another; and especially that the party who takes an appeal shall not be suffered to tie up the hands of his adversary and suspend all action on his judgment without securing the payment of it on failure to succeed. This is just and reasonable, and accords with the manifest intention of the law; because an appeal entirely vacates the decree appealed from. Paine v. Cowdin, 17 Pick. 142; Davis v. Cowdin, 20 Pick. 510. A supersedeas operates to set aside and annul the act. 9 Bac. Abr. 274. After an appeal, all authority on the part of the inferior court over the cause, entirely ceases; and every act and proceeding of such court is void. The judgment or sentence becomes wholly inoperative (Tealon v. U. S., 5 Cranch [9 U. S.] 281; The Venus, 1 Wheat. [14 U. S.] 113); even though the appeal be not prosecuted (Campbell v. Howard, 5 Mass. 376; [Penhallow v. Doane] 3 Dall. [3 U. S.] 87, 119; 13 Mass. 266; Coxe [1 N. J. Law] 159; Davis v. The Seneca [Case No. 3,651]). Now, after appeal, the judgment or decree is considered as lost to the party, and the appeal bond is substituted for it. The decree becomes entirely unavailable to the party in whose favor it was rendered, and if a person can be said to have lost what cannot be obtained, then it is clear that the appellee, by virtue of the appeal and supersedeas, has lost the money decreed to him. Whether he may get it at some future time, or on some future contingency, is quite a different question. The lapidist who loses a valuable diamond, has hopes of its recovery; and although it may be regained at some future time, yet it is lost for the present.

The amount of the judgment or decree is at least prima facie evidence of the measure of damages, conceding that it is competent for the defendants to show that no damages have been

sustained, or only partial damages, which seems to be intimated in the case in 9 Wheat. [22 U. S.] 554; still this must come from the defence in mitigation, because when the plaintiff has shown an appeal and supersedeas of the decree, the affirmation of the decree, and the non-payment of the decree, he has made out to say the least, of it, a primâ facie case, which entitles him to recover the amount of the decree, and costs and damages, if within the penalty of the bond, and if beyond it, then the amount of the penalty, with interest on it from judicial demand, according to the case in [Ives v. Mechanics' Bank of Boston] 12 How. [53 U. S.] 159. He is not obliged to prove that he could have made the amount of the decree out of the principal, or give any evidence of the solvency of the principal in the bond. He has established a right in himself and a presumed loss, and that is enough in the first instance. 17 Wend. 545; 9 Johns. 300. The right and remedy are perfect, because the moment judgment is rendered in an appeal cause, if the money is not paid immediately, the condition of the bond is forfeited, and an action can be brought upon it at any time before that judgment is actually satisfied. Gregory v. Stark, 3 Scam. 612. And execution against the principal is not necessary. [Ives v. Merchants' Bank of Boston] 12 How. [53 U. S.] 159. The same rule applies in actions against sheriffs for escapes, or taking insufficient bail. The plaintiff is entitled to recover his whole debt, which is presumed to be lost by the negligence. That is the measure of damages; and circumstances of mitigation must come from the defendant. 3 Conn. 423; 17 Wend. 547; 2 Cow. 504; 6 Pick. 468; 9 Conn. 380; 9 Johns. 300; 11 Mass. 89; 13 Mass. 187; 17 Wend. 543. And such is the rule for a failure to execute or return final process. 6 Hill, 550; 1 Hill, 275; 10 Mass. 474; 11 Mass. 89; 9 Johns. 300; 3 Denio, 327. See 8 Ala. 285; 1 La. Ann. 122; 17 Ohio, 244.

A creditor having several remedies, may pursue any one or all of them until he obtains satisfaction, but can, of course, only have one satisfaction. Tayloe v. Thomson, 5 Pet. [30 U. S.] 369. The plaintiff may proceed with a fi. fa. on his judgment, and at the same time sue the appeal bond to enforce payment of the same judgment. Sasscer v. Walker, 5 Gill & J. 102. Hence Pintard might proceed on the appeal bond, and also proceed on the decree against the estate of Goodloe; and could bring separate suits on the appeal bond, but can have but one satisfaction. Dig. 621, 806; 4 Ark. 510; 1 Eng. (Ark.) 92. The rule of 30th of March, 1839, adopted the forms and modes of proceeding and the practice in the state courts, to be used in this court; excepting by a subsequent rule of June 25, 1841, the sections relating to discovery in suits at law.

Case No. 12,675.

SETON v. DELAWARE INS. CO

[2 Wash. C. C. 175.] [1]

Circuit Court, D. Pennsylvania. April Term, 1808.

EVIDENCE—PROOF OF FOREIGN LAWS—MARINE INSURANCE—CONSTRUCTION OF POLICY—PARTIAL LOSS.

1. Parol evidence, to prove the regulation of Cuba, prohibiting the exportation of specie, will not be admitted, unless evidence is given of efforts to obtain a certified copy of the written law, which have failed.

[Cited in Sidwell v. Evans, 1 Pen. & W. 388.]

2. If the written and printed clauses of a policy of insurance can be made to stand together, and both be available, such an exposition of them should be adopted.

[Cited in The Orient, 16 Fed. 920.]

3. A partial loss of an entire cargo, by sea damage, if amounting to more than fifty per cent., may, under circumstances, be converted into a technical total loss; but not if a distinct part of the cargo be destroyed, and the voyage be not thereby broken up, or rendered unworthy of being prosecuted.

[Cited in Forbes v. Manufacturers' Ins. Co., 1 Gray, 375.]

Action on four policies of insurance: two on the cargo underwritten, for 11,000 dollars, and the other valued at 1,000 dollars, on board the William, at and from New-York to Baracoa, Nevitas, and Matanzas, in the island of Cuba, and back; to return one per cent. for all ports she shall not stop at; declared, in a written clause, to be on goods and specie, both or either valued on the voyage outward at 12,000 dollars, with the usual printed clause of warranty against any charge or loss on account of any illicit or prohibited trade. The third policy is on the ship, and the fourth on the freight for the same voyage, also valued; the one at 4,000 dollars, and the last at 2,000 dollars, with like stipulations for return of premium and warranty. The vessel sailed from New-York on the voyage insured, touched at Baracoa, and thence proceeded to Nevitas, where she disposed of her outward cargo, and took in a return cargo of goods, and 5,000 dollars in silver, besides upwards of 1,000 dollars of the sum she carried outward. She sailed from Nevitas on her return voyage, but by stress of weather, and injury sustained, she was compelled to put into Matanzas, where the 5,000 dollars taken in at Nevitas, being more than half the value of the cargo, were landed by order of the governor; the supercargo was permitted to lay out the money in the produce of the island, and to take it away; but he was refused permission to carry away the specie. Upon the petition of the captain to the subdelegate of the royal hacienda at Havana, setting forth that he had received regular clearances at Nevitas for the specie, and that it was seized, that officer decreed that the specie should not be taken away; stating in his decree, that specie was prohibited by law to be carried away, but permitting the same to be laid out in colonial produce. Upon this, the supercargo laid out about half of the 5,000 dollars in sugars, which filling the vessel, he deposited the balance of the silver with a merchant at Matanzas, who afterwards laid it out in sugars, and sent them by another vessel, the Charlotte, to New-York. Regular protest being made, the ship left Matanzas, and arrived safe at New-York, with the loss of part of her cargo, which had been thrown overboard in a storm. She arrived on the 20th of December, 1806. A regular abandonment of ship, cargo, and freight, was offered and refused; but the

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

plaintiff was authorized by the defendants to dispose of the vessel and cargo, as well that brought in the William, as the sugar afterwards sent in the Charlotte, without prejudice. On these sales a loss was sustained, as stated by the plaintiff, to the amount of upwards of 8,000 dollars. To prove that this was a prohibited trade, the defendants offered to examine a witness. This was opposed, and [Church v. Hubbart] 2 Cranch [6 U. S.] 187, 236, relied upon, to prove that the law or order of the governor should be produced.

THE COURT rejected the evidence. This is a commercial regulation of the government, and a subject of pure municipal arrangement. The law must be presumed to be written, and therefore it should be produced; or evidence given to prove that it was not in the party's power to obtain a certified copy of it; in which case inferior evidence might be received.

Mr. Dallas, for plaintiff, upon the court intimating, that, as to the vessel, there was no ground of abandonment, she having performed her voyage in safety, and even arrived before the offer made, gave it up, and claimed only for a partial loss. As to the cargo, he insisted that the clearance was evidence of the legality of the trade; but if not so, the written clause, which insures specie out and home, overrules the printed clause of the warranty; and as the defendants knew, or ought to have known, that it was prohibited, they are bound, the policy, insuring a trade prohibited by foreign laws, is good. Park, Ins. 235. As to the freight, he argued that the right to it on the whole cargo having once attached, the loss of so great a proportion, by a peril insured against, amounted to a total loss.

Rawle & Condy, for defendants. If there had been no clause in the policy, to exempt the defendants from indemnifying against losses incurred, in consequence of any illicit or prohibited trade; yet, upon general principles, such a trading would have exonerated the underwriters. 2 Vern. 176; 4 Bac. Abr. 643; 1 Johns. 20. That this was a prohibited trade, is proved by the best evidence, the sentence of the hacienda, a revenue tribunal, uniting judicial with executive powers. The true exposition of the policy is, that if the goods shipped, and the specie, should be subjects of lawful trade, then the underwriters were to be liable, in case of loss; otherwise not. But, at all events, the plaintiff could not abandon. The loss of part of the cargo only, if the vessel with the balance arrived safe, can only be a partial loss.

WASHINGTON, Circuit Justice (charging jury). The question of law is, whether the plaintiff is entitled to recover for a total or a partial loss on cargo and freight. Upon the construction of the policy, it is said that the written must control the printed clause, if they contradict each other. This is true. There are strong reasons in favour of the position. But the construction of policies of insurance, is governed by the same rules as apply to other written instruments; and if all the clauses can be fairly made to stand together, and to have effect, they should be so expounded as to produce such a result. We understand the underwriters, from the language they have used, to say, we will insure you against loss upon any goods or specie, both or either on the voyage from New-York to the enumerated ports in Cuba, and back to New-York. As to the cargo, generally, it is impossible for us to know whether it may in whole or in part be composed of prohibited articles, or not; and, therefore, we will not engage to indemnify against losses arising from such trade, if it should be illicit. But as to specie, the specified article, we know that it is, by the general commercial regulations of the Spanish government, prohibited from being exported, and therefore we except it from the clause of warranty. We say, that this ought to be understood as the language of the underwriters; because, as to the course of trade, and the general laws of the country with which this trade was to be carried on, they were bound to take notice; and if it was not their intention to except specie from the warranty, it is impossible to suggest a reason for its being especially mentioned; since it would clearly have been comprehended under the general term goods, used in the same clause. Still, the question is, can the plaintiff recover for a total loss of cargo and freight, in consequence of the detention of the 5,000 dollars at Matanzas? The opinion of the court is, that he cannot. The loss is not total, either in fact, or technically so. A part of the cargo was taken out, forcibly, at Matanzas, and replaced by other articles; with which, and the residue of her cargo taken in at Nevitas, she arrived, fully loaded, in safety at her port of destination. The original cargo, taken in at Nevitas, received no kind of injury from any thing which happened at Matanzas; and the only consequence of the proceedings at that place, was the exchange of a part of the cargo, the whole of which arrived safe, partly in this vessel, and the residue of the new cargo by another. Now, can it be seriously contended, that the loss of a distinct and separate part of the cargo, by the seizure of a foreign government, though it amount to more than half of the whole cargo, will warrant an abandonment of the whole, when the residue has in fact been discharged, and has arrived safe? A partial loss of an entire cargo, by sea damage, if amounting to more than half, may, under circumstances, be converted into a technical total loss; but not if a distinct part of the cargo be destroyed, and the voyage be not thereby broken up, or rendered unworthy of being prosecuted. Here the voyage was not lost, or otherwise impaired or affected, but in respect to the particular part of the cargo

exchanged at Matanzas. We inquired of the plaintiff's counsel, if he recollected any case in which such a loss had been construed total; and the only one to which he referred us, was that of Simond v. Union Ins. Co. (decided in this court) [Case No. 12,875]. But there is no similitude between that and this case. In that, the vessel was not only prevented by a blockading squadron off one of her ports in St. Domingo, from entering either; but she was forcibly carried to Jamaica, and there compelled to end her voyage, and to dispose of her cargo. There, the voyage was broken up, and completely frustrated; quite otherwise is the present case. We do not recollect a single case, from Goss v. Withers, 2 Burrows, 683, to this time, or before, in which, from an injury to the cargo, the loss was considered total, that the voyage was not broken up by some disaster to the vessel, which could not be repaired without great additional expense and loss; or which prevented the further prosecution of the voyage; or where the injury to the cargo was general. The doctrine of abandonment has gone far enough, perhaps too far, when the real nature of the contract of insurance is considered. We do not feel disposed to carry it further. The opinion of the court, therefore, is, that the plaintiff is entitled to recover only for a partial loss.

The jury found that the plaintiff was entitled to a partial loss, which the parties agreed to adjust.

Case No. 12,676.

SETZER v. The SYLVIA DE GRASSE.

[3 Betts, D. C. MS. 46.]

District Court, S. D. New York. Jan. 17, 1843.

SEAMEN'S WAGES — MISCONDUCT OF MATE — ABANDONMENT OF WATCH — DISRATING.

[1. For the mate, during his watch in the night, to go below and turn into his berth, leaving the ship with no officer in command of the watch, is sufficient, when unexplained or unexcused, to justify the master in disrating him, and sending him forward as one of the crew.]

[2. Where it is shown that the mate was in his berth during the time for his watch on deck, it is not necessary to prove affirmatively that he was called, on the change of the watch, but it will be presumed, until the contrary is shown, that the ordinary routine was pursued, and the burden is upon him to show any facts which would excuse or exculpate him for the apparent neglect of duty.]

[This was a libel for wages by Isaac T. Setzer against the ship Sylvia De Grasse, Bolton, Fox & Livingston, claimants.]

BETTS, District Judge. This court has repeatedly ruled, upon the clear authority of foreign and domestic adjudications, that the master may dismiss a mate or other officer of the ship during a voyage for misbehavior or incompetency. The Elizabeth Frith [Case No. 4,361]; Thompson v. Busch [Id. 13,944]; [U. S. v. Savage, Id. 16,225]; [The Mentor, Id. 9,427]; Foster v. Neilson, 2 Pet. [27 U. S.] 261; Mitchell v. The Orozimbo [Case No. 9,667]. The inattention of a mate to his duties while in command of the deck, as, especially, sleeping on his watch, has been marked as an instance of gross and culpable misconduct, well justifying his instant degradation, or the denial of wages as a mode of punishment. It is proved in this case that, while it was the libelant's watch on deck, in the night, he went below, and turned into his berth, leaving the ship without any officer in command of the watch. The master came on deck and found the ship had reversed her true course and the libelant asleep below, and he immediately disrated him, and sent him forward, and put him on duty as one of the crew. An action at law was brought by the mate against the master after the arrival of the ship at this port, for personal wrongs done him on the voyage, and also "for discharging him, and driving him forward into the forecastle, and making him do duty as a seaman," and a recovery of $250 has been had for those injuries.

Whatever of wrong therefrom there might be in the manner of exercising this authority, or the disgrace and discomfort inflicted by subjecting the libelant to associate and perform duty with the crew, was embraced within and compensated by that action. It being proved to be the duty of the libelant to hold his watch on deck, and that it was not performed, he must supply an adequate excuse for the omission. The master need not prove affirmatively that the libelant was called on the change of watch to take his station on deck. The ordinary routine of duties will be presumed to have been pursued until the contrary is shown, and if the exculpation of the libelant lies in his not being assigned to this particular watch, or being relieved from it, for sickness or any other cause, the evidence to establish that exemption must come from him. He puts this cause to trial, demanding the full recovery of wages as mate for the voyage, and he must accordingly be prepared to meet and repel every proof calculated to take away or diminish his claim. The issue was most distinctly before him. This demand for wages was contested because of malfeasance in his office. It was, therefore, enough for the owners to prove that, when it was the libelant's watch on deck, he was off his post and in his berth, and he must be prepared to offer clear justification in his own behalf. None touching the point has been offered by him. He has called no witness to prove he was not put in charge of the ship on that watch,—no one to prove his physical inability to hold the watch.

I do not go into the proofs offered showing other acts of negligence, misconduct, or incompetency in the libelant. This one gross dereliction of duty, involving in the most eminent degree the safety of the ship, directly

proved by the oath of the master, and in no way excused or extenuated, is all-sufficient to bar the libelant the recovery of wages as mate; and the decree is against him accordingly.

There is some statement of a tender of wages to him as a seaman, but the facts attending it, or the time it was made, are not given now, so that I can now adjust the decree definitively. I will settle its terms, and dispose of the costs, when put in possession of those particulars more exactly. Decree accordingly.

SEVELOFF (UNITED STATES v.). See Case No. 16,252.

SEVEN BARRELS DISTILLED OIL (UNITED STATES v.). See Case No. 16,253.

Case No. 12,677.

SEVEN COAL BARGES.

[2 Biss. 297; [1] 3 Am. Law T. Rep. U. S. Cts. 109; 2 Chi. Leg. News, 277.]

Circuit Court, D. Indiana. May, 1870.

ADMIRALTY—JURISDICTION—NAVIGABLE RIVERS—SALVAGE SERVICE—WHAT CONSTITUTES—BARGES.

1. Under the decisions of the supreme court the admiralty jurisdiction of the district courts over all the navigable waters of the country must be considered as established.

2. Salvage being a branch of admiralty jurisdiction, the district court has the same jurisdiction over a case of salvage on the Ohio river as on the Hudson.

[Cited in Salvor Wrecking Co. v. Sectional Dock Co., Case No. 12,273.]

3. It is sufficient that the property be exposed to a chance which might destroy it, and that the labor, at some personal risk, substantially contributes to the salvage.

4. The fact that the owner is in pursuit, unknown to the salvor, does not deprive him of his claim.

5. Barges adrift on the Ohio river are a proper subject of salvage.

[Cited in Salvor Wrecking Co. v. Sectional Dock Co., Case No. 12,273.]

In admiralty. This was an appeal from a decree of the district court [of the United States for the district of Indiana] dismissing a libel filed by Henry Huber and others for salvage against seven coal barges found adrift on the Ohio river.

C. E. Marsh, for libellants, argued: First. That salvage services were in their nature the same everywhere, and as meritorious when rendered upon a river as on the high seas; and that the decisions of the supreme court of the United States, following the case of The Genesee Chief v. Fitzhugh [12 How. (53 U. S.) 443], establishing the admiralty and maritime jurisdiction of the national courts over the navigable western waters, brought the case within the ordinary salvage rules. Second. That whether the property saved was at the time derelict or not, is a question that need be considered by the court only as a circumstance to aid in fixing the quantum of salvage. Courts have repeatedly awarded salvage compensation to salvors who have only aided the master and crew while they still remained on the vessel saved, working conjointly with the salvors in saving the vessel. Nor is actual, present, imminent danger, either to the property or salvors, necessary, though it may be considered in fixing the amount of compensation. The James T. Abbott [Case No. 7,202]; The Susan [Id. 13,630]; note to same case; The Phantom, L. R. 1 Adm. & Ecc. 58; The Collier, Id. 83; The Missouri [Case No. 9,654]; The Reward, 1 W. Rob. Adm. 176; The Isabella, 3 Hagg. Adm. 428; Allen v. The Canada [Case No. 219]; Union Towboat Co. v. The Delphos [Id. 14,400]; The H. B. Foster [Id. 6,290]. Third. Barges are the subject of salvage, as well as vessels used in commerce. A Raft of Spars [Id. 11,529]; Raft of Timber, 2 W. Rob. Adm. 251.

A. Dyer and Asa Iglehart, for respondents.

DRUMMOND, Circuit Judge. These seem to be the material facts: The barges, of considerable size and strength, some of them being one hundred and thirty feet long and twenty-three or twenty-four feet wide, bulkheaded at each end, and some of them decked over, and altogether of the value of four thousand dollars, were fastened to the landing at Evansville in this state, on the Ohio river. They were all lashed together, and had been at the landing for some weeks. They were left there by the steamer Robert Fulton, which used them to tow coal into Evansville. Ervin F. Sansom had charge of them as the agent of the Ardlie Coal and Iron Company. They were lying about half a mile below the place where the steamer was moored. On the 15th of September, 1868, the river being high and rising fast, and between five and six o'clock in the afternoon, some drift-wood having gathered around the coal barges, the pressure became so strong that it snapped the rope which held them to the shore, and they, with the drift, were borne by the current down the river. The rope, which was quite long, in breaking, wound around, more or less, the logs of which the drift was in part composed. Two of the libellants, Huber and Sheer, seeing the barges adrift and no one aboard, took a skiff and immediately followed them, with intent to save them. Friedly, the other libellant, soon joined them in another skiff. The drift and barges floated down not far from and along the Indiana shore. It was necessary, in order to stop the barges and tie them to the shore, that they should obtain possession of the rope wound around the logs of the drift-wood. Accordingly, one of the libellants got on the

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

logs, and, jumping from log to log, with some difficulty and risk, succeeded in extricating the rope, and taking advantage of an eddy, two of them going ashore in a skiff with the line, or hawser, fastened it to two trees, and one of them remaining on the barges and gradually checking them with the hawser, succeeded finally in bringing the barges to land. Three of the barges, when they started, were more or less filled with water. They were all tied to the Indiana shore, about three miles below Evansville. By this time it was getting dark. The drift logs, which had caused the barges to break their fastenings, passed by the eddy down the river. Some time after the barges had broken loose, Mr. Sansom was notified of the fact, and gave directions to the captain of the Robert Fulton to secure them, and the latter, with two men, took a skiff from the steamer, and landing to obtain a line, at the spot where the barges had been fastened, proceeded down the river in a skiff after the barges.

It is not clear how far down the river the barges were when the captain of the Fulton and his two men started after them in the skiff. It is probable they were a mile or more, as the captain says it was over an hour before he reached them. They arrived at the place where the barges were fastened, and were told by the libellants, who then first saw them, that the barges were all safe. The libellants deny that anything was done by way of assistance by the other three, but the latter all assert that the barges were more safely fastened to the shore by their aid. And this is probably true. After the barges were secured, all six men left them, went out into the river and took passage on board of the steamer Nimrod, then on her way up to Evansville. The libellants seem to have returned to the barges once or twice during the next few days, and claimed possession of them, while the captain of the Robert Fulton declares that he took control of them. A few days after, they were removed by the Robert Fulton, and then the libel was filed claiming salvage.

There is some controversy in the testimony as to whether the libellants incurred any personal danger in their efforts to secure the barges, and whether the latter were subjected to any risk in floating down the river. The weight of the evidence is that there was some danger to the libellants in what they did. The barges could not be said to be derelict, as within a short time after they broke loose the owner sent men to reclaim them. But as it was growing dark, the river was high, no one was on board, and the barges had no lights, it is not certain that those who followed the libellants could immediately have stopped them, and there would have been undoubtedly a certain risk to the barges had they not been taken by the libellants.

There can be no doubt of the jurisdiction of the district court over a case of salvage on the Ohio river. Since the cases of The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443, and The Hine v. Trevor, 4 Wall. [71 U. S.] 555, and particularly the case of The James E. Eagle v. Frazer [8 Wall. (75 U. S.) 15], decided at the last term of the supreme court of the United States, the admiralty jurisdiction of the district court of the United States over all the navigable waters of this country must be considered as established. Salvage is a branch of the admiralty jurisdiction, and the district court would have the same jurisdiction over a case of salvage on the Ohio or the Mississippi river as on the Hudson or the Delaware. McGinnis v. The Pontiac [Case No. 8,801]; Eads v. The H. D. Bacon [Id. 4,232]; Williams v. The Jenny Lind [Id. 17,723].

The only question therefore in this case is, whether the acts done by the libellants, constituted a salvage service. The elements to make a case of salvage are, enterprise and daring, involving some personal risk, the danger of destruction or loss or injury to the property, labor and skill shown, and the time occupied, the value of the property, and the success of the effort by rescuing the same. It is not necessary that the risk or danger should be absolute; it is enough that at the time, the property is exposed to a chance which might destroy it. Neither is it necessary that the result should be brought about solely by the claimant of salvage; it is enough if his acts in this particular substantially contribute to the salvage even when others assist. 2 Pars. Shipp. & Adm. 282–292, and authorities there cited.

Tested by some of these rules, this was a case of salvage. The barges were afloat on the river with no one on them. It was true they had broken from their moorings, and some one acting for the owner might follow them—how soon was unknown. The current was rapid, the river high, night was approaching, the property was valuable, there was a possibility it might be lost or seriously damaged, there was some personal hazard to the libellants, and the acts of the libellants essentially contributed to save it from loss. If they had seen the owner in pursuit, or known that it would be immediately made, and merely sought to anticipate him with a view of exacting a large compensation for the service, then there might be good reason for saying it was not a case of salvage. But if it was understood that the fact that at the time of rescue the owner was in pursuit of his property floating down the river, deprived the party of the right to a liberal compensation by way of salvage, it would greatly tend to discourage efforts in that direction. The very object of the law of salvage is to promote commerce and trade, and the general interests of the country, by preventing the destruction of property, and to accomplish this by appealing to the personal interests of the individual as a motive of ac-

tion, with the assurance that he will not depend upon the owner of the property he saves for the measure of his compensation, but to a court of admiralty, governed by principles of equity. In this case the libellants appear to have acted in entire good faith. They, at the time, knew nothing of the attempt of the captain of the Fulton to save the barges. They acted promptly and efficiently, and are entitled to a reasonable reward. The claimant tendered each of the libellants five dollars, and paid that sum into court.

Is this adequate compensation under the circumstances? There seems to be no established criterion in estimating the amount of compensation to be given in salvage cases. It depends very much in each case upon the view the court may take of the facts. The hazard run by the salvors, the peril to the property, its value, the extent of labor, the enterprise, skill, energy and daring exhibited in the rescue, and the number of salvors, all enter more or less into the consideration of the question, and determine whether the compensation shall be a mere quantum meruit for work done and time spent, or one-half, or even more, of the value of the property saved.

In this case the property was afloat on a river, not on the ocean; it was not, therefore, exposed to the same danger as if it had been on or near the open sea. The personal risk was not very great, nor the labor long or arduous, and, therefore, a large remuneration should not be given. But the value of the property the libellants helped to save was considerable, and while I wish to do nothing in the administration of the law of salvage to excite unreasonable expectations on the part of those who may save property from peril on the water, I am constrained to say, that if in such cases more liberality were sometimes exhibited by the owner, many cases might be settled by the parties which otherwise reach the courts.

I shall allow the libellants, as salvage, the sum of two hundred dollars, to be equally divided among them.

The decree of the district court is, therefore, reversed, and a decree will be entered in this court in favor of each of the libellants for one-third of the whole sum awarded as salvage, together with costs.

It is proper to add that although my Brother DAVIS did not hear the argument in this case, he has been consulted in relation to it, and concurs in this opinion.

SEVEN COAL BARGES (HUBER v.). See Case No. 12,677.

SEVEN LARGE FERMENTING TUBS (UNITED STATES v.). See Case No. 16,254.

SEVENTEEN EMPTY BARRELS (UNITED STATES v.). See Case No. 16,255.

SEVENTEEN PACKAGES, ETC. (UNITED STATES v.). See Case No. 16,256.

SEVEN THOUSAND EIGHT HUNDRED BUSHELS OF OATS (CHUBB v.). See Case No. 2,709.

Case No. 12,678.

SEVENTH WARD BANK v. HANRICK.

[2 Story, 416.] [1]

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

NOTES—NOTICE OF DISHONOR—WHEN TO BE GIVEN—EXTENSION OF TIME—RELEASE OF INDORSER.

1. Where a note became due on Saturday, and was duly presented and dishonored, and the indorser lived in another state: It was *held*, that notice of the dishonor should, in order to bind the indorser, be put into the mail of the succeeding Monday, early enough to go by the mail of that day to the place of residence of the indorser, it appearing that the mail on that day did not close until half-past three o'clock p. m.; otherwise the indorser would be discharged.

[Cited in Lawson v. Farmers' Bank of Salem, 1 Ohio St. 214.]

2. If, after a note is dishonored, and notice is given to the payee, who is the first indorser, an arrangement be made with the holder, by the maker of the note, and the subsequent indorsers thereon, without the consent of the payee, to prolong the credit, and to discount, by way of renewal, certain bills, drawn by the maker and one of the indorsers, and duly accepted, for the amount of the note, and in the mean time, and until the maturity of the bill, the note is to be deemed extinguished as to the maker, and the indorsers, who have given the bills, the original payee of the note is discharged thereby.

This was an action of assumpsit, originally commenced in the state court, and removed from thence to this court, the plaintiffs [the president, directors, etc., of the Seventh Ward Bank], being a corporation in New York, and the defendant [Edward Hanrick], a citizen of Alabama. The action was brought on the following promissory note: "New York, October 31, 1835. Ten months after date I promise to pay at the Seventh Ward Bank to the order of Mr. Edward Hanrick five thousand two hundred and ninety-one dollars seventeen cents, value received." Signed "James G. Kelly." The note was indorsed by the defendant (Edward Hanrick) in blank, and successively afterwards by Moreley Hooker, and F. A. Lawrence; and was discounted by the bank, who now sued as indorsees. Plea, the general issue. At the trial it appeared in evidence, that all the parties, except Lawrence, belonged to Alabama. Lawrence lived in New York; and the note was discounted at the instance of a Mr. Greenfield, one of the directors, and the money received by Hanrick, who was, in fact, a mere accommodation payee and indorser, the money being received by him for Kelly, the maker of the note, and Hooker, the indorser, to whom it was paid in equal moieties. At the time when the note became due (on Saturday, the 3d of September, 1836), payment was demanded

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

at the bank by one of the tellers for the bank, but the maker having no funds then in the bank, it was dishonored; and it was protested by the notary of the bank for non-payment, on the same day. He, however, had not presented the note for payment, but it was done for him by a teller at the bank, although his notarial certificate very improperly stated, that he had personally made the presentment. A written notice addressed to Hanrick was put into the post office at New York on the following Monday, addressed to Hanrick at his residence in Montgomery, Alabama. There was conflicting testimony on the point, at what time of the day the notice was put into the post office. On the one hand, a brother of the notary, who was his clerk, stated, that he put the notice into the post office on the next Monday morning. On the other hand, a teller of the bank stated, that he, and not the notary's clerk, put it into the post office after seven o'clock in the evening of the same Monday, and he detailed particular circumstances in corroboration of his statement. The southern mail was closed at the post-office on Monday at half-past three o'clock, p. m.; and it was proved by a post-office clerk, that if the notice had been put into the office before that time, it would have been sent, in the usual course of things, by that mail, and post-marked (stamped) the 5th of Sept. If put in after that time, it would have been post-marked the 6th of Sept.; and the office did not close until 7 o'clock in the evening. The notice was produced in evidence by Hanrick, and it had the post-mark of New York, the 6th of September. There was other evidence introduced by both the parties upon this point of the notice, which was submitted to the jury.

STORY, Circuit Justice, stated to the jury, on this point, that by law it was essential, under the circumstances, to charge Hanrick, that the letter should have been put into the post-office at New York on Monday, early enough to have gone by the southern mail of that day; and if the plaintiffs, or their agents, were guilty of negligence in not putting it into the post-office in time to go by the southern mail of that day, the defendant was discharged from his liability as indorser. He added, that the onus probandi of due notice to Hanrick was upon the plaintiffs; and if the jury were not satisfied, beyond a reasonable doubt, that the notice was not duly given, that doubt would justify a verdict for the defendant. And after commenting upon the evidence, he left the point with this direction to the jury.

Another point made in the defence was, that by subsequent arrangements made between the bank and the other parties to the note, except Hanrick, and without his consent, a prolonged time had been given to those parties for the payment of the debt due on the note; and thereby he was discharged therefrom. As to this point, it appeared in evidence, that after the note was dishonored, Lawrence (the indorser) went to Montgomery, Alabama, with the view of arranging the matter, partly for the bank, and partly for his own protection. He there saw Hooker and Hanrick, who admitted, that they had received notice of the dishonor; and he tried to prevail upon them to renew the paper; Hooker was willing and consented to make new paper; Hanrick refused to have any thing to do with it, saying that he would not assume any further responsibilities; and he refused to indorse any new paper. Afterwards, by arrangements between Lawrence, and Hooker, and Kelly, three bills of exchange were drawn; two were drawn by Kelly and accepted by Hooker, and one was drawn by Hooker, and accepted by Kelly. All the bills were drawn payable at Mobile, Alabama; one dated Sept. 28, 1836, payable at seventy days, for $1,879.50; one of the same date, payable at ninety days, for $1,890; one of the same date, payable at one hundred and twenty days, for $1,950.50; in all $5,720. Lawrence was on all the drafts as indorser; and they were by him procured to be discounted at the bank, on the 11th of October, 1836, the bank deducting five per cent as the rate of exchange on Mobile, and interest for the time the bills had to run. The balance was then carried to the credit of Lawrence on the books of the bank. Lawrence on the same day (the 11th of October), drew a check on the bank for $5,291.67 (the amount due on the note); and the check was, "Pay James G. Kelly's note." On the same day, there was an entry made in the bank books, under the head of "Notes, When Paid," "Oct. 11, paid," against Kelly's note. Testimony was given by the cashier of the bank and by Lawrence, that these bills were discounted at the bank with an express agreement, that the note of Kelly should remain collateral security for the payment of the bills at maturity, in order to hold Hanrick upon his indorsement on the note. On the other hand, Kelly in his testimony expressly stated, that the bills were drawn, "according to his best knowledge and belief, for the purpose of renewing the note," and were negotiated at the bank; but he, Kelly, had no knowledge of the terms of the negotiation. The whole evidence upon this point also was left to the jury.

Rand & Fiske, for plaintiffs.
C. P. & B. R. Curtis, for defendant.

STORY, Circuit Justice, in summing up the case, said: I shall leave the evidence upon this point also for the consideration of the jury, as it seems to me very difficult to reconcile some of the admitted facts with some of the statements made by the cashier of the bank and Lawrence. It is clear, that Lawrence, in procuring these bills, acted as the agent of the bank, as well as for himself,

and that the bank must, therefore, be presumed to have had full notice of the purpose, for which the bills were made by Kelly and Hooker. If Lawrence applied them in his negotiation with the bank to any other purpose, than that for which they were originally made, and confided to him, he was guilty of a fraud upon Kelly and Hooker; and the bank, if cognizant of such original purpose, cannot be placed in a better predicament, than he would be as holder of the drafts. Now, it is for the jury to say, whether they entertain any doubt, that the bills were actually drawn and accepted by Kelly and Hooker, for the express purpose of being negotiated at the bank, by way of renewal of and to take up the dishonored note, and to procure a delay of payment of the debt, during the period that the bills were to run; and whether Lawrence and the bank did not, at the time of the negotiation and discount of the bills, fully know that such was the purpose; and if so, whether it was not agreed between the bank and Lawrence, that neither he, nor Kelly, nor Hooker, should be proceeded against upon the debt during the period that the bills were to run, and that the amount of the bills, deducting the discount, should be applied in extinguishment of the note, so far as they were concerned. If the jury are of opinion, that such was the real nature and character of the transaction, as understood by all the parties to the bills, at the time of the discount, then Hanrick is not liable upon the note; but the arrangement for such delay and prolongation of credit, being for a valuable consideration, discharged him as an accommodation indorser from all liability on the note. If the arrangement was not of this nature, it is difficult to perceive any motive, on the part of Kelly or Hooker, for drawing or accepting the bills, or of having them discounted at the bank, and paying a large sum for the rate of exchange, as well as for interest, since the proceeds never were otherwise applied to their use, or for the benefit of Lawrence, or Kelly, or Hooker; but remained in the bank until the maturity of the bills.

Verdict for the defendant.

Case No. 12,679.

SEVENTY-EIGHT BALES OF COTTON.

[1 Lowell, 11;[1] 27 Law Rep. 251.]

District Court, D. Massachusetts. July, 1865.

PRIZE—PROPERTY ABANDONED BY ENEMY.

1. Cotton picked up at sea by a cruiser of the United States, under circumstances which show that it has recently been abandoned, either by an enemy or by a neutral engaged in breaking the blockade of an enemy's port, is rightly proceeded against as prize rather than derelict.

2. In order that goods should be condemned as prize, it is not necessary that they should be taken by force, nor from actual hostile possession; it is enough that they have been rightly taken and are the property of an enemy.

The following facts appeared: On the forenoon of the thirty-first day of May, 1864, the United States public armed steamer Vicksburg, attached to the North Atlantic blockading squadron, and then cruising on what was known as the outside blockade, discovered a steamer lying to, some fifty miles from the coast of North Carolina. The stranger, on discovering the Vicksburg, immediately got up steam and endeavored to escape; was chased by the cruiser, but gained on her, and after some hours escaped. It afterwards turned out that this steamer was the Georgiana McGaw, bound from the Bermudas to some blockaded port; and the deposition of her master was taken in the case. When she was first seen, two merchant vessels, a barque and a brig, were lying to, not very far from her. Soon after the chase began, the officers and crew of the Vicksburg saw cotton floating in and near the wake of the McGaw, which some of them supposed to have been thrown from her to aid her escape, as was usual with cotton-loaded blockade runners. After giving up the chase, the Vicksburg returned upon her course, and on the same afternoon and the next morning picked up the cotton which was the subject of this proceeding. The two vessels above mentioned were found near where they had been seen before, and were evidently engaged in picking up cotton. The seventy-eight bales were sent to the port of Boston, by Captain Braine, commander of the Vicksburg, and at his request were libelled here by the district attorney, as prize. After the cause had been pending for some little time, Captain Braine, in behalf of the officers and crew of his ship, intervened by petition in the nature of a libel for salvage, and alleged that the goods were, in fact and law, not prize but derelict, and that the whole proceeds ought to be awarded to him and his officers and crew. No claimant appeared.

It was proved that this cotton was not thrown over from the Georgiana McGaw, and that it must have been thrown over within a day or two before it was found, and in all probability from some vessel which had recently broken the blockade, and was forced to make the jettison by stress of the hostile pursuit of our cruisers.

W. G. Russell, for the officers and crew of the Vicksburg.

This is derelict property, which, under the circumstances, belongs to the finders, because there are no elements of capture to make it prize, and there are no owners who would be permitted to appear in this court, since they are undoubtedly enemies. The goods were not abandoned with any hope or intention of recovering them, and must be regarded as bona vacantia. To the point of

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

capture, see The Two Friends, 1 C. Rob. Adm. 283. We have no droits of the admiralty in this country, and if the goods are simply derelict, the whole will go to the finders, after the lapse of a sufficient time for the owners to appear and claim. Such has been the practice, of late, in this district and in several others. See Marv. Wreck & Salv. § 131n.

R. H. Dana, Jr., Dist. Atty., for the United States.

This is clearly a case of prize. Enemy property taken in any lawful manner, within the ebb and flow of the tide, is prize. The Aquila, 1 C. Rob. Adm. 41. In The Emulous [Case No. 4,479], 8 Cranch [12 U. S.] 110, the supreme court does not overrule Mr. Justice Story on this point. The question there was of the lawfulness of the taking. If this cotton should be considered derelict, the United States, and not the finders, would be entitled to the remainder, after due salvage is awarded, in case no claimant appears. Dane, Abr. tit. 76, art. 7, § 16; 3 Kent, Comm. 356; Peabody v. Proceeds of 28 Bags of Cotton [Case No. 10,869].

LOWELL, District Judge (after stating the facts). Upon this state of facts the questions, which have been argued with very great learning and ability, are, whether these goods are prize of war, and if not, what are the rights of the salvors or finders? I shall find occasion to deal with only the first.

For the Vicksburg, the position is taken that these goods were simply derelict; and that they were open to the occupancy of any finder, whose rights are the same as in time of peace; that in peace the finder is, by our law, entitled to a reasonable salvage, which, where the property was utterly derelict on the high seas, would ordinarily be one-half; and that he has, besides, a title to the remainder, when the lapse of time or other circumstances show that no owner will appear; and that in this case no owner can ever appear, because the goods, having broken blockade, would not, by our courts, even after the war is over, be restored to a person whose title would be so tainted with illegality. That the goods were derelict, is evident. But I think they were also prize of war. The question of prize or no prize is essentially a question of title. Enemy property, or property found so engaged in an unfinished voyage of illicit traffic with the enemy as to be quasi hostile, is liable to condemnation; property not in that predicament is not. And these goods are, confessedly, in that predicament, though under which branch of it cannot be known.

But, it is said, in order that goods should be condemned, they must be captured from the enemy, and here was no capture. Sir William Scott is quoted as saying in The Two Friends, 1 C. Rob. Adm. 283: "I know of no other definition of prize goods than that they are goods taken on the high seas, jure belli, out of the hands of the enemy." It is sought to be inferred from this remark of an eminent judge, that there must have been a hostile possession at the time of the taking, which possession has been changed by the captors. But it is evident that no such meaning was intended, because in the great majority of all the condemnations pronounced by that learned judge, the property came from neutral or friendly possession. Nor can it be maintained that the application of force, actual or constructive, is necessary. In many cases that have passed into judgment the goods were driven within the jurisdiction by stress of weather, or of a hostile pursuit which had ceased, or had been detained by an embargo; and the taking has often been only by the marshal, on his warrant, after due proceedings had in the prize court itself.

It is true there often is a capture; and when that is the case, the title and right are derived through that capture, and it must be such as the laws of war authorize. And the prize court may well refuse to try the question of prize, when it appears that the captors invoke its aid in favor of a title improperly acquired. The Conqueror, 2 C. Rob. Adm. 303. As, if the capture be within neutral territory, and the neutral government require restitution to be made. So in a remarkable case before Sir William Scott. The Jonge Jacobus, 1 C. Rob. Adm. 243, where the officers and crew of a British frigate who had been saved from shipwreck and brought into Yarmouth by a neutral vessel with enemy cargo on board, proceeded against the vessel and cargo as prize, the court very properly refused to examine the question, so far as the vessel was concerned, and intimated that the same rule would have been applied to an enemy vessel, as it clearly ought. But in that very case the learned judge observed that the cargo might properly be condemned; and I suppose it was condemned. This case shows very clearly that no capture is necessary, and that all the court requires is jurisdiction properly obtained, and then its inquiry is into the title. Thus the cargo was thought (though wrongly, as it seems to me on the merits of the question) not to be entitled to the safe conduct which was implied in favor of the ship, and so, though never captured, it was condemned.

In the case of The Emulous [Case No. 4,479], goods owned in England and found here in the custody of one of our citizens on the breaking out of the war with Great Britain, in the year 1812, were libelled as prize, and Judge Story, following Lord Stowell and the practice of the British towards us in that war, condemned them as prize, but the supreme court reversed this decision, not on the ground of want of capture or want of taking from hostile possession, but because

they were not willing to admit that the laws of war as understood and practised in this country authorized such reprisals. The Emulous [supra]; same case, 8 Cranch [12 U. S.] 110, sub nom. Brown v. U. S. In the case from which the quotation has been made, the question was only whether goods captured at sea could, after being landed, be proceeded against as prize; and Lord Stowell was only deciding that the taking was so far maritime as to make it a question properly of prize and not of common-law jurisdiction. He was not attempting to give an exhaustive definition of prize; though, as I understand his language, it is perhaps as good a definition as could easily be made. Including neutral goods liable to condemnation from being involved in illegal trade under the phrase enemy goods, which you must do in any interpretation, I understand him to mean simply this: "Prize is enemy property taken at sea, jure belli." That is, taken into our hands, and therefore out of the enemy's hands.

But, it may be said, in all the instances above given, the taking, whether forcible or not, and whether from hostile possession or not, was, at all events, jure belli; and here the taking was by right of finding, which would equally exist in time of peace, or in favor of a non-commissioned vessel; as of the barque or brig which did take some cotton without interference by the Vicksburg.

In point of law the possession was taken and held jure belli, and was a capture. If the hostile or quasi hostile owner had, immediately after the taking, demanded the goods, tendering a sufficient salvage, the answer would have been, and rightly, that they were held as goods liable to be condemned to the United States, as having been taken on the high seas, jure belli. And the merchant vessels, if American (as one of them was), might lawfully have set up the same right; but if neutral, they must have yielded to the demand of the true owner. There is no difficulty in holding the goods to have been both derelict and prize; derelict so as to give a primary right of possession to the finder, and prize to give the sovereign of that finder, if a hostile belligerent as regards the owner, the right to condemn the property as prize. And to this effect is the language of Sir William Scott in The Aquila, 1 C. Rob. Adm. 41, a case of a ship and cargo found at sea: "This case, therefore, is to be considered as derelict; and in that form the proceedings were originally commenced against both the ship and cargo; the ship has been claimed and restored; the cargo has not been claimed; but there was reason to expect an owner would appear, as there were papers on board describing it to be the property of a neutral owner. Some suspicions occurred, however, that it was in fact the property of an enemy; and under these circumstances it became expedient to proceed against it as a prize, for the purpose of meeting the pretensions of the ostensible, neutral owner, and of bringing the examination of his claim, where alone it could be properly discussed, into the prize court." If this is not so, the absurdity follows which was urged at the bar, that the crew of a vessel chased by a hostile cruiser have only to abandon her, and if she is taken by another cruiser that did not join in the chase, then, though fully armed for war, she is only derelict and not prize.

It is argued that if property belonging to one of our citizens had been captured by an enemy and had then been abandoned by him and found by one of our cruisers under circumstances and in the way that these goods were abandoned and found, such finding would not be a recapture, and the finders would not be limited to the statute rate of salvage as for a recapture. This is true. But recapture is a matter of statute, and its meaning is not necessarily the converse of that of capture. By definition it denotes a taking from hostile possession. Capture affects the title of the true owner: recapture only the possessory right of the captor. By capture the goods come into the possession of an enemy; but do not become his property until condemnation. If abandoned before condemnation, the title of the original owner attaches again, and the finder, if a friend, finds for him, and divests no right of the enemy, for that was wholly possessory and was lost by the abandonment. This is well shown by the case, among many others, of The Adventure, 8 Cranch [12 U. S.] 221, in which a French captor gave a British prize to an American shipmaster; and the supreme court held that the original British owner should have the remaining property after salvage paid; and, war in the mean time having occurred with England, allowed him till peace to make his claim, on the principle of the case of The Emulous, above referred to.

But suppose the Vicksburg, with this cotton on board, had been taken by the enemy, and carried into one of their ports and before one of their tribunals, would not the captors of the Vicksburg have been entitled to salvage from the original owners of the cotton, as upon a recapture, or must they have restored without salvage?

Finally, it is urged that our prize acts regulating the awards of prize-money, and prize proceedings generally, speak only of the capture of vessels and their cargoes, and of the relative force of the vessels, giving the captors the whole of the prize, if the latter is of equal or superior force to the captors, and the half if she is of inferior force: but that here is no vessel, and no force, superior or inferior; wherefore, it is concluded, there can be no prize.

But the prize acts do not undertake to define what shall be lawful prize, nor, in general, how the court shall obtain jurisdiction to pass upon that question. They regulate some of the proceedings of the captors, and of the courts, and the mode of ascertaining and distributing the prize-money. If the property is water borne, it need not be in a vessel, and

if it be properly brought within the jurisdiction of the court, it need not be by what would be in the most strict and literal sense a capture. If the takers should not come within the benefits of the prize acts as captors in any particular case, it would be their misfortune, in so much that they must seek their redress in another tribunal. But that they would eventually be compensated, we cannot permit ourselves to doubt. It has been the habit of congress in all our wars, I believe, to award suitable remuneration to non-commissioned captors, and all others who have performed services of this nature, for which the law has made no effectual provision. And, indeed, courts of prize have power to grant a reasonable compensation under the name of salvage, which in theory, perhaps, is rather for the preservation and bringing in of the goods than for the original taking; and in the case of mere derelict there would be no difficulty in considering that the salvage should be as large a proportion of the value as our acts now allow for prize-money in the case of an ordinary unarmed prize, that is one-half. The Dos Hermanos, 10 Wheat. [23 U. S.] 306. I find no such difficulty, however, in this case, because this court has always construed the acts to include all lawful takings by commissioned cruisers, whether any vessel or opposing force were present or not. If the force is not equal or superior, it is taken to have been inferior. And I do not doubt that this is the correct interpretation.

I conclude, therefore, that these goods must be condemned as prize, and distributed accordingly, the Vicksburg being entitled, as sole captor, to one-half of the proceeds. Decree accordingly.

SEVENTY-EIGHT BARRELS (UNITED STATES v.). See Case No. 16,257.

SEVENTY-EIGHT CASES OF BOOKS (UNITED STATES v.). See Case No. 16,258.

SEVENTY-EIGHT CASKS OF WHITE WINE (UNITED STATES v.). See Case No. 16,259.

SEVENTY HOGSHEADS AND NINE BARRELS OF SUGAR (SHEAFF v.). See Case No. 12,730.

Case No. 12,680.

SEVERANCE v. CONTINENTAL INS. CO.

[5 Biss. 156.] [1]

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

INSURANCE—FIRE—LOCATION OF PROPERTY —MISTAKE.

1. Locality is an important element in an insurance policy; and when the location of the property is specified, the risk cannot be extended so as to cover it, if, in fact, it is situate in an adjoining building. This is true, though the insurer supposed that the property was in the building described; and the policy cannot be reformed on the ground of mistake.

2. Though it appear that the same agents would have taken the risk with equal readiness in either building, though perhaps in a different company, this fact cannot change the contract actually entered into.

This was a bill in equity [by Joshua S. Severance against the Continental Insurance Company] to reform a policy of insurance, and for general relief. The complainant having purchased, on February 25, 1865, of Pollard & Doane, a quantity of tobacco, but not wishing to use it immediately, made arrangements to store it with them, and took from them a warehouse receipt in the ordinary form, setting forth that it was stored at their warehouse, Nos. 189 and 191 South Water street, Chicago. Wishing to obtain insurance upon this tobacco so stored, Severance took the receipt of Pollard & Doane to the insurance agency of Messrs B. W. Phillips & Co., of Chicago, who at that time were agents for the Continental Insurance Company, the present defendant, having other companies represented by them, who issued their policy in due form upon the tobacco, B. W. Phillips & Co., as agents of the Continental Insurance Company, giving the plaintiff the following certificate: "This is to certify that the Continental Insurance Company has insured against loss by fire, under open policy 100, by indorsement thereon on this date, in the sum of $1,800, fifty caddies of tobacco and fifty boxes of plug tobacco, in 189 and 191 South Water street." This policy was extended after the expiration of its first term for a further term of three months, and during the second term of insurance, the same description being given in both certificates, the buildings Nos. 183, 185 and 187 South Water street were destroyed by fire. It appears from the evidence that Pollard & Doane occupied the entire portion of 189 and 191, as a wholesale grocery store, and also a portion of 185 and 187 above the first floors, and that in point of fact, the tobacco in question was never in the buildings 189 and 191, but was, from the time of the sale thereof to Severance, up to the time of its destruction by fire, stored in the upper room of 187 South Water street. The insurance company refused to pay the loss, on the ground that the insurance was on property situated in 189 and 191, while, in fact, the tobacco which the complainant had bought of Pollard & Doane, was stored in 187 and was burned there.

BLODGETT, District Judge. It is claimed on the part of the complainant that there was a mistake—a mutual mistake—between the parties in reference to the locality of this tobacco, and this bill is brought to reform that mistake and compel the insurance company to pay for the loss sustained by the complainant by the destruction of the tobacco which they supposed they had insured. There is no evidence that the insurance company at any time supposed that this tobacco was in 187 at the time they described it as being in 189

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

and 191, nor is there any evidence that there was any mistake on the part of the insurance company in reference to the locality of the tobacco. It is true, that according to the evidence, the tobacco was in 189 and 191, but it is equally true that to hold that the insurance company would have insured if they had known it was in 187 the same as in 189 and 191, would be virtually to compel them to make a new contract, instead of reforming one which they actually did make. Indeed, there is evidence in the case going to show that the agent of the defendant would not have taken a risk in this company, the Continental, upon this tobacco if he had known it was in 187, because the company was already carrying as large an amount of risk on property in that building as the rules of the company allowed, although he would probably have insured the tobacco with some other company; but because he would have made an insurance with some other company it does not follow he would have made one with the Continental, nor does it follow because the Continental, by its agent, was willing to insure in 189 and 191, they were therefore willing to insure in 187. Locality is an important matter in taking risks upon property, and if the courts can be allowed to say that property described as in one locality in a policy of insurance may, in point of fact, be elsewhere, fifty or a hundred feet away from that locality, it may with equal propriety be a mile away and still be covered by that policy. In other words, there would be no security for insurance companies if you were to spread their liabilities over an indefinite territory when the company supposed it confined to a particular locality.

I am therefore of opinion clearly, that the relief cannot be granted, that there was no mistake on the part of the insurance company that can be reformed by a court of equity.

The bill will be dismissed.

Case No. 12,680a.

SEVIER v. HOLLIDAY.

[Hempst. 160.] [1]

Superior Court, Territory of Arkansas. July, 1831.

BAILMENT—POSSESSION—ATTORNEY AND CLIENT—NEGLIGENCE.

1. On a receipt given by an attorney at law to A. B., for a note in favor of C. D., the legal interest is vested in the latter and he must sue; and A. B. cannot maintain suit against the attorney.

2. Being only a naked bailee, A. B. by voluntarily parting with the possession of the note, divested himself of all right to or interest in it, and could not hold the attorney responsible.

3. As to liability of an attorney for negligence, and for failing to pay over moneys collected, see notes.

Writ of error to the Clark circuit court.

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

Before THOMAS P. ESKRIDGE and JAMES WOODSON BATES, JJ.

ESKRIDGE, J. This is an action of trespass on the case brought by Peter Holliday against Ambrose H. Sevier, in the Clark circuit court, and comes to this court by writ of error. The declaration contains three counts, the first two for negligence in the defendant as an attorney in failing to collect and account for a note placed in his hands for collection by the plaintiff, and a third in trover, for controverting the note so placed in his hands. There was a judgment in favor of the plaintiff for one hundred and sixty-four dollars and four cents, to reverse which the defendant has brought this writ of error.

Several grounds are relied on in argument for reversing the judgment of the circuit court, only two of which will be noticed.

First, it is contended that the action was improperly brought in the name of Peter Holliday, instead of in the name of William English. There was a receipt given in evidence in the court below, signed by A. H. Sevier to Peter Holliday, in the following language: "Received of Peter Holliday, one note of $133, against Joshua J. Henness, drawn in favor of William English, this 14th November, 1825. A. H. Sevier." The circuit court decided that the receipt was evidence conducing to prove a privity of contract between Sevier and Holliday, and admitted the receipt in evidence, to which opinion there was a bill of exceptions filed.

The general doctrine that the action must be brought in the name of the person in whom the legal title resides cannot be controverted. 1 Chit. 3; 1 Saund. 153, note 1; 8 Term R. 332. I cannot perceive how the receipt given by Sevier to Holliday for a note payable to English, can operate as a recognition of title to the note in Holliday. There is nothing in the record of the court below going to show that Holliday had any interest in the note whatever, nor can I perceive how it tends to establish a privity of contract between Sevier and Holliday. The possession of the note by the latter might have established a privity of contract between himself as bearer, and Henness, the maker, but that question it is not necessary to decide. Holliday must be considered as the naked bailee of the note, or as the agent of English, and in either character he cannot recover on the receipt. If Holliday was a naked bailee, and voluntarily parted with the possession of the note to Sevier, he thereby ceased to have any control of it, and divested himself of all right to bring an action. Whilst holding the note as bailee, Holliday had a good title to it against all the world, except English, the rightful owner; but having voluntarily parted with the possession of it, he divested himself of all interest in it. But consider Holliday as the agent of English, and the result is precisely the same. Holliday certainly could

not bring an action in his own name, as was settled in Gunn v. Cantine, 10 Johns. 387, a case strikingly analogous to the one under consideration, in which it was said by the court, that a mere agent or attorney not having any beneficial interest in a contract, cannot maintain an action in his own name.

The second point which I deem it necessary to mention, is the alleged defect in the count in trover, in which it is not stated that Holliday was possessed of the note in controversy, as of his own property. This, by reference to the authorities, will be seen to be a valid objection. 1 Chit. 185. But the first question being decisive of the cause, it is not necessary to inquire whether the defect in the count in trover has been aided by verdict. The two first counts in the declaration are fatally defective in not setting out a title in the plaintiff to the note, and that is not cured by verdict. My opinion is that the judgment of the circuit court ought to be reversed.

NOTE. This case came before the supreme court of Arkansas, and is fully reported in 2 Ark. 512; and the doctrine advanced in the above opinion was sustained, and the judgment reversed. The following is a synopsis of the decision of the supreme court.

1. An attorney is not liable in the discharge of his official duty for claims put into his hands to collect as such attorney, unless it be shown that he has been guilty of culpable negligence in the prosecution of the suit, or that thereby the plaintiff has lost his debts; nor can he be held liable for moneys collected by him as an attorney, unless a demand be made upon him, and he refuses to pay it over, or remit it, according to the instructions of his client.[2]

2. Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily requires on the trial, proof of the facts so defectively or improperly stated or omitted, and without which it is not to be presumed that either the judge would have directed the jury to give, or the jury would have given a verdict, such defect, imperfection, or omission, is by the common law cured by the verdict. 1 Saund. 228, notes; 1 Term R. 545; 3 Term R. 147; 4 Term R. 472; 7 Term R. 518; 10 Bac. Abr. "Verdict," X, 354.

After verdict, nothing is to be presumed except what is expressly stated in the declaration, or what is necessarily implied from the facts that are stated; that is, where the whole is stated to exist, the existence of the parts is implied; and where the claim is alleged to exist, the existence of the component links will be implied after verdict. But if the plaintiff wholly omits to state a good title or cause of action even by implication, matters which are neither stated nor implied need not be proved at the trial, and there is no room for intendment or presumption, as the intendment must arise from the verdict when considered in connection with the issue upon which it was given. 1 Term R. 141; 4 Term R. 472; 7 Term R. 519; 3 Term R. 481; H. Bl. 569. The cases of presumption are where the plaintiff has stated a case defective in form, not where he has shown a title defective in itself. 4 Term R. 472. If anything essential to the plaintiff's action be not set forth, though the verdict be found for him, he cannot have judgment; because if the essential parts of the declaration be not put in issue, the verdict can have no relation to it, and if it had been put in issue it might have been found false. Therefore, in an action against an attorney for failing to collect a note, a count stating that the plaintiff caused to be delivered to the defendant, and the defendant received from him a note made by a third person for so many dollars to bring suit on, recover, and collect of that third person for the use and benefit of the plaintiff for certain fee and reward to the defendant in that behalf, is so defective in stating the plaintiff's title to sue, that a verdict on it in favor of the plaintiff will not sustain the judgment. No title to the note in the plaintiff is stated by or implied in any of these allegations, and no facts are stated which could not be proven without at the same time establishing the plaintiff's title to the note or legal right to receive the proceeds; nor is it stated or implied that the note was due when so delivered, nor to whom payable, nor what sum was due upon it. Such a count shows a defective title, and not a title defectively stated, and no proof is admissible under it, which can make it good. Under such a count a receipt given by the defendant, stating that he had received of the plaintiff a note for so many dollars against A. B., in favor of C. D., so far from proving the title to the note to be in the plaintiff, proves it to be in C. D., who is the legal owner, and is held in law to have possession of it. Such a receipt is, therefore, inadmissible in evidence under such a count.

3. A party cannot be allowed to prove more than he has alleged in his declaration, and when he omits to allege a fact essential to his

[2] In Sneed v. Hanlyport, it was held, that an attorney was not subject to an action for moneys collected by him, until demand, directions to remit, or some equivalent act; and that the statute commenced running from that point of time. 5 Cow. 376; 7 Wend. 320; 3 Barb. 584. In Cummins v. McLain, 2 Ark. 412, it was decided that an attorney at law cannot be held liable as for money collected by him as attorney, unless it be first proved that by failure to prosecute claims put into his hands for collection with due and proper diligence, the plaintiff lost his debt; or that he had collected the money, and refused to pay it over on demand, or to remit it according to instructions. The liability of the attorney rests upon the principle of his agency for the plaintiff, and he holds the money for his principal in that capacity, and the court said the plaintiff must demand payment or request the money to be remitted before the attorney can be charged with being guilty of laches or culpable negligence; and it was observed that it would be in opposition to the nature of the trust created between the parties, as well as against good faith and justice, to hold the attorney liable before demand and refusal to pay, or remit the money. Sevier v. Holliday, 2 Ark. 570; Palmer v. Ashley, 3 Ark. 82. The legitimate object, however, of a demand is to enable a party to discharge his liability agreeable to the nature of it, without suit. But if an attorney denies the liability, or the right of the other to call upon him, a demand, or directions to remit, it is conceived, would be as unnecessary as useless, and it was so held in Walradt v. Maynard, 3 Barb. 586. And in chancery the rule is, that if the defendant denies the right of the plaintiff, he cannot insist in his defence that there was no demand. Ayer v. Ayer, 16 Pick. 335. The law dispenses with the necessity of a demand where the defendant has committed acts inconsistent with the title of the plaintiff, and conducted himself in such a way as to render a demand wholly unavailing. Beebe v. De Baun, 3 Eng. [8 Ark.] 565; La Place v. Aupoix, 1 Johns. Cas. 407. Where there has been an actual conversion by the defendant, no demand is required. 9 Bac. Abr. "Trover," B, 638.

action and not involved or implied in the pleadings, or inferable from the verdict, he can offer no proof of such a fact.

A party having no interest in a note cannot be injured by the failure of an attorney to collect it. If his declaration does not show such an interest, or such an interest is not legally implied from its allegations, he cannot prove his interest, nor does he show any right to recover.

4. To entitle a plaintiff to recover in trover two things are necessary to be stated and proved, first, property, either general or special, in the plaintiff, and second, a wrongful conversion. In trover for a note, the omission to state in the declaration that the plaintiff was possessed of the note as of his own property, or that it came to the possession of the defendant, would be fatal on general demurrer, but is probably cured by verdict. But the introduction of such a receipt as is mentioned above, disproves the plaintiff's title to the note, and establishes the interest to be in another, and consequently precluded a recovery.

The opinion of the supreme court was delivered by Dickinson, J., and the case was very elaborately discussed by counsel, as will be seen by reference to it.

Case No. 12,681.

SEVIER v. WHITE et al.

[4 Am. Law T. 218.]

Circuit Court, W. D. Virginia. 1871.

ACTION ON DECREE — SUFFICIENCY OF DECLARATION— DEMURRER.

[In an action on a decree, a general averment that the parties declared against were defendants to the suit by which the decree was rendered is equivalent to an averment that they duly became parties, either by service of process or by voluntary appearance; and hence the declaration is not in this particular vulnerable to a demurrer.]

"Ambrose H. Sevier (trustee for Matilda Johnson), a citizen of Arkansas, plaintiff, complains of Addison White, a citizen of Alabama, and Milton White and Newton White, citizens of Virginia, defendants of a plea of debt, that they render to the plaintiff the sum of $60,000, his debt, and $15,999.99 for his damages, and $60 costs, with interest, &c.; for that, theretofore, to wit, on the 27th day of April, 1869, at a term of the circuit court of the county of Desha, in the state of Arkansas, &c., in chancery sitting, it was adjudged, ordered and decreed by the said court, in a certain suit then therein depending, wherein the said Ambrose H. Sevier, trustee for Matilda Johnson, was complainant, and Milton White, Addison White, and Newton K. White, and a certain William Blydenburg and Mrs. Little, were defendants, that the said Ambrose H. Sevier, trustee for Matilda Johnson, recover of and from the said Milton White, Addison White and Newton White (alias Newton K. White) the sum of $60,000 debt and $15,999.99 damages with interest; and the said plaintiff in fact saith that the said decree still remains in full force, &c., not in any wise reversed, &c., and that the said sums of money, &c., still remain and are due, &c., to him, the said plaintiff, whereby an action hath accrued, &c., to demand and have, &c., the sum of money above demanded being the debt, damages, interest, costs and charges aforesaid, so in form aforesaid recovered, to wit, by the decree aforesaid in the court aforesaid; nevertheless, the said defendants, although often requested, have not paid, &c., &c., &c. B. R. Johnston and Johnston & Trigg, P. J."

To the above declaration the following demurrer was filed: "1st. The defendants demur to the plaintiff's declaration, and say that it is insufficient in law; wherefore they pray judgment, &c. 2d. And the defendants for plea say that there is no such record and decree as alleged in the declaration on which the plaintiff's action is founded, and this they are ready to verify. 3d. And the defendants for further plea say that they were non-residents of the state of Arkansas at the time of the institution and during the pendency of said proceedings in the circuit court of Desha county, Arkansas, in chancery, and at the time of the rendition of the alleged decree sued on, but were and are citizens and residents of other states, &c., that they or either of them were not served with process in said suit by any personal service, or had any actual notice, nor did they or either of them appear in said suit in person or by attorney; but said decree sued on was taken and rendered against them by default; and said decree is therefore of no force or effect against them in this suit in this court to charge them with said supposed debt in the declaration demanded, and this they are ready to verify. 4th. And the defendants for further plea say that the said circuit court of the county of Desha, in the state of Arkansas, in chancery sitting, had no jurisdiction to render the decree alleged against the defendants under the pleadings and proceedings in said suit, in said court, as appears by said record when produced; and so the defendants say that said supposed decree sued on has no force or effect against them in this suit in this court to charge them with said supposed debt, and this they are ready to verify by the record, wherefore, &c. 5th. And the defendants for further plea say the said proceedings and decree in the circuit court of Desha county, Arkansas, in chancery, against the defendants for the recovery of said debt sued on, are, upon the face of said proceeding and decree, contrary to reason and natural justice, and therefore said decree is a nullity and has no force or effect to charge the defendants in this suit in this court with the debt in the declaration demanded, and this they are ready to verify; wherefore, &c. Campbells & Sheffy, for defendants."

BY THE COURT. This day came the parties, by their attorneys, and the defendants demurred to plaintiff's declaration, and issue was joined thereon; and the matters of law arising thereon being argued, it seems to the court that the law is for the plaintiff, and for

the following reasons the demurrer is overruled: "Which special demurrer to declaration was overruled by the court, on the ground that the general averment of the declaration that the persons declared against were defendants to the suit in which the decree was rendered in the state of Arkansas is equivalent to the allegation that they were duly parties to said suit either by the service of process upon them or by their voluntary appearance and pleading in said suit; so that said general averment may be traversed by plea that the defendants to this action were not bound or affected by said decree in the circuit court of Desha county, in Arkansas, because not served with any process, or bound by any appearance or pleading in said suit;" and thereupon the plaintiff asked and obtained leave to file an additional count to this declaration, which is done, and the defendants take time to plead to the same, and this cause is continued.

Case No. 12,682.

SEWALL v. HULL OF A NEW SHIP.

[1 Ware, 565.] [1]

District Court, D. Maine. Sept. Term, 1855.

MARITIME LIENS—UNDER STATE STATUTE—MATERIALS—APPROPRIATION.

To entitle a person to a lien on a vessel, under Rev. St. Me. c. 125, § 35, there must be an appropriation, express or implied, of the labor or materials at the time of the contract, or if not, at least at the time of the execution of the contract by the delivery of the materials, to the particular vessel against which the lien is claimed.

[Cited in The Young Sam, Case No. 18,186; The James H. Prentice, 36 Fed. 781.]

[Cited in Rogers v. Currier, 13 Gray, 134; Barstow v. Robinson, 2 Allen, 606.]

This was a libel by a material man for the price of materials furnished for, and used in the construction of a new ship.

Mr. Merrill, for libellant.

Mr. Shepley, for claimant.

WARE, District Judge. The materials were furnished in this case, as is alleged in the libel, as well on the credit of the ship as on the personal credit of the builders, Harriman & Co., to the amount of $1,112.49, according to a schedule annexed. The account being unpaid, and the builders, before the completion of the ship having stopped payment, she was arrested, and the libel having been filed within four days after she was launched, the libellant claims a lien on her under the Revised Statutes of Maine. The answer of Franklin Clarke, claiming to be the sole owner under a mortgage now foreclosed, denies that the materials were furnished on the credit of the ship, but alleges that they were sold in the ordinary course of trade on the personal credit of the builders only; that as to the larger part of the claim, it was settled and paid by Harriman & Co., on the 12th of January, by their negotiable note for the amount then due. There are other exceptions to the residue of the claim; but before coming to them, it is necessary to dispose of an objection that goes to the whole claim set up in the libel. It is denied that the materials were furnished on the credit of the vessel, or that any lien upon it for security was contemplated by the parties, but that they were purchased in the usual course of trade on the personal credit of the builders, without any reference to the use to which they might be applied; and therefore, though actually used in the construction of the ship, that the vendor has no more claim to a lien upon it than the vendor of any other merchandise, sold in the common course of trade, has for materials which may happen to be used in the building of a vessel.

The facts not controverted are, that when the contract was made for the lumber it was known to the libellant that Harriman & Co. were engaged in building this vessel; that the lumber was such as is ordinarily used in vessels, and that he had good reason for believing that it was intended to be used in this vessel. But there is no proof that any thing was said on the subject by either party. In what form the charges were entered on the books of the vendor, whether against the ship, or the builders personally, or against both, does not appear. Though notified to produce his books the libellant has not done so, and the reasonable inference is, that if produced they would furnish no evidence that the vendor originally looked to the vessel as security. There is, then, no evidence that the articles named in the bill of particulars were obtained by the purchasers in any other way than in the ordinary course of trade, or that the libellant bargained for, or contemplated any other security for payment, than in any other case of trade; that is, the personal liability of the purchasers; and here it should be observed that they were at this time in undoubted credit. But it is conceded that the materials were actually used in building the vessel.

On these facts the question is raised whether the statute gives the lien. If it does, the mere transfer will not defeat it. It is as valid in the hands of the assignee as in those of the original owner. And this question depends on the true construction of the statute. The material and operative words of the law are: "Any ship-carpenter, caulker, blacksmith, joiner, or other person, who shall perform labor or furnish materials for or on account of any vessel, building or standing on the stocks, or under repairs after being launched, shall have a lien on such vessels for his wages or materials, until four days after such vessel is launched, or such repairs afterwards completed." Rev. St. c. 125, § 35. The lien is given in the most

[1] [Reported by Edward H. Daveis, Esq.]

comprehensive and liberal terms. Every person may stipulate for the credit of the ship in addition to the personal liability of the builders; and further, where labor has been performed or materials furnished for or on account of a vessel, the law gives the creditor a lien without any express stipulation for that purpose. All that seems to be required is, that it should be understood between the parties that the labor or materials are engaged for that particular purpose, and the vessel becomes bound for the payment, by operation of law, provided proceedings are instituted to enforce the lien within four days after the vessel is launched or the repairs completed. But the words "for or on account of" naturally and necessarily imply that they are furnished for the use of a particular and known vessel, and that this is one of the express or understood terms of the contract. For it cannot be pretended that when a person has performed labor under a general contract for service, or has sold materials in the ordinary course of trade, to a merchant or ship-builder, without reference to any particular vessel that is being built or under repair, that he has a lien under this law against any vessel to which the labor or materials may happen to be appropriated. There must be a reference or appropriation, either express or implied, to the thing against which the lien is claimed. It was so held by this court in the case of The Calisto [Case No. 2,316], and the doctrine was affirmed in the same case on appeal. Read v. Hull of a New Brig [Id. 11,609]. In the present case, though it was known to the vendor that Harriman & Co. were building this vessel, it does not appear that any thing was said by either party in reference to it. Nor does it appear that the vendor charged the materials to the vessel, as he naturally would and should have done if he intended to rely on a lien, but the inference is that he did not. There is no proof that at any time before Harriman & Co. suspended payment the libellant ever looked to the ship as security. On the contrary, on the settlement, on the 12th of January, when a negotiable note was given for the amount then due, nothing was said by either party of a lien on the vessel; though a note intended to be negotiated was taken, which, by the law of this state, unexplained, amounted to payment and satisfaction of the account. Taking all the evidence together, it appears to me to have been a sale in the ordinary course of business, and that there was no such appropriation of the materials to any particular purpose, that they can properly be said, in the language of the law, to have been furnished for or on account of this ship, but that the vendor looked for payment only to the personal responsibility of the purchasers. This view of the evidence applies as well to the materials sold after the settlement on the 12th of January, as to those sold before.

On the whole, if the view I have of the law be correct, in order to maintain the lien, there must be an appropriation of the materials, express or implied, at the time of the contract, or if not then, at least at the time of the delivery of them and the execution of the contract, to the particular vessel against which the lien is claimed. As this is not shown to have been done in the present case, the libel must be dismissed with costs.

SEWALL (JONES v.). See Case No. 7,495.

Case No. 12,683.

SEWELL et al. v. NINE BALES OF COTTON.

[21 Leg. Int. 244; [1] 5 Phila. 508.]

District Court, D. Pennsylvania. 1864.

DISTRIBUTION OF SALVAGE.

[1. In all ordinary cases the fixed rule is to give to the owners of the salving vessel one-third of the entire salvage decree.]

[2. The distribution of salvage among officers and seamen in proportion to wages would furnish a just and uniform rule for all ordinary cases. The rule is accordingly applied in this case.]

[This was a libel by Charles Sewell and others against nine bales of cotton, to recover salvage compensation. The case was referred to Thomas Hart, Jr., Esq., as commissioner, to report upon the question of the distribution of the salvage award. The report filed by him was as follows:]

Neither the courts of this country, nor of England, seem to have laid down any binding rules governing distribution in cases of salvage, and indeed from an examination of the authorities on the subject, and a comparison of their tables of distribution, it is difficult to discover much reason therein, or to arrive at any uniform method of computing the shares of all the parties entitled. There appears to be no uncertainty, however, in this country, as far as regards the share to which the owners of the vessel are entitled. In the leading cases of The Blaireau, 2 Cranch [6 U. S.] 240, and particularly The Henry Ewbank [Case No. 6,376], the principle of the owner's interest in salvage was considered at length and forcibly sustained. The cases were ordinary in their circumstances, without any special risk and consequent merit in the vessel. One-third of the salvage was awarded to the owners in both cases. The same measure has been adopted in nearly all the American courts and seems to have become a fixed rule in ordinary cases. See Bond v. The Cora [Id. 1,621]; The Boston [Id. 1,673]; Evans v. The Charles [Id. 4,556]. In but one or two instances, has this amount been exceeded, and

[1] [Reprinted from 21 Leg. Int. 244, by permission.]

then for special reason. The commissioner thinks one-third an ample compensation to the owners in this case and awards them that share.

Concerning the distribution of the remaining two-thirds there is more difficulty. Some of the authorities say that the matter rests in the discretion of the court and that the manner of distribution is to be governed by the peculiar circumstances of each case. Fland. Mar. Law, 429; The Albion, 3 Hagg. Adm. 256. And upon this principle many, particularly the English cases, have made arbitrary apportionments into round sums and assigned them among the officers and crew, without much rule or reason applicable to other instances. The Nicolina, 2 W. Rob. Adm. 175; The Hope, 3 Hagg. Adm. 423; The Deveron, 1 W. Rob. Adm. 180; The Columbine, 2 W. Rob. Adm. 186; The Henry Ewbank [supra].

The foregoing cases were peculiar. Valuable ships and cargoes were rescued, and great risk suffered therein by the salvors, who thereupon became entitled, according to the respective amounts and degrees of service performed by them. They cannot bear strongly upon the present case. No such special circumstances exist herein. * * *

The commissioner does not think that the services of the mate entitle him to any extra share or additional sum, in excess of his ordinary allowance as in The Martha, 3 Hagg. Adm. 436; but is of the opinion that all were equally meritorious, and that a plan of distribution must be sought or laid down, applicable to cases of ordinary or universal merit. Many such are to be found in our own and the English books, but a careful comparison of the modes of apportionment therein, has not enabled the commissioner to discover any certain rule of computation laid down for future direction. Our own cases are much less satisfactory herein than those in England. The courts seem to have contented themselves with a subdivision of the remaining two-thirds into a certain number of shares and allotting them among the officers and crew. Warder v. La Belle Creole [Case No. 17,165]; Concklin v. The Harmony [Id. 3,089]; Taylor v. The Cato [Id. 13,786]; Bond v. The Cora, supra; The Boston, supra; Lewis v. The Elizabeth and Jane [Case No. 8,321.] But the number of the shares, and the proportions of their allotment, vary in almost every case, and though a comparison thereof may approximate to some uniformity as respects the captain's part, it fails altogether in affording us any guide to calculate the shares of the inferior officers and men. So too, the court say in The Columbia, 3 Hagg. Adm. 430: "We will not vary the simple rule adopted in this country in the case of The Waterloo, 2 Dod. 443. We shall follow that precedent and allot one-fourth to captain, and one-fourth to the officers and men." But an examination of the distribution in The Waterloo, shows that the captain there, only received one-fourth of one-half, and that the remaining three-eighths was divided among the inferior officers and men. In The Martha, before cited, one-fourth was awarded to the captain. In The Caroline, 2 W. Rob. Adm. 124, he was allowed one-third of the balance after deducting owner's share. In Warder v. La Belle Creole [supra], he obtained a little less, and in The Harmony a little more than one-third. In The Cora, one-fourth was given to him, and in The Boston, one-half. No very satisfactory result is obtained from these cases, though they seem to indicate some fraction between one-third and one-fourth for the captain's share. If such or any other fixed proportion, however, be adopted for the shares of the captain and mates, and the remainder awarded to the men as a class, to be divided among them, it is evident that the share of each man will be altogether dependent, aside from other circumstances, upon the number of the crew aboard the particular vessel, instead of bearing some certain and more equitable relative proportion to the shares of the captain and mates, which would remain the same in all cases. Otherwise the officers of a large ship with many men, would take a very large amount of the whole, while the share of each seaman in the remainder, would almost be consumed by their very number. On the other hand, if the crew consisted of only three or four men, their shares would too closely approximate the officers. The commissioner thinks such a result should not be allowed in either case. In the one the men would be over-rewarded, in the other, very inadequately. The services in each instance of the officers and men would be of nearly the same proportionate value, and their respective shares ought to bear the same relation to each other in both cases. How can we arrive at such a result?

The officers and men of a ship, are valuable in their respective positions and line of duty, and the ordinary services they render at sea, are in their own particular stations. Now their wages represent the value of those services, and the relation of his wages to those of the others, the proportionate worth of each man's efforts in the enterprise. It may be said, salvage is an extraordinary service, not dependent in its distribution upon terms fixed for ordinary employment, but the power to reward peculiar merit in certain cases, will, it is believed, surmount this objection, or at least not interfere with the application of such a rule in most cases. It is submitted then that a proportion derived from the pay and wages of the officers and men would furnish a just and uniform rule for distribution of salvage in this and all ordinary cases. Each man's share will then bear the same fixed proportion to that of the captain or mate in all cases (at the same wages), and not vary in each particular vessel, according to the number of hands on board. This method of distribution is not

without authority, but may be well supported by the expression of the court in several English cases, and by some analogies in our own country. In The Columbia, before cited, the court "allots the remaining one-fourth to the officers and men in proportion to their wages, as specified in the muster roll." In The Earl Grey, 3 Hagg. Adm. 364: "Remainder £400, among the officers and crew in proportion to their respective weekly wages; the master sharing pro rata exclusively of £50 specially allotted for his responsibility." See, also, The Hope, 3 Hagg. Adm. 423; The Britain, 1 W. Rob. Adm. 45; and The Martha, 3 Hagg. Adm. 436. Although in none of the above cases, except The Earl Grey, does the rule appear to have been applied to the captain, nor to the mate in all of them, yet the commissioner thinks its principle even more applicable to them, for the reason before stated, and in the difficulty of fixing their shares in any other manner, is much disposed to adopt and extend it. As in The Earl Grey, an additional sum may be awarded to the captain for his responsibility, if the result of the proportion does not fully reward him. It is not known that the rule above has been adopted or used as a guide in any of our own cases. In the report of the leading case of The Blaireau [supra], there is a table of the wages of the salvor crew, which may have influenced the apportionment, though it is difficult to discover the plan upon which it proceeded.

The distribution of civil and military salvage among the men of public ships and of prize money furnishes strong analogies. In the following cases of civil salvage by king's ships, the money was directed to be distributed among the officers and crew in the same manner as prize proceeds would have been distributable amongst them: The Waterloo, 2 Dod. 443; The Thetis, 3 Hagg. Adm. 65; s. c., 2 Knapp, 409, 410; The Mary Ann, 1 Hagg. Adm. 158. And by the late prize act of 1862 [12 Stat. 600] salvage (inter alia) is directed to be distributed and paid in the same manner as prize money. Now the same act changed the manner of distributing prize money and has adopted the same method of apportioning it (and consequently civil salvage by public ships, and military salvage) as is recommended and reported herein for distribution in the present case. See Act 17th July, 1862 [12 Stat. 606]. "The residue shall be distributed and apportioned among all others, doing duty on board, and borne upon the books, according to their respective rates of pay in the service."

The commissioner therefore reports a scheme of distribution among the officers and men of the bark Fanny of $800 salvage awarded them, based upon the proportions which their respective weekly or monthly wages bear to each other, and directs the same to be paid to them in accordance with a table hereto annexed.

The report of the commissioner was confirmed by the court, and distribution decreed accordingly.

SEXTON v. The TROY. See Case No. 4,115.

Case No. 12,684.

In re SEYMOUR.

[1 Ben. 348;[1] 1 Bankr. Reg. Supp. 7; 1 N. B. R. 29; 6 Int. Rev. Rec. 60.]

District Court, S. D. New York. Aug., 1867.

HABEAS CORPUS—FRAUDULENT DEBT—PENDENCY OF BANKRUPTCY PROCEEDINGS—DISCHARGE FROM ARREST UNDER STATE AUTHORITY.

1. Where R., a merchant in New York, deposited goods with S., a merchant in New Orleans, for sale on commission, and S. sold them, but made no returns, and thereupon R. commenced a suit against S. in the superior court of the city of New York, and obtained an order of arrest, under which S. was arrested, and, after trial and judgment against him, S. was held by the sheriff under an execution issued against his person on the judgment, and, having filed his petition in bankruptcy before the district court in Louisiana, now applied to this court and obtained a writ of habeas corpus, and also presented a petition praying that he might be discharged from imprisonment pending the bankruptcy proceedings, and that all proceedings in the state court against him might be stayed, pending such proceedings, and the return to the writ and the answer to the petition showed the above facts: *held*, that, under the twenty-sixth section of the bankruptcy act [of 1867 (14 Stat. 529)] a bankrupt may, notwithstanding the pendency of proceedings in bankruptcy by or against him, be held under arrest in a civil action, if it is founded on a debt or claim from which his discharge in bankruptcy would not release him.

[Cited in brief in Hazleton v. Valentine, Case No. 6,287.]

[Cited in Gibson v. Gorman, 44 N. J. Law 328; Donald v. Kell, 111 Ind. 3, 11 N. E. 783.]

2. Under that act, no debt created by the defalcation of a bankrupt, while acting in any fiduciary capacity, will be discharged.

[Followed in Re Kimball, Case No. 7,768; Cited in Re Smith, Id. 12,976; Fulton v. Hammond, 11 Fed. 294; Zeperink v. Card, Id. 296; Hennequin v. Clews, 111 U. S. 680, 4 Sup. Ct. 578.]

[Cited in Flanagan v. Pearson, 42 Tex. 1; Lemcke v. Booth, 47 Mo. 387.]

3. The debt contracted by S. was contracted by his defalcation while acting in a fiduciary capacity.

4. It was, therefore, a debt which, under the thirty-third section of the act, would not be released by his discharge in bankruptcy.

5. The twenty-first section of the bankruptcy act does not apply to any suit brought to collect or enforce or satisfy any debt which would not be discharged by a discharge under the act.

[Overruled in Re Rosenberg, Case No. 12,054. Disapproved in Re Ghirardelli, Id. 5,376.]

6. The twenty-seventh rule of the general orders in bankruptcy applies only to the court in which the bankruptcy proceedings are pending,

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

and, therefore, does not apply to this court in this case.

7. If S. was held by the state court in violation of any law of the United States, this court would have power to release him on habeas corpus, under the act of February 5th, 1867 [14 Stat. 385].

This case came up on a writ of habeas corpus issued, on the petition of James W. Seymour, to the sheriff of the city and county of New York, in whose custody he was held. The sheriff returned to the writ, that he arrested Seymour and took him into custody on the 3d of September, 1866, by virtue of an order of arrest issued by a justice of the superior court of the city of New York, under the Code of Procedure of the state of New York, in a civil action in that court, wherein Constantine Rosswog was plaintiff and the petitioner was defendant; that Seymour remained in his custody under said order until the 22d of September, 1866, when he was discharged on bail; that, on the 3d of July, 1867, his bail surrendered him into the custody of said sheriff, in exoneration of themselves as his bail; that the sheriff, thereupon received and thereafter held and detained Seymour in his custody by virtue of such surrender; that, on the 20th of July, 1867, an execution against the person of Seymour in said action was duly issued to said sheriff, and that the debt embraced in the judgment set forth in the execution was created by the fraud or embezzlement of Seymour or by his defalcation while acting in a fiduciary character. [That section declares as follows: "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under the act, but the debt may be proved, and the dividend thereon shall be a payment on account of said debt."] [2]

In connection with the petition for this writ of habeas corpus, and the writ itself, and the return thereto, Seymour presented to this court a petition, praying for his discharge from imprisonment and arrest during the pendency of proceedings in bankruptcy which he had instituted, and that all proceedings in the state court be stayed until the termination of said proceedings in bankruptcy. This petition showed that the suit in the superior court was commenced August 22d, 1866; that Seymour was held to bail, under an order of arrest in the suit, in the sum of five thousand dollars; that, on the 24th of June, 1867, he filed his voluntary petition in bankruptcy, in the district court of the United States for the Eastern district of Louisiana, praying for his discharge under the bankruptcy act of March 2d, 1867; that, on the 20th of July, 1867, he was duly adjudicated a bankrupt by the court in Louisiana; and that the indebtedness to Rosswog was included in the schedule to the petition in bankruptcy, and was provable under the act. Annexed to the petition was a copy of the judgment roll in the suit in the superior court. By this it appeared, that the cause of action in the suit was, that, in 1860, Rosswog, a manufacturing jeweler in New York, deposited with Seymour, then a wholesale jeweler in New Orleans, certain manufactured jewelry worth three thousand nine hundred and seventy-one dollars and seventy-five cents, which was deposited with Seymour for sale on commission, the proceeds to be remitted to Rosswog as soon as the goods should be sold, less five per cent. for cash, and, if the same should be sold on a credit, then Seymour should remit to Rosswog good business notes for the same, endorsed by Seymour; that Seymour received the goods for sale on those conditions, but had never rendered any account of them or paid for them; that Rosswog had demanded the goods from Seymour, and Seymour had refused to deliver them; that Seymour had sold many of the goods and received the price thereof, but failed and refused to pay over the same to Rosswog; and that Seymour had converted the goods, or the proceeds thereof, to his own use. The complaint claimed damages in twelve thousand dollars. The answer of Seymour denied all the material allegations of the complaint, and denied his indebtedness in any sum whatever. The case was tried before a jury May 10th, 1867, and a verdict was rendered for the plaintiff for five thousand two hundred and forty-two dollars and ninety cents, upon which judgment was perfected in the sum of five thousand five hundred and ninety-two dollars and seventy-four cents, May 18th, 1867. The answer of Rosswog to the petition of Seymour showed that Rosswog had not proved his claim against Seymour in the bankruptcy proceedings, and claimed that the debt was created by Seymour while Seymour was acting in a fiduciary character toward Rosswog, and that no proceedings in bankruptcy affected the debt or the remedies of Rosswog therefor. It was claimed, on the part of Seymour, that the debt in question was not within the enumeration of debts in the thirty-third section of the bankruptcy act, which can not be discharged under the act. [The execution is issued from the said superior court, and recites that a judgment was rendered on the 18th day of May, 1867, in an action in said court, between said Rosswog, plaintiff, and said Seymour, defendant, in favor of Rosswog against Seymour for $5,592.74, and that the said sum, with interest from May 8, 1867, is actually due thereon, and that an execution against the property of Seymour has been duly issued to the sheriff of the proper county, and returned unsatisfied. It then commands the sheriff to arrest Seymour and commit him to the jail of the county of the sheriff until he shall

[2] [From 1 N. B. R. 29.]

pay the judgment or be discharged according to law.] [3]

Thomas Dunphy, for Seymour.
R. B. Roosevelt, G. F. Noyes, and J. F. Daly, for Rosswog and the sheriff.

BLATCHFORD, District Judge. The twenty-sixth section of the bankruptcy act provides as follows: "No bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded on some debtor claim from which his discharge in bankruptcy would not release him." The purport of this provision of the twenty-sixth section is, that no person shall be held under arrest, or suffer imprisonment, in any civil action, during the pendency of proceedings in bankruptcy by or against him, whether he is first put under arrest after the commencement of the proceedings, or is imprisoned at the time the proceedings are commenced, unless the action is founded on some debt or claim from which his discharge in bankruptcy would not release him; but that he may, notwithstanding the pendency of proceedings in bankruptcy by or against him, be held under arrest, and suffer imprisonment, in a civil action, if such action is founded on a debt or claim from which his discharge in bankruptcy would not release him.

The question, therefore, arises, whether the debt due to Rosswog is one from which Seymour's discharge in bankruptcy would release him. In other words, is such debt, within the language of the thirty-third section of the act, a debt created by the fraud of Seymour, or by his defalcation while acting in a fiduciary character? According to well settled authority, such a debt was created by the defalcation of Seymour while acting in a fiduciary character. The depositing of the property with Seymour for sale on commission for Rosswog, established a fiduciary relation between them, and charged Seymour with the execution of a trust on behalf of Rosswog, under which it was his duty either to return the property to Rosswog or to remit to him its proceeds. His failure to do so was a defalcation by him while acting in such fiduciary capacity, and such defalcation created the debt to Rosswog. Such debt will, therefore, not be discharged by the discharge of Seymour in bankruptcy, and consequently such debt is one for which, in a civil action founded on it, Seymour may be arrested and held under imprisonment during the pendency of proceedings in bankruptcy.

The case of Chapman v. Forsyth, 2 How. [43 U. S.] 202, only decides that a balance due from a factor to his principal, for goods of the principal's sold by the factor, is not a fiduciary debt within the meaning of the bankruptcy act of 1841 [5 Stat. 440]. The act of 1841 excluded from its benefits "all persons owing debts created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity." The supreme court held, in Chapman v. Forsyth, that a discharge under the act of 1841 did not release the bankrupt from any such debts, and that no debt fell within the description of a debt created by a defalcation "while acting in any other fiduciary capacity," unless it was a debt created by a defalcation while acting in a capacity of the same class and character as the capacity of executor, administrator, guardian and trustee. The court held, that the language of the act of 1841 was not broad enough to include every fiduciary capacity, but was limited to fiduciary capacities of a specified standard or character. That was clearly so, under that act. But, in the act of 1867, the language seems to have been intentionally made so broad as to extend to a debt created by a defalcation of the bankrupt while acting in any fiduciary capacity, and not to be limited to any special fiduciary capacity. Therefore, under the act of 1867, no debt created by the defalcation of a bankrupt while acting in any fiduciary capacity will be discharged, and a bankrupt can be imprisoned, during the pendency of proceedings in bankruptcy by or against him, in a civil action founded on any such debt.

The twenty-first section of the bankruptcy act does not apply to the present case. As Rosswog has not proved his debt in the bankruptcy proceedings by Seymour, he is not within the inhibitions imposed by that section on a creditor who proves his debt or claim. There is another provision of the twenty-first section, which is as follows: "No creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined, and any such suit or proceeding shall, upon the application of the bankrupt, be stayed, to await the determination of the court in bankruptcy on the question of the discharge; provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid." This provision cannot be regarded as applying to any suit or proceedings brought to collect or enforce or satisfy any debt which would not be discharged by a discharge granted under the act.[4] There

[3] [From 1 N. B. R. 29.]

[4] In the Case of Rosenberg [Case No. 12,054], decided in November, 1868, Judge Blatchford

can be no reason for staying any suit or proceedings to collect or enforce or satisfy a debt, until the question of the debtor's discharge shall have been determined by the court, if the discharge, when granted, will not discharge the debt. The statute ought not to be interpreted as extending to the staying of any suit or proceedings to collect or enforce or satisfy a debt which cannot be discharged, if any other interpretation is consistent with the language. If the reason for the stay ceases, the presumption is that the legislature did not intend that there should be a stay. No greater scope can be given to the suits and proceedings and debts named in the provision, than is given to the discharge by the act, and, as the act does not extend the effect of a discharge to the releasing of a debt created by the defalcation of the bankrupt while acting in a fiduciary character, this provision of the twenty-first section cannot be regarded as referring to the staying of any suit or proceedings to collect or enforce or satisfy such a debt.

It was urged, that the twenty-seventh rule of the "General Orders in Bankruptcy," provided for the release of Seymour, although the act might not in terms apply to the case. That rule provides as follows: "If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of habeas corpus to bring him before the court, to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and, if so provable, he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be." Without deciding whether this rule can, in any case, be construed as extending the exemption from imprisonment further than it is extended by the act itself, it is sufficient to say that the rule applies only to the court in which the proceedings in bankruptcy are pending. In the present case, the proceedings in bankruptcy are not pending in this court, and, therefore, the rule does not apply to this court.

If Seymour were restrained of his liberty under the process of a state court in violation of any law of the United States, this court would, under the provisions of the act of February 5th, 1867 (14 Stat. 385), have power to release him on habeas corpus. That act extends the power of this court to such a case.

The result is, that Seymour must be remanded to the custody of the sheriff, and the prayer of his petition must be denied.

held that this view of the twenty-first section was erroneous, and that the effect of that section was, that proceedings in a suit against the bankrupt to recover a provable debt must be stayed, whether that debt would be discharged or not by the discharge in bankruptcy.

Case No. 12,685.

SEYMOUR v. CHICAGO, B. & Q. RY. CO.

[3 Biss. 43;[1] 4 Am. Law T. Rep. U. S. Cts. 134.]

Circuit Court, N. D. Illinois. June, 1871.

CARRIERS—INJURY TO PASSENGER—SAFETY OF DEPOT PLATFORM—CONTRIBUTORY NEGLIGENCE.

1. Railway companies who are carriers of passengers are required to use all the means reasonably in their power to prevent accident. To render them liable it is not necessary that they should be guilty of great negligence. It is enough if an accident be caused solely by any negligence on their part, however slight, if by the exercise of the strictest care or precaution, reasonably within their power, the injury would not have been sustained.

[Cited in Alabama G. S. R. Co. v. Arnold, 84 Ala. 159, 4 South. 365.]

2. But a company, although guilty of negligence, will not be liable if the injury arose from the want of ordinary or proper care on the part of the plaintiff at the time.

3. So, where the accident was caused by the plaintiff's stepping on ice left on the platform in the depot, the company is not liable if the plaintiff, having seen pieces of ice, could, by reasonable care, have avoided stepping on one of them.

4. It is the duty of a railroad company using a platform in a depot belonging to another company to see that the platform used is safe and convenient for passengers to get in and out of the cars, regardless of any arrangement with such other company. Whether or not ice was placed on the platform by the company's agents makes no difference if the jury believe that it was dangerous to passengers going to or getting out of the cars—the cars being then open to receive pasengers.

5. The agents of the company, by opening the doors of the cars, notified passengers to enter them, and, in fact, notified them that the platform was safe and free from obstructions for those who had purchased tickets.

6. The plaintiff was obliged to use ordinary care and prudence in descending the steps and landing on the platform, and if at any moment it would have appeared to a reasonably prudent person that there was risk of danger to herself in proceeding, then, if she did proceed, it was at her own peril, even though the defendant was guilty of negligence.

[Cited in Alabama G. S. R. Co. v. Arnold, 84 Ala. 159, 4 South. 366.]

7. But, if, on the other hand, taking all the circumstances of the situation together, there would not have appeared to a reasonably prudent person any danger in descending the steps and going on the platform, then she cannot be said to have been guilty of contributory negligence, though in fact injury followed what she did.

8. The jury may taken into consideration the degree of light, the time of day, the fact that the plaintiff saw the pieces of ice, and the position she occupied when she first saw them.

9. The jury can only give as damages compensation for the injury, and cannot add anything by way of punishing the defendant.

10. A married woman has the right to sue for personal injuries without joining her husband.

This was an action by Mary A. Seymour for damages for personal injuries caused by the

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

alleged negligence of the defendant. About ten o'clock in the forenoon of the 30th of August, 1870, the plaintiff purchased of the defendant a passenger ticket from Chicago to Galesburg, and proceeded to the defendant's train of cars. She had her baggage checked for Galesburg, and passed up the steps of one of the Pullman palace cars, intending to pay the extra fare for the right to travel in it. But she found the door of that car locked, and thereupon she passed across the platform of that car and into the car next to the palace car, laid down her shawl and basket and retraced her way to the door. Passing out upon the platform of that car she proceeded to pass to the depot platform for the purpose of finding the person who had the care of the palace car, that she might take a seat in it. As she was about to step from the platform of the car to the platform of the depot, she noticed some pieces of ice on her right, near to the palace car, and it seems there were other pieces of ice close to the steps of the car from which she was about to descend, and upon one of them she set her foot, slipped and fell, dislocating her left ankle. The plaintiff, a married woman, had never been divorced from her husband, but during the last nine years had supported herself, and had not seen her husband in seven years. The Illinois Central Railroad Company were the owners of the depot where the accident occurred. The defendant insisted that the plaintiff was not competent to sue in her own name without joining her husband in the action, and that, upon plaintiff's own showing, she was not entitled to recover, because she saw some of the pieces of ice before she stepped off the car, and that, therefore, she could have avoided that upon which she put her foot.

O. B. Sansum and Samuel W. Fuller, for plaintiff.

Walker, Dexter & Smith, for defendant.

DAVIS, Circuit Justice (charging jury). Railway companies who are carriers of passengers are required to use all the means reasonably in their power to prevent accident. It is not necessary to charge them with liability that they be guilty of great negligence. It is enough if the accident was caused solely by any negligence on their part, however slight, if by the exercise of the strictest care or precaution, reasonably within their power, the injury would not have been sustained. But the company will not be liable, although guilty of negligence, if the injury arose from the want of ordinary or proper care on the part of the plaintiff at the time of its commission, so that in this case the company would not be liable, although the accident would not have happened if the ice had not been left on the platform, or if the plaintiff, having seen that there were pieces of ice on the platform, could, by reasonable care, have avoided stepping on one of them. And it is for you to say whether this accident occurred to Mrs. Seymour in consequence of want of reasonable care on her part, or whether, as she says, it was entirely the company's own negligence that produced it.

It was the duty of the defendant to see that the platform used by it was safe and convenient for passengers to get in and out of the cars, regardless of any arrangement with the Illinois Central Railroad Company, who owned the building. And whether the ice was placed on the platform by the agents of the company or not makes no difference in this case, if the jury believe it was dangerous to passengers going to or getting out of the cars, and the cars were open to receive passengers. As soon as the cars were opened to receive passengers it was the duty of the employés of the company to have seen the ice and to have removed it. The agents of the company, by opening the doors of the cars, invited passengers to enter them, and, in fact, notified them that the platform was safe and free from obstructions for those who had purchased tickets to enter the cars.

But the main question in this case relates to the fault. Whether the plaintiff was in fault, the court does not instruct you as a matter of law upon the evidence that the plaintiff was or was not guilty of contributory negligence, but leaves the fact to be found by you under the rules of law stated by the court.

Mrs. Seymour was obliged to use ordinary care and prudence in descending the steps and landing on the platform, and if at any moment it would have appeared to a reasonably prudent person that there was risk of danger to herself in proceeding, then if she did proceed it was at her own peril, even though the defendant was guilty of negligence.

But if, on the other hand, taking all the circumstances of the situation together, there would not have appeared to a reasonably prudent person any danger in descending the steps and going on the platform, then she cannot be said to have been guilty of contributory negligence though in fact injury followed what she did.

In deciding these points the jury will take into consideration the degree of light on the steps and platform, the time of day, the fact that she saw pieces of ice and a wet spot on the platform, and the position she occupied when she first saw them.

If the jury should find from the evidence that the plaintiff's conduct contributed to the accident, they will find for the defendant.

If, on the contrary, they shall find that she was not negligent and the defendant was, then they will proceed to the question of damages. And on this point they are instructed they must give no more than will compensate the plaintiff for the injury, and cannot add anything by way of punishing the defendant.

In estimating the extent of this compensation they can take into consideration the loss of time sustained, the expenses attending the

cure of the injury, the length of time likely to occur before a permanent cure is effected, and the pain and suffering undergone by the plaintiff.

The jury are instructed that under the evidence in this case the plaintiff has the right to sue without joining her husband.

The jury found a verdict for $2,500 damages for plaintiff.

NOTE. If a railroad company allows the trains of another company to run over its track, as to passengers on its own trains it is responsible in the same manner as if all the trains belonged to itself. Barron v. Illinois Cent. R. Co. [Case No. 1,053]. and cases there cited.

It is no defense to an action for injuries caused by the negligence of a defendant railroad company, that the negligence of a third party contributed to the injuries. Webster v. Hudson River R. Co., 38 N. Y. 260.

To maintain an action for negligence, there must be fault on the part of the defendant, and no want of ordinary care on the part of the plaintiff. In proportion to the negligence of one party, should be measured the degree of care required of the other. Where there are faults on both sides, the plaintiff may, in some cases, recover, as where it appears that his negligence is comparatively slight, and that of the defendant gross. Galena & C. U. R. Co. v. Jacobs, 20 Ill. 478; Chicago, B. & Q. R. Co. v. Dewey, 26 Ill. 255; Same v. Hazard, Id. 373; Chicago & A. R. Co. v. Pondrom, 51 Ill. 333; Chicago & N. W. R. Co. v. Harris, 54 Ill. 528.

As to carrier's liability for negligence where both parties are in fault, see 2 Redf. R. R. 240.

The doctrine in relation to the mutual negligence of parties in causing an injury, as affecting the right of parties to recover therefor, is applicable to passengers carried upon railroads. Galena & C. U. R. Co. v. Fay, 16 Ill. 558; Same v. Yarwood, 15 Ill. 468; Same v. Same, 17 Ill. 509; Chicago & R. I. R. Co. v. Still, 19 Ill. 500.

For a discussion of the doctrine of contributory negligence, consult the following cases in New York court of appeals: Wilds v. Hudson River R. Co., 24 N. Y. 430; s. c., 29 N. Y. 315; Brown v. New York Cent. & H. R. R. Co., 34 N. Y. 404; Chapman v. New Haven R. Co., 19 N. Y. 341; Gonzales v. New York & H. R. Co., 38 N. Y. 440; Grippen v. New York Cent. & H. R. R. Co., 40 N. Y. 34; Nicholson v. Erie Ry. Co., 41 N. Y. 525; Owen v. Hudson River R. Co., 35 N. Y. 516; Ernst v. Hudson River R. Co., Id. 9; s. c., 39 N. Y. 61.

Case No. 12,686.

SEYMOUR et al. v. GREGORY et al.

[10 Biss. 13.] [1]

Circuit Court, N. D. Illinois. Oct., 1867.

APPEALS—SUPERSEDEAS BOND—PERFORMANCE OF CONDITION—REMITTITUR—CHANGING JUDGMENT—RELEASE OF SURETIES.

The condition of a supersedeas bond was that the defendant (plaintiff in error) should prosecute its writ of error to effect, and answer all damages and costs if it failed to make good its plea. The judgment in the court below was for $119,061.46,—$107,353.44 being on a general verdict of the jury, and $11,708 being on a special verdict. The supreme court reversed the judgment and remanded the cause, ordering the special verdict to be set aside. The supreme court also ordered that, if the plaintiffs would file a remittitur of the amount of the special verdict in the circuit court, and a certified copy thereof in the supreme court, the judgment of reversal would be set aside, and a judgment of affirmance entered in its stead. This was accordingly done. In a suit against the sureties on the supersedeas bond, *held*, that the condition of the bond had been complied with, and that the sureties were released from all liability.

On July 19, 1873, judgment was recovered by the plaintiffs in this action against the Phillips & Colby Construction Company, in the circuit court of the Northern district of Illinois for $119,061.46 damages, and $130.92 costs. The case was tried by a jury, who found a general verdict of $107,353.44, and a special verdict, for extra cost of certain work, of $11,708, which the jury said should be added to the general verdict; and the court rendered judgment both on the general and special verdicts for the entire amount. [Case unreported.] On July 28, 1873, the Phillips & Colby Construction Company sued out a writ of error to the supreme court of the United States, and executed a supersedeas bond, whereby the present defendants became sureties that the Phillips & Colby Construction Company "shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea." The supreme court, on December 13, 1875, reversed the plaintiffs' judgment with costs, and declared that the cause "is hereby remanded to the said circuit court, with directions to set aside the special verdict of the jury for $11,708, and to enter a judgment on the general verdict for $107,353.44, with interest from the 19th day of July, 1873, until paid, at the same rate per annum that similar judgments bear in the courts of the state of Illinois." [91 U. S. 646.] On the same day the supreme court also declared: "And it is further ordered that, if the defendants in error shall, within a reasonable time, during the present term of this court, file in the circuit court a remittitur of so much of the judgment of that court in their favor as is based on the special verdict, and produce here a certified copy of the remittitur, then the judgment of reversal here rendered will be set aside, and a judgment of affirmance entered in its stead; the defendants in error to pay costs in this court." On January 5, 1876, the plaintiffs, without notice to, and knowledge or consent of, the defendants, filed in the circuit court of the Northern district of Illinois their remittitur, which stated that they did thereby "remit from the judgment heretofore entered in this cause the sum of $11,708, and interest from the date of the entry of said judgment, * * * and they pray the court here to reduce the said judgment to the sum of $107,353.44, * * * and that said reduction may be made now as of and for the day of the date of the entry of such judgment." The circuit court, upon filing of this remittitur, granted the plaintiffs' request, and "ordered that leave be, and the same is hereby, given

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to the said plaintiffs to remit the said sum of $11,708, * * * that the judgment herein be reduced to the sum of $107,353.44, * * * and that such reduction be made now as of the date of the entry of said judgment."

This order of the circuit court was then certified to the supreme court, which, on January 11, 1876, entered upon its record the following order in the writ of error: "This case came on to be heard on the transcript of the record from the circuit court of the United States for the Northern district of Illinois, and was argued by counsel. On consideration whereof, it appearing to this court that the judgment of the said circuit court is for a larger sum than should have been entered, and the said defendants in error having filed here, in open court, a certified copy of a remittitur in the following words, namely [quoting it], and also a certified order of said circuit court, entered thereon, as follows, namely [quoting it], whereupon it is considered, ordered, and adjudged by this court that the judgment of the said circuit court in this case be, and the same is hereby, affirmed, deducting from the said judgment of said circuit court the amount so remitted as aforesaid, with interest until paid, at the same rate per annum that similar judgments bear in the courts of the state of Illinois, the defendants in error to pay costs in this court, and that the said defendants recover against the said plaintiffs, Mark T. Seymour et al., $20 for its costs herein expended, and have execution thereof." The plaintiffs paid the clerk's costs in the supreme court on the writ of error, and the defendant company had execution for the attorneys' costs against the plaintiffs. The plaintiffs [Mark T. Seymour and others], on February 25, 1876, brought this action to recover from the defendants [Charles A. Gregory and others], as sureties in the supersedeas bond, the amount of the reduced judgment, being the residue of the original judgment of July 19, 1873, after it had been diminished by the remittitur filed January 5, 1876. The defendants pleaded in abatement to the jurisdiction of the court, but the plea was overruled, and is reported in [Case No. 12,689].

Sleeper & Whiton, for plaintiffs.

Edwin H. Abbot and L. S. Dixon, for defendants.

DRUMMOND, Circuit Judge (charging jury). The breach on the bond alleged in the declaration is that the company did not prosecute its writ of error to effect, and had not answered to the obligees all or any part of the damages and costs, by reason of the failure to make good its plea. And the declaration then sets forth the affirmance of the judgment by the supreme court on the 11th of January, 1876, the remanding of the cause, the issue of an execution from the circuit court against the company, the return of nulla bona, and avers that the company has no property in Illinois subject to execution, and that no part of the judgment has been paid. On the facts of the case, which are all either in writing or of record, and about which there seems to be no controversy, the questions are, whether the plaintiffs have established (1) that the company failed to prosecute its writ of error to effect; or (2) that the company failed to make good its plea.

It is not seriously insisted, as I understand, by the plaintiffs' counsel, that the company did not prosecute its writ of error to effect, but it is claimed that it failed to make good its plea. The writ of error was regularly sued out and prosecuted, the record filed in due time, errors assigned, and everything done, in the prosecution of the writ by the company, which the law or the rules of the court required; and the result proved that the writ of error had been effectual, because the judgment on which the writ of error was sued out did not stand.

The answer to the other question depends on what was meant by its plea and was its plea made good? The bond recites that the company had prosecuted a writ of error to reverse the judgment. The writ declares that it is issued because, in the proceedings and record, and in the rendition of the judgment, a manifest error had happened; and declares further that the record is to be taken to the supreme court to be inspected, and that the court "may cause further to be done therein to correct that error which of right and according to law and custom of the United States should be done." The plea is that manifest error had occurred in the record and judgment. The supreme court found that was true, and reversed the judgment, but promised, if the defendants in error would perform certain acts and furnish evidence of the same to the supreme court, it would affirm the judgment; and when the remittitur was made and proved to the supreme court that court did affirm the judgment. But what judgment? Not the original judgment on which the writ of error issued, but one purged of error, as found by the supreme court.

The question then is, whether within the meaning of the condition in the bond, as against the sureties, the company had failed to make its plea good, because, under the power conferred on the supreme court, it had directed the judgment of this court to be changed, and then affirmed it as changed. I think not. It seems to me that, under the facts of the case, the company did prosecute the writ of error to effect, and did make its plea good, and, as at present advised, I so instruct the jury.

Verdict and judgment for defendants.

NOTE. A motion for new trial was denied by the court, and plaintiffs carried the case by writ of error to the supreme court of the United

States, in which, subsequently, the judgment of the court below was affirmed by consent. [Case unreported.]

SEYMOUR (McCORMICK v.). See Cases Nos. 8,725–8,727.

Case No. 12,687.

SEYMOUR et al. v. MARSH et al.

[6 Fish. Pat. Cas. 115;[1] 2 O. G. 675; 9 Phila. 380; 29 Leg. Int. 357; 4 Leg. Gaz. 346.]

Circuit Court, E. D. Pennsylvania. Oct. 25, 1872.

PATENTS—REISSUE—NOVELTY—EXPERIMENTS—HARVESTERS.

1. The rule for determining the validity of a reissued patent restricts the inquiry to a comparison of the terms and import of the original and reissued letters, and a consideration of the patent office drawings and model. If, from these, it results that the invention claimed in the reissue is substantially described or indicated in the original specification, drawing, or model, the very case for which the act of congress was intended to provide is shown to exist, and any change in the description or claims, which is necessary to effectuate the invention, is within its sanction.

2. Under the rule laid down by the supreme court, in Seymour v. Osborn [11 Wall. (78 U. S.) 516], if the inventions claimed in the reissue were suggested or substantially indicated in the original specification, it is clear that the specification of the reissue may be amended so as to fully describe them, and the claims enlarged so as distinctly to embrace them.

3. It is no objection to the validity of reissues that their claims are broader than those of the original patents.

4. The allegation of want of novelty can not avail the defendants unless it reaches back to the date of the original patent, and is founded upon proof that the invention then indicated was not novel. It certainly can not be invoked against the authority of the commissioner to allow an amended specification, and to grant a reissued patent upon it. And upon this ground alone can a reissue be adjudged to be ultra vires.

5. If a machine, taken as a whole, in its construction and operation, is an advance upon the state of the art to which it appertains, furnishing a better method of performing a useful function than was before available, it is not to be discarded as destitute of patentable merit.

[Cited in Broadnax v. Central Stock Yard & Transit Co., 4 Fed. 216.]

6. When one witness testifies to a single machine constructed by Hussey, in the fall of 1848, having a quadrant-shaped platform, and there is other evidence, not however beyond the reach of criticism, tending to show that such a platform was attached to more than one machine, but there is no additional evidence that machines thus constructed were actually used and were successfully operative: *Held*, that these machines must be treated as experiments, in nowise affecting the novelty of the complainant's invention.

7. Reissued letters patent Nos. 72, 1,682, and 1,683 held valid, and infringed by defendant's machines.

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

[These were two suits in equity, by William H. Seymour and Dayton C. Morgan, against James S. Marsh & Co., of Lewisberg, Pa., and Marsh, Grier & Co., of Williamsport, Pa., respectively, for the infringement of the Seymour patent and the Palmer and Williams patent. The causes are numbered, respectively, 33, June term, 1871, Western district of Pennsylvania, and 30, April term, 1871, Eastern district of Pennsylvania, and are now before the court on final hearing upon pleading and proofs.]

Suits brought upon letters patent [No. 8,192] granted Aaron Palmer and S. G. Williams, July 1, 1851, for improvements in grain-harvesters, reissued April 10, 1855, as No. 305—again reissued January 1, 1861, as reissues 4 and 5; No. 5 being reissued May 31, 1864, as No. 1,682, and extended July 1, 1865, for seven years; also, upon letters patent granted William H. Seymour, July 8, 1851, for "improvement in reaping-machines," reissued July 10, 1860, in three divisions, two of which were again reissued—No. 1,003 on May 3, 1864, as reissue No. 1,683, and No. 1,005 on May 7, 1861, as reissue No. 72. No. 1,683 and No. 72 were extended July 8, 1865, for seven years.

The claim of the Palmer and Williams patent, No. 1,682, is: "The combination of the cutting apparatus of a harvesting-machine, with a quadrant-shaped platform, arranged in the rear thereof, and a sweep-rake, operated by mechanism, in such manner that its teeth are caused to sweep over the platform in curves, when acting on the grain, these parts being and operating substantially as set forth in the specification."

Fig. 1, taken from the drawings of the Palmer and Williams patent, represents the devices covered by the claim, and will be readily understood in connection therewith.

The claim of the Seymour reissue, No. 1,683, is: "The combination, in a harvesting-machine, of the cutting apparatus with a quadrant-shaped platform in the rear of the cutting apparatus, a sweep-rake mechanism for operating the same, and devices for preventing the rise of the rake-teeth when operating on the grain; these five members being and operating substantially as set forth."

The claim of Seymour reissue, No. 72, is: "A quadrant-shaped platform, arranged relatively to the cutting apparatus, substantially as described and for the purpose set forth."

Fig. 2 represents the device claimed thus broadly in reissue 72, and in combination in reissue 1,683.

Fig. 3 represents the device used by the defendants. It was patented to James S. Marsh, February 28, 1871.

It has the quadrant-shaped platform A, over which an automatic revolving-rake, R, sweeps from the cutter to the place of delivery. It also has directing grain-guides, B B, to direct the standing grain toward the draft-frame.

The questions presented to the court were very similar to those decided by the supreme court, in the case of Seymour v. Osborn, 11

[Figure 1 is from drawings of reissued patent No. 1,682, granted May 31, 1864, to Palmer and Williams, published from the records of the United States patent office.]

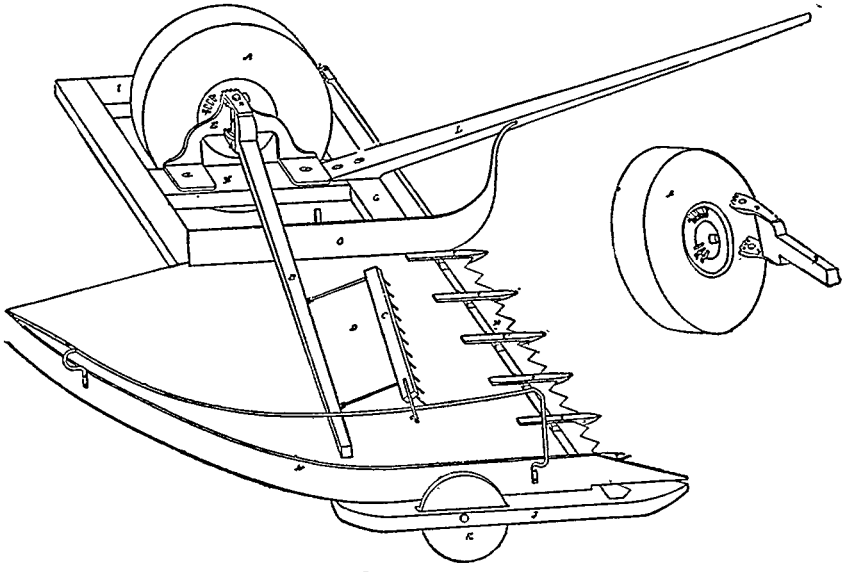
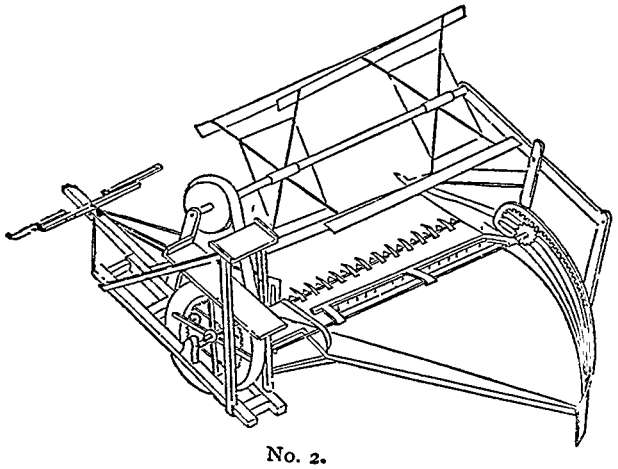


Fig. 1.



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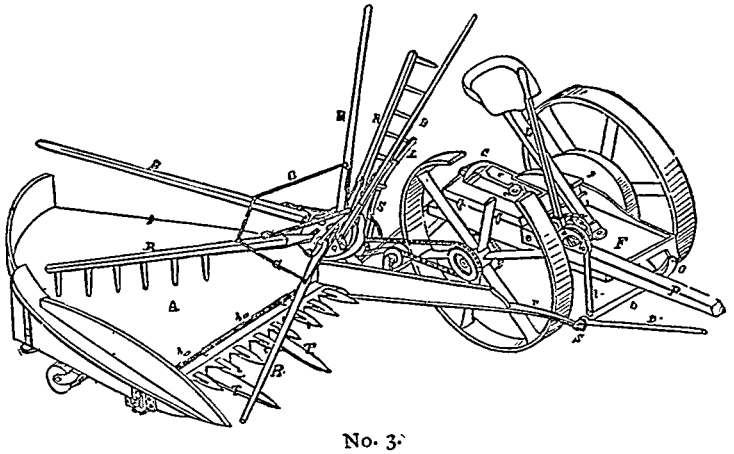

No. 3.

Wall. [78 U. S.] 516, where the state of the art is very fully illustrated by the reporter in the statement of the case.

The patents sued on were the same in each case.

Henry Baldwin, Jr., and George Harding, for complainants.

J. W. Maynard and J. O. Parker, for defendants.

McKENNAN, Circuit Judge. On July 1, 1851, letters patent were granted to Aaron Palmer and S. G. Williams, for "improvement in grain-harvesters." This patent was reissued in divisions, one of which was numbered 1,682, which was extended for seven years from July 1, 1865.

On July 8, 1851, William H. Seymour obtained a patent for an "improvement in reaping-machines," which was also reissued in divisions; two of which were numbered 72 and 1,683, and were extended for seven years from July 8, 1865.

The title to these several reissued and extended patents, 1,682, 72, and 1,683, has been duly vested in the complainants, and they constitute the subjects of the present contention.

These patents embrace several claims, the three following of which only are the defendants charged with having infringed:

1. The claim of 1862, which is for a combination of the cutting apparatus of a harvesting-machine, with a quadrant-shaped platform, arranged in the rear thereof, and a sweep-rake operated by mechanism in such manner that its teeth are caused to sweep over the platform in curves when acting on the grain, these parts being and operating substantially as set forth in the specification.

2. The claim of No. 72, for a quadrant-shaped platform, arranged relatively to the cutting apparatus, substantially as described, and for the purpose set forth.

3. The claim of 1,683 for "the combination, in a harvesting-machine, of the cutting apparatus with a quadrant-shaped platform in the rear of the cutting apparatus, a sweep-rake mechanism for operating the same, and devices for preventing the rise of the rake-teeth when operating on the grain; these five members being and operating substantially as set forth."

The defendants resist the complainants' right to a decree upon the grounds that the reissued patents are invalid; that the inventions claimed are not novel; that such inventions will not work practically; and that they are not infringers.

The rule by which the validity of reissued patents is to be determined, is well defined and familiar. It restricts the inquiry to a comparison of the terms and import of the original and reissued letters, and a consideration of the patent office drawings and model. If, from these, it results that the invention claimed in the reissue is substantially described or indicated in the original specification, drawing, or model, the very case for which the act of congress was intended to provide is shown to exist, and any change in the description or claims, which is necessary to effectuate the invention, is within its sanction. In Seymour v. Osborn, 11 Wall. [78 U. S.] 544, the court say: "Power is unquestionably conferred upon the commissioner to allow the specification to be amended, if the patent is inoperative or invalid, and in that event to issue the patent in proper form; and he may, doubtless, under that authority, allow the patentee to redescribe his invention, and to include in the description and claims of the patent, not only what was well described before, but whatever else was suggested or substantially indicated in the specification or drawings, which properly belonged to the invention, as actually made and perfected."

Now, if the inventions claimed in the several reissues in question, were suggested or substantially indicated in the original specification, it is clear that the specification might be amended so as to fully describe them, and the claims enlarged so as distinctly to embrace them.

To ascertain this, it is altogether unnecessary to institute a comparative analysis of the original and reissued patents, because it is plain, upon inspection, that the quadrant-shaped platform, arranged as described, claimed in reissue 72, and the combinations claimed in 1,682 and 1,683, are represented in the descriptions and models, and illustrated by the drawings filed with the original applications, and because this is distinctly proved by the defendants' expert witness, Homer P. K. Peck. This being so, it is no objection to the validity of the reissues that their claims are broader than those of the original patents; or that, in view of the state of the art, these claims are broader than the patentees' invention. The very object of the act of congress is to authorize such enlargement of the description and claims of the reissue, as to cover the invention indicated in the original, and the latter branch of the objection can only affect the reissue by avoiding the original patent for want of novelty of the invention. It can not avail the defendants, unless it reaches back to the date of the original patent, and is founded upon proof that the invention then indicated was not novel. It certainly can not be invoked against the authority of the commissioner to allow an amended specification and to grant a reissued patent upon it. And upon this ground alone can a reissue be adjudged to be ultra vires.

That a machine, when first applied in practice, does not perfectly accomplish the work for which it was designed, or does not accomplish all that its inventor supposed it would, is not enough to secure its rejection as a patentable invention. Correction of defects, arising from imperfect material and not involving reorganization of the machine,

will not change its fundamental character, and subject it to condemnation as impracticable in its original condition. Taken as a whole in its construction and operation, if it is an advance upon the state of the art to which it appertains, furnishing a better, though still imperfect method of performing a useful function, than was before available, it is not to be discarded as destitute of patentable merit. The proofs in this case show no more than that, when the complainants first put their machine in operation, some of its parts were unequal to the strain upon them, and the rake was not heavy enough to hold itself steadily in the gavel. The weak parts were strengthened, and a spring was added to hold the rake down, and the proof is plenary, that then a large number of machines was made and sold, and that they were successfully operative.

It is said, however, that this was a remodeling of the machine, and that it was not then the same machine described in the patent. But there was not the least change in its organization. It embodied still the precise devices and combinations claimed in the patents, arranged as there described, with only such amendments as were conducive to its more perfect efficiency. If any one else had constructed a reaping-machine, with a quadrant-shaped platform and the combination of elements claimed by the patentees, and had made the jaws, by which the rake is operated, of sufficient strength to bear the strain upon them, and had applied a spring or other device to hold the rake down, can there be any doubt that he would be an infringer? He would be rightly so treated. for the reason that he had appropriated the combinations claimed by the patentees, and that the changes made by him did not constitute a new or different invention. The same effect only is due to the acts of the patentees, and while they have retained the constituents and organization of their invention, they have made it more efficient in operation by strengthening its weaker parts, and by the use of auxiliary mechanism, to hold the rake steadily in its place. It is clear that by so doing the identity of their invention has not been changed, nor has it been abandoned, or withdrawn from the protection of their patents. Nor is this conclusion to be repelled by the speculative opinions of experts, mechanical or professional, that the invention, as described in the original specification, would be impracticable. Founded, as they are, upon a very literal and narrow construction of the patent, they are of but little value when weighed against the demonstration of actual results.

The novelty of the inventions in question is contested upon the ground that they were anticipated by the attachment of a circular platform to a McCormick reaper by Brinckerhoff, by the construction of Burrall reapers by Joseph Hall, and by machines constructed by Platt, McCormick, and Hussey. Of the two first of these, it is only necessary to say that the weight of evidence is decidedly against the fact testified to by Brinckerhoff, and that the construction of Burrall reapers by Hall, prior to the complainants' invention in 1849, is satisfactorily disproved.

The other exhibits were before the supreme court, in the case of Seymour v. Osborn, 11 Wall. [78 U. S.] 516, in which the same patents involved in this case were in controversy; and were fully considered and examined by the court. Although the judgment pronounced is not conclusive in this case, yet the opinion of the court, even as to matters of fact, is entitled to the respect which is due to the high character of the tribunal, and to its careful analysis of the proofs; and especially ought it to be accepted as definitive in this court, when I have heard no argument to produce a doubt of the soundness of its conclusions, or to lead me to suppose that they would not be reasserted upon the evidence in this case. I must, therefore, hold that the Platt & McCormick reapers did not embody the complainants' inventions, and do not disprove their novelty. Additional evidence has been produced in this case in reference to the construction, by Hussey, of reapers with a quadrant-shaped platform. In Seymour v. Osborn the proof was that one machine only, embracing this feature, was constructed by Hussey, in the fall of 1848, and it was adjudged by the court to be an experiment, which was abandoned. Thomas J. Lovegrove, who was examined as a witness in that case, and omitted all mention of a quadrant-shaped or curvilinear platform in a Hussey machine, testifies now that Hussey attached to the back of the platform of some of his machines, an additional angular piece, which finally developed itself, in 1847 or 1848, into a part of a circle, the guide-board being sawed so that it could be easily bent. He was reminded of this, after the lapse of more than twenty-three years, by reading the depositions of the two witnesses who testified in regard to the Hussey machine in Seymour v. Osborn. Even if such remarkable obliviousness, and such a lapse of time, do not impair the credibility of his testimony, he is altogether indefinite as to the number of machines made with the curvilinear attachment, or as to the fact that any one of them was sold or used. The only one of which he speaks with any distinctness is the old returned machine at Hussey's shop in Baltimore, to which evidently the testimony in Seymour v. Osborn related. But he has no recollection of ever seeing this machine or one like it in use.

The question then stands just as it did in Seymour v. Osborn, except that there is evidence, certainly not beyond the reach of criticism, tending to show that a curvilinear platform was attached to more than one machine, but there is no additional evidence that machines thus constructed were actual-

ly used and were successfully operative. There is no reason, therefore, why the deductions of the court in that case are not just as appropriate to the evidence in this. Thus applying them, these machines must be treated as experiments, in nowise affecting the novelty of the complainants' invention.

It is earnestly contended that the machines constructed by the respondents do not infringe the patents of the plaintiffs. The argument is rested mainly upon the fact that the mechanism employed in the machines constructed by the defendants, is different from that described in the patents. This is undoubtedly true, and so it was also in Seymour v. Osborn. But the question is not as to the identity of the actuating forces, but whether the devices and combination of devices claimed by the patentees, are embodied in the defendants' machines and operate to produce the same result in substantially the same way.

Now, in these machines is to be found a quadrant-shaped platform, annexed relatively to the cutting apparatus, as is described and claimed in reissued patent No. 72.

There is also to be found the combination claimed in No. 1,682, viz., of the cutting apparatus, with a quadrant-shaped platform arranged in the rear thereof, and a sweep-rake operated by mechanism, so that its teeth are caused to sweep over the platform in curves when acting on the grain. And there is also to be found the combination claimed and described in No. 1,683, of the cutting apparatus, with a quadrant-shaped platform in the rear thereof, a sweep-rake, mechanism for operating the same, and devices for preventing the rise of the rake-teeth when operating in the grain.

This combination embraces the three elements which compose the other, and its merit consists chiefly in the value and novelty of the results accomplished by it. That result is the automatic removal of the grain, as it is cut, from the platform, and its delivery crosswise upon the ground, and out of the way of the team or machine when cutting the succeeding swath. The same result is produced by the defendants' machine; but do the mechanical agencies employed operate substantially in the same way with those described in the patents? Rakes, similar in construction, are used in both the complainants' and defendants' machines, but in the complainants', the rake has a vibrating or reciprocating motion, while in the defendants' it has a revolving motion. This is said to constitute a material difference of operation. But it is to be observed that the essential function of the rake is to sweep over the platform in the arc of a circle, thereby discharging the cut grain at the rear of the platform, so as to be out of the way of the team and machine on their next round. If this function, then, is performed in the same way in both cases, as it manifestly is, what matters it whether the rake is made to move from the rear to the front of the platform to resume its appointed work in a horizontal line or in the orbit of a circle? In neither case is there any difference in the result or the essential method of effecting it, and there is, therefore, no noticeable difference in operation.

The complainants' patent having expired, they can have a decree for an account only. To this they are entitled, and it will accordingly be entered.

[NOTE. A further decree was made ordering a reference to a master. Exceptions made to this report were overruled by the circuit court. Case unreported. To the award of damages made by the circuit court, both parties appealed to the supreme court, where the decree was affirmed. 97 U. S. 348.

[For other cases involving this patent, see note to Seymour v. Osborne, Case No. 12,688.]

Case No. 12,688.

SEYMOUR et al. v. OSBORNE et al.

[3 Fish. Pat. Cas. 555.] [1]

Circuit Court, N. D. New York. May, 1869.[2]

PATENTS — RESULT — MEANS — "SUBSTANTIALLY AS DESCRIBED" — REISSUE — IMPROVEMENTS IN WELL-KNOWN MACHINE.

1. A claim for "the discharging the cut stalks and heads of grain from the platform D by means of the combination of the rake C with the lever B," etc., though in its strictly literal sense a claim for a result, which would be invalid, is a claim for a result produced by specific means; and under the rules which obtain in the construction of such claims, it should doubtless be held to be a claim for the described means, and valid to the extent of the invention of the patentee.

2. The qualification, "substantially as described," affixed to broad claims, is a qualification intended to mean much or little, as the interests of the patentees may require.

3. Though the action of the commissioner in receiving a surrender and granting a reissue is very strong prima facie evidence that the case was one in which a reissue was proper and lawful, the decision of the commissioner upon this point is not conclusive; and the more recent decisions very clearly indicate the opinion that many reissues have been improperly granted, and that the abuses arising therefrom have been such as to require a more rigid scrutiny in regard to the propriety and legality of the surrender and reissue of a patent.

4. To remove a useless appendage of a quadrant-shaped platform, or simply to change its position from the side to the rear of a cutting apparatus, required neither ingenuity or invention.

5. Claims too broad upon their face may be so restricted by the words "substantially as described," or words of similar import, that they may be considered valid to the extent of the invention of the patentees.

6. In determining the question of infringement, such claims must be considered in their restricted sense, and will not be infringed by devices differing in mechanical construction, not operating in substantially the same way or upon the same mechanical principles, or which are not mere equivalents.

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

[2] [Reversed in 11 Wall. (78 U. S.) 516.]

7. When the improvements claimed are only improvements upon a well-known machine, the patentee can not treat as infringers others who have improved the previously-existing organizations by the use of a different device, arrangement, or combination, which, though performing the same functions, does it in a different, simpler, and better manner.

This was a bill in equity [by William H. Seymour and Dayton S. Morgan, against David M. Osborne, William A. Kirby and others] to restrain the defendants from infringing the following letters patent: 1. Letters patent [No. 8,192] for an "improvement in harvesting machines," granted to Aaron Palmer and S. G. Williams, July 1, 1851, reissued to them April 10, 1855 [No. 305], and again, in two divisions (Nos. 4 and 5), January 1, 1861 [No. 1,110]. These reissues having been assigned to complainants, one of them (No. 5) was again reissued to them May 31, 1864 [No. 1,682]. 2. Letters patent for an "improvement in reaping machines," granted to William H. Seymour, July 8, 1851 [No. 8,212], and reissued to him in three divisions (Nos. 1003, 1004, and 1005). These reissues having been assigned to complainants, No. 1004 was reissued May 7, 1861 [No. 1,177], and No. 1003 was reissued May 31, 1864 [No. 1,683]. The foregoing patents were extended for seven years from the expiration of the original term. 3. Letters patent [No. 10,459] for an "improvement in grain harvesters," granted to Aaron Palmer and Stephen G. Williams, January 24, 1854, and assigned to complainants. [For drawings of these patents, see Case No. 12,687.]

Geo. Gifford and E. W. Stoughton, for complainants.

David Wright, for defendants.

Before NELSON, Circuit Justice, and HALL, District Judge.

HALL, District Judge. The bill in this case alleges the infringement of one original and of four reissued patents; and it prays for an injunction and an account, and for a decree for the profits of the alleged infringements.

The defendants having answered the bill, voluminous proofs were taken; and in June last the cause was heard on pleadings and proofs. The continual pressure of other business has prevented an earlier decision.

On July 1, 1851, letters patent were granted to Aaron Palmer and S. G. Williams, upon a specification which stated that they had invented "a new and improved harvesting machine," and which sufficiently described the construction of the parts embraced within the claim of the patentee.

The invention thus claimed and patented was an improvement in the harvesting machine; the improvement consisting of new devices and a novel arrangement of parts, by which the cut grain was to be removed from the platform, and laid in gavels, by an automatic rake.

In the machine described, the inner edge of the platform on which the cut grain was to be received was straight, and the outer edge was curved. There was a straight fence or guard rising from the inner edge of this platform, and a curved fence or guard along and above its outer edge; and by and between these the cut grain was kept in its proper place when the machine and its automatic rake were in operation. An iron rail (marked "d" in the drawing), inclining upward as it extended toward the front of the platform, was properly supported above this outer or curved fence or guard. This rail did not extend forward quite to the point where the rake was to fall upon the platform in front of the cut grain, and it terminated at some distance from the rear of the platform; and a short rail or gate was hinged to the rear end of the inclined rail just described. The rear end of this short rail or gate rested upon the curved fence or guard; and mostly, though not entirely, in the rear of the loose end of this hinged rail, and upon the rear part of the outer or curved guard, there was placed another short rail, having an upward inclination as it extended to the rear.

The rake was moved forward and backward between the inner and outer fences, or guards, by means of an operating lever, to which it was connected by rods or arms of suitable length. This rake was placed some distance in front of the operating lever, and the connecting rods or arms were hinged upon this lever so as to allow the rake to rise and fall without regard to the plane in which the lever moved. A stiff rod or bar was firmly attached to the outer end of the rake-head, and extended outward beyond it so far as to rest upon the above-described rails which surmounted this outer fence or guard, or upon the upper edge of such fence or guard, as the action and movement of the machine required. The operating lever was forked at the inner end, and was hinged upon and supported in a horizontal position by a fulcrum pin between the inner fence or guard and the main or driving-wheel of the machine. This fulcrum pin passed through the two legs or branches of the lever, one of which branches extended a considerable distance above, and the other a somewhat less distance below the main body of the lever. On the inner end of each of these legs or branches were several teeth, which, respectively, corresponded with and meshed into an outer or an inner series of teeth or cogs cast within a recess on the side or face of the main or driving-wheel of the machine. As these series of teeth or cogs were on opposite sides of the wheel, and contained only the number of teeth or cogs required to give the desired motion to the operating lever, this lever was moved forward when one of these series of teeth or cogs on the driving-wheel came, in the course of the forward movement of the machine, in proper connection with the lower branch or arm of such

lever; and it was moved backward when the teeth upon the upper branch or arm of such lever came into proper connection with the other series of teeth or cogs upon such driving-wheel—thus giving to the lever, and consequently to the rake hinged upon it, the required reciprocating motion forward and backward above the platform.

In a machine thus constructed, the rake, when it reached its most advanced position, would be in advance of the forward end of the supporting rail, and would then fall by its own weight and rest upon the forward part of the platform. The supports of the inclined rail first before mentioned being so bent outwardly, or otherwise so constructed as not to interfere with the backward movement of the rod or bar extending outward from the end of the rake-head, the backward movement of the lever would carry back the rake with its teeth resting upon the platform. By this movement of the rake the cut grain would be raked along the platform and finally thrown or dropped from its inner side. When the bar or rod projecting from the outer end of the rake-head reached the under side of the rear end or rear part of the short or hinged rail, that end of such hinged rail would be forced upward until the rod or bar cleared it, when it would fall back into its place. As the rake was drawn still further backward, the projecting bar or rod would rise upon the upward inclination of the short rail in the rear until the teeth of the upper branch of the lever were no longer in connection with the series of teeth upon the driving-wheel, when the rearward motion of the operating lever would be suspended. Then almost simultaneously with this suspension, and as the driving-wheel revolved, the teeth of the upper arm of the operating lever would be brought into connection with the other series of teeth or cogs upon the driving-wheel, and the operating lever and the rake would consequently advance toward the front part of the platform. The rear end of the short rail hinged on the outer edge of the platform having dropped into its place below the inclined rail at the rear of the platform, the rod or bar attached to the rake-head would ride the hinged rail and the outer rail forward of such hinged rail (thus keeping the rake-teeth above the cut grain) until it reached the forward end of such outer rail, when the rake would again fall by its own weight until its teeth rested upon the front portion of the platform, ready, when the backward movement of the lever should begin, to repeat the movement just described.

The different parts of the machine described in such specification were shown upon the drawing which accompanied it; and they were indicated by letters referred to in such specification and in the claim of the patentees.

The claim was in these words: "What we claim as our invention, and desire to secure by letters patent, is the discharging the cut stalks and heads of grain from the platform D by means of the combination of the rake C with the lever B, and the co-operation therewith of the series of teeth p, q, on the face of the wheel A and the inclined rail d, rising above the curved guard of the platform D, substantially in the manner herein set forth."

This claim, though in its strictly literal sense a claim of a result which would be invalid, is a claim of a result produced by specific means; and under the rules which obtain in the construction of such claims, it should doubtless be held to be a claim of the described means—or rather of the particular organization and devices described by means of which the specified result is produced—and therefore valid and effectual to the extent of the actual invention of the patentees.

On April 10, 1855, this patent was surrendered, and it was then reissued to Palmer and Williams, the original patentees, upon an amended or different specification.

There was no great difference between these two specifications in respect to the mode of construction recommended, except that it was said that the fence or guard on the inner edge of the platform might be made straight, or might be curved to correspond with the sweep of the inner end of the rake.

The claim, however, was considerably modified; the co-operation of the series of teeth p and q on the face of the wheel A, and the inclined rail d rising above the curved guard of the platform being no longer claimed as a part of the invention; and the modified claim was restricted to the use of the specified combination of the rake and lever when moved by gearing located within the inner edge or circle of the platform. This will sufficiently appear by a comparison of the two claims, the claim of the reissued patent being in these words: "What we claim as our invention, and desire to secure by letters patent, is, discharging the cut stalks and heads of grain from the main platform D, on which they first fall, by means of the combination of the rake C with the overhung lever B, moved by gearing located within the inner edge or circle of said platform, as herein set forth." This amended claim, unless restricted by the words "as herein set forth," to the devices and organization particularly described, seems to be much more extensive than that of the original patent, inasmuch as it covers the use of the combination of the rake and lever when moved by gearing of any description located within the inner edge or circle of the platform, instead of confining it to the gearing described in the original specification; and it seems to be intended to cover every such use, and to prevent any evasion of the assumed rights of

the patentees, on the ground that the fence or guard on the inner edge of the platform was curved instead of straight.

This reissued patent was obtained nearly four years after the original patent was granted, and when, it is to be supposed, the patentees were not ignorant of the precise character and extent of their invention, or of the best mode of embodying it for public use, whatever might have been the case at the time the original patent was granted. This reissued patent was, however, deemed insufficient to suppress the use of all devices which might be employed by others in the construction and operation of an automatic rake; and nearly six years after the first reissue, and nine and a half years from the date of the original patent, this reissued patent was surrendered, and was immediately reissued to the original patentees, in two patents, dated on the first day of January, 1861.

The claim in the first of these reissues (called in the bill reissue No. 4) is in these words: "What we claim as our invention is discharging the cut grain from a quadrant-shaped platform, upon which it falls as it is cut, by means of an automatic sweep-rake sweeping over the same platform, substantially as described."

This claim, unless the words "substantially as described," are held to impose restrictions which they would not impose under the ordinary rules of construction, is much more extended than that of either the original or the prior reissued patent, for the introduction for the first time of the term "quadrant-shaped," as a description of the platform, can hardly be considered as a restriction of the prior claims. The platform required under either of the prior patents was, necessarily (in substance), a quadrant-shaped platform as much as that described in this reissue; for the curved fence or guard at the outer edge, and which was necessary to the proper action of the rake and the other parts described, made the platform quadrant-shaped, in substance and effect, without regard to the precise form of the outline adopted in its construction. The combination of the rake and operating lever, which was the prominent feature of the original and prior reissued patent, is not mentioned; and the limitation of the claim of the reissued patent to machines in which the rake and lever were moved by gearing, located within the inner edge or circle of the platform, is silently rejected. Indeed, this claim bears scarcely any resemblance to the claim of the original patent, which was, in substance, a claim of the combination of several elements, viz: the rake, the forked lever with teeth upon its upper and lower branches, the movement of which gave to the rake its reciprocating motion backward and forward, the two series of teeth or cogs in the face of the driving-wheel, and the curved rails at the outer edge of the platform which governed the vertical motion of the rake. The combination originally patented, and all its elements (unless it be the rake), are apparently forgotten; and the broad claim is made of "discharging the cut grain from a quadrant-shaped platform on which it falls as it is cut, by means of an automatic sweep-rake sweeping over the same," limited only by the qualification "substantially as described;" a qualification which is evidently intended to mean little or much, as the interests of the patentees may require. And in order to aid in giving it this flexible character, the specification states that the invention claimed under this patent, consists in arranging an automatic sweep-rake in such relation to a quadrant-shaped platform upon which the grain falls as it is cut, that it shall vibrate over the same at suitable intervals to discharge the cut grain upon the ground, and "that the accompanying drawings represent," not the invention itself, but "a convenient arrangement of parts for carrying out the object of our invention."

The claim of this reissue is so broad that there would seem to be no necessity for the other patent granted upon the last mentioned surrender, and reissue, if the broad claim just referred to could be maintained. Perhaps the just fear that this might be extremely doubtful, may be properly regarded as the reason why the other reissued patent was desired.

The other patent of the reissue of January 1, 1861, was not obtained without much difficulty, the application having been twice rejected. It was finally granted upon a report, which states that "the claim is in fact for the means made use of to free the platform from the fallen grain," and that "it covers the combination and arrangement of those means within the inner edge of the platform." This claim is in these words: "What we claim under this patent as our invention, is, sweeping the cut grain from the platform, upon which it falls as it is cut, by means of an automatic sweep-rake, moved by gearing located within the inner edge of said platform, substantially as described." This claim is more restricted than that of the other reissue of the same date, founded upon the same reissued patent, and is confined to cases in which the rake is moved by gearing located within the inner edge of the platform, while the other claim contained no such restriction. The omission of the term "quadrant shaped," in describing the platform, is not, for reasons already stated, deemed of much importance; and it is not easy to give any satisfactory reason for the application for this patent, if the other reissued patent could be sustained, as any infringement of this patent would be also an infringement of the other reissue of the same date, if the validity of the latter could be maintained.

Only the first named of these reissues of January 1, 1861, is now in force and relied on in this suit, the last having been surrendered and

reissued to the plaintiffs as assignees under Palmer and Williams, on May 31, 1864. In this last reissue, designated by the plaintiffs as reissue No. 1682, the claim is in these words: "What we claim under this patent as our invention is, the combination of the cutting apparatus of a harvesting machine with a quadrant-shaped platform arranged in the rear thereof, and a sweep-rake operated by mechanism in such manner that its teeth are caused to sweep over the platform in curves when acting on the grain, these parts being and operating substantially as hereinbefore set forth. We also claim the combination of a quadrant-shaped platform, a sweep-rake operated by mechanism which causes the rake to move in alternately opposite directions, an inclined rail to raise the rake, and a switch, these parts being and operating substantially as hereinbefore set forth." The switch here referred to, as one of the elements of the combination claimed, is the short or hinged portion of the rail denominated a short rail or gate in the original patent.

On this last reissue, also, the plaintiffs rely to sustain their suit, it being claimed that the defendants have infringed the first claim of this patent.

The several reissues above mentioned appear to have been granted upon petitions stating that the patents surrendered were inoperative and invalid by reason of a defective specification, which defect had arisen from inadvertence and mistake; but instead of this statement being verified by oath, the affidavit of the applicant, following such petition, states only his belief that such prior patent was not fully valid and available to him, and that the said error had arisen from "inadvertence, accident or mistake."

It was urged upon the argument, that these reissued patents were severally unauthorized, illegal and void; and as the question thus raised, if decided in favor of the defendants, must render any further discussion of the rights claimed under these patents entirely unnecessary, it will be first considered.

The 13th section of the act of 1836 [5 Stat. 122], which authorizes the surrender and reissue of patents, provides, in substance, that when any patent "shall be inoperative or invalid, by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification as his own invention, more than he had or shall have a right to claim as new, if the error has or shall have arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent, to cause a new patent to be issued to the said inventor for the same invention, for the residue of the period then unexpired for which the original patent was granted, in accordance with the patentee's corrected description and specification," etc.

It must be conceded that the action of the commissioner, in receiving a surrender and granting a reissue, is very strong prima facie evidence that the case was one in which a reissue was proper and lawful, but the decision of the commissioner upon this point is not conclusive; and the more recent decisions very clearly indicate the opinion that many reissues have been improperly granted, and that the abuses which have grown out of fraudulent or improper reissues have been such as to require a more rigid scrutiny in regard to the propriety and legality of the surrender and reissue of a patent. Burr v. Duryee, 1 Wall. [68 U. S.] 531, 579; Case v. Brown, 2 Wall. [69 U. S.] 320; Sickles v. Evans [Case No. 12,839]; Cahart v. Austin [Id. 2,288].

It would seem to be quite clear upon the patents and proofs in this case, that the original patent to Palmer and Williams was not in any just sense inoperative or invalid. The specification was full and complete, and it is believed that the claim fully covered and completely protected the actual invention of the patentees. It is true that it did not claim a quadrant-shaped platform, nor the combination of such a platform with the cutting apparatus or other operating parts of a harvesting machine; but it is conceded by the plaintiffs that the quadrant-shaped platform was not then new, and that it had been before used by Seymour. And it had been described in combination with a revolving automatic rake in the prior patent to Platt. But independently of these circumstances, the particular form or outline described was not, we think, then the subject matter of a patent. The size and particular form of the platform, whether square, rectangular, or otherwise shaped, was simply a question of mechanical construction, depending upon the form, construction, and operation of the other parts of the machine; and the actual invention of Palmer and Williams was confined to the devices and organization by which the automatic rake was effectually operated and made to produce the desired result. No one who had any pretension to mechanical skill, or even to practical good sense, could have been stupid enough, after placing the circular fence and rail on the old-fashioned rectangular platform, to leave the useless wood outside that fence and rail, to add unnecessarily to the weight of the machine and consequently to the force required for its operation. To remove this useless wood, or simply to change the position of Platt's quadrant-shaped platform to the rear of the cutting apparatus, required neither ingenuity nor invention.

It is also quite certain that the patentees had neither invented nor contemplated any device for the operation of an automatic rake, other than that specifically described and claimed in the specification. That was a meritorious and valuable invention, and it was amply protected by the original patent. In short, it is believed that there is no ground upon which a surrender and reissue of this patent can be maintained.

It may be useful, though unnecessary, to re-

fer to some of the modifications of the claims of the patentees, as exhibited in these reissued patents, and to some circumstances which indicate that they were made for the purpose of covering subsequently invented devices, or different forms of construction, which had been observed in other machines. The patent to Seymour, hereinafter mentioned, had secured to him the exclusive use of certain devices for operating the automatic rake, the most material and most essential portions of which were located at or near the outer edge of the platform; and the same liberality which would extend the claim of Palmer and Williams to all devices for operating the rake by gearing located within the inner edge or circle of the platform, would extend that of Seymour to all gearing located at or near its outer edge. If the broad claims of the reissues of Palmer and Williams' patent could be maintained, the efforts of all other inventors to produce superior devices, if not effectually suppressed, would be rendered comparatively fruitless by a combination of these two patents, and of the reissues granted upon their surrender from time to time, and by the danger of protracted and expensive litigation under them.

The idea of claiming a quadrant-shaped platform had not occurred to the patentees, either at the time of the application for the original patent, or at the time of the application for the first reissue; and in the specification annexed to the first reissue (and, in fact, also in those annexed to the last reissue), the inner fence or guard, which, for all substantial and practical purposes, marks and defines the real outline of the side of the platform on which it rests, may, it is said, be either straight or curved. Besides, upon the original drawing or model of Palmer and Williams' invention, the platform deserves the appellation of quadrant-shaped as little as that above referred to, which would be bounded by two circular lines (one convex and one concave) and two straight lines.

In all the specifications the claims are, in their literal terms, of the operation or result of the devices or invention which might have been claimed, rather than of the invention itself; but in the original patent the claim is so qualified and limited that the claim could doubtless have been maintained. The claims under the reissued patents of January 1, 1861, are not so restricted and qualified; and the broad claim to the exclusive right of discharging cut grain from a quadrant-shaped platform, on which it falls as it is cut, by means of an automatic sweep-rake, operated by mechanism and sweeping over the same platform, is put forth, subject only to the limitation, "substantially as described," which is to be claimed to be of very great or of very little importance, as the interest of the patentees may require. This form of claim was properly characterized and condemned in Burr v. Duryee [supra], and much that was said by Mr. Justice Grier, in delivering the opinion of the court in that case, might be properly repeated in this.

The claims under the reissue of the other patent of 1861, as made in 1864, are not of the same objectionable character, but they are broad enough, if they can be maintained, to cover nearly every form of construction and mode of operation which could be adopted in the construction and use of an automatic rake upon any existing form of the ordinary harvesting machine; and certainly these claims would cover many subsequent inventions, of which these patentees, at the time of their application for their original patent, had not the slighest conception—inventions so entirely different from theirs that there can be no possible doubt but that, so far from being identical, they are entirely different in construction, character, and mode of operation. Indeed, neither of these claims could be sustained as being a claim of the same invention as that described in the original patent, except by force of the words "substantially as described," or words of similar import; and the case of Burr v. Duryee is deemed sufficient authority for the conclusion that these claims under the issue of the Palmer and Williams patents are void unless these claims can be held to be restricted to the devices originally described and claimed.

But, leaving the invention of Palmer and Williams for the present, another series of patents will now be considered.

On July 8, 1851, a patent was granted to the plaintiff, Seymour, for new and useful improvements in reaping machines.

In the specification annexed to this patent it is said: "The platform, instead of being made in a square form, extending only three or four feet back of the sickle, as heretofore, is extended back in a circular form; that the grain, instead of being raked off behind the machine, as heretofore, making it necessary to take up each swath as it is cut, is swept off in a circle and dropped far enough from the standing grain to be out of the way of cutting the next swath." The specification further says: "The grain is raked from the machine by means of a rake that is made to travel back and forth in the following manner: To one end of the rake-rod is attached a pinion of 12 cogs, may be more or less, that meshes into the internal spur-wheel, which causes the rod to revolve. This rod has a universal joint a few inches from the pinion. This short section of the rod is supported in a horizontal transverse position by two bearings that are attached to the wheel frame. To the other end of this rake-rod is attached a pinion with cogs or some irregular surface to correspond with the oblong track. As the rod revolves, the pinion travels in the oblong circular track. The rake-rod extends through the pinion and projects out a little, say a half an inch, more or less, as the pinion comes to the upper side of the track. The end of the rake-rod rests on the upper side

of the guide which holds the pinion up into the upper side of the track, and causes it to pass from 3 to 4 as the rake-rod revolves. Then the rake-rod passes around the end of the guide and under the under side of it, and holds the pinion down into the under side of the circulating track, and causes it to return back to 3 again. The rake is attached to the rake-rod by the three attachments through which the rake-rod revolves. The rod passes through one or more of the attachments, and extends out beyond the pinion into the groove in the center of the guide. It extends out a little further than the rake-rod, that it may keep in the groove at all times. When the pinion is against the upper side of the track, the rod holds the rake down on the grain; when the pinion passes down the rod, holding into the groove, raises the rake up and holds it up until the pinion passes up to the upper side of the track, where the rake falls on the grain and is held down until the grain is swept off. This application of the power to the rake will allow the extension of the cutting and raking surface with little additional expense."

The description thus given may, perhaps, be better understood, in the absence of the proper drawing, if it be stated that the reciprocating motion of the operating lever was caused by its continued revolution, while its outward end was moved backward and forward by the meshing of the cogs of a wheel firmly attached to the outer end of such lever, into a series of cogs projecting upward from a bar which curved along near the outer and curved edge of the quadrant-shaped platform, and into another series of cogs projecting downward and placed at a distance above this lower series of cogs about equal to twice the diameter of such cog-wheel. These upper and lower series were connected at each end by a semi-circular bar, with cogs of the same character upon the inner side, so that on reaching the front end of the lower bar, or series of cogs, the cog-wheel attached to the end of the lever would be carried up along the cogs, on the inner side of the semi-circular bar, until it struck the upper series of cogs, and would then be carried back to and down the semi-circle in the rear, and then again back to the front and around as before. A bar passing through the arms which connected the rake-head with the operating lever, by a hinge joint near the middle of the length of such arms, and fitting into a slot or open space between guide-bars placed parallel to and equidistant from the upper and lower cogged bars, or series of cogs, was thereby kept in the same plane, while the rise and fall of the operating bar at one end of such arms produced a reversed motion of the rake-head at the other end. With this explanation, and the description above copied, the operation of the rake, and of the machinery by which its movements were to be produced, will probably be understood.

The device thus described is very ingenious, and operated beautifuly in the model, but it is probably too complicated in its structure, and too liable to be clogged, or otherwise injuriously affected by the falling or standing grain, to compete successfully with the more simple arrangement adopted by the defendants.

The claim made in the specification annexed to this patent is in the following words: "What I claim as my invention, and desire to secure by letters patent, is, the rake attached for raking the grain from the machine without hand labor, constructed and operated substantially as described.

This patent was surrendered on the 10th of July, 1860, and was reissued in three parts, Nos. 1003, 1004, and 1005. The claims in these reissued patents, Nos. 1003, 1004, and 1005, were respectively as follows: No. 1003, "What I claim as my invention is: first, supporting the arm or lever of a vibrating sweep-rake at each end, substantially as described; second, operating an automatic sweep-rake, by gearing on both ends thereof, in combination with the platform of the harvesting machine for delivering the grain in gavels, substantially as described;" No. 1004, "The combination of the arm, rod, or lever, which carries a vibrating sweep-rake, with a guide-rod, which forms a moveable fulcrum for the rake-head, substantially as described, for the purpose set forth;" and No. 1005, "The arrangement of a quadrant-shaped platform, immediately behind the cutting apparatus, so as to receive the cut grain as it falls, and from which it is discharged in the arc of a circle substantially as described."

On the 7th day of May, 1861, this reissued patent, No. 1005, was surrendered and reissued. The claim in such last mentioned reissue is for "a quadrant-shaped platform, arranged relatively to the cutting apparatus substantially as herein described, for the purpose set forth." This reissue is called No. 72 in the plaintiff's bill.

The above No. 1004 does not appear to have been reissued; but it is not relied upon by the plaintiffs in this suit.

On the 31st day of May, 1864, the above reissued patent, No. 1003, was surrendered and reissued as No. 1683. The claims in the last mentioned reissue are: "First. The combination in a harvesting machine of the cutting apparatus (to sever the stalks) with a reel and with a quadrant-shaped platform located in the rear of the cutting apparatus, these three numbers being and operating substantially as set forth. Second. The combination in a harvesting machine of the cutting apparatus with a quadrant-shaped platform in the rear of the cutting apparatus, a sweep-rake, mechanism for operating the same, and devices for preventing the rise of the rake-teeth when operating on the grain, these five members being and operating substantially as set forth."

These reissues of the patent originally granted to William H. Seymour, in 1851, were granted upon petitions and affidavits that the prior patents were not fully available, etc., substantially like those before referred to as those upon which the several reissues of the Palmer and Williams patents were severally granted.

On the 3d day of July, 1865, the reissued patents above designated as No. 72 and No. 1683 were extended for seven years from and after the 8th day of July, 1865, and they are relied upon by the plaintiffs, who allege that they have been infringed by the defendants.

The general form, scope, and object of the claims of the several reissues of the Seymour patent need not be particularly remarked upon. They are substantially of the same character as those contained in the reissues of the Palmer and Williams patent, and must be governed by the same principles; and much that has been said in respect to the reissues of the Palmer and Williams patent will therefore apply with equal force to the reissues of the patent of Seymour.

But there is still another patent under which a claim is made by the plaintiffs, and this will now be referred to:

On the 24th day of January, 1854, a patent was issued to Aaron Palmer and Stephen G. Williams for an improvement in grain harvesters. The specification annexed to this patent described a method of hanging the inner and outer bearing of the shaft or axis of the reel, used in harvesters, upon the forward and projecting ends of two horizontal beams supported by posts, crossing each other in the form of an X, set upon or attached to the frame of the machine at a point so far in the rear of the cutting apparatus as not to come in contact with the standing grain. The outer bearing of this shaft was near the middle of its length. The reel was made with this shaft nearly five feet long, with one set of arms projecting from the middle, and another set from the end of the shaft at right angles; and to the outer end of those arms are attached ribs running parallel with and projecting outward beyond the shaft and over the standing grain nearly half their length—thus covering the width of grain within the scope of the cutting apparatus.

One of the claims in this patent is, of "the method of hanging the reel so as to dispense with any post or reel bearers next to the standing grain, as herein described; thereby preventing the grain from getting caught and held fast between the divider and reel supporter;" and it is insisted by the plaintiffs that this claim has been infringed by the defendants.

Before either of the inventions patented by Palmer and Williams and by Seymour, as hereinbefore stated, were made, and on or before the 22d day of November, 1848, one Nelson Platt made his petition and specification to obtain a patent. On the day last mentioned he made the required oath, that he believed himself to be the original and first inventor of the improvement in the harvesting machines described in such specification; and on this petition and specification a patent was issued, bearing date June 12th, 1849. The priority of Platt's invention is not denied.

The machine described in Platt's specification was extremely complicated. It had a quadrangular platform directly in the rear of the cutting apparatus, and a quadrant-shaped platform at the inner or stubble end of the quadrangular platform. These platforms were double, with spaces between the upper and lower portions to allow the head of an automatic rake to move and turn between such upper and lower portions. The upper portions of these double platforms were slotted, so that the rakes might pass through these slots and move with the head of the rake, which moved between the upper and lower parts of the platform. The specification also fully described two automatic rakes, and the gearing required for their operation when attached to and working with a harvesting machine. The head of one of such rakes moved from side to side across the swath cut, and under the upper portion of the double quadrangular platform, which had slots therein to allow the teeth of the rake to pass through when turned upward perpendicular to the platform, and to be carried across the length of the platform while in that position in order to move the grain to the stubble side of the quadrangular platform and to the edge of the conjoined quadrant-shaped platform. When this was accomplished, the teeth were turned downward through the upper quadrangular platform and out of the way of the fallen grain; and the rake was then moved by the machinery to the proper position for its teeth to be again turned up from their horizontal to their vertical position, when they were again turned upward by the machinery, and the rake carried the cut grain to the edge of the quadrant-shaped platform as before. The second rake was attached by one end of its head to a cogged quadrant, in such a manner that it might be turned upon its own axis, at the same time that it was swung through the arc of vibration of the quadrant, to carry the grain received from the first rake over the second or quadrant-shaped platform, and deposit it behind the latter on the ground. In order that the ends of the teeth might be carried above and placed behind the grain or grass delivered by the first rake on the second platform, they were turned to a horizontal position when moving forward by a weighted lever, in which position they remained until brought over and behind the grain to be removed by them, when the teeth were again turned to a vertical position and the rake moved in such manner as to rake off the

grain which had been delivered by the first rake on the second platform.

The devices for operating these rakes were fully described, and the claims of the patentees were as follows:

"1. What I claim as my invention, and desire to secure by letters patent, is the combination of a series of removable cutters with the links of an endless revolving chain which carries them successively into contact with the grass or grain to be cut, substantially as herein described, whether the cutters be contiguous or placed at intervals upon the chain.

"2. I claim making one end of each cutter sharp, in order that by pressing against the adjacent end of the next cutter straw, grass, or other intervening obstructions may be cut in two and allowed to pass out, the cutters thus freeing themselves from obstructions which might otherwise choke or break them.

"3. I also claim placing the bundles or sheaves of grain at right angles to the path of the machine by means of a second rake (H) combined with the first, substantially as herein set forth.

"4. I also claim moving or turning the first rake by cords, chains, or belts, arranged and operated as described, or in any other substantially similar manner.

"5. I also claim vibrating the second rake (H) and turning the teeth as herein set forth, whether the devices employed to effect these movements be such as described or others equivalent thereto.

"6. I also claim changing the frequency of the alternations of the rakes by means of cones of wheels (3, 4, 5), and pinions (3, 4, 5), or other equivalent device, for the purpose of varying the size of the sheaves as herein set forth."

The last mentioned patent having been assigned to the plaintiffs in this suit, was by them surrendered, and it was reissued to them in four separate patents on August 31, 1858. The first, second, and fifth of the six claims contained in the specification, annexed to one of these reissued patents, were in the following words:

"First, combining with a machine for cutting grain and gathering it upon a platform (A) a raking mechanism which at suitable intervals sweeps the grain off the platform, changes the direction of its stalks relative to the path of the machine, and discharges it upon the ground in gavels, substantially as herein set forth.

"Second. The employment of a sweep or vibrating rake, operating in such manner that while sweeping the grain off the platform and discharging it upon the ground, it will change the direction of the stalks as described."

"Fifth. The construction and arrangement of a sweep-rake, and the mechanism for operating it, in such manner that it is carried back and forth and its teeth raised and lowered without support at the outer end."

The claims contained in the remaining three reissued patents, obtained by the plaintiffs on the surrender of the original patent to Platt, are not now all before us, nor if they were, would it be necessary to examine them except to see how far they were in conflict with the broad claims now insisted upon, and contained in the reissues of the patents to Seymour, and to Palmer and Williams. If they were of the same character as those above given, it is difficult to perceive upon what grounds the reissued patents relied on in this case can be valid, if Platt had invented, in November, 1848, all that is now covered by the claims of the reissues of Platt's patent, made upon the application and for the benefit of the present plaintiffs.

The construction and operation of the rakes contained in the machines manufactured by the defendants, and which are complained of as an infringement of the patents relied on by the plaintiffs, are quite simple, when compared with the construction and operation of either of those described in the plaintiffs' patents. In the defendants' machines, the rake is not connected by long arms and hinged joints to a separate operating lever, by which it is to be dragged and pushed back and forth over the platform; there is no arrangement or device at the outer or grain side of the machine to give to the rake its reciprocating motion backward and forward, or its motion up and down in order to pass over the cut grain in its forward motion, and to place it in contact with such grain in its backward movement, and the construction and mode of operation of the rake, and of the gearing which gives it its proper motion, are substantially, if not entirely, different from those of either of the machines described in the plaintiffs' several patents.

In this machine of the defendants the rake-teeth are set in a lever or beam, the outer portion of which forms the rake-head, and the outer end of which moves over the platform from front to rear in the arc of a circle; and the rake so formed removes the cut grain from the platform to the ground. This lever or beam extends inward some distance beyond the rake-teeth, and is there firmly attached longitudinally to a shorter bar or frame of metal which moves horizontally upon a pivot fixed just inside of the periphery of a horizontal wheel placed between this pivotal point and that portion of the lever or beam which contains the teeth of the rake. The metal bar or frame attached to the inner end or extension of the beam which forms the rake-head, is also so arranged as to move up and down upon another pivot placed directly above the point of the pivot first mentioned. This horizontal wheel has a series of cogs on its upper face and near its periphery, and there is another series of cogs on the inner face of the driving wheel. The cogs on these

wheels mesh into cog-wheels at the end of a shaft extending from one of these wheels to the other, and the motion of the driving-wheel is thus communicated to the horizontal wheel before referred to. On the upper face of this horizontal wheel, and just within the series of cogs near its periphery, is a wedge-shaped cam of a curved form, not very far within and parallel to the periphery of the wheel, and from its highest point a pin projects upward through a slot which runs along on one side of the short bar or metal frame before described, from near the pivots before referred to, a distance nearly equal to the diameter of the horizontal wheel. On the under side of the metal frame or bar before mentioned and on each side of the slot before referred to, are cams, having curved faces extending downward, and so arranged as to come into contact and co-operation with the circular and wedge-shaped cam before described as extending upward from the upper face of the horizontal wheel.

The machine being in motion, and the rake at the front of the platform in its proper place to begin its backward movement, the beam on which the rake-teeth are fixed is carried backward by the pin upon the horizontal wheel moving in the slot before described, until it reaches the side of the platform. The lower portion of the cam on the upper face of the horizontal wheel having then come into contact with the cams on the sides of the slot in the metal bar or frame before described, the beam and rake are immediately, by the continued movement of the wheel and the combined action of the cams, lifted out of the way of the cut grain then upon the platform, and the beam and rake are moved round to the front of the platform. The highest portion of the cam upon the horizontal wheel having by this time been reached and passed, the beam falls, and the beam and rake again go through the movements just described.

The platform of the defendants' machine is not quadrant-shaped in its outline. It has four straight sides, but no two sides are parallel. Both on the stubble side and on the side next the standing grain, the platform narrows considerably as the lines extend to the rear, and the rear line of the platform inclines backward from the grain side to the stubble side so rapidly that the fence or guard which extends along the grain side and rear of the platform is not only quite near the outer end of the rake where it reaches the front edge of the platform, but also at the time it reaches the rearmost corner of the platform at the stubble side of the machine.

This form of the platform with the fence or guard before referred to, makes the platform in effect a quadrant-shaped platform, although in its actual outline it does not approach much nearer the shape of an exact quadrant than the platform made by Hussey prior to the inventions of Palmer and Williams, and of Seymour.

In this machine of the defendants, the reel is supported by a single upright post pivoted at its lower end upon the inner portion or standing grain side of the main frame of the machine, nearly opposite the driving wheel, and at a considerable distance in front of the cutter bar. Being thus pivoted, it is adjustable in such manner that the reel can be moved backward or forward, and temporarily fastened in such position as may be required. By means of two short arms or posts rising from each end of a connecting beam or bar, either straight or curved, which is attached crosswise to this single post in such manner as to be adjustable up and down as required by the height or condition of the grain to be cut, the reel is supported in its horizontal position, one of the bearings being at the stubble end of the shaft and the other near the middle, there being no support at the outer end of the reel. The reel shaft is extended beyond the arms of the reel on the stubble side, through the upper ends of the short arms before referred to, and it is made to revolve by means of a wheel on its extreme inner or stubble end, connected by proper means with the driving-wheel. The reel shaft has, therefore, no support at its outer end, or at any point over the standing grain, but this method of support does not dispense with a post or reel bearer on the side of the frame next the standing grain. It is apparent that this method of hanging the reel is an improvement upon the plaintiffs' method of hanging it in respect to the adjustable features of the defendants' organization, and it is supposed that it is also an improvement in so far as it diminishes the weight of the machine. The infringement claimed consists in the construction, sale, and use of the defendants' machine of the character just described.

In considering this case upon this question of infringement, it is unnecessary to determine that the reissues of the Seymour patent, or of that of Palmer and Williams, are void; but the case may be disposed of upon the assumption that the claims in the several reissued patents are so restricted by the words "substantially as described," or words of similar import, that they may be considered valid to the extent of the actual inventions of the several patentees.

In regard to the first of Palmer and Williams' inventions and patents, and also in regard to the Seymour invention and patents, it may be said in general terms that the inventions of the patentees are not embraced in the machines manufactured and sold by the defendants.

These devices are not the same in form or in substance. Indeed, they are not even similar in their form or modes of construction or operation. They are entirely differ-

ent in mechanical construction, and do not operate substantially in the same way, or upon substantially the same mechanical principles; and the difference does not result from the substitution in the defendants' machine of mechanical equivalents for the devices invented by Palmer and Williams, or by Seymour. This sufficiently appears by a comparison of the several devices; and a very slight examination of the models produced at the hearing was sufficient to satisfy us that no infringement of the patents just refered to had been established. Eames v. Cook [Case No. 4,239]; Morris v. Barrett [Id. 9,827]; Rapp v. Bard [Id. 11,577]; American Pin Co. v. Oakville Co. [Id. 313].

The several inventions claimed were only improvements upon a well-known machine; the plaintiffs were not the first who had invented and described an automatic rake in combination with the cutting apparatus and other parts of harvesting machines, and the patentees can not treat as infringers others who have improved the previously existing organizations by the use of a different device, arrangement or combination which, though performing the same functions, does it in a different and more simple and better manner. It is well settled that the inventor of the first improvement can not successfully invoke the doctrine of equivalents to suppress other improvements which are not colorable imitations of the first. McCormick v. Talcott, 20 How. [61 U. S.] 405; Burr v. Duryee, 1 Wall. [68 U. S.] 573.

The doctrine just stated is also applicable in its full force to the claim made under the original patent to Palmer and Williams, which claims the described "method" of supporting the reel of a harvesting machine; that is, the described mode or manner, or the described means of supporting the reel. Boulton v. Bull, 2 H. Bl. 463, 478. The use of entirely different means of support does not constitute an infringement; and though the result or end attained may be the same, the means used in the defendants' machine for supporting the reel are not, in form or substance, the same as that described in the Palmer and Williams patent, nor are they such as would be suggested by the reading of that patent. In the Palmer and Williams machine, the reel is supported by four posts, two of them crossed in the form of an X, resting on the outer side of the main frame of the machine, and the other two crossed in the same manner, resting on the inner or stubble side of the frame, and by bearers attached to the heads of these crossed posts, extending a considerable distance forward from the most advanced upper ends of these posts. On the drawing, these cross-posts appear to rest on the frame at points on each side of the driving-wheel, nearly opposite to the cutting apparatus and the axis of the driving-wheel respectively.

In the defendants' machine, as has been stated, there is but a single post rising from the frame for the support of the reel. It rests upon the inner or standing grain side of the frame at a point considerably in advance of the cutting apparatus, and it has the adjustable features and the cross-beam and short posts or arms before described.

This method of supporting the reel is not in substance the same as that described in Palmer and Williams' specification, and it does not dispense with a post next to the standing grain, as stated in the claim of Palmer and Williams' patent, although such post is placed next the standing grain to be immediately cut, and not next the standing grain included in the swath to be cut during the next round of the machine.

In our opinion, the method of supporting the reel adopted in the defendants' machine is not that described and claimed in the Palmer and Williams patent, nor do we consider it a colorable evasion of that patent.

Upon the whole case, then, the plaintiffs' bill will be dismissed with costs.

[On appeal to the supreme court, the decree of this court was reversed. 11 Wall. (78 U. S.) 516.]

[For other cases involving these patents, see Seymour v. Marsh (Case No. 12,687); Marsh v. Seymour, 97 U. S. 349.]

Case No. 12,689.

SEYMOUR et al. v. PHILLIPS & COLBY CONST. CO. et al.

[7 Biss. 460; [1] 22 Int. Rev. Rec. 234; 8 Chi. Leg. News, 329.]

Circuit Court, N. D. Illinois. June 30, 1877.

COURTS—FEDERAL JURISDICTION—CITIZENSHIP—SUPERSEDEAS BOND—RULES OF SUPREME COURT.

1. The United States circuit court has jurisdiction of a suit upon a supersedeas bond given in that court, independent of the citizenship of the parties.

[Distinguished in Winter v. Swinburne, 8 Fed. 55.]

2. A rule established by the United States supreme court in pursuance of law, becomes, essentially, a part of the law itself.

The plaintiffs [Mark T. Seymour and others] recovered a judgment in this court against the Phillips & Colby Construction Company, in July, 1873, and thereupon the defendants in that case sued out a writ of error to the supreme court of the United States, and gave a supersedeas bond, to which the defendants in this case are parties, as obligors. The writ of error having been dismissed, and the judgment of this court affirmed [91 U. S. 646], a suit was brought upon the bond given, to which a plea in abatement is put in, alleging that all the plaintiffs and all the defendants are citizens of this state, and that this court, therefore, has no jurisdiction of the case.

Sleeper & Whiton, for plaintiffs.

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

Dent & Black, for defendants.

DRUMMOND, Circuit Judge. The question is, whether, in consequence merely of the suit being upon a bond given under the circumstances mentioned, this court has jurisdiction of the case, independent of the citizenship of the parties; and I am inclined to think that it has.

[I would state that, in giving this opinion at this time, I do not desire to foreclose any of the rights of the defendants. If, as the result of my opinion, there shall be a finding against them upon the demurrer, there may be a motion made in arrest of judgment, and they may take the opinion of the justice of the supreme court for this circuit, upon the question: and if they should plead to the merits, and an issue shall be found against them before the court or a jury, in that case also, a motion may be made in arrest of judgment, and the opinion of Judge Davis taken upon the question.] [2]

So far as I have been able to investigate the subject, I am of opinion that this court has jurisdiction, on account of the nature of the controversy. I leave out of view one very strong aspect of the case, which was presented by the counsel for the plaintiffs, namely: that growing out of the fact that this may, in one sense, be said to be an incident of the original suit—something inseparably connected with it, and that owing to that circumstance alone, independently of the nature of the controversy, the court might have jurisdiction precisely as it would of a bill filed (connected with a judgment at law), on the equity side of the court, of which, as is well known, the court has jurisdiction, irrespective of the citizenship of the parties. Waiving that view of the case at present, I think the nature of the controversy is such as to give the court jurisdiction.

Section 1000 of the Revised Statutes of the United States, which re-enacts a provision of the act of 1789 [1 Stat. 73] declares that when a judge signs a citation on any writ of error, "he shall take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where a writ is a supersedeas, and stays execution; of all costs only where it is not a supersedeas, as aforesaid." This does not prescribe the particular form of the security. In practice, the security has uniformly been, under this statute, a bond given by the party in the usual form, and because it is such a bond, the defendants contend that the obligations growing out of the bond are of a common law character, and really give rise to no question under the laws of the United States. But it is clear that in one sense the obligation must be determined by the law of the United States, namely, this statute—"If he fail to make his plea good he shall answer all damages and costs." Now what are those damages and costs must be determined by a construction to be given to this statute, because it is this statute which constitutes the measure of damages, and is the law governing the rights of the parties. Section 1007 of the Revised Statutes is substantially the same as the act of 1789 amended by the act of the 18th of February, 1875 [18 Stat. 315], after the passage of the law authorizing an extension of time to sixty days, to give the bond. What is the law upon the subject can be further ascertained by referring to rule No. 29, adopted by the supreme court of the United States. A rule established by the supreme court of the United States in pursuance of law, becomes, to all intents and purposes, of the same effect as the law itself, and where the court prescribes a rule as to the kind of indemnity that shall be given, then it becomes a rule under the law, and substantially a law of the United States. Now this was a supersedeas bond, and the rule is this: "Supersedeas bonds in the circuit courts must be taken with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay and costs and interest on the appeal," &c. Whatever questions there are, must arise under the law and under this rule. Whenever any question comes up in a controversy between parties upon a bond thus given, what court is to decide it; —what was the intention of the law in relation to the determination of that controversy? Is it not manifest, that if it be true that a state court may have jurisdiction of the case, it is only concurrent with the jurisdiction of the federal court, and that the federal court is peculiarly the tribunal that ought to decide all such questions, because they are questions that arise under the acts of congress, or under rules of court passed in pursuance of acts of congress; and is it not also manifest that if a state court took jurisdiction of such a controversy, that it might ultimately, under the law or under the rule, be carried to the supreme court of the United States? And that position was not seriously controverted in the argument. If that is so, how can the court say, upon the declaration on the bond, that there may not necessarily arise some question which is not a mere common law question, but may become a question under the statutes or under the rule; and must it affirmatively appear before the court can take jurisdiction of the case, that there will be necessarily a question arising under the statutes or under the rule? It was said, and perhaps that constituted the strongest argument on the part of

[2] [From 22 Int. Rev. Rec. 234.]

the defense in presenting the demurrer, that it did not follow, because there was a contract made under an act of congress, or a bond given, that therefore the federal court could necessarily take jurisdiction of the case. Perhaps that is so. The case of Wilson v. Sandford, 10 How. [51 U. S.] 99, was a case where there was a contract made growing out of a patent right, and the court held, where the question was whether or not the supreme court of the United States had appellate jurisdiction in the case, that it had not, because it affirmatively appeared that there was no question arising under the patent law; that it was simply a contract made in relation to a patent right, all questions connected with which were to be determined independently of the statute upon the subject of patents.

Now, if it affirmatively appeared in this case that it was so; if, in other words, it did appear that there was no question arising in this case, either under the act of congress or under the rule of the court, then it might be brought within this decision; but it is manifest that if the question had been in relation to the validity of the assignment of a patent right, then it would necessarily come within the jurisdiction of the federal court, because it would be a question arising under an act of congress covering patent rights, and I apprehend that the supreme court in this case does not intend to intimate that if such a question had come up on the validity of an assignment, as authorized by an act of congress, that the court would not have had appellate jurisdiction of the case, although the amount in controversy might not have been two thousand dollars—the supreme court of the United States having jurisdiction independently of the amount in controversy in patent cases.

The first section of the act of the 3d of March, 1875 [18 Stat. 470], which we have had occasion so often to examine since it was passed, declares that "circuit courts of the United States shall have original cognizance concurrently with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States." Now, is this not a matter in dispute arising under the laws of the United States, as it is presented upon the face of the pleadings? It is an indemnity given in pursuance of a law of the United States; the measure of the liability of the party, and the rights both of the plaintiffs and the defendants, depend upon a law of the United States, and a rule of the supreme court of the United States. It is impossible to take a step in the progress of the cause in order to determine the rights of the parties, without looking at the law and the rule as the guide of the court, and controlling its judgment in the determination of the case.

From the best consideration that I have been able to give this case, therefore, I think that the court has jurisdiction. It is a little singular that no case precisely in this form has been reported.

The argument ab inconveniente is not without weight in determining this question. It is a controversy springing out of a suit already determined in the federal court. It is in one sense an off-shoot of that suit. It would seem upon principle, that this is the proper forum to settle all controversies growing out of that suit. If it were a question connected with an execution, and a bill had been filed, as already stated, this court would be the proper forum to determine any such controversy. This is a bond growing out of that suit; it would seem that this is the proper forum to settle all controversies connected with the execution of the bond, and the rights of the parties, particularly as to the liabilities of the obligors to the bond; so that conceding that it may in one sense be considered a new question, I feel inclined to establish a precedent that the federal court is the proper forum to settle the rights of the parties.

The demurrer, therefore, to the plea in abatement will be sustained, reserving the right to the defendants to move in arrest of judgment.

[NOTE. The cause was afterwards tried by a jury, resulting in a verdict and judgment for defendants (Case No. 12,686), which judgment, after a motion for new trial had been denied, was affirmed by the supreme court (case unreported).]

Case No. 12,690.

SEYMOUR et al. v. SANDERS et ux.

[3 Dill. 437.] [1]

Circuit Court, D. Minnesota. 1874.

PUBLIC LANDS—HOMESTEAD ACT—EXEMPTION PROVISION.

1. The fourth section of the homestead act of congress of May 20, 1862 (12 Stat. 393), which provides that no lands acquired thereunder shall in any event become liable to any debt contracted prior to the issuing of the patent therefor, is valid and binding upon the states.

[Cited in Fink v. O'Neil, 106 U. S. 283, 1 Sup. Ct. 334.]

2. The power of congress to dispose of the public domain, and the policy of the above exemption provision in the homestead act, considered.

[Cited in Paige v. Peters, 70 Wis. 182, 35 N. W. 329.]

This was an action of ejectment [by William H. Seymour and others, against Daniel Sanders and wife] to recover possession of eighty acres of land in Goodhue county, Minnesota. The plaintiffs allege that they were owners of the land November 1st, 1872, and that the defendants unlawfully detain the same. The defendants in their answer allege

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

that ever since April 10th, 1868, they have been and before that time were, and still are owners in fee of said lands and are in possession thereof, and that Daniel Sanders duly entered it at the local land office under the homestead act of congress (12 Stat. 392), and holds and occupies it as a homestead with his family, and that no patent has ever been issued. The cause was tried on a stipulation as to the facts. From this stipulation it appears that Daniel Sanders, on March 14th, 1863, settled upon, improved and entered, one hundred and sixty acres of the public lands under the said homestead act. That he complied with said act and proved, perfected and completed his right to a title on April 10th, 1868, and on that day became entitled to a patent and received the final certificate, signed by the proper receiver of the United States land office. It does not appear that the patent has yet issued. The plaintiffs obtained judgment in the state court against Daniel Sanders on May 25th, 1868, and on the same day docketed it in the office of the clerk of that court in Goodhue county, where the land was situated.

By Gen. St. Minn. pp. 485, 486, § 254, judgments are liens on all the real property of the judgment debtor in the county or afterwards acquired by him. The plaintiffs issued execution on this judgment August 30th, 1871, and Sanders selected and the sheriff set off to him as exempt, the south half of the said 160 acres, under the state exemption laws (Gen. St. Minn. p. 498, c. 18), and sold the north half (being the land in dispute, to the plaintiffs on October 21, 1871. One year from such sale expired and no redemption was made from the sale, and under the statute the certificate became evidence of absolute title in plaintiffs without further conveyance. Gen. St. Minn. p. 491, § 290.

Daniel Sanders made a deed of this eighty acres of land to his wife, Mary Ann Sanders, on April 23d, 1868, and for that reason she is made a defendant. This deed was not recorded until June 24th, 1869. By Gen. St. Minn. p. 500, § 2, such a deed is permitted if the conveyance contains a power of disposition by deed, will, or otherwise (Leighton v. Sheldon, 16 Minn. 243 [Gil. 214]), but is void as to his creditors unless recorded in proper registry within seventy days after its execution and delivery. This deed does not contain such power and was not so recorded. The plaintiffs were his creditors, and as such claim that the deed to the wife was void. The stipulation provides that if the fourth section of the homestead act, so called (12 Stat. 392), is, in its application to this case, constitutional, and a valid and binding regulation of the judicial power and policy of the state of Minnesota and paramount to the state laws and regulations in regard to exemptions from levy and sale on writs of execution, then judgment shall be given for the defendants, otherwise for the plaintiffs.

The General Statutes of Minnesota (page 448, § 269) provide that all property, real, personal or mixed, belonging to the defendant in the execution may be levied upon and sold. But by the same statutes (page 498, § 1) it is provided that a homestead in quantity not exceeding eighty acres and the dwelling house thereon, to be selected by the owner thereof, and owned and occupied by any resident of this state, shall not be subject to levy or sale upon execution. The act of congress approved May 20th, 1862 (12 Stat. 393), provides that no lands acquired under that act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor. By the act of congress approved February 26th, 1857 (11 Stat. 167, § 5), authorizing the people of Minnesota to form a constitution, it was provided that the state should "never interfere with the primary disposal of the soil within the same by the United States, or with any regulation congress might find necessary for securing the title in said soil to bona fide purchasers thereof." These provisions were incorporated into the state constitution (article 2, § 3), and were ratified by a vote of the people. The state was admitted into the Union May 11th, 1858, on an equal footing with the original states.

Chas. C. Wilson, for plaintiffs.

C. & J. C. McClure, for defendants.

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

DILLON, Circuit Judge. Congress is invested by the constitution with the express power of disposing of and making all needful rules and regulations respecting the public domain. This gives to congress authority to dispose of the public lands without limitation, and leaves to its discretion the mode of disposition. U. S. v. Gratiot, 14 Pet. [39 U. S.] 526.

If the land here in question were within one of the territories of the United States it would hardly be doubted that congress could lawfully provide in an act for the disposal of the public lands that it should not be liable for debts contracted by the homestead settler prior to the issue of the patent. This the learned counsel for the plaintiffs conceded, but they claim that sec. 4 of the homestead act of congress, of May 20th, 1862, should be limited in its application to the public domain outside of the respective states. But the power of congress within the limits of the state of Minnesota is, in our judgment, precisely the same as respects the mode and purposes of disposing of the public lands, as it is within the territories.

Over the public lands, so far as concerns their disposition, whether as to time, mode or objects, the state has no authority whatever. On the other hand, the authority of congress is paramount and exclusive. Any question upon this subject which might otherwise exist, growing out of the respective powers of the state and federal governments, is precluded by a solemn compact in the act

providing for the admission of the state, and in the constitution of the state itself, to the effect that the state would "never interfere with the primary disposal of the soil within the same by the United States, or with any regulation congress might find necessary for securing the title in said soil to bona fide purchasers thereof."

Thus the plenary power of congress over the disposition of the public lands within the state is expressly recognized to exist by the organic law of the state; and we hold that congress may dispose of them at such time, in such manner, and for such purposes as in its judgment it may deem best.

The title to all public lands must pass and vest according to the laws of the United States. Wilcox v. Jackson, 13 Pet. [38 U. S.] 498, 517. And, undoubtedly, it is true as a general proposition, that after the title has passed from the United States, and is fully vested in purchasers from it, the land becomes subject to state legislation, and the power of the general government with respect to it ceases, except so far as it is otherwise lawfully provided in the act by which congress disposes of the land.

It has been expressly adjudged by the supreme court that congress cannot be confined to any particular mode of disposition, but may lease or otherwise dispose of the public domain in its discretion. U. S. v. Gratiot, supra.

Down to 1862, congress had never adopted the policy of offering the public lands to those who would cultivate and make permanent homes upon them, and the act of May 10th, of that year, is the first homestead law of the general government. It would be difficult, perhaps, to point to any enactment of the federal congress more wise in conception, just in policy, and beneficial in results, than this. And these benefits were chiefly to the states by securing therein at an early day a large body of permanent settlers upon the public lands. By the act a quantity of land not exceeding 160 acres is given to any head of a family possessing the required qualifications, on condition of settlement, cultivation and continuous occupancy as a home by the settler for the period of five years. During this period the settler is prevented from alienating any part of it, or from making any actual change of residence, or from abandoning the land for more than six months at any time. If he complies with the provisions of the act, he becomes entitled to a patent at the end of five years.

Section 4, the validity of which, in its application to this case, is the question to be settled, is in these words: "No lands acquired under the provisions of this act shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of a patent therefor."

It is not difficult to discover the reason for this provision. A leading object of the enactment was to benefit the poor man who was unable to buy the lands at government price and receive his title at once and without conditions; and it undoubtedly occurred to congress, that many persons who had been unfortunate and were insolvent would avail themselves of the act; and conceiving that the creditor in such cases had no equity to subject to the payment of his debt lands which had been given to the debtor by the bounty of the government, and to protect the debtor and to encourage persons to settle upon the public domain under the act, the fourth section was adopted. In the case before us the debt upon which the plaintiffs obtained judgment was created after the defendant had settled upon the land under the homestead act of congress, and before the expiration of the five years, so that the creditor was all along apprised that the land was not liable to the payment of his debt, and certainly he is without just ground of complaint against the exemption. His legal ground of objection, however, is that the exemption is an invasion of the lawful rights of the state, and conflicts with her laws, which exempt only 80 acres of land to the debtor. It will be observed that congress does not attempt to exempt the land from debts contracted after the patent has issued, or, in other words, after the title has passed from the general government. Before the title has thus passed, congress, under its power to dispose of the public lands, may prescribe the terms and conditions upon which the disposition shall be made, and as against the state, it is our judgment that it was competent for congress as incidental to the power of disposal of the lands, and to promote the enlightened and humane policy it had in view, to provide that the lands acquired by the homestead settler should be held by him free from all antecedent debts.

This question, which is one of great practical moment, and affecting, as counsel inform us, very many persons, does not appear to have before arisen for judicial determination, but we feel quite confident that our conclusion is correct.

Agreeably to the stipulation of counsel, in case we should be of opinion that the fourth section of the act is valid, judgment will be entered for the defendants.

NELSON, District Judge, concurs in the foregoing, and is of opinion also that the same result follows from the fact that no patent has ever emanated from the government, and hence the plaintiff not having legal title cannot maintain ejectment.

Judgment for defendants.

NOTE. Since the foregoing opinion was delivered, the supreme court of Minnesota, in the case of Russell, respondent, v. Lowth & Howe [unreported], appellants, have decided, under section 4 of the homestead act of May 20, 1862, that land patented to an actual settler under said act of congress does not become liable for debts of the patentee contracted prior to the

issuing of the patent, if conveyed to another person. The provision of the state constitution "that this state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations congress may find necessary for securing the title to said soil to bona fide purchasers thereof" (article 2, sec. 3) is an express inhibition of the state legislature to pass any law subjecting lands patented under the act of congress known as the homestead act, to levy and sale upon execution, issued upon a judgment for a debt of the patentee created prior to the issuing of the patent. Same principle, see Miller v. Little (1874) 47 Cal. 348. In Nyeum v. McAllister, 33 Iowa, 374, it was held that the provision in section 4 of the federal homestead act of May 20, 1862, which provides that "no lands, acquired under the provisions of this act shall become liable to the satisfaction of any debt contracted prior to the issuing of the patent," was not designed to disable the settler from mortgaging his interest in the premises before the issuing of the patent. In this case the right of a mortgagor to a patent was perfected, he having resided on the premises more than five years.

SEYMOUR (SEAVEY v.). See Case No. 12,596.

SEYMOUR (STANTON v.). See Case No. 13,298.

SEYMOUR (SWIGGETT v.). See Case No. 13,701.

SEYMOUR, The WESLEY. See Case No. 17,420.

S. G. ANDREWS, The (MUTUAL FIRE INS. CO. v.). See Case No. 9,978.

S. G. OWENS, The (McDERMOTT v.). See Case No. 8,748.

S. G. OWENS, The (WEAVER v.). See Case No. 17,310

SHACKELFORD (MURDOCK v.). See Case No. 9,937.

SHACKELFORD (UNITED STATES v.). See Cases Nos. 16,260 and 16,261.

SHACKFORD (UNITED STATES v.). See Cases Nos. 16,262 and 16,263.

Case No. 12,691.

The SHADY SIDE.

[8 Ben. 424.] [1]

District Court, E. D. New York. May, 1876.[2]

COLLISION AT PIER—FOG—SPEED.

The steam tug M. backed from a bulkhead out into a slip in the East river alongside of a brig which was lying alongside of the pier at one side of the slip, to take her in tow. The morning was foggy. The steamboat S., coming up the East river near the piers, miscalculated her position and ran into the M. which was at the time inside of the end of the piers. *Held*, that the S. was running at too great a rate of speed in the fog, and was out of her proper place, and that she was responsible for the damages.

This was a libel by George S. Townsend, owner of the steam tug Mary, to recover the damages sustained by her in a collision with the steamboat Shady Side, which occurred on the 16th of March, 1875. The libel alleged, that the tug was in a slip in the East river between the foot of Jackson and the foot of Gouverneur streets, in New York City; that she backed from the bulkhead to come alongside of a brig which was lying on the lower side of the Jackson street pier, for the purpose of taking her in tow; and that the Shady Side came up the East river close to the Gouverneur street pier, and, instead of keeping on up the river, headed into the slip and struck the port side of the tug, head on, injuring her so that she sank. The answer alleged, that the morning was very foggy, so that it was not safe for the Shady Side, as she was bound on a regular trip from Fulton street to Morrisania, to keep the middle of the river, on account of the danger of meeting ferry-boats; that, accordingly, she was running slowly up the river near the New York piers, keeping a good lookout and blowing her whistle, when suddenly a tug was seen backing rapidly out of the slip in question; and that the tug backed across the bows of the Shady Side and was struck by her before the Shady Side could, with all diligence, be stopped.

Beebe, Wilcox & Hobbs, for libelant.

D. & T. McMahon, for claimant.

BLATCHFORD, District Judge. I deem it satisfactorily established that the tug was not, as to any part of her, outside of the end of the Jackson street pier at any time prior to the collision. The testimony of the witness Pearson, on the Martha, is more reliable than that of any of the witnesses on the part of the steamboat, and his evidence, added to that of the other witnesses for the libelant, is controlling on that point. That being so, the tug was entirely out of the way of any course which the steamboat was entitled to take or was intending to take, and was without fault. She was in a position which gave to her the benefit of the rule established in the cases of The Granite State, 3 Wall. [70 U. S.] 310, and The Bridgeport, 14 Wall. [81 U. S.] 116. The steamboat was proceeding at too great speed in the fog, and manifestly did not know where she was with accuracy. She was heading in for the piers, but, in the fog, she headed in at a greater angle than she supposed she was making. She thought she was heading for a point outside of the end of the Jackson street pier, while, in fact, at the time she discovered the tug ahead of her, she was heading further inshore. The result was, that she hit the tug when the tug was inside of the end of the Jackson street pier.

The libelant must have a decree, with a reference to ascertain the damages sustained by him.

[NOTE. A decree was entered for $7,616.05, from which the claimant appealed to the circuit

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

[2] [Modified in Case No. 12,692.]

court. The decree of this court was modified by allowing the libelant $3,500, as the value of the tug at the time of the collision. The libelant was allowed costs in this court, but the costs in the circuit court were divided. Case No. 12,692.]

Case No. 12,692.

The SHADY SIDE.

[17 Blatchf. 132.] [1]

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

COLLISION—IN SLIP—RUNNING IN FOG—SPEED—WHISTLE—AMOUNT OF RECOVERY—COSTS.

1. A steam tug moving in a slip, in a fog, and inside of the ends of the piers, is not required to sound her steam whistles, as a signal to a steamer moving up the river outside of the slip, and which runs into the slip and collides with her.

2. A steamer running up a river in a fog mistook her way and ran into a slip at a speed which made it impossible for her to stop, so as to avoid a collision with a tug inside of the slip, after the tug came in sight, and was *held* in fault for not running at a moderate speed in a fog.

3. The tug having been sunk by the collision, the libellant procured her to be raised. She was sold to the libellant for $18, in a suit against her by the person who raised her. The libellant afterwards paid the charge for raising her, $600. The expense of repairing her, added to the cost of raising her and a reasonable demurrage, exceeded what would have been her value when repaired. This court allowed the libellant $3,500, as her value at the time of her loss, as a total loss. The value of what was saved was sufficient to pay the expense of saving it, but no more; and the value of the tug when raised was equal to the expense incurred in searching for and raising her, but no more.

4. This court allowed to the libellant his costs in the district court, and, as the claimant had been partially successful on the appeal, it divided the costs in this court.

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

This was a libel in rem, filed in the district court, for a collision. That court decreed for the libellant, with costs [Case No. 12,691], and awarded to him $5,000, as the value of his tug at the time of her loss, as a total loss, with interest; $600, as the expense of raising her, with interest; $250 for the time and disbursements of the libellant, after the collision, in finding his tug and preserving her; and $300 for her furniture lost, not appurtenances, with interest; in all, $6,803.10, for which amount, with interest, and $720.37, costs, being, in all, $7,616.05, a decree was entered. The claimant appealed to this court. This court found the following facts: "At about eight o'clock in the morning of March 16, 1875, the steam tug Mary, owned by the libellant, and which had been laid up the night before on the upper side of pier 52, East river, New York, near the bulkhead in the slip between piers 52 and 53, left her berth to back across the slip, and take on her fenders, either at pier 53, or at a brig lying alongside that pier. The brig lay at the lower side of the pier, with her bow toward the bulkhead of the slip, and her stern about seventy feet inside the outer end of the pier. The brig was about one hundred feet long. Pier 52 was about two hundred feet long, and pier 53 about two hundred and eighteen. The slip between them was about five hundren and fifty feet wide. The tide was strong ebb, and a thick fog was prevailing. The Shady Side was a side-wheel steamer, running on a ferry between pier 22, East river, and Morrisania. She left her pier at 7.45 that morning, bound up the East river, on a trip to connect at Morrisania with the Port Chester Railroad, at 8.25. When she was about opposite Catharine street, the fog growing thicker, she was slowed down, and her course, which, to that time, had been well out in the river, going up parallel with the ends of the piers, was changed so as to head, as was supposed, about for the end of pier 53. That pier could not be seen at the time, and the course was shaped by compass. At pier 38 the fog lighted up again, and she was run at full speed until she reached pier 45, when, the fog again becoming thicker, she was slowed once more, and her course changed, so as to bring her in nearer the piers. She passed pier 52 not a great distance away, and headed on her course, which would take her somewhat inside the end of pier 53. That pier could not then be seen from her. When the Shady Side was passing pier 52, the Mary was in the slip, about halfway across from pier 52 to the brig. She lay a little angling across the slip, her stern being nearer the brig than her bow. Her stern was not then as far out toward the end of the pier as was the stern of the brig. Her engine was stopped, though she still had a little sternway on. The intention was to have her taken by an eddy in the slip over towards the brig. The wheelsman on the Shady Side first saw the Mary when he, in the pilot house, was about opposite, or a little past, pier 52. The attention of the captain was at once called to the Mary, and he rang the bell to stop and back, and hove the wheel hard over to starboard. The Shady Side was at the time headed for the Mary, and under strong headway. The Mary, seeing her coming, commenced backing, but, before the Shady Side could be stopped, or the Mary got out of the way, the vessels came together, the Shady Side striking the Mary on her port side, about twenty feet aft of the stem, cutting into her nearly as far as the keel. The force of the blow was such as to throw the captain of the Mary, who was standing on the outside of the pilot house, and another man on deck, overboard. The engineer of the Mary got on board the Shady Side, without shutting off his engine, which was backing. The engine kept up its backward motion until the vessels got separated,

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

[2] [Modifying Case No. 12,691.]

and then the Mary was carried about two-thirds the way across the river, and down as far as the bridge pier, where she sank. The Shady Side kept on under headway until she came within a few feet of the brig. When she stopped, she was headed so as to strike the brig about fifteen feet from the stern. The collision occurred a considerable distance inside the ends of the piers. The Mary did not sound her whistle when she left her berth, or at any time while moving in the slip. She at no time went outside the slip. The Mary was about sixty-eight feet long, and the Shady Side about one hundred and sixty-eight. Some time was spent in searching for the Mary, after she sank. She was found in very deep water, and in a much frequented part of the harbor. Some difficulty was experienced in getting parties willing to contract for raising her. She was at last raised, however, and taken to the Hoboken flats. The price paid for this work was six hundred dollars. While she was lying on the flats, an effort was made to have the claimant agree that she should be considered a total loss, and the rights of the parties determined accordingly. The claimant not assenting to this, the contractors for raising her commenced a suit against her, in admiralty, to recover the amount due them. This was done with the consent of the libellant, and, a decree having been obtained for her sale, she was bid in by the libellant for eighteen dollars. After this was done, the libellant paid the debt. He made no defence in the admiralty suit. Soon after the purchase was made at this sale, she was taken by the libellant to a dry dock in New York, where some repairs were made. But little was done, however, and she was taken down to pier 52. After lying there awhile, she was removed to a small creek on Long Island, and there beached. When she was raised she was not worth repairing. The cost of repairs, added to the expense of raising, and a proper allowance for demurrage, would amount to more than she would be worth when repaired. The value of the Mary, at the time of the collision, was thirty-five hundred dollars. Her value when raised was equal to the expense incurred in searching for and raising her, but no more."

E. A. Wilcox, for libellant.
Dennis McMahon, for claimant.

WAITE, Circuit Justice. The only fault charged upon the Mary is her failure to sound her whistle. The evidence leaves no doubt on my mind, that the collision occurred inside the ends of the piers, and that the Mary was simply moving across the slip. The sailing rules require, that steam vessels, when under way in a fog, shall sound their steam whistles, and, when not under way, their bell. This evidently applies to vessels moored, or moving in the way of commerce, and not to those lying at docks, or, ordinarily, to those moving about in slips. The object is not to notify vessels of their approach to the land, but of the proximity of other vessels in the waters they are navigating. The Shady Side was moving up the river. Her course was entirely outside the slip. A whistle sounded as a fog signal in the slip would tend to deceive rather than give information as to the actual facts. Such a signal would indicate the channel or fairway of the river, rather than a place inside the land, as a slip really is. What the Shady Side expected was information as to the waters she was to navigate, not the mooring places along the shore in the harbor. It was not a fault of the Mary, therefore, toward the Shady Side, to omit the sounding of her whistle. The Shady Side was clearly in fault. While running in a fog, in a harbor liable to be crowded, she mistook her way and ran into a slip at a speed which made it impossible for her to stop, so as to avoid a collision, after an obstruction came in sight. Such speed was certainly not moderate, under the circumstances, and indicated a want of caution, which is entirely inexcusable while navigating a harbor like that of New York, in a dense fog.

The real controversy in the case is as to the amount of damages. The libellant claims as for a total loss, because the expenses of repairs, added to the cost of raising and a reasonable demurrage, would exceed the value of the vessel when repaired. In this, I think, he is sustained by the evidence; but, if the boat had been sound and in all respects in a good condition at the time of the collision, the case would have been different. Neither the engine nor the boiler were seriously injured by the blow. The hull alone was hit. Had that been reasonably strong, it is scarcely to be believed that a cut into the side only, even as far as the keel, would have put her past repair. The fact, that, after she was taken out on the dock, her owner abandoned her, is evidence that, to his mind, her hull was not worth repairing. The mere mending of the break would not make an otherwise weak hull strong. Whatever damage happened to the engine and boiler, save in some unimportant particulars, was caused by the sinking. This seems to have developed the fact that the boiler was substantially worn out, and that the engine might possibly not be worth a new hull. The libellant, under these circumstances, is entitled to recover as for a total loss, less the value of what was saved.

The testimony as to value is conflicting and not altogether satisfactory. My conclusion, however, is, that the vessel was in a condition which made her liable to fail at any time. So long as she could be kept up, she would do reasonably good work, and make fair earnings, but, when she began to give out, she was likely to go altogether. She was nearly sixteen years old, and had been bought by the libellant, in Boston, for two thousand dollars, three years before. Somewhat extensive repairs were made on her after this purchase, and her market value in New York may have

been greater than it was in Boston. She was still, however, an old vessel. She had never been rebuilt. Her boiler was as old as the hull, and, undoubtedly, would have soon given out. Under all the circumstances, I cannot believe the actual value of the vessel was more than thirty-five hundred dollars. If it was, I am clear she ought to have been repaired. The value of what was saved is sufficient to pay the expense of saving it, but no more.

The libellant may take a decree for three thousand five hundred dollars, with interest at six per cent. from March 16, 1875. He is also entitled to recover his costs in the district court, but, as the claimant has been partially successful on his appeal, the costs in this court will be divided.

Case No. 12,693.

SHAEFER et al. v. KETCHUM.

[6 Int. Rev. Rec. 4.]

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

INTERNAL REVENUE—PAYMENTS UNDER PROTEST—BEER TAX—ACTION TO RECOVER BACK.

[1. A payment of internal revenue taxes under protest is not a voluntary payment, where both the collector and the party paying understand at the time that payment must be made or the law will be enforced.]

[Cited in U. S. v. Schlessinger, 14 Fed. 684.]

[2. A verbal protest, which is noted by the deputy collector on the back of the tax receipt which he gives to the parties paying the tax, is a sufficient protest.]

[3. Under section 50 of the act of 1862, which lays a tax of one dollar a barrel on beer "manufactured and sold, or removed for consumption and sale," after the 1st day of September in that year, the tax applies only to beer manufactured on or after that date, and not to beer which was manufactured in the spring, and which was sold, or removed for consumption and sale, after the 1st of September.]

[4. An action will lie against the collector of internal revenue to recover back taxes paid under protest, and which were assessed under the act of 1862.]

This was a suit [by Frank Shaefer and others] against the defendant [Edgar Ketchum] as collector of internal revenue for the Ninth district, New York, to recover certain tax claimed to have been illegally collected on a quantity of lager beer.

Mr. Pelton, for plaintiffs.

Dist. Atty. Courtney, for defendant.

SHIPMAN, District Judge (charging jury). This suit is to recover $1,997, the amount of internal revenue tax collected by defendant on that number of barrels of lager beer, returned by the plaintiffs as removed for consumption or sale during the month of September, 1862. The plaintiffs claim that this amount was wrongfully exacted of them, and they seek to recover it back in this suit. The first question to be determined is, whether the payment was voluntary, or whether it was made to prevent its collection by distraint of the plaintiffs' property. On this point there can be no doubt, in view of the testimony of the defendant, the collector. He frankly states that "it was understood by the parties that payment must be made, or the law would be enforced." The plaintiffs paid under this view of the matter, and this must be deemed a constrained and not a voluntary payment. The sum in question was paid under a verbal protest, which protest was noted by the deputy collector on the back of the receipt which he gave the plaintiffs. If any protest at all was necessary, this was sufficient. The clauses of the law under which this tax was collected are as follows: That on and after the 1st day of August (afterwards extended to the 1st day of September), 1862, there shall be paid on all beer, lager beer, ale, porter, and other similar fermented liquors, by whatever name such liquors may be called, a duty of one dollar for each and every barrel containing not more than 31 gallons, and at a like rate for any other quantity or fractional parts of a barrel which should be brewed, or manufactured and sold, or removed for consumption and sale, within the United States or the territories thereof, or within the District of Columbia after that day. Section 50 [12 Stat. 450]. "That whenever by the provisions of this act a duty is imposed upon any article removed for consumption or sale, it shall only apply to such articles as are manufactured on or after the 1st day of August (September), 1862, and to such as are manufactured and not removed from the place of manufacture prior to that day." Section 75, proviso at the end.

It is clear, from the language of the fiftieth section cited, that lager beer sold after the 1st of September, and manufactured before that time, was not subject to tax. The words of the act are plain: "Beer, lager beer, etc., manufactured and sold * * * after that day" shall pay a tax of one dollar per barrel. The words "removed for consumption or sale" are separated by the disjunctive "or" from the "manufactured and sold," as they must have been in order to make the provision intelligible. But it cannot for a moment be supposed that congress intended to allow beer made before the 1st of September to be sold after that date free of tax, while the same article made before, and removed for consumption or sale after, the same date should be subject to tax. The obvious intent of the law was to subject all of this class of beverages in the hands of the manufacturer, made after the 1st of September, to a uniform tax, and the time when such tax should become payable was fixed at the date when the same should be sold or removed for consumption or sale. When the manufacturer sold it, then it should become payable. When he sent it to any place, owned by himself or another, for consumption, then the tax should become payable. When he removed it to a commission house or any other place for sale, then it should become

payable. The law intended to make removal for consumption or sale equivalent to a sale, and to require the manufacturer, when he should either sell or remove for consumption or future sale, to at once pay the tax. The tax was to be levied on the manufacturer as soon as the article passed into the trade in any form or for any purpose.

The beer in question was removed for consumption and sale during the month of September, 1862, and was so returned by the plaintiffs to the collector, and the tax exacted. If it was manufactured after the 1st day of September, then it was subject to tax; if not, it was not subject to tax. On this point both the plaintiffs and the defendant have examined witnesses, and they all substantially agree. The plaintiffs testify that the beer was all brewed before the middle of April, and most of it in January, February, and March; that it was that kind of lager beer made for summer use, and could not be manufactured later than April; that immediately after it was brewed, and by the middle of April at the latest, it was drawn from the fermenting tubs into large casks and placed in cool vaults, where the air was kept through the summer at a low temperature, in order to preserve the beer to be dealt out during the summer and fall to the customers of the manufacturers. The defendant claimed that this kind of beer, for a considerable time after it is placed in the vaults, necessarily undergoes a ripening process, which is indispensable to its perfection and fitness for use, and that therefore it was not wholly "manufactured" till this alleged change was completed. But the witnesses on both sides, if their testimony is to be believed, and I see no reason to disbelieve them, conclusively prove that this claim is unfounded. None of them fix a longer time than four weeks after the beer is placed in the vaults before it becomes settled, and perfectly fit for use. Most of them fix a shorter time. They all agree that after four weeks in the vaults, at the longest, the beer is in as complete a state for the market as it ever can be, though, as its age increases, some slight and immaterial difference in the taste is perceptible, until it finally begins to deteriorate. Now, upon the most liberal test of proof for the defendant, his own witnesses establish the fact that this beer must have been completely manufactured by the 1st of June, including in the term "manufactured" the alleged ripening or improvement of the article as a beverage, which is supposed to have taken place after it was placed in the vaults.

To ask you, therefore, to retire to deliberate upon a question whether or not this beer was manufactured till after the 1st of September, 1862, would be simply to submit to you the question whether the witnesses on both sides have not testified falsely. I see no occasion to do this, and I therefore direct you to return a verdict for the plaintiffs for $1,997 principal, and $651.96 interest, making, in the whole, $2,648.96.

I will add a single remark touching the proviso, cited from the seventy-fifth section of the act. It will be seen, from the construction I have given to the fiftieth section, that I regard that proviso as having no application to the class of articles taxed by the fiftieth section, as I hold that none are taxed by the latter on removal for consumption or sale except such as were manufactured after the 1st of September.

The district attorney, among other requests, asks me to charge you that the collector is not liable to this suit, which request is denied, as I understand, upon reliable authority, that the supreme court of the United States at its last term held that such actions would lie against the collectors of internal revenue. However the law may have been regarded heretofore on this point, if I am correctly informed, it is no longer an open question.

The district attorney excepted to the rulings of the judge as to the construction of the law.

The jury, as directed, rendered a verdict for the plaintiffs.

Case No. 12,694.

In re SHAFER et al.

[2 N. B. R. 586 (Quarto, 178); 1 Chi. Leg. News, 326.] [1]

District Court, S. D. New York. May 19, 1869.

BANKRUPTCY — VOLUNTARY PETITION — DELAY IN SURRENDERING ASSETS.—CUSTODIAN.

Where debtors had been adjudged bankrupts on their own petition, but delayed to surrender their assets to the register, *held*, that an order should be issued for the immediate surrender thereof to the register, and the appointment by him of a proper custodian.

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

[Cited in Williams v. Merritt, 103 Mass. 187.]

[In the matter of Shafer & Hamilton, bankrupts.]

By I. T. WILLIAMS, Register:

This case coming on before me, one of the registers of this court, upon the return of the order of reference, and having adjudicated the bankruptcy of the said bankrupts, and it appearing from the schedules annexed to their petition that there is a large amount of assets, consisting of large quantities of liquor, now in possession of said bankrupts, and the said bankrupts, by their counsel, having intimated that they do not desire to surrender their said assets to the register, as there is a prospect of a settlement with their creditors, the register desired to be instructed by the court as to whether he ought to appoint a custodian of said assets, to take charge and custody thereof, until an assignee shall be appointed.

[1] [Reprinted from 2 N. B. R. 586 (Quarto, 178), by permission. 1 Chi. Leg. News, 326, contains only a partial report.]

BLATCHFORD, District Judge. Let an order be entered that the bankrupts and all other persons, at once surrender to the custody of the register all the assets of the bankrupt which were in their possession at the time of filing the petition, and that the register appoint a proper custodian of the same.

Case No. 12,695.

In re SHAFER et al.

[17 N. B. R. 116; [1] 1 N. J. Law J. 66.]

District Court, D. New Jersey. 1878.

COMPOSITION—EFFECT UPON FRAUDULENT DEBTS—ACTION AGAINST BANKRUPT—INJUNCTION.

1. Provable debts created by fraud are included in and bound by a composition in bankruptcy.

2. An injunction to restrain the prosecution of an action against the bankrupt in a state court, during the pendency of a composition, is proper where instalments of the composition have been tendered to the creditors, and the bankrupt is not permitted to plead the composition as a bar to the action.

[In the matter of Nathan B. Shafer and John S. Wesselhoefft, bankrupts.]

Hamilton Wallis, for bankrupts.

James Clark, for Waldron and Loughran.

NIXON, District Judge. This is an application to the court, by the bankrupts, to restrain one of their creditors from prosecuting a suit against them in the marine court of the city of New York, to recover the amount of a debt provable in the bankruptcy proceedings. The petitioners were adjudged bankrupts in this court on the 2d of January, 1877, upon an involuntary petition filed by their creditors on the 15th of December, 1876. Pending the bankruptcy proceedings, to wit, on the 21st of December, 1876, the alleged bankrupts proposed a composition under the provisions of section 5103 of the act. The necessary formal steps were taken to secure the assent of their creditors, and such assent was given. The requisite number of their creditors in amount and value agreed to accept twenty-five per cent. in full satisfaction of all their debts—the payment to be made in money—in four equal instalments, payable in three, six, nine and twelve months from the time when the composition should go into effect, and to be evidenced by the promissory notes of the bankrupts falling due at said times. The court, after notice and hearing, ordered the resolution of the creditors to be recorded on the 27th of March, 1877, and directed the assignee in bankruptcy to reassign to the bankrupts the property of the estate. After the petition in bankruptcy was filed, and before an adjudication, to wit, on the 22d day of December, 1876, one Thomas Waldron and Peter Loughran commenced an action in the marine court of the city of New York against the bankrupts, by the names of Nathan B. Shafer and Charles Wesselhoefft, to recover three hundred and forty-three dollars and thirty-one cents, and obtained an order of arrest against them on an affidavit setting forth that the debt was fraudulently contracted. In the composition proceedings, and at the first meeting of creditors, the name, address, and claim of Waldron & Loughran were included in the list of creditors presented by the bankrupts. In the petition praying for the injunction in this case it is alleged that, after the order of the court directing the resolution of the creditors accepting the composition to be recorded, the said bankrupts proceeded to carry out the settlement therein proposed and accepted; that they tendered to Waldron & Loughran the notes provided for in said composition as evidence of the indebtedness and time of payment of the several instalments, and that two of the said notes have matured, and the amounts due thereon have been tendered to the said creditors and refused by them. The court is asked to interfere by an injunction before judgment is obtained by these creditors, whereby they will recover the full amount of their claim, and thus obtain a preference over other creditors who are receiving only twenty-five per cent. The counsel for the respondents insists that this court ought not to grant the injunction, for the reason that the marine court of the city of New York, in ordering the warrant of arrest, adjudged the debt to have been contracted by fraud; that such adjudication ought not to be impeached collaterally here, and that fraudulent debts are not affected by the composition proceedings.

We are thus brought face to face to the question, which seems to be an open one in this court, whether debts created by the fraud or embezzlement of the bankrupt, or while acting in any fiduciary character, are included in and bound by the composition provided for in the 17th section of the amendments of June 22, 1874 [18 Stat. 189]. To assist in determining it, let us look at the provisions of the section. It is provided that in all cases of bankruptcy, whether an adjudication shall have been had or not, the creditors may, at a meeting called under the direction of the court, resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor, if such resolution is passed by a majority in number and three-fourths in value of the creditors assembled, and shall be confirmed by the signatures of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor. The only creditors who are excluded from voting are those whose debts are fully secured, and they are allowed to vote and sign the resolution when relinquishing their security for the benefit of the estate. * * * "The provisions of a composition ac-

[1] [Reprinted from 17 N. B. R. 116, by permission.]

cepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amounts of the debts due to whom, are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the right of any other creditors. * * * Every such composition shall, subject to the priorities declared in said act, provide for a pro rata payment or satisfaction in money to the creditors in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered." We find no warrant here for discrimination in regard to the nature and character of the debtors' liabilities; no distinction is drawn between debts that are honestly and those that are fraudulently contracted—between those which grown out of ordinary business relations and those of a fiduciary character. The phraseology of the section is broad enough to include in the composition all debts except those for which security is held, and all creditors are expressly bound, whose names, addresses, and amounts of claims are shown in the statement of the debt, or produced at the meeting called to consider the proposition for composition.

What reason or foundation, then, is there for the impression that any class of debts is excepted from the operation of the composition proceedings? It arises, doubtless, from section 5117 of the bankrupt act, which was in the original law, and relates to the granting of a discharge in bankruptcy. It is there enacted that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt." This, of course, refers to the matter of discharging a bankrupt from his debts in the bankruptcy proceedings, but no discharge is necessary or proper when the proceedings are by composition. In Re Becket [Case No. 1,210]. Woods, Circuit Judge, says: "When a proposition for composition has been made and accepted by a meeting of creditors, and approved by the court, and the terms complied with by the debtor, he is discharged from the claims of all creditors whose names and addresses, and the amounts of the debts due to whom, are shown in the statement of the debtor produced at the meeting of creditors at which the resolution accepting the composition was passed. No other discharge is necessary, for, in the language of the act, the provision of the composition shall be binding on such creditors. No general discharge can be granted, for the composition does not affect or prejudice the rights of other creditors. This settlement by composition of the affairs of the debtor in whose case proceedings in bankruptcy have been commenced does not contemplate a discharge under the act. The composition may be offered, accepted, and approved, even without an adjudication in bankruptcy." The section in regard to a composition, which was copied substantially from the 126th section of the English act of 1869, was for the first time incorporated into our law by the amendment of June 22, 1874. It is not so much an amendment of the old law as an addition to the methods by which a debtor arranges with his creditors. The English act authorizes the composition "without any proceedings in bankruptcy;" our act requires "a case in bankruptcy to be pending against the debtor," but does not require an adjudication to be had. The bankruptcy proceedings stand in abeyance, so to speak, while the negotiations for composition are going on, and they revive or die according to the failure or success of these negotiations of the debtor with his creditors.

In construing the composition act, several decisions have been rendered which reflect light on the question under consideration. In Re Trafton [Case No. 14,133]. Judge Lowell says, "that the word creditors, as therein used, plainly means all who have debts provable in bankruptcy;" and debts created by fraud, etc., are so provable. Section 5117. In Re Haskell [Id. 6,192], the same learned judge holds that a debtor may compound with his creditors under this section, who, in consequence of preferences made after he was insolvent, would not be able to obtain his discharge in bankruptcy proceedings. In Ex parte Jewett [Id. 7,303], he also decided that a creditor who had bought the debt with intent to prevent the adoption of a pending resolution for composition, might vote upon it at the meeting for composition, although section 5077 of the bankrupt act required that the creditor, in proving his claim in bankruptcy, should swear that he had not procured it for the purpose of influencing the proceedings; and that the form of oath prescribed for proving debts in bankruptcy need not be followed in voting upon resolutions for composition.

It may be added in this connection that the composition act provides that the percentage to the creditors shall be paid pro rata, subject, nevertheless, to the priorities declared in section 5101 of the bankrupt act. If congress deemed it necessary, in order to preserve the priorities given in the original law, to enact specifically that they should continue, is it not a fair inference that, if they had intended to except from the operation of the provisions of the composition the discharge of the debts created under the circumstances mentioned in section 5117, they would have manifested their intention by a qualification of the sweeping clause that the composition should be binding upon all the creditors whose names, addresses, and the amounts of the debts due to whom, were

shown in the statement of the debtor produced at the meeting of creditors? I am strongly under the impression, therefore, that the composition act was designed to include within the operation of its provisions, debts created by the fraud of the debtor, and that such debts are discharged by the payment of the dividend agreed to by the creditors and sanctioned by the court. And this impression is strengthened by a recent decision of the supreme court of New Hampshire, in the case of Wells v. Lamprey [see note at end of case], which has come to my notice since reaching this conclusion. That was an action of covenant against a debtor who pleaded his discharge by a composition. The plaintiff replied that the debt was created by the fraud of the defendant. It was admitted that the debt was one provable in bankruptcy; that the creditor's name and residence, with the amount of his claim, had been duly inserted in the list of claims furnished by the defendant, and that the plaintiff had received the amount proposed by the resolution for the composition. The court said: "Upon these facts, we think the plaintiff is not entitled to recover. It will be observed that the statute under consideration does not exempt from its operation any class of debts; it, in terms, declares that the composition or settlement shall be binding 'on all the creditors whose names, and the amount of whose debts are mentioned in the statement produced at the meeting at which the resolution has been passed.' This provision is not in amendment of, or a substitute for, the provision of the Revised Statutes, but is in addition to them. Under this provision the debtor receives no discharge. He makes a settlement of his debts under the supervision and with the sanction of the court, and that settlement is declared to be binding. It is as if the debtor went to each creditor and offered him a certain percentage to discharge his claim against him, and the offer was accepted. The only difference in the two cases is that, under the act in question, the amount paid is uniform, and a certain portion of the creditors may compel the balance to discharge their claims, whether they are willing to do so or not."

What effect should such a view of the provisions of the law have upon the pending motion? The composition proceedings are still going forward. The instalments to be paid have not all matured, and until they do the bankrupts are entitled to protection from the suits of creditors who are included in the composition. To leave no room for doubt in this respect, it was further enacted in the section relating to composition, that the provisions of any composition might be enforced by the court, on motion made in a summary manner by any person interested, and on reasonable notice. This does not mean that the court, on application by the debtor, will compel the creditors to accept the composition. They may refuse to take the money, if they please, just as any other creditor may refuse when his debtor tenders payment of his debt. But it does mean that the court will, or may continue to exercise a restraining authority over all the parties to the arrangement, when they pursue or attempt to pursue a course of conduct which tends to nullify or hinder the carrying out of the composition, and will enforce the prompt performance of any affirmative act which its terms require of the bankrupt or the creditor.

But it may be asked, why should this court interfere with a suit pending in another court? Why not allow the bankrupts to be sued or harassed by their opposing creditors, since they can defend themselves against any ultimate loss by pleading the composition? These inquiries bring up the chief difficulty in the present case. The petitioners alleged that the respondents commenced their action after the filing of the petition in bankruptcy; that upon proof being made that the order for the arrest of the defendants had been vacated by the judge of the marine court, this court restrained the plaintiffs from further proceedings therein; that the general term setting aside the vacation of the order for arrest, the plaintiffs gave notice of going forward with the case; that the composition proceedings, in the meantime, having been approved by the court and ordered to be recorded, they applied to the marine court for leave to plead the composition, which request was refused; and that they have not had, and cannot obtain, an opportunity in that court to try either the question of fraud in the creation of the debt, or the effect of the composition upon the respondents' claim. The counsel for the bankrupts stated on the argument, that if the proceedings could be so ordered that he would be heard upon these matters, he wanted no injunction; and that he had come to this court because he was refused a hearing elsewhere, in order to protect the bankrupt and the other creditors from the inequality and injustice which must follow if these creditors were allowed, in an action commenced since the petition in bankruptcy was filed, to recover a judgment for their whole debt, which judgment would become a lien upon the property and assets on the possession and value of which they had relied for the means and ability to carry out the composition.

I do not regard the question of fraud in the creation of the debt as an open one. In authorizing the arrest of the bankrupts in the preliminary proceedings, it has been decided by a court of competent jurisdiction, and that decision cannot be impeached collaterally in this court. But, holding that the composition proceedings are still pending; that, notwithstanding the fraudulent character of the debt it is within the provisions of the composition act, and that the tender of the instalments relieves the bankrupts from suit, I must allow the injunction as prayed for. I do it with some reluctance, but do not perceive

that I can do otherwise, as long as the bankrupts are not permitted to plead the composition as a bar to the plaintiffs' recovery. Whenever it shall be made to appear that the plaintiffs in the action have consented to the filing of such a plea, and the court has allowed a trial on the issue raised by it, I will dissolve the injunction, and will leave the parties to the judgment of that court as to the effect of the plea upon the debt in controversy.

[NOTE. The case of Wells v. Lamprey, decided by the supreme court of New Hampshire, in August, 1877, is here reprinted from 16 N. B. R. 205, by permission:]

Provable debts, although created by fraud, are discharged by a composition in bankruptcy.

The action is covenant. The writ was dated April 10, 1876. The defendant conveyed to the plaintiff certain premises, covenanting that they were free from all incumbrances. They were, in fact, subject to a mortgage, which the plaintiff was compelled to pay, and this action was brought to recover the amount of such payment. The defendant pleaded a discharge in bankruptcy, by a composition. The plaintiff replied that the debt was created by the fraud of the defendant.

Mr. Spring, for plaintiff.

Mr. Murray, for defendant.

STANLY, J. The question here presented is as to the effect of a discharge in bankruptcy, by a composition, by which we understand that, under the act of June 22, 1874 [18 Stat. 178], the defendant compounded and settled with his creditors, one of whom was the plaintiff. The provision of law bearing on this question is as follows: "In all cases of bankruptcy, now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to such known creditors, of the time, place and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition, proposed by the debtor, shall be accepted in satisfaction of the debts due to them from the debtor; and such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting, either in person, or by proxy, and shall be confirmed by the signatures thereto, of the debtor, and two-thirds in number and one-half in value of all the creditors of the debtor. * * * The provisions of a composition accepted, by such resolution, in pursuance of this section, shall be binding on all the creditors, whose names and addresses and the amount of the debts due to whom are shown, in the statement of the debtor, produced at the meeting at which the resolution shall have been passed, but shall not affect, or prejudice the rights of any other creditors." 18 Stat. 1st Sess. 43d Cong. 182, § 17.

No question is raised as to whether or not the plaintiff's debt is provable in bankruptcy, nor that his name and residence, with the amount of his claim was duly inserted in the list of claims furnished by the defendant, under the provisions of the act in question, and the case finds that the plaintiff received the amount proposed by the resolution for a composition.

Upon these facts, we think the plaintiff is not entitled to recover. It will be observed that the statute under consideration does not exempt from its operation any class of debts. It, in terms, declares that the composition or settlement shall be binding "on all the creditors whose names and the amount of whose debts are mentioned in the statement produced at the meeting at which the resolution has been passed." This provision is not in amendment of, or a substitute for the provisions of the Revised Statutes, but is in addition to them. Under this provision the debtor receives no discharge. He makes a settlement of his debts under the supervision and with the sanction of the court, and that settlement is declared to be binding. It is as if the debtor went to each creditor and offered him a certain percentage to discharge his claim against him, and the offer was accepted. The only difference in the two cases is, that under the act in question, the amount paid is uniform, and a certain portion of the creditors may compel the balance to discharge their claims, whether they are willing to do so or not. By the adoption of the resolution for the composition, and its approval by the court and the payment of the amount proposed, the claims of all those whose names, residences and the amount of whose debts appear in the statement are absolutely discharged, and all right of action thereon is thereafter forever barred. No other discharge is necessary. The record of the adoption of the resolution and the evidence of payment are all that is required. In re Becket [Case No. 1,210]; In re Trafton [Id. 14,133].

Case discharged.

Case No. 12,696.

Ex parte SHAFFENBURG.

[4 Dill. 271.] [1]

Circuit Court, D. Colorado. 1877.

CRIMINAL LAW — INDICTMENT FOR FRAUDULENT CLAIMS AGAINST THE GOVERNMENT—JURISDICTION — REV. ST. SEC. 5438, CONSTRUED.

1. An erroneous decision of a court having jurisdiction of the offence and of the person indicted, cannot be re-examined on habeas corpus.

[Cited in Ex parte Kenyon, Case No. 7,720; Re Morris, 40 Fed. 825.]

[Cited in Ex parte Bowen (Fla.) 6 South. 65.]

2. Section 5438 of the Revised Statutes, prohibiting the making or presenting of false claims and bills against the general government, construed.

3. This statute distinguishes between the making and the presenting of a false claim, and makes each a distinct offence.

4. A false account made by a marshal within the limits of Colorado, and presented to the court and approved in Colorado, and afterwards presented to the treasury department in Washington, is a complete offence as to the making in Colorado, for which the offender may be there indicted.

Mr. Hugh Butler presented the petition of M. A. Shaffenburg for a writ of habeas corpus. The petitioner was the late United States marshal for the territory of Colorado, and was convicted by the United States district court under an indictment founded upon section 5438 of the Revised Statutes of the United States, and sentenced to imprisonment for the term of two years in the penitentiary of the state of Kansas. He presented to the circuit court his petition for a writ of habeas corpus, alleging that his imprisonment is unlawful. The indictment contains two counts, the first, in substance, charging

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

that the petitioner, being the marshal of the United States for the territory of Colorado, made and caused to be made therein, a false, fictitious, and fraudulent claim against the United States, in respect of court expenses, stating the amount, and presented, and caused the same to be presented, to the treasury department of the United States for the purpose of obtaining the payment thereof. The second count is as follows:

"And the grand jurors aforesaid, on their oaths aforesaid, do further present that the said Mark A. Shaffenburg, late of Arapahoe county, in the First judicial district of Colorado territory aforesaid, heretofore, on the third day of December, in the year of our Lord one thousand eight hundred and seventy-four, at the said county of Arapahoe, in the First judicial district of Colorado territory aforesaid, and within the jurisdiction of this court, being then and there marshal of the United States for the territory of Colorado, did then and there make and cause to be made for payment and approval by officers of the treasury department of the United States, a false, fictitious, and fraudulent claim, amounting to the sum of to-wit: nine thousand three hundred and eighty-eight dollars and fifty-six cents, in words and figures following:

"The United States in Account Current with M. A. Shaffenburg, United States Marshal for the District of Colorado, for the Expenses of the United States District Court, Held at Denver, Colorado, September Term, 1874:

Dr.

Compensation of United States grand jury (abst.)	$ 344 35
Compensation of United States petit jury (abst. 2)	300 80
Compensation of United States witnesses (abst. 3)	439 00
Before United States commissioner, supplemental	298 85
Before United States marshal, supplemental (abst. 47)	402 95
Contingent expenses, supplemental (abst. 6)	485 25
Commissions on $1868.25 disbursed, at two per cent. (abst. 46)	37 36
Balance due the United States	5,106 59
	$14,495 15
By amount from former account current	$14,495 15

"District of Colorado, ss: M. A. Shaffenburg, marshal of the United States for the district of Colorado, being duly sworn, deposes and says, that the services stated in the foregoing account, and in the abstracts and vouchers therein referred to, have been rendered as therein stated; that the supplies charged were furnished for and used by the court; that the disbursements charged, and all the expenses stated therein, were necessary and proper, and were paid in good faith, and that all the items charged are correct and legal, and the amounts thereof justly due to him as therein stated, as he verily believes. (Signed) M. A. Shaffenburg.

"Subscribed and sworn to this 3d day of December, in the year 1874, before me (Signed) John W. Webster, Clerk Supreme Court Colorado Territory. (Seal.)

"Approved: (Signed) E. T. Wells, Judge First Judicial District, Colorado Territory.

"And he, the said Mark A. Shaffenburg, did, on the said 3d day of December, in the year of our Lord one thousand eight hundred and seventy-four, present, and cause to be presented, the said false, fictitious, and fraudulent claim to the first auditor and the first comptroller of the treasury department of the United States, and the treasurer of the United States, for payment and approval, the said first auditor and first comptroller of the treasury department of the United States and the said treasurer of the United States being then and there persons and officers in the civil service of the United States, knowing the said claim to be false, fictitious, and fraudulent; and for the purpose of obtaining and aiding to obtain the payment and approval of said false, fictitious, and fraudulent claim, he, the said Mark A. Shaffenburg, did, then and there, make, use, and cause to be made and used, a certain false voucher, designated therein 'Voucher 6,' in words and figures following:

"The United States, to M. A. Shaffenburg, United States Marshal, Dr.

"For maintaining and subsisting United States prisoners during their time of confinement awaiting trial, as follows: Of United States prisoners Gustave Buchasen, Charles Leichering, and Florain Spalti, from July 16th to November 17th, 1874, inclusive—three persons, one hundred and twenty-five days each—three hundred and seventy-five days, at $1.15 per day $431 25

"(Here follow other like bills or vouchers.)

"He, the said Mark A. Shaffenburg, then and there knowing the said vouchers to contain fraudulent and fictitious entries, with fraudulent design and intent, and with intent then and there to cheat and defraud the government of the United States, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

On the admission of the territory of Colorado as a state the indictment was transferred to the United States district court, in which the trial was had.

Hugh Butler and Thomas P. Fenlon, for petitioner.

George R. Peck, contra.

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

DILLON, Circuit Judge. The statute (Rev. St. § 5438) on which the indictment is based, when carefully examined, will be found to provide not only for the making or presenting for approval or payment of a claim against the government which is known to be false, fictitious, or fraudulent, but also for the making, for the purpose of

obtaining, or aiding to obtain, the payment or approval thereof of "any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry." Rev. St. § 5438.

The first count of the indictment charges the petitioner with the making, in Colorado, of a false claim for court expenses, but that count does not, in terms, aver that the claim was in the form of a bill, account, or voucher. But the second count expressly charges the petitioner with the making of a false and fraudulent bill and vouchers, which are set forth at large therein, and avers that this was done within the territorial limits of Colorado.

The precise claim of the petitioner is that the district court of Colorado was without jurisdiction in the case, because it appears from the indictment that it is legally impossible for that court to have cognizance of the offence therein charged, for the reason that the offence, as charged, was not consummated, and, in the nature of things, could not be consummated, in Colorado. It is contended by the petitioner that the making of a false and fraudulent claim by the marshal of the United States, within the meaning of the statute, necessarily involves the presentation of that claim for payment or approval, and as it is alleged that this claim was presented to the treasury department in Washington, there could be no completed offence until it was thus presented; and hence the jurisdiction to try the petitioner therefor is exclusively in the proper court in the District of Columbia.

In any view of the present case, it probably falls within and is governed by the decision of the supreme court in Ex parte Parks, 93 U. S. 18. Inasmuch as the making of a false and fraudulent claim against the government is made a criminal offence, and jurisdiction over such offences is given to the district court, the question whether the particular indictment charged a completed offence within the district of Colorado, is one which that court was competent to decide, and would be required to decide on a demurrer to the indictment or on a motion in arrest of judgment.

If decided wrongly, the decision would be erroneous, but not void, and it is plain that an erroneous decision of this kind cannot be corrected on habeas corpus. But it is not necessary to place our judgment on this ground. Nor is it necessary to state what constitutes the making of a false claim within the meaning of the first part of section 5438. A subsequent clause in the section makes it a criminal offence to make any false paper, instrument, bill, affidavit, etc., for the prohibited purpose.

The second count in the indictment charges the making, by the petitioner, within the limits of Colorado, of a false bill, or claim, in writing, which is set forth in full in the indictment. The offence was complete when that bill was made, as therein alleged, with the intent to use the same to obtain the payment thereof, just as much so as if, under another clause, standing in the same connection, the petitioner had made a false affidavit or deposition in Colorado with a view to obtain or aid in obtaining the payment or approval of a fraudulent claim by the treasury department in Washington.

The statute distinguishes between the making and the presenting of a fraudulent account or bill. It makes each a distinct offence. It may be that the offence of presenting a false bill or account to the treasury department in Washington can only be prosecuted in the courts of the District of Columbia; but the offence of making a false bill or account may be prosecuted in the judicial district in which the fraudulent claim is made. What constitutes or consummates the making of a false claim, within the meaning of the statute, may be difficult to define so as to embrace within the definition all cases that might arise. For the purposes of the present application, it is sufficient to say that we are of opinion that the facts averred in the second count of the indictment do show a completed offence within the territorial limits of the district of Colorado. In other words, our judgment is, that if a marshal of the United States for a given district shall make out a false and fraudulent bill against the United States for official services or expenses, and present the same to the court for approval, and, after having secured that, shall forward the same to the treasury department at Washington for payment, or otherwise cause the same to be there presented for this purpose, this is the making, in such district, of a false and fraudulent bill, within the meaning and purpose of the statute.

Such has been the construction which has heretofore been put upon this useful and necessary statute in the courts in this circuit, and elsewhere, so far as we know. The opposite construction overlooks the distinction which the statute so broadly marks between the making and the presenting of fraudulent claims, and by confining the jurisdiction, in most cases, to the District of Columbia, would rob the statute of its utility by disabling the government to prosecute for its violation, except under obvious difficulties, and at great expense, both to itself and to the persons whom it accused.

Mr. Justice MILLER concurs in this exposition of the statute and in the opinion that the petitioner is not entitled, on the showing made, to a writ of habeas corpus. The writ is accordingly refused.

Writ refused.

See Ex parte Peters [Case No. 11,027].

Case No. 12,697.

SHAFFER v. FRITCHERY et al.

[4 N. B. R. 548 (Quarto, 179).] [1]

District Court, D. Maryland. 1871.

BANKRUPTCY—JUDGMENTS—WHEN VOID—ACTS OF BANKRUPTCY—NOTES FOR EXCESS OF INTEREST.

1. Judgments are not to be set aside as fraudulent and void merely because the plaintiff has exacted a high rate of interest, especially when at the time of entering of the judgments, valuable collateral securities were surrendered to debtor by plaintiff for a large part of said judgments.

[Cited in Davis v. Anderson, Case No. 3,623.]

2. A judgment is fraudulent and void, if the plaintiff knew at the time it was entered up, that the debtor had executed a deed of assignment to said plaintiff and another party.

3. In a mercantile community the non-payment of a note at maturity by the maker, who is a merchant or trader, is prima facie evidence of insolvency, and warrants a decree in bankruptcy. In an agricultural country the rule is different, and there no man is suspected of being insolvent from the fact alone that his notes are not paid promptly at maturity.

4. Notes given for the excess or bonus over legal interest are not provable in bankruptcy, and must be surrendered to the assignee.

[This was a bill by Shaffer against Fritchery & Thomas, praying that certain judgments be set aside.]

GILES, District Judge. The bill in this cause was filed 27th of September, 1869. It sets forth that the said Shaffer, being insolvent, gave to respondents the orders or warrants to enter four judgments against him in the circuit court for Carroll county, at the several times mentioned in the said bill of complaint, the first one being entered on the 5th day of February, 1869, and which was for the sum of six thousand dollars; the second one on the 1st of April, 1869, for three thousand and ninety-seven dollars and fifty-seven cents; the third one on April 12th, 1869, for three thousand one hundred and nineteen dollars; and the fourth, and last one, on 14th of April, 1869, for five hundred and thirty dollars. The bill charges that these judgments were confessed by Shaffer, with intent to give a preference to said defendants over his other creditors, and to defeat the operation, and in fraud of the provisions of the bankrupt act [of 1867 (14 Stat. 517)]; and that, when said judgments were entered, the said defendants had reasonable cause to believe that a fraud on this act was intended, and that Shaffer was insolvent. The bill also charges that said judgments were confessed for a much larger amount than Shaffer owed to the defendants; the amount of said judgments being about thirteen thousand dollars, and the true indebtedness of said Shaffer to defendants was less than eight thousand dollars; and that said judgments are fraudulent in fact, as well as void under the 35th and 39th sections of the bankrupt act. And it concludes with a prayer that the said judgments may be decreed void, and be set aside; or, if the court should decide that they have no authority to pass such a decree, that the defendants may be restrained from asserting any priority under them to payment from the assets of said bankrupt's estate, and for such order and further relief as the case may require. The answer denies all the material allegations of the bill. They admit the confession of the four judgments mentioned in the said bill, but they deny that at the several times said judgments were confessed, they had any reasonable cause to believe, or that they, in fact, believed that said Shaffer was insolvent, and that the same were confessed with intent to give them a preference; and they also deny that the said judgments do not represent truly the amount of the indebtedness of said bankrupt to them, but that said bankrupt was then and is still justly indebted to them in the several amounts stated in said judgments, and they deny all charges of fraud. The answer then states the course of dealing between the said bankrupt and these respondents (who were bankers and brokers in Westminster, in this state), and the origin of said indebtedness and its character when the said several judgments were confessed; and the said answer further states that when said first judgment was confessed, these defendants surrendered to Shaffer certain securities, being the indorsements of other parties, and which securities they regarded as ample, being satisfied with the said judgment in lieu thereof; and the answer insists that said judgments are valid and a lien on the real estate of said bankrupt, and they pray that the court will so decree, and that, if the said real estate shall be sold by the assignee, that he shall be directed to pay off the said judgments, etc.

Under the issues, therefore, clearly made by the said bill and answer, a large amount of testimony had been taken, and the case has been fully and ably argued by learned counsel. At the commencement of his argument one of the learned counsel for the defendants suggested a doubt whether, at this time, the court has any jurisdiction of this case to decree the relief prayed. But the court has no doubt on this point. When this bill was filed, the real estate had not been sold by the assignee; and if he believed that there were liens upon the same which were fraudulent and void, it was his duty to have them removed; and although this court had passed an order, on the petition of the said assignee, on the 10th day of September, authorizing him to sell the real estate of the said bankrupt, free and discharged from the liens on the same, and from the proceeds of sale to discharge the liens thereon, there was still more necessity that the power of this court should be invoked to ascertain what liens existed, and to pass upon their validity. Whether this authority of the court is asked by bill

[1] [Reprinted by permission.]

in equity or by summary petition, can make no difference; as, under the 1st section of the bankrupt act, this court has full jurisdiction over the subject-matter. Still, I think a bill in equity is the most suitable remedy. There are four judgments sought to be set aside in this case, of different dates; and it might well be that one or more might be valid, and others fraudulent and void. It will be necessary, therefore, to examine the evidence in relation to each one separately. The first one was entered up on the 5th of February, 1869, for six thousand dollars. Now, at this time, was Shaffer insolvent? I have no doubt that he was. His whole assets, as ascertained by the subsequent sales, were only about twenty-five thousand seven hundred and fifty dollars, while his indebtedness must have been at least over thirty-five thousand dollars, and it might have been much more, for we find him, on the 13th of April, 1869, making a deed of trust to certain parties for the benefit of his creditors; and there is no proof that between the 5th of February and the 13th of April he met with any losses in his business or otherwise.

Then the next question is, when this judgment was taken had defendants reasonable cause to believe that Shaffer was insolvent, and that by the confession of said judgment a fraud on the bankrupt act was intended? Now, it is proved, beyond any doubt, that up to the execution of the deed of trust Shaffer was in good credit in the county in which he resided; that he owned a large real estate, and was computed to be worth from twenty-five to thirty thousand dollars; that prior to the first judgment of defendants the only debt of his of which the community generally could have had any knowledge, were Cover's judgment for four thousand dollars and the mortgage on the mill property for two thousand six hundred and fifty-nine dollars and forty-one cents, making six thousand six hundred and fifty-nine dollars and forty-one cents. Now, in all the facts attending the transactions between Shaffer and defendants, what cause was there to suspect the solvency of Shaffer, and that he contemplated a fraud on the bankrupt act? The fact that he did not pay his notes punctually at maturity, and that he agreed to pay heavy interest on the cash advanced to him, are relied on by the counsel for the complainant to show a knowledge by the defendants of Shaffer's true condition. Now, if these transactions had taken place in a mercantile community, or the bankrupt had been a merchant, the non-payment of his note would have been prima facie evidence of insolvency, and would have warranted a decree in bankruptcy against him. And if defendants, after such non-payment, took from him a judgment to secure either past indebtedness, or that, with a present advance, they would have done so at their peril. But in an agricultural community the rule is different. And it is proved in this case, that in the county where these parties resided, the general experience is that notes are not paid punctually at maturity; and that no man is suspected of being insolvent from the fact alone that his notes are not punctually paid. Now as to the fact of the charge of three per cent. a month for many of the advances made by defendants, this, if standing alone, would certainly raise a presumption of defendants' knowledge of the embarrassed condition of Shaffer, sufficient to put them on inquiry. But this presumption is removed when we find them continuing to make advances to Shaffer of large sums, even so late as the 12th of April, 1869. It only shows that defendants were very sharp in all their transactions, and believing that they were dealing with a man who was responsible, with large real estate, but much in want of cash, they took advantage of his necessities to get a large interest for their money. Also, it appears from the evidence that when the first three judgments were taken, the defendants surrendered to Shaffer valuable collateral security which they held for a large part of said amounts. According to my view of the evidence, I cannot, therefore, set the first three judgments aside as fraudulent and void. The last judgment was entered up on the 14th of April, 1869. On the evening of the 13th of April a deed of trust of all his property had been executed by Shaffer to one of the defendants and another party, with the knowledge of the said defendant. With this knowledge defendants, on the 14th of April, 1869, caused to be entered the judgment of that date, and I, therefore, hold it to be fraudulent and void, and will so decree. It remains only for me to ascertain how much money was actually advanced to said Shaffer by defendants, and to secure the payment of which the remaining judgments were confessed; for that amount alone, with six per cent. interest on the same, will these defendants be permitted to prove said judgments against Shaffer's estate, and to obtain judgment of the same, according to the legal priority of said judgments. By the laws of this state, where the defense of usury is taken, the party taking it forfeits only the excess above the sum loaned and the legal interest (six per cent.) on the same. Now, this is a matter of no slight difficulty, from the mass of evidence in this case, and from the want of recollection of Shaffer upon the subject; and also from the fact, apparent on the books of the defendants, given in evidence on the call of the complainant, that sometimes the discount was paid in cash, but more generally notes were taken for the same, which were renewed from time to time, and were subsequently merged in the large notes for which the judgments were entered. This interest seems to have been usually three per cent. a month. If the learned counsel can agree upon the amount of the interest thus charged beyond six per cent., I will deduct the same from the three judgments and per-

mit the defendants to prove the same for the balance. If they cannot agree, I will ascertain the amount myself, from the best data I can obtain from the evidence, which is anything but clear on this point.

The three bonus notes filed in this cause the court holds to be void, and they will be decreed to be surrendered to the assignee.

Case No. 12,698.

SHAKELEY et al. v. TAYLOR et al.

[1 Bond, 142.] [1]

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

ADMINISTRATORS — FIDUCIARY RELATIONS — PURCHASE AT SALE—INSOLVENT ESTATE—WHO MAY IMPEACH.

1. The law is well settled, that a person occupying the position of a fiduciary can not be a purchaser of the trust property, even in the absence of any ground for the presumption of actual fraud.

2. Where three persons were administrators of an insolvent estate, and had obtained an order from the probate court for the sale of the decedent's land to pay debts, and at the sale a note was taken for a part of the purchase money, payable to the administrators, upon which suit was brought, judgment obtained, and the property offered for sale by the sheriff on execution, and at the sale one of the administrators became the purchaser at two-thirds of the appraisement: *held*, that such administrator did not occupy a fiduciary relation to the land, and that the sheriff's deed vested a good title in him.

3. If the purchaser could be viewed on any ground as a trustee, under the facts of this case, the creditors of the insolvent decedent, and not the heirs, would be the proper persons to impeach the sale.

[This was a bill by Eliza Shakeley and others against A. M. Taylor and others. Heard on demurrer to the bill.]

Mills & Hoadly, for complainants.

Ball & Skinner and Collins & Herron, for defendants.

OPINION OF THE COURT. The questions submitted in this case arise on a demurrer to a bill in equity. The facts set forth in the bill may be briefly stated as follows: In 1816, James K. Bailey died without issue, intestate and insolvent, seized of an interest of one undivided half in certain real estate in Cincinnati, which he held in common with one John B. Enness, leaving a widow, Eliza Bailey, since deceased, and a sister, Susan Shakeley, wife of Robert Shakeley, a citizen of Adams county, in the state of Pennsylvania, his only heirs at law. Susan Shakeley died in said county in 1825, leaving several children, all of tender age, who, including the heirs of one since deceased, are the complainants in this case. Eliza Bailey, widow of James K. Bailey, and William Barr and James Keys, were duly appointed administratrix and administrators of the estate of said Bailey; and having filed their petition in the probate court for the sale of the interest of said Bailey, in the real estate described in the bill, to pay the debts owing by his estate, in March, 1817, an order of sale was made by said court, and in pursuance thereof, in September, 1818, the property was sold to Samuel Still, for the sum of two thousand dollars; for which he executed his notes in equal amounts, payable in one, two, and three years, secured by mortgage. The sale was approved of, and confirmed by the court of probate, and a deed was made by the administrators. The sale, it appears, was made free from any claim of dower by the widow, but with the understanding that, in lieu of dower, she should receive the interest on one-third of the purchase money during her life, and that, at her death, the principal should be returned to the estate, and applied to the payment of the debts. The purchaser, Still, having failed to pay the notes given for the purchase money, was sued on one or more of them; and in 1824, the administrators of Bailey obtained a judgment against him, in the court of common pleas of Hamilton county. Execution was issued on this judgment, which was levied on the property described in the bill; of which said Still was then the sole owner, having previously purchased the undivided interest of said Enness therein. In 1826, the property was offered at public sale by the sheriff of Hamilton county, upon the execution issued as before stated, and was sold to said William Barr for $1,868, that being two-thirds the appraised value. This sale was confirmed by the court, and an order made requiring the sheriff to execute a deed to the purchaser. The sheriff by his deed, dated August 31, 1826, conveyed the premises to William Barr, under whom the defendants in this case severally claim title. It is alleged that these defendants purchased with notice of the facts charged in the bill; and the complainants pray that the purchase made by Barr, as above mentioned, may be held to be a purchase in trust for them; and that on being reimbursed to the amount paid by them, with interest, the present claimants may be decreed to convey the portions of the property held by them respectively to the complainants, and also to account to them for the rents and profits. It is also averred in the bill, that the complainants are now, and have been since their birth, residents of Pennsylvania, and until recently were minors; and had no knowledge of the facts set forth in their bill till about the year 1853.

Upon the facts thus alleged in the bill, the main inquiry presented by the demurrer relates to the character and legal effect of the purchase of the property by Barr, one of the administrators of the decedent, Bailey. The complainants insist that Barr occupied a fiduciary relation to the property, and that the purchase falls within the settled rule of

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

law, which, on grounds of public policy, prohibits a trustee from purchasing property held in trust. And they ask that the conveyance to Barr may be held to be a deed of trust, and as such inuring to the benefit of the complainants, as the legal heirs of Bailey. In support of the demurrer to the bill, it is contended: 1. That Barr did not stand in the relation of a trustee, and that the sale and conveyance vested in him a perfect title in his own right. 2. That as the estate of Bailey was largely insolvent, if a trust estate can be created, Barr holds the property as the trustee of the creditors of Bailey, who alone are interested in the question; and that the creditors, not being made parties to the bill, no decree can be entered in the case. 3. That if these complainants ever had a claim to relief, they are barred by the lapse of time and the statute of limitations.

It is not proposed to examine the numerous cases referred to by the counsel for the complainants, to sustain the doctrine that a trustee can not purchase the property held by him in trust. It is undeniably true, that while some courts of the highest respectability have limited the application of the doctrine to cases where, from the facts, there was either actual or constructive fraud on the part of the trustee, the current of decisions is against the validity of purchases by any one holding a fiduciary relation to the property sold, without any inquiry as to the circumstances of the sale, or the motive of the trustee in becoming a purchaser. The courts hold, with great propriety and force of reasoning, that sound policy requires that persons in a fiduciary character should have no temptation to use trust property for their own benefit and to the injury of the cestui que trust. And if the present case falls within this principle, the relief sought for by these complainants must be awarded, unless denied to them on other grounds. But the court do not perceive the applicability of the rule referred to, to the case stated in this bill. Barr, the purchaser of the property in question, was one of three administrators of an insolvent estate. Upon a proper showing to the probate court, by the administrators, that it was necessary to sell the real estate of the decedent to pay debts, an order for that purpose was made, under which Still became the purchaser of the property. The administrators made return of the sale, and the usual order for its confirmation was made, and also an order that the administrators should convey the "premises to the purchaser." A deed was accordingly executed, which vested the legal title to the property in the purchaser, Still. From that time, the administrators were separated from all connection with it as fiduciaries. It appears that subsequently, in default of the payment of the notes given by the purchaser for the real estate sold, it became necessary to bring suit on one or more of these notes, in which suit the names of the three administrators were used as plaintiffs. A judgment was obtained by the administrators; and upon an execution against the defendant, the property purchased by him at the sale by the administrators, as also the undivided half which he had acquired by purchase from Enness, was levied upon. Having been duly appraised and advertised, as required by law, it was offered at public sale by the sheriff of Hamilton county, and Barr, being the highest bidder, was the purchaser. The sale thus made was confirmed by the proper court, and in pursuance of the order of the court, the sheriff conveyed the property to Barr.

It may be remarked here, that there is no allegation in the bill, nor any ground presented for an inference, that these proceedings were not conducted in the most perfect good faith. The sum bid for the property by Barr being two-thirds its appraised value, after applying one-third to the satisfaction of the widow's claim of dower, was paid to the administrators, and by them distributed to the creditors of the estate. Neither is there any averment in the bill that Barr made any profit for himself by the purchase.

The main ground on which courts have rested their condemnation of fiduciary purchases is, that the trustee has control of the sale of the property, and thus is exposed to the temptation of resorting to fraudulent management in the sale, thereby to subserve his own interests, at the sacrifice of the interests of those for whom he is the trustee. Hence, at a sale by administrators or executors of property belonging to their decedent, they are not allowed to become purchasers, for the reason that they appoint the time and place, and have the entire management of the sale. But this has no application to the sale at which Barr was the purchaser. The property sold to him was not trust property, the title, legal and equitable, having vested in Still, the defendant in the execution. It was levied on and sold to satisfy the execution against him. The sale, and all the proceedings connected with it, were conducted by the sheriff, the officer who by law was authorized to perform this duty, without any interference or attempted control on the part of Barr or his co-administrators. It would seem to be a clear proposition that a sale thus made is not liable to the objections which usually invalidate a fiduciary sale. It is clearly not within the principle on which such sales are held to be void, for the reason that the purchaser, though his name as an administrator was necessarily used in the suit against Still, had no control over the sale. It was impossible, therefore, that, by any agency on his part, he could prevent the fullest competition at the sale, or by any device or management effect a purchase at an unfair price.

Two cases have been referred to by counsel, one from the Vermont and one from the Georgia Reports, in which it is said the court

ignored the distinction between a purchase by an administrator or executor of property held as the representative of a decedent, and property levied on to satisfy a judgment in which an administrator or executor is a party plaintiff. I have not had an opportunity of referring to these cases, and do not, therefore, know the precise grounds on which the decisions were placed. But, considering the distinction intimated as obvious, and as entitled to a controlling influence in the consideration of the question, I am not prepared to sanction the doctrine which the cases cited are supposed to sustain. It is not within the reason of the rule of law condemning fiduciary purchases, and there is certainly nothing in the facts presented in the bill requiring so stringent an application of the doctrine. As before intimated, there does not appear to have been any unfairness, much less fraud, in the purchase of the property in question. It was sold at its fair value, and its proceeds applied to the payment of the debts owing by the estate. But, if the facts presented warranted the implication that Barr, the purchaser of the property, can be viewed as having acquired merely a trust estate, the inquiry may properly be made, to whose benefit did the trust inure? The estate of the decedent Bailey was insolvent, and paid only fifty cents on the dollar of the debts owing. It would seem, therefore, that his heirs could have no possible interest in the sale and disposition of his estate, as there is no pretense that in any event there would have been any surplus for distribution after the payment of the debts. If, therefore, there is any ground of complaint against the administrators, it should be urged by the creditors, and not by the heirs of Bailey. But the creditors are not parties to this bill and ask nothing at the hands of this court. And this is a full answer to the prayer of the bill, so far as the equities of the heirs are concerned. The case of Chronister v. Bushey, 7 Watts & S. 152, is cited as sustaining the doctrine that it is the right of the heirs to impeach a sale by an administrator or executor, even where the estate is insolvent. In that case, however, the property purchased belonged to the estate of which the administrator was the representative. It was, in fact, a sale by the administrator, and of which he had the entire control, and there were facts in the case justifying the inference of fraud on the part of the administrator. It was possible, that if the sale had been fairly made and the property sold at its full value, there might have been a residuum for the heirs. The court held, therefore, that as the heirs had a remote or contingent interest in the sale, it was competent for them to impeach it without the interposition of the creditors of the estate. It is not necessary to inquire into the correctness of the decision in the case referred to. The facts in that case have no analogy to those in the case before the court, and the law as sanctioned by the Pennsylvania court has no application to this case.

Regarding the reasons stated as conclusive against the right of the complainants to the relief sought for, the demurrer is sustained and the bill dismissed. It is not therefore necessary to inquire or decide whether the complainants are barred by the statute of limitations or the lapse of time.

Case No. 12,699.

SHAKERLY v. PEDRICK.

[Crabbe, 63.] [1]

District Court, E. D. Pennsylvania. Jan. 4, 1837.

SEAMEN — LEFT IN FOREIGN HOSPITAL — WAGES.

If a seaman be left in a foreign hospital, sick, and, on his cure, rejoins the vessel, he is entitled to his wages at the rate originally contracted for, where no new contract is shown, and notwithstanding the master has complied with the requirements of the act of 28th February, 1803 [2 Stat. 203].

[Cited in Callon v. Williams, Case No. 2,324.]

This was a libel for wages [by Robert M. Shakerly, mariner, against Silas Pedrick, late master of the brig Latona].

It appeared that the libellant shipped on board the brig Latona, at Philadelphia, on the 23d November, 1834, for a voyage to Buenos Ayres and Montevideo, and back, at thirteen dollars per month; that at Buenos Ayres he became sick, and was removed to the hospital; that the captain paid to the consul there three months' wages, as required by the act of 28th February, 1803 (2 Story's Laws, 883); that, on the libellant's being discharged from the hospital, cured, he rejoined the brig at Montevideo; that he remained on board, doing his duty, till her arrival at Philadelphia, on the 28th May, 1835; and that, on demanding his wages, they were refused him, on the ground that his return to the brig was under a contract to work his passage home, in consideration of the money paid to the consul on his account. This suit was an amicable action, entered by agreement filed on the 21st September, 1836.

The case came on for a hearing on the 16th December, 1836, before Judge HOPKINSON, and was argued by Mr. Grinnell, for libellant, and Mr. Clarkson, for respondent.

No new contract was shown.

On the 4th January, 1837, HOPKINSON, District Judge, decreed for the libellant the whole amount of wages demanded and costs.

SHAKESPEARE, The (LEAVIT v.). See Case No. 8,167.

[1] [Reported by William H. Crabbe, Esq.]

Case No. 12,700.

The SHAKSPEARE.

[4 Ben. 128.] [1]

District Court, E. D. New York. April, 1870.

COLLISION—SAILING VESSELS—PORTING IN IGNORANCE—CHANGE OF COURSE IN EXTREMIS—LOOKOUT—LIGHTS.

1. The schooner A. was off Barnegat, close-hauled on her starboard tack, heading southwest by south. The ship S. was free on her port tack, heading northeast by north, a little to the windward of the schooner. She ported her helm. The schooner starboarded hers, and the vessels came together nearly at right angles, the ship striking the schooner on the starboard side. The night was not very dark. The lights of the ship were placed abaft her mizzen rigging, so as to be obscured from the vessel approaching ahead: *Held*, that the real cause of the collision was a negligent lookout on the ship, and the wrongful porting of her helm in a moment of alarm, before the course of the schooner was known;

[Cited in The Alberta, 23 Fed. 811.]

2. The starboarding of the schooner's helm was a movement in extremis, and was not a fault;

3. The position of the ship's lights was faulty;

4. It was not a fault in the schooner to have her chief mate on the lookout, it being his watch at the time.

These were libels filed by the owners and the master of the schooner Adelaide, to recover the damages occasioned by a collision between her and the ship Shakspeare, which occurred on the night of January 4, 1870, off Barnegat. The libellants alleged that the schooner was going down the coast, with the wind west or west by south, closehauled and heading southwest by south; that the ship was seen coming up the coast with a free wind, and heading northeast by north, but to the right of the schooner, and soon after she was seen she began to change her course more to the eastward; that the schooner kept her course till the vessels were about a hundred yards apart, when her helm was put a starboard, a collision being then inevitable, and the ship struck the schooner amidships on the starboard side. On behalf of the ship, it was alleged that the ship was heading northeast by north, with the wind about west northwest; that the schooner was seen approaching and about a mile distant, and the ship's helm was at once put hard-a-port, and kept so till the collision, and the ship fell off so that, at the collision, she was heading about east by south; that as soon as the ship had begun to fall off, the red light of the schooner came in sight, no light having been visible till then, and remained so till it bore three or four points on the port bow of the ship, and distant about two hundred and fifty feet, when suddenly the schooner put her helm hard-a-starboard, and attempted to cross the ship's bows, and the collision occurred.

Wm. D. Booth, for libellants.

C. M. Da Costa, for claimant.

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

BENEDICT, District Judge. I have examined, and weighed with much care, the evidence produced before me, in regard to the collision which has given rise to these actions, and feel well satisfied as to what should be the decree.

There are, undoubtedly, statements of fact made on both sides which cannot be reconciled; and when they are such as to be inconsistent with other and controlling circumstances appearing in the case, I must disregard them, and rest my decision upon what I consider to be the reliable portion of the evidence. It is noticeable that the account of the accident put forth in the answer of the ship, is plainly incorrect. The case there stated is an impossible one. If, as the answer says, and as the master of the ship positively swears, the ship's helm was put hard-a-starboard, when the schooner was nearly a mile distant, and approaching end on, the ship then going free at a speed of seven knots, and the schooner closehauled at a speed of five knots, no collision could have occurred. But the vessels did, in fact, come together at right angles, the schooner being at the time some three points off her course, and the ship six points off hers. The difficulty in the case of the ship, which the answer discloses, is not diminished when the evidence of those on board the ship is examined; on the contrary, it is found that, while attempting to prove the case set up in the answer, and sustaining it, so far as positive statement can go, the witnesses for the ship furnish corroborative evidence in support of the account which is given by those on board the schooner. Evidence given by the pilot of the ship, for instance, makes it quite apparent that the ship was to windward of the schooner; and would have passed the schooner in safety, if, before giving any order to change the course of the ship, the schooner had been carefully observed and her course ascertained.

It is also quite manifest, from what is disclosed to have taken place on board the ship, that the schooner was not seen at the distance of a mile, as the witnesses would have it believed, nor until she was very close at hand; and that the helm of the ship was then put hard aport, on the alarm given by those forward, and not upon any judgment as to the proper manœuvre to adopt under the circumstances, formed on observation of the course of the approaching vessel. Furthermore, the mode in which the vessels came together—the ship heading east by south, as she says, and striking the schooner, as she did, abaft the fore rigging—on the starboard side, at right angles, or bearing a little ahead, while it is consistent with the theory of the schooner, is inconsistent with the account given by those on the ship. These circumstances, and inconsistencies which are found in the evidence of those on board the ship, impel me to resort to the statements of those on board the schooner,

as furnishing the more reliable account of the occurrence. The account given by the mate of the schooner is clear and positive. It is supported by the man at the wheel, and to some extent by the master, who came on deck on hearing the order to starboard, and it appears to furnish the more probable explanation of what took place.

I have little hesitation, therefore, in coming to the conclusion, that the action of the schooner in starboarding was taken at the last moment, and was not a fault which should render her responsible for the collision which almost instantly ensued, but that the real cause of the collision was a negligent lookout on the ship, and an improper movement on her part, in porting before the course of the approaching vessel was known, whereby the ship was thrown across the course of the schooner, which otherwise would have passed to leeward in safety. I do not deem it necessary to add more to what I have said, except to remark that the fact that the ship had her side lights placed abaft the mizzen rigging, and so located as to be obscured from a vessel approaching ahead, was negligence, which, while it accounts for the fact that the ship's course was not discovered sooner than it was by the lookout of the schooner, would also render the ship responsible for the schooner's starboarding, when she did, if that were found to have been a wrong manœuvre.

I should also say, that I do not consider it a fault on a vessel of the class of this schooner, to have her chief mate stationed forward on the lookout, notwithstanding it was at the time his watch on deck. Absence of the lookout from a station forward, and attention to other duties inconsistent with keeping a careful watch for approaching vessels, would, of course, be a fault; but the fact that the chief mate placed himself on the lookout, and the seaman at the wheel, when it is shown, as it is here, that he in time saw the approaching ship, and from his place forward gave his order to the wheelsman, as soon as he could determine the necessity of change, shows a proper lookout on board the schooner.

The decree must be in favor of the libellants, with an order of reference to ascertain the amount of the loss.

SHALER (BRAMHALL v.). See Case No. 1,805a.

Case No. 12,701.

In re SHANAHAN et al.

[6 Biss. 39.] [1]

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

BANKRUPTCY — SOLVENT PARTNER — PARTNERSHIP ASSETS—GUARANTOR.

1. A solvent partner has no right to the possession of partnership assets in the hands of an assignee under an adjudication against the remaining members of the firm.

2. A person guarantying the notes of a firm, and contracting for an interest in the firm property after payment of its indebtedness, takes subject to the rights of the creditors, and the crediting up by the firm to each member of his interest, does not affect the rights of the creditors in the fund in the hands of the assignee.

3. If these guarantied notes are unpaid and proved against the estate, the court will take judicial cognizance of that fact as negativing the solvency of the guarantor.

In bankruptcy.

Dent & Black, for Wm. J. Manning.

McClellan & Hodges, for Assignee.

BLODGETT, District Judge. In the matter of Shanahan & West, I am prepared to dispose this morning of the question raised upon the petition of William J. Manning to have the funds in court paid over to him, and the proceeds in the hands of the assignee ordered into his hands, on the ground that he is the solvent partner of the firm. The petition sets up in substance that Edward Shanahan, James West, and the petitioner, were partners under the firm name of Shanahan & West; that some time in February, 1873, some four months after the partnership was formed, and after Manning had become a member of the firm, and invested with all the rights of an equal owner in the property, Shanahan filed a petition to have the firm adjudged bankrupt; that that petition was subsequently amended so that Manning's name was stricken out, and the petition stood as a petition to have Shanahan & West adjudged bankrupts, they having been former co-partners before Manning became a member of the firm; and that such proceedings were had that Shanahan & West were adjudged bankrupts, Manning being dismissed from the case. He now claims that he is solvent, and that, as the surviving solvent member of the firm, he is entitled to have the assets of the firm delivered over to him for the purpose of closing up the affairs of the firm and paying its debts. The answer of the assignee in bankruptcy of Shanahan & West, sets up in substance that Shanahan & West were co-partners in business in this city for a considerable time prior to the first of January, 1873, and that, as such co-partners, they contracted a large amount of indebtedness; that in the latter part of October, 1872, or first of January, 1873, they took Manning into partnership under an article of agreement by which he was to become an equal partner after the payment of the debts of the firm of Shanahan & West; and the answer then avers that the indebtedness of Shanahan & West still remains unpaid; that they have been adjudicated bankrupts by reason of that indebtedness, and that an assignee is now in the possession of their estate for the purpose of paying their indebtedness. He denies that Manning is solvent, and denies that

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

Manning is entitled to the possession of the goods, by reason of anything set up in his petition.

I do not see that the replication raises any material facts. It is but a reiteration of the oft-repeated allegation that Manning is solvent. Assuming the allegation to be true, for the purpose of this case, the articles of co-partnership between himself and Shanahan & West, provide as follows:

"In consideration that William J. Manning do assume and indorse the notes of the said Shanahan & West, at seventy cents on the dollar, in accordance with the settlement recently made by said firm with their creditors, the said Edward Shanahan and James West hereby agree to give said Manning an equal interest with them in the assets of said Shanahan & West, after paying the indebtedness of said firm."

That is the language and that is the contract by which Manning claims to have acquired the right to have these assets now turned over to him. The very terms of the contract are that he gets no rights except such as shall remain after the payment of these debts. Now the court must take notice that the debts of Shanahan & West remain unpaid. They have been proven in bankruptcy here before the court, in all the forms in which it is necessary for the creditors to represent themselves for the purpose of showing that their debts remain unpaid. It seems to me an assumption on the part of Manning that is totally unwarranted by the contract, that he has any right to these goods, except subject to the debts of Shanahan & West. Shanahan & West have been adjudged bankrupts, and it seems to me there can be no doubt but that Shanahan & West's contract with Manning for an interest in their goods, even if it had not been so limited by the agreement, must be taken subject to the rights of their creditors in those goods. They could not, in other words, have made a conveyance of one-third interest in those goods to Manning, so as to defeat their creditors of their right to have their pay out of these goods. These goods, therefore, having come into the possession of this court through its proper officer, it seems to me that they, or the proceeds of them, must remain in the hands of the court for distribution to the creditors of Shanahan & West. And it will be a question, perhaps, to be considered hereafter, if any creditor of Shanahan, West & Manning prove a debt, or attempt to prove a debt, as to how far he should be allowed to participate in this fund. But I am not prepared to concede the position taken by the counsel for Manning in this case, that he, because he is the solvent partner, is entitled to the possession of these goods.

I do not think that the case is analogous to that of the decease of the other members of the partnership, although some courts have used the expression that it is the financial death of the partners. The goods form a trust fund for the payment of co-partnership debts, and the party in possession of them, whether he be the assignee of Shanahan & West, or whether he be a solvent partner, is equally bound to execute that trust, and I do not think that the fact that one of the partners of the firm remains solvent while the others are insolvent, would entitle him to take goods out of the possession of the bankrupt court, if they are in its possession. It might be a reason why the solvent partner should not deliver up goods which he had in his possession at the time that the adjudication was made, because it might be equally his duty to execute the law by applying the proceeds of the goods in his possession to the payment of the debts, but the goods that come into the possession of the court through its proper officer, it seems to me, should remain in the posses sion of the court for the purpose of executing the trust with which those goods are charged. In this case, however, there is no use in considering that proposition, because Manning took his interest in this stock of goods subject to the debts of this firm, and if the debts absorbed the full amount of the goods, then there was nothing for him to take. He took nothing but the residuum. It is still further urged on his part that, on the first of January, they credited up to each of the partners their respective interests in the firm, and that therefore his rights have become vested. Now this is not a question of bookkeeping. The mere fact that the firm sits down and credits to its respective members their respective interests in the assets of the firm, does not deprive creditors of their rights to be paid out of the funds as an entirety. They cannot separate it by any of the tricks of bookkeeping so as to defeat the rights of creditors, and therefore the assertion in the petition that these goods were credited up on the first of January, one-third respectively to each of these partners, does not prove or tend to prove that Manning acquired any interest as against the creditors of Shanahan & West. The answer in this case shows that the debts of Shanahan & West remained unpaid; these debts were due at the time Manning attempted to acquire an interest in this firm; and it seems so clear to me as not to be open to argument, that until these debts are paid, without reference to the contract, Manning can acquire no right by purchase which will defeat those creditors of their right to have the proceeds of goods applied to the payment of their claims, whether they are found in Manning's hands, or in the hands of the other bankrupt co-partners. The petition will therefore be dismissed.

[See Case No. 9,040.]

SHANE (SMITH v.). See Case No. 13,105.

Case No. 12,702.

The SHAND.

[10 Ben. 294.] [1]

District Court, S. D. New York. Feb., 1879.

SHIPPING—DAMAGE TO CARGO—PERIL OF THE SEA—NEGLIGENCE—BURDEN OF PROOF—DUTY OF MASTER.

1. A ship took on board at Manila a large quantity of mats of sugar, to be brought to New York, under bills of lading containing the usual exception of perils of the sea. On the voyage she met with heavy weather and sprung a leak so that, after having jettisoned a part of her cargo, she arrived at her dock with ten feet of water in her hold, her crew having become so worn out by labor that after she had passed quarantine a gang of fresh men was sent to her, who were, however, able to control the leak with the ship's pumps. The consignees of the ship at once agreed with the owner of a steam pump and the pump was put on board the ship, and by the next morning the water in the ship had been pumped down as far as the suction pipe of the steam pump reached, which was just about at the bottom of the sugar. During the following day, the pump, which was in charge of an engineer and fireman employed by its owner, was worked at intervals as the water rose high enough to reach the suction pipe. The discharge of the cargo had been commenced and continued during that day. During the following night, none of the ship's officers or crew being on duty, the steam pump stopped working, and the water again flooded the lower hold where the sugar was stowed. The consignees of the sugar filed a libel against the ship, claiming to recover damages for a failure to deliver the sugar in like good order as when received, as she had contracted in the bills of lading to do; and the owners of the ship set up as a defence that the damage was occasioned by peril of the sea. *Held*, that, the leak being shown to have been a peril of the sea, the ship had made out her defence as to the cargo jettisoned, and as to the sugar washed out by the leak and the injury caused by the leak to that which remained, up till the time when the water was first pumped out of the ship by the steam pump.

[Cited in The Sloga, Case No. 12,955; The Chasca, 23 Fed. 160.]

2. The duty of the ship, on arriving at the dock, was to use whatever extraordinary means were accessible to prevent further injury to the cargo; and that the employment of the steam pump was an act of the master, in performance of that duty, and not an act of the master as agent of the cargo in extraordinary peril.

[Cited in The Charles J. Willard, 38 Fed. 762.]

3. The persons working the steam pump were therefore the agents of the ship and not agents of the owners of the cargo.

4. The ship, therefore, was responsible for the proper performance of duty by those in charge of the steam pump.

5. Although the original leak was a peril of the sea, the owners of the cargo, having shown that the leak could have been controlled by the use of means which were available, and that such leak had not been controlled, had made out a case of negligence on the part of the ship.

6. The ship, having failed to give any explanation of the stoppage of the steam pump on the night in question, was liable to the owners of the cargo for all the loss and damage to the cargo which arose from the flooding of the ship on that night.

7. The ship was liable for all the loss of sugar occasioned by the suction pipe being so short that the water must rise on the cargo in order to be within reach of the pump.

In admiralty.

R. D. Benedict, for libellants.

T. E. Stillman and W. A. Butler, for claimants.

CHOATE, District Judge. This is a libel by the Donner & De Castro Sugar Refining Company, the owners of part of the cargo of the ship Shand, against the ship and her owners, to recover damages on account of her failure to deliver her cargo in good order and condition, pursuant to the stipulations of her bills of lading. She shipped at Manila, among other goods, 34,742 mats of sugar, weighing about 2,430,940 pounds, and sailed from that port for New York on the 1st day of August, 1876. The sugar was stowed in the lower hold and properly stowed, and dunnaged. It was shipped under bills of lading which acknowledged its receipt in good order and condition, and stipulated for its delivery in New York in like good order and condition, "all and every the dangers and accidents of the seas and navigation of whatsoever kind excepted." The ship delivered in New York only 31,663 mats weighing about 1,008,865 pounds. As to the 3,079 mats not delivered it appeared that they were jettisoned at sea; and the loss of weight in the mats that were delivered was about 1,206,545 pounds. And for this failure to deliver and this loss of weight the suit is brought. The libel charges "that the said ship and her owners have failed to keep and perform the contracts in said bills of lading contained or to deliver the said sugars in conformity therewith; but on the contrary, by reason of carelessness and negligence on the part of said ship and her owners, and their servants or agents, a large part of said sugars were totally lost and a large portion of the remainder delivered in a damaged condition." The answer alleges that part of the sugar was necessarily jettisoned to save the ship and cargo and the lives of those on board, and that all the sugar which was lost or destroyed or jettisoned or which was not delivered was lost, destroyed or not delivered solely from the causes excepted in the bills of lading, and not from any fault, negligence or carelessness on the part of the ship and her owners, or their servants or agents. The answer further alleges in excuse of the damage to the cargo that the ship sprung a leak on the voyage, by reason of violent storms and stress of weather, and that the damage was the result of this leak.

The proofs are sufficient to show that when the ship left Manila she was tight, staunch and strong. It is true that no evidence is given of any survey or examination made before her sailing, nor of any survey or examination of her hull after her discharge in New York to account for or to show the nature

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

and position of the leak which she undoubtedly had in her upon her arrival; but the uncontradicted testimony of her master and mate as to her condition, and the fact that she was several months at sea and encountered considerable rough weather before a leak of any importance appeared, and that the leak did appear only after she met with very tempestuous weather, sufficient to account for the injury to a good ship, are clearly proof enough that she was seaworthy at the time of her sailing. The proofs also are sufficient to show that the circumstances of danger under which part of the cargo was jettisoned were such as justified the act, and that it was done under reasonable apprehension on the part of the master that the ship might founder, and for the purpose of checking the leak and for the safety of all concerned. As to that part of the loss, therefore, the defence is clearly made out and the libellants have no claim.

From the time the ship was off Cape Hatteras she encountered very heavy weather and the crew were kept constantly at the pumps, and even after the jettison of part of the cargo the leak continued. On the night of the 25th of December, 1876, she took the pilot, being then about sixty miles S. S. E. of Sandy Hook. She came to anchor at quarantine about midnight of the 26th. Her crew were exhausted with constant working at the pumps. The captain and the pilot had thought it necessary to call to their assistance two tugs to bring her in, and they had done so. From quarantine the master telegraphed to the consignees of the ship, Grinnell, Minturn & Co., of New York, for a fresh gang of men to work the pumps. At 5 o'clock in the morning of the 27th and again at 8½ o'clock, the pumps were sounded. At the first sounding they found nearly nine feet of water, and at the second sounding within an inch of ten feet. The depth of the hold from the platform on which the sugar was stowed, to the deck beams, was eleven feet and seven inches, and from the bottom to the platform, three feet and four inches. The ship left quarantine about noon on the 27th, and soon after leaving, took on board a fresh gang of men to work the pumps, and from the time they arrived they were able to control the leak with the ship's pumps. She arrived at Martin's stores shortly after noon of the 27th of December, with ten feet of water in her hold. There is considerable conflict of testimony as to the amount of water in the ship before her arrival at quarantine. The pilot, testifying from his recollection as to the behavior of the ship, and from his apprehensions lest she should founder, and also from his recollection as to the reports of the soundings, makes the depth of water eleven feet on the afternoon of the 26th, and six feet at five in the morning of that day; but he is evidently mistaken as to the amount, as appears by the log and the testimony of the master and mate. The captain testified to the correctness of the entry in his log, which shows that on Wednesday, the 27th of December, they sounded and found six feet four inches. He says this was very early in the morning and that there was no time before that when they had so much water in her as that. The evidence shows that the water had been gaining in consequence of the exhaustion of the crew, till it reached a maximum of about ten feet, and that the leak was such that fresh men at the ship's pumps were able to hold it in check.

That a very considerable damage to the cargo of sugar had been done by sea water at the time of the ship's arrival at the pier is very evident. A large part of the sugar had been submerged in the water for nearly twenty-four hours, and this must have resulted in great wastage of the sugar. It is claimed by the libellants that the evidence does not warrant the conclusion that before Wednesday the water ever rose higher than the bottom of the cargo. But even that quantity of water, with the ship rolling and tossing in a heavy sea, must have very seriously wet and washed the sugar in the lower part of the ship. As soon as possible after her arrival at the pier, the consignees of the ship, upon the master's report and application for aid, engaged the Coast Wrecking Company to send a steam pump, with sufficient men to work it, to the ship. This was done, and about eight or nine in the evening, the steam pump was got to work and worked continuously till three o'clock the next morning, when the pump sucked, having reduced the water to three feet and four inches, which was as low as its suction pipe reached. After the steam pump was got working the ship's pumps were stopped.

For all the loss and damage to the cargo by the salt water up to the time that the ship was thus pumped out by the steam pump, the libellants have no claim against the ship and her owners. The cause of the injury was a peril of the sea, and upon the most rigorous rule of diligence which has ever been enforced against the ship or the master in the effort to resist and overcome the effect of the threatened danger, this ship and her master and crew had up to that time discharged their entire duty to the cargo. They had used their utmost endeavors to protect the cargo from the threatened peril.

The discharge of the cargo was commenced on Wednesday. Manila hemp and indigo and canes from between decks, shipped to other parties, were first discharged. The stevedores worked all Wednesday night. On Thursday the steam pump was kept going at intervals, pumping till it sucked and then pumping again as the water rose. On Thursday a considerable quantity of sugar was discharged. They worked till five or six o'clock in the evening. A special permit had been obtained from the custom house, allowing the discharge of this cargo more rapidly than is usual on account of its condition. The cus-

tom house interposed no restriction whatever on the rapidity of the discharge or its continuing day and night, week days and Sundays. When the men quit work on Thursday evening, there were on board, of the ship's company, the captain, the mate, the second mate, carpenter, cook, steward, one able seaman and three boys. The evidence shows, I think, that the mate afterwards left the ship to sleep on shore and did not return before four o'clock Friday morning. A night watchman came on board during the evening, but whether he remained on board all night did not appear. The steam pump was in charge of an engineer named Johnson, and other men, how many does not appear. The captain turned in between eight and nine o'clock and none of the ship's company remained on deck. During the night the steam pump stopped. It failed to keep the ship clear. The cause of the failure does not appear. The weather was very cold but there is no evidence which justifies the conclusion that it was the cold that disabled the pump, or indeed that anything disabled it. There is proof of a conversation in the morning between the engineer and the mate, in which the engineer complained that it was out of order. The evidence is that it was a good and suitable pump, and that the men who were manning it were men who had experience in that work. In the morning it was found that it had failed to keep the ship clear. The lower hold where the sugar was stowed was flooded. . The water had risen higher among the mats of sugar than it had ever been before. See The Shand, 4 Fed. 925. Neither the engineer nor the men in charge of the pump, nor the watchman were called as witnesses, and no attempt has been made to explain why or how the accident happened. No alarm was given during the night. The captain was not called nor notified that the pumping had stopped. After the discovery was made in the morning, the steam pump was started again and the ship was pumped out and thereafter kept pumped out as before. For the loss caused by this flooding on the night of the 28th of December, the libellants claim damages. That there was a very large wastage of the sugar from this cause, which is not to be attributed to the effect of the water in her before she was first pumped out, is very evident. The claimants, however, insist that this loss and damage as well as the other is to be attributed to the same peril of the sea; that it was caused by the leak in the ship, which was a continuing peril of the sea; and they claim as to this particular part of the loss that the same having been caused by a peril of the sea, the burden is on the libellants to show that the ship has been guilty of negligence in not guarding against the peril; that such negligence has not been shown; on the contrary, that it is affirmatively shown that the master did all that could have been reasonably required of him under the circumstances of the case; that he employed proper and efficient means to keep the ship clear of water; that having done that, he was not chargeable with negligence if those means became ineffectual through the fault or negligence of those in charge of the steam pump. It is further claimed on the part of the owners of the ship, that the master in employing the steam pump was not acting merely as the agent of the ship, but in a case of necessity and distress as agent for all concerned, cargo as well as ship, and that being the agent of the libellants in thus employing the pump and those in charge of it, they cannot recover of the ship for a loss resulting from the negligence of the libellants' own agents. It is further claimed that the Coast Wrecking Company in this service acted as salvors; that ship and cargo were in imminent peril, and that the service rendered by the Coast Wrecking Company was in fact a salvage service and if through the negligence of the salvors a loss happens to the cargo, its owners have no remedy against the ship.

Assuming that the leak in this ship was caused by a peril of the sea and that this loss now in question resulted from the same leak, the question is, what is the duty of the ship in protecting the cargo against a peril of the sea which threatens its safety, or, which is the same thing, against damage, which threatens to result from an injury to the ship caused by a peril of the sea. The duty of the ship to the owner of the cargo, in this respect, has been so conclusively determined in this country that it is necessary only to quote the language of the supreme court in the case of The Niagara v. Cordes, 21 How. [62 U. S.] 7. In that case the court say (page 26): "Carriers by water are liable at common law and independent of any statutory provision for losses arising from the acts or negligence of others, to the same extent and upon the same principles as carriers by land—that is to say, they are in the nature of insurers and are liable, as before remarked, in all events and for any loss however sustained, unless it happen from the act of God, or the public enemy, or by the act of the shipper or from some other cause or accident, expressly excepted in the bill of lading. Duties remain to be performed by the owner or the master as the agent of the owner after the vessel is wrecked or disabled, and after he has ascertained that he can neither procure another vessel nor repair his own, and those too of a very important character, arising immediately out of his original undertaking to carry the goods safely to their place of destination. His obligation to take all possible care of the goods still continues and is by no means discharged or lessened, while it appears that the goods have not perished with the wreck and certainly not where, as in this case, the vessel is only stranded on the beach. Such disasters are of frequent occurrence along the sea coast in certain seasons of the year, as well

as on the lakes, and it cannot for a moment be admitted that the duties and liabilities of a carrier or master are varied or in any manner lessened by the happening of such an event. Safe custody is as much the duty of a carrier as conveyance and delivery, and when he is unable to carry the goods forward to their place of destination, from causes which he did not produce and over which he has no control, as by the stranding of the vessel, he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight, skill and prudence. An effort was made by able counsel in King v. Shepherd [Case No. 7,804], to maintain the proposition assumed by the respondents in this case that the duties of a carrier after the ship was wrecked or stranded, were varied, and therefore that he was exempted from all liability, except for reasonable diligence and care in his endeavors to save the property. Judge Story refused to sanction the doctrine and held that his obligations, liabilities and duties as a common carrier still continued, and that he was bound to show that no human diligence, skill or care, could save the property from being lost by the disaster. Anything short of that requirement would be inconsistent with the nature of the original undertaking and the meaning of the contract, as universally understood in courts of justice. Admit the proposition, and it is no longer true that where there is no provision in the contract of affreightment, varying the liability of the carrier, he cannot relieve himself from liability for injuries to goods entrusted to his care except by proving that it was the result of some natural and inevitable necessity, superior to all human agency, or of a force exerted by a public enemy." The contract of carriage in the present case, by the bill of lading, is an absolute promise to carry and deliver in good order and condition, the perils of the seas only excepted, and no distinction can be made nor do the learned counsel for the claimants attempt any between this case and the case of a common carrier, as respects the duty of the ship or master to protect and preserve the cargo. And indeed the evidence shows that the Shand was on this voyage a general ship. And clearly if the duty of the ship in this respect is not varied nor lessened in case the vessel is wrecked or stranded, it cannot be varied or lessened because she has sprung a leak which threatens the cargo with damage. And on this subject the supreme court further says (page 28): "His duties as carrier are not ended until the goods are delivered at their place of destination or are returned to the possession of the shipper or kept safely until the shipper can resume their possession, or they are otherwise disposed of according to law. King v. Shepherd [supra]; Abb. Shipp. (8th Ed.) 478. These authorities are sufficient, it is believed, to demonstrate the proposition that where a loss or damage is shown it is incumbent upon the carrier to bring it within the excepted peril in order to discharge himself from responsibility. It is not sufficient without more to show that the vessel was stranded, to bring the goods within the exception set up in the case. Had the goods perished with the wreck, it would be clear that the loss was the immediate consequence of the stranding of the vessel, and assuming that the disaster to the vessel was the result of the excepted peril, or of some natural and inevitable accident, then the carrier would be discharged. All the evidence in this case, however, shows the facts to be otherwise—that the goods did not perish at the time the steamer was stranded, and the damage having since occurred, the rule of law to be ascertained is the one applicable in cases where the injury complained of arises subsequently to the disaster to the vessel. Such interruptions to a voyage are of frequent occurrence, and the rule of law is just and reasonable which holds that the master is bound to the utmost exertions in his power to save the goods from the impending peril, as it is no more than a prudent man would do, under like circumstances. In great dangers great care is the ordinary care of prudent men, and in great emergencies prudent men employ their best exertions, so that the difference in the rule contended for and the one here laid down is much less than at first appears. Nevertheless there is a difference, and in a question of so much practical importance it is necessary to adhere strictly to the correct rule. Losses arising from the dangers of navigation within the meaning of the exception set up in this case are not such as are in any degree produced from the intervention of man. They are such as happen in spite of human exertion, and which cannot be prevented by human skill and prudence. When such efforts fail to save the goods from the excepted peril, the ultimate damage and loss in judgment of law results from the first cause, upon the ground that when human exertions are insufficient to ward off the consequences, the excepted peril may be regarded as continuing its operation." And in that case, by the application of the principles thus declared, the ship was held liable for the negligence of the master in not availing himself of the means shown to have been within his reach at a short distance from the ship on the shore for the storage and preservation of the goods, although they ultimately perished from being left in the stranded vessel. In the case of King v. Shepherd [Case No. 7,804], the owners of the ship were held liable to the shipper of specie embezzled by salvors employed by the master to save the cargo after the wreck of the ship, such a loss being held not within the exception of perils of the sea. Judge Story says: "My own opinion is, that the loss of this coin was occasioned solely by embezzlement or theft;

and it matters not whether it was by the officers or crew of the ship, or by the salvors employed by the master."

These cases, as it seems to me, are singularly applicable to the present case, and are conclusive to the point that the master was bound by the contract of affreightment, upon the happening of the disaster which befell his ship, the springing of the leak, to employ all possible means within his reach to protect the goods against the danger which the leak threatened them with,—that he was bound under his original agreement for the safe carriage and delivery of the goods, not only to employ all the resources of his ship's company to this end, but on his arrival in port, where other and more efficient aid could be procured, to employ such other means for the effectual preservation of the cargo against the consequences that might be expected to result to it from the leak; that though that leak was caused by a peril of the sea, this employment of extraordinary means to resist and control it was a duty of the master as agent and representative of the owners of the ship under their contract with the owners of the cargo, and not a duty thrust upon the master ex necessitate, as agent for the owners of the cargo. In the case of The Niagara [Case No. 10,219], the stranded condition of the vessel was a continuing peril to the cargo and was itself caused by a peril of the sea, yet the loss of the goods was not caused by the peril of the sea within the meaning of the exception, because the master could, by means at his command, extraordinary in their character, that is, means independent of and outside of the resources of his ship and his ship's company, have saved the goods from this threatened peril. So here the leak threatened damage to the goods. The master had means at hand by the employment of men and machinery to control that leak. He was bound to employ those men and that machinery, and the fact, if it be a fact, that the peril of the ship and cargo was so great that the service rendered will, on grounds of public policy, be rewarded at salvage rates of compensation, does not make the employment of these means any the less an act done by the master in the performance of the contract of the ship with the owners of the cargo. I think these authorities are sufficient to show that there is no ground for the claim that the men working the steam pump were not in the employ of the ship, or that the possible claim of the Coast Wrecking Company for salvage compensation can make any difference in the liability of the ship for the negligence of the men employed in working the pump as well as for the immediate negligence of the master, officers or crew. A ship is liable for the result of negligence, though the negligence be that of one of the crew, as in case the fault is that of the lookout. If there may be cases where the overpowering necessity for assistance is such that the master may surrender to salvors the entire control of ship and cargo, that certainly was not this case. His duty was plain. The vessel was leaking. Salt water would damage the cargo. It was his duty to keep her pumped out. The means at hand were ample. He employed men and machinery for this purpose. There is nothing in the evidence which warrants the conclusion that he in fact surrendered the care or control of the ship to the Coast Wrecking Company, or understood that he did, nor were the circumstances such as would have justified him in doing so, if he so intended. On the contrary, all that is proved is that the ship's agents hired of that company a pump and men to run it, and sent it to the ship. The pump and the men were subject to the master's orders. He could at any time have sent them away and employed other persons and other machinery, to do the pumping. I see no principle upon which the ship can be relieved from responsibility for the negligence of the persons thus employed.

As Judge Story says, in King v. Shepherd [supra]: "The rules which regulate losses under policies of insurance are by no means the same as those which either necessarily or ordinarily govern in cases of common carriers. Each contract has its own peculiarities and principles of interpretation; and it is not safe, in many instances, to reason from one to the other." So it may be said that although by the principles of general average or of salvage, extraordinary expenses incurred by the master are, under certain circumstances, a charge in part upon the cargo, it cannot be safely concluded from that circumstance that as between the master and the owner of the cargo the incurring of the expense was not the duty of the master by force of the bill of lading. General average and salvage contribution rest not on contract, but on reasons of public policy, adopted and enforced for the furtherance of the interests of commerce. The foregoing remarks dispose of the point made for the claimants, that an extraordinary exigency had arisen which threw on the master ex necessitate the character of agent of the shipper, and that in the employment of the steam pump he was acting as such agent, in support of which the learned counsel cite the case of The Gratitudine [3 C. Rob. Adm. 240–267] and other cases. The cases cited refer to the agency of the master thus created to do something with the cargo outside of that which he is already authorized to do with it by the contract of affreightment, as for instance, to sell or hypothecate it. Those authorities are not in point to show that the master is ever made the agent of the owner of the cargo to preserve and protect it. Such preservation and protection are of the very substance of the ship's contract, with the cargo owner, and therefore what the master does in that regard is done for the

ship and there is no necessity for creating by a legal fiction any new agency to authorize or require him to do this duty towards the cargo. It is obvious, therefore, that these authorities have no application to the present case.

The English cases cited show that the courts in England do not hold the ship to so strict a liability as our courts for preventing damage to the cargo from the effect of a threatened peril of the sea. In the recent case of Nugent v. Smith, 1 C. P. Div. 423, it was held that the loss or damage is caused by a peril of the sea if "by no reasonable precaution under the circumstances could it have been prevented." And singularly enough the court cites the authority of Judge Story, in support of this milder rule of liability and in opposition to the stricter rule, which, as appears above, has been adopted by our own supreme court, partly, at least, on Judge Story's authority. They quote Story, Bailm. p. 512, as follows: "Hence it is, if the loss occurs by a peril of the sea, which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be in the sense of the phrase such a loss by the perils of the sea as will exempt the carrier from liability, but rather a loss by the gross negligence of the party." And the court go on to say: "Story here speaks only of 'ordinary exertion of human skill and prudence and the exercise of reasonable skill and diligence.' In my opinion this is the true view of the matter, and what Story here says of perils of the sea applies, I think, equally to the perils of the sea coming within the designation of 'acts of God.' In other words, all that can be required of the carrier is that he shall do all that is reasonably and practically possible to ensure the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can be reasonably required of him, and if, under such circumstances, he is overpowered by a storm or other natural agency, he is within the rule which gives immunity to the effects of such vis major, as the act of God." The language here cited from Judge Story is almost identical with that used by him in his decision of the case of The Reeside [Case No. 11,657]. And the court seems not to have observed his more full and exact exposition of what he understood to be the law in this respect contained in the later case of King v. Shepherd, cited above.

But even under the English rule, it was clearly the duty of the master to keep this ship pumped out, for the preservation of the cargo, and no case is referred to which will relieve the owners of the ship from the consequences of not keeping her pumped out, if the failure to do so was the result of the negligence of those employed by the ship for that purpose. And to hold otherwise would virtually allow the master of the ship in any exigency or condition of distress, however slight, to delegate to other parties those duties which, under the contract, the ship has assumed towards the owner of the cargo, holding him only to due diligence in the choice of the agency so employed. This would be fatal to that security which the law merchant has thrown around the goods entrusted entirely to the care and custody of the ship, and to that rule of vigilance which the law, for wise reasons of public policy, has imposed upon the master and crew as the chief support of that security. It would, as it seems to me, be not only without sanction from authority, but most disastrous to the interests of commerce.

The questions raised as to the burden of proof and as to whether the libellants have sustained the burden which is upon them, are very easily disposed of, so far as this case is concerned. Where goods are carried under a bill of lading which stipulates for their delivery in good order and condition, excepting certain perils, as the perils of the sea or the act of God, proof of the failure to deliver the goods in good order throws the burden on the ship-owner to show that the damage resulted from the excepted peril. Clark v. Barnwell, 12 How. [53 U. S.] 280. If, then, it appears by the proofs offered that the damage resulted from a sea peril, this is prima facie sufficient to bring the case within the exception. Id.; Transportation Co. v. Downer, 11 Wall. [78 U. S.] 134. Therefore, where the evidence which shows that the damage resulted from a sea peril does not also show that there were available to the master means of avoiding the damage which threatened the goods, then the libellant must go further and show that though the goods perished as the result of the excepted peril, yet that there were means within reach of the master by which he could have averted the peril. Negligence is not presumed from the mere occurrence of an accident, "except where the accident proceeds from an act of such a character, that when due care is taken in its performance no injury ordinarily ensues from it in similar cases, or (except) where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control and for the management and construction of which he is responsible." Transportation Co. v. Downer, 11 Wall. [78 U. S.] 134. But there is no case which goes so far as to hold that because the goods were damaged in consequence of a sea peril any greater burden is thrown on the libellant than to show that the master had at his command the means to have averted the threatened danger. The proof of that and the further admitted or proved circumstance, that the danger was not averted, is evidence from which the presumption of negligence in the use of those means at once arises. It is, unexplained, sufficient proof of negligence. The presumption is of the same

general character as that presumption of negligence which arises in the first instance upon proof of the failure to deliver the goods in an undamaged condition. The cases relied on by claimants to sustain their position that the libellants should have gone further and affirmatively proved that the pump failed through the negligence of the engineer or those in charge of it, are not in point. They are cases where the loss was shown to be ultimately traceable to a peril of the sea and where the evidence disclosed no available means on the part of the ship to have averted the danger to the goods. Now in the present case it appears that the means at the master's command were ample. The ship's pumps were sufficient for that purpose, if properly manned. He undoubtedly had a right to use the steam pump in place of the ship's pumps if he chose to do so, but having employed this new agency he was bound by the same rule of vigilance that governed his whole conduct toward the cargo, to see to it that the pump was efficient and properly used. There certainly is no presumption that the stoppage of the steam pump was caused by an inevitable accident. And the failure to call the engineer or others in charge of it, to explain the fact, is fatal to the supposition. It must be assumed that their testimony would not aid the claimants. But if the steam pump did break down, the duty of the master was equally plain to put the ship's pumps at work at once. His ship's company, reduced as it was, consisted of ten men and boys, and the men in charge of the steam pump were at his service. The danger could thus have been wholly or partially averted until further help could be obtained. Thus the libellants have clearly made out a case of negligence in the failure to keep the ship pumped out, and for all damage to the cargo resulting from the ship being flooded on the night of the 28th of December they are entitled to recover.

A further claim is made by the libellants for damage to the cargo by the exposure of the bottom of the sugar to the water, in consequence of the suction pipe of the steam pump not reaching lower than the platform. All the time that the ship was discharging and while the steam pump was at work the water was necessarily allowed to rise somewhat above the point reached by this pump to enable the pump to work. Upon the proofs, I think it appears that some small part of the lower portion of the sugar was thus constantly being alternately submerged and drained of water. This process necessarily carried off more or less of the sugar, and for this damage the ship is clearly responsible. No excuse or reason is shown or suggested why the pipe was not lengthened or why the ship's pumps, which reached this water, were not employed to pump it out, if there was any difficulty or necessary delay in properly adjusting the steam pump. The claimants insist that the loss attributable to this cause is too trifling to be charged against the ship, but the negligence being entirely clear the amount of the damage is not material. Whatever loss ensued from this cause the ship is liable for.

A further claim of damage is made in consequence of delay in delivering the cargo. The delivery stopped at some time on Saturday, December 30th, and was not resumed until Wednesday, January 3d. The cause of the stoppage was that the ship became crank, and the ballast which the consignees of the ship had intended to put on board for the outward voyage was not at hand on Saturday, and owing to the intervention of Sunday and New Year's day and the severity of the weather, the ballast was not got to the ship till Tuesday afternoon, although when it was discovered that the ship was getting crank some efforts were made to hurry it up. The effect of the delay was to increase to some extent the necessary loss by drainage of this mass of wet sugar. That the ship owner owes some duty to the owner of the cargo in the preservation from further loss of goods already damaged by a sea peril is unquestionable. Notara v. Henderson, L. R. 7 Q. B. 225. There is nothing unlawful or in the view of the maritime law improper in the delivery of cargo on Sunday or festival days, especially where such delivery is necessary to avert loss. Richardson v. Goddard, 23 How. [64 U. S.] 28. And although a carrier seems not to be held generally to more than reasonable diligence as respects the time of delivery (Briddon v. Great Northern Ry. Co., 28 L. J. Exch. 51), yet it seems but reasonable that the delivery should be continued on Sundays and holidays if thereby any considerable damage to the goods would be averted. But where the owner of the goods is at hand and knows the circumstances and no request to do this is made, it may be doubted if the ship is chargeable with negligence from this cause. It seems, however, unnecessary at this stage of the case to determine these questions, or the further question whether there was fault in not having the ballast at the ship on Saturday, because so far as the loss which resulted from the flooding of the ship on Thursday night was aggravated by any delay in delivery, the ship is liable for that additional loss as a part of the loss caused by the flooding, and it does not distinctly appear that the loss necessarily resulting from the original wetting of the cargo was appreciably enhanced by the slowness of the delivery. Therefore, any such question of liability may well be left till the report of the commissioner as to the amount of the damage shall disclose the fact that the question really arises.

Decree for libellants and reference to compute damages.

[NOTE. The claimants desired to introduce evidence before the commissioner to whom the case was referred, pursuant to the above de-

cree, tending to show that the water did not rise so high on the morning of the 29th as it had been previously, and an application was made to the district court for a reconsideration of this finding of fact, and to ascertain whether this question was open upon the reference. The court decided that this question was immaterial. 4 Fed. 925.

[The commissioner assessed damages at $30,328.63. For a hearing on exceptions to this report, see 16 Fed. 570.]

Case No. 12,703.

SHANKLAND v. WASHINGTON.

[3 Cranch, C. C. 328.] [1]

Circuit Court, District of Columbia. May, 1828.[2]

LOTTERIES — PART TICKET — RIGHTS OF HOLDER.

The corporation of Washington is not liable to the holder of a sub-ticket, or part of a ticket, for any part of the prize drawn by the ticket. It is only liable to the holder of the whole ticket.

[Cited in McCue v. Washington, Case No. 8,735.]

[This was an action by Alexander B. Shankland against the corporation of Washington, to recover one half of a prize drawn by a certain lottery ticket.]

CRANCH, Chief Judge (THRUSTON, Circuit Judge, not sitting). This is an action of assumpsit for money had and received, to recover one half of the amount of the prize of $25,000, drawn by ticket No. 5591 in the 5th class of the Washington lottery. The plaintiff produced the same evidence which was produced in the case of Clark v. Corporation of Washington, 12 Wheat. [25 U. S.] 40, except the ticket which drew the prize; which ticket in the present case, namely, No. 5591, was, after the drawing, given up to the managers as a cancelled prize ticket by D. Gillespie, who received from the managers, in consideration thereof, an equivalent in notes of purchasers of tickets in the lottery, which had been deposited with the managers by Gillespie as stated in Mr. Webb's deposition. The plaintiff further proved by the testimony of the same Mr. Webb, that, as clerk of the said D. Gillespie, he was in the habit of selling whole tickets, half tickets, and quarter tickets, in the 5th class of the said lottery, and that as such clerk, he sold to the plaintiff one half of the ticket No. 5591. That the said ticket No. 5591 was duly signed by the managers. The defendants waived the necessity of producing upon the trial the original ticket No. 5591, and agreed that it is in their possession, and that its form, excepting its number, is like that produced in Clark's case. Mr. Webb, after he had sold one half of the ticket, No. 5591, to the plaintiff, issued a sub-ticket in these words and figures, namely: "National Lottery—5th class. No. 5591. This ticket will entitle the possessor or to one half of such prize as may be drawn to its number, if demanded within twelve months after the completion of the drawing, subject to a deduction of fifteen per cent.; payable sixty days after the drawing is finished. Washington City, Feb. 1, 1821. ½ 5591. D. Gillespie, per J. F. Webb." It did not contain the names of the managers, nor any allusion to them; nor any evidence that, in making such sub-ticket, D. Gillespie acted as the agent of the managers, or of the corporation. It was further proved that the ticket No. 5591 drew a prize of $25,000, on the 33d day's drawing; that payment of half of the prize was, in due time, demanded at the office of the mayor of Washington, who was absent, and of the register of the city, and of the managers, all of whom refused payment. That Mr. Webb sent to the plaintiff a list of the 33d day's drawing. It was agreed that the printed copy of the scheme, given in evidence, is a true copy of the real scheme by which the lottery was drawn; and that the drawing was commenced on the 27th November, 1821, and was completed on the 2d of January, 1823. That the court shall decide what of the said evidence is admissible, and shall judge upon such as they shall decide to be admissible as if it were a demurrer to evidence, and draw all the inferences of fact which a jury could draw, and shall say what sum the plaintiff shall recover, if entitled to recover upon such evidence, and judgment shall be entered accordingly; and if the court should be of opinion that the plaintiff is not entitled to recover, then judgment shall be entered for the defendants.

Upon this evidence, supposing it all to be admissible, the court is of opinion that the plaintiff is not entitled to recover. By the by-law of 22d May, 1821, all the lottery tickets were to be signed by the president of the managers. This sub-ticket was not so signed. It purported to be the private agreement of D. Gillespie to pay to the holder thereof one-half of the prize which should be drawn by the ticket No. 5591, which Gillespie retained in his own possession. It did not bear on its face the names of the managers, nor in any manner allude to them. The advertisements, which were signed by the managers, did not authorize the sale of half tickets; nor is there any evidence that they authorized Gillespie to multiply the responsibilities of the corporation to an indefinite extent by dividing the tickets. By requiring that all the tickets should be signed by the president of the managers, they clearly intended to limit their responsibility to such tickets only as should be so signed. We think that D. Gillespie had no better right than any other person who purchased a whole ticket, to sell a share in it, and thereby make the corporation liable to such shareholder. It does not appear that the managers, at the ti they received the ticket No. 5591 from Gillespie, as a cancelled prize-ticket, knew that he had sold a share of the prize to the plaintiff, or

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

[2] [Affirmed in 5 Pet. (30 U. S.) 390.]

to any other person; and it is to be inferred that they gave up to Gillespie, in exchange for this prize, its full value in other securities which they held. They may be considered, therefore, as having paid this prize to the holder of the ticket, without notice of the plaintiff's interest therein; and therefore the plaintiff has no right to recover in this action for money had and received, which is in the nature of a suit in equity.

Upon the whole, therefore, we think that no contract, express or implied, is made out by the evidence, which will support this action.

Affirmed by the supreme court, 5 Pet. [30 U. S.] 390.

SHANKS (KLEINE v.). See Case No. 7,870.

Case No. 12,704.

SHANKWIKER v. READING.

[4 McLean, 240.] [1]

Circuit Court, D. Michigan. June, 1847.

DEPOSITION—CUSTODY—REJECTION.

1. The law requires the deposition taken under the act of congress [4 Stat. 197], to be retained by the officer, until he deliver the same into court, or shall, together with a certificate of the reasons for taking it, etc., be by him sealed and directed to the court.

[Cited in U. S. v. Tilden, Case No. 16,520.]

2. The law did not intend that either party should have possession of the deposition, until it shall be published by the special or general order of the court. A deposition not so put up and directed, will be rejected.

[This was an action by H. Shankwiker against A. Reading. Heard on objection to a deposition.]

Bates & Watson, for plaintiff.

Mr. Romeyn, for defendant.

OPINION OF THE COURT. On the trial of this case, a deposition was offered in evidence, which was taken in New York, May 29th, 1847. It was mailed at Waterloo, in that state, June the 4th, and received from the post office here, the 7th of June. The county judge certified that the deposition was reduced to writing by the deponent, in his presence, but did not state that it was retained by him until it was sealed and directed to the clerk of the circuit court. It was so directed, but by whom is not stated. The name of the case in which the deposition was taken was indorsed on the envelope. For the want of this certificate, the deposition was objected to. The act of congress provides that the depositions so taken shall be retained by such magistrate, until he deliver the same with his own hand, into the court, for which they were taken, or shall, together with a certificate of the reasons as aforesaid, of their being taken, and of the notice, if any, given to the adverse party, be by him, the said magistrate, sealed up and directed to such court, and remain under his seal, until opened in court. This act of congress, under which depositions are generally taken, without notice, has always received a strict construction. In Beal v. Thompson, 8 Cranch [12 U. S.] 70, it was held to be a fatal objection to a deposition taken under the judiciary act of 1789 [1 Stat. 73] that it was opened out of court. And in the case of U. S. v. Smith [Case No. 16,332], it was decided where the certificate of a magistrate, taking a deposition, stated it to have been written in his presence, without saying by whom, and it appeared that the substance of it had been reduced to writing by the deponent, ten days before, at a different place, when the magistrate was not present, that such deposition was not admissible in evidence. The deposition objected to, may have been handed to the party, at whose instance it was taken, who forwarded it by mail to the clerk of the court. The law did not intend that either party should have possession of the deposition, until it should be received by the clerk, and opened by the general or special order of the court. The deposition is rejected.

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

Case No. 12,705.

SHANNON v. The ANGELIQUE.

[N. Y. Times, Jan. 7, 1856.]

District Court, D. New York.

COUNSEL FEES—ADMIRALTY—PAYMENT OUT OF FUND IN COURT.

[A libel was filed by a mortgage lienholder against the proceeds of a vessel sold under decree, in suits by material men, seamen, and others, general maritime lien creditors. Had the validity of the mortgage lien against the proceeds been established, it would have absorbed the total proceeds, leaving nothing to the general lien creditors. *Held*, that the counsel who successfully resisted the claim of the mortgagees was entitled to a fee out of the proceeds. Fee of $250 awarded.]

[Cited in Re Schwab, Case No. 12,498.]

In admiralty.

BY THE COURT (BETTS, District Judge). This is an application to the court, for a counsel fee out of the funds in court to the counsel who argued this cause in this court [Cases Nos. 12,483a and 12,483b], and on appeal to the circuit court [Case No. 12,483c]. It appears that 67 separate actions had been brought for various parties, raising, as between the parties, questions as to the right of priority of payment, and all of them antagonistic to a suit or proceeding by mortgagees who claimed a moiety of the proceeds of the ship. The matter contested in the two courts related chiefly to the claim of the mortgagees. The facts do not point specifically to any extraordinary labor or investigation imposed upon the counsel, other than what resulted from the procrastination of the

cause by circumstances not incident to its trial in either court. If such was incurred, it would naturally be compensated for by the particular party calling for it, and would be no equitable charge upon the common fund. The award by order of the court out of a fund, will necessarily be more restricted than would probably be claimed and admitted between counsel and the client, because the court cannot look to the circumstance of special predilection of the parties in selecting their advocate, or his position and rate of compensation, as between himself and private clients.

I think, accordingly, that a fee not exceeding $250 for all the services of the counsel, payable to him in that capacity by the conjoined suitors, may be properly allowed, and I shall direct that sum to be paid him.

[See note to Case No. 12,483b.]

Case No. 12,706.

SHANNON v. FOX.

[1 Cranch, C. C. 133.] [1]

Circuit Court, District of Columbia. July, 1803.

EVIDENCE — PROOF OF HANDWRITING — COMPARISONS.

The handwriting of a party cannot be proved by a comparison with the handwriting of his power of attorney filed in the cause, there being no proof of the latter.

Mr. Woodward, for plaintiff, offered to prove the handwriting of Fox, by comparing it with his signature to the power of attorney filed in this cause, considering it as a matter of record.

THE COURT (nem. con.) refused to allow it, on the ground that no proof was given of the signature of the power of attorney.

Marshall, J., was absent all this term, after Tuesday, 2d of August, and resigned before the next term.

SHANNON (KEENAN v.). See Case No. 7,640.

SHANNON (SAWYER v.). See Case No. 12,405.

SHANTZ (STUART v.). See Case No. 13,556.

Case No. 12,707.

SHAPLEY v. RANGELEY.

[1 Woodb. & M. 213.] [2]

Circuit Court, D. Maine. May Term, 1846.

EQUITY—ADEQUATE REMEDY AT LAW—DISCOVERY—TO QUIET TITLE—MORTGAGES—ENTRY—RIGHT TO REDEEM.

1. This court will not interfere in equity, in a case where the parties appear to have a full remedy for their rights at law.

2. When a disclosure is sought here, and has been obtained, the party may then resort to a proceeding at law, if an ample one exists.

3. A bill of peace does not generally lie here in respect to land, unless the complainant is or has been in possession, or there is a defect in some deed, asked to be given up.

4. An entry on one piece of land to foreclose a mortgage covering several pieces in the same county and town, and in possession of the same person, is good for all.

5. A party, claiming an interest in land, who sees it conveyed to others without objecting, or giving notice of his own claim, is usually estopped from afterwards setting it up as against that conveyance.

6. Where A mortgages to B, and before the foreclosure takes effect, B agrees to receive the money at a certain day after the time of foreclosure expires, and does do it, and then by direction of A transfers his right to C, who had advanced most of the money for A, it was held, that this was not to be considered a payment and discharge of the mortgage, but a conveyance of the land after foreclosure to C. And though C, therefore, gave a writing in a few days to A to convey to him on the payment of what had been advanced by C with interest, this did not make C's title that of a mortgagee. So that it could not be extended on by his creditors, though C, on a tender to him of what was due by A, would be held strictly to a specific performance of his contract, if no rights of third persons had intervened; and might in equity be considered as holding in trust or mortgage for A, should he choose to claim it.

[Cited in brief in Newberry v. Detroit & L. S. Iron Co., 17 Mich. 157.]

7. A person, who had a subsequent deed of the separate piece of land, and assisted in the entry by B, and in the conveyance by B to C, without giving notice of his claim, and who has paid, or tendered nothing to B or C, is not entitled to redeem, or to pay the money named in C's contract with A, and have a release of the premises.

[Cited in Baldwin v. Howell, 45 N. J. Eq. 532, 15 Atl. 241.]

This was a bill in equity [by John R. Shapley against James Rangeley]. Among other things it alleged, that John Spring and Olive Spring, his wife, on the 4th of January, 1830, mortgaged to the president, directors, and company, of the Saco Bank, the mansion-house of said Spring, and several lots of land adjoining, and a three acre piece, being the same bargained to Thomas Gerrish. The object was to secure a note from Spring, to said corporation, of the same date for $6000, payable in two years with interest. The bill further averred, that on the 14th of April, 1832, Spring conveyed to Ether Shepley his right to redeem said three acre piece, and which right on the 5th of April, 1843, said Ether conveyed to the complainant. It was then alleged, that the bank on the 9th of May or June, 1833, through said Ether Shepley, their attorney, entered the mansion-house of Spring, to foreclose said mortgage, but did not go upon the three acre piece, which was near in the same town, but separate; and leaving said Spring still in possession of all the mortgaged premises. It was next alleged, that the bank, on the 30th of September, 1833, conveyed all its property in trust to Jona.

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

[2] [Reported by Charles L. Woodbury, Esq., and George Minot, Esq.]

King, George Thatcher, and Samuel Hartley, and on the last day for the redemption of the mortgaged premises, said Spring applied to King, the business member of the trustees, and offered to settle the amount due. But as most of the payment was proposed to be made by a check drawn on the Manufacturers' and Traders' Bank in Portland by David Webster, payable at a future day, it was arranged to postpone the completion of the business till that day; when the check being paid, and the balance in money, the notes and mortgage deed were the next day given up to Spring, and a release executed to said Webster, the drawer of the check, of all the premises and the rights of the Saco Bank therein. This was done at the request of Spring, and through his agency, in the absence of Webster; and the deed was drawn by said Ether Shepley, and acknowledged before him. It was further averred, that Webster, on the 18th of April, 1838, conveyed his interest in the premises to one Daniel Burnham, and he conveyed the same to Rangeley, the respondent. That Rangeley had also, on the 9th of July, 1839, extended an execution on the same for a judgment recovered by him against Webster; that the mortgaged premises, independent of the three acre piece, were worth more than the money due Webster for his advances; and after asking a disclosure on certain points, the bill prays that the three acre piece "stand discharged, redeemed, and relieved free of, and from said mortgage, and that the levy of said Rangeley on the same, may be declared to be inoperative in law, and that Rangeley may be required to release all right to your orator to said three acres, or be perpetually enjoined from selling the same to the injury of the title of your orator." The answer of Rangeley admitted most of the facts averred, and, among other things, the continued occupation of all the premises by Spring to this time; but denied that without the three acre piece, their value was sufficient to pay the amount due to Webster from Spring, and averred that the title in the whole passed to Webster from the Saco Bank, and had been attached by Rangeley in his suit against Webster, before Webster conveyed to Burnham, and was now by his extent vested absolutely in himself, Rangeley. It is not deemed important here to notice the other pleadings or the evidence in the case; but they will hereafter be referred to when material to the points on which the bill is disposed of. [See Case No. 12,756.]

George F. Shapley, for complainant.
Charles Davis and Son, for respondent.

WOODBURY, Circuit Justice. Several of the facts in this case, which are sufficient to dispose of it, seem but little controverted; and the chief difficulty is in respect to the law. The original owner of the mortgaged premises appears never to have been ejected from them; and in a suit at law against him by the complainant to recover the three acre piece, which is now in contest, his rights, if any, as against the complainant, can be fully settled; and in a like manner can those of Rangeley be, should he ever obtain possession under the suit which, by his answer it seems, he has already commenced against Spring. Why should this court then interfere, when the rights of the parties can fully be adjusted at law? Calverley v. Williams, 1 Ves. Jr. 210, 213. No mistake is averred, nor any fraud, nor misrepresentation on the part of the respondent. It is true, that a disclosure has been asked on certain points; but this has been obtained; and hence, so far as the bill may be regarded as brought for discovery, its purpose has already been answered. Nor is it here a good ground for application to us, that the complainant fears, quia timet, being disturbed by the respondent, and hence brings a bill of peace. He must first have been in possession, or have shown a better title than the respondent, or a defect in some deed asked to be given up, in order generally to justify such an application. Story, Eq. Jur. § 703 et seq.; Hamilton v. Cummings, 1 Johns. Ch. 517, 523; Devonsher v. Newenham, 2 Schoales & L. 199, 208. But considering this doubtful, were we to go at length into the other prayers of the bill, it would be difficult to find sufficient ground for granting them in any equities of the case, that are clearly established. The original mortgage to the bank embraced the three acre piece as a part of its security. The entry to foreclose, by the agent of the bank, was evidently intended to cover that piece, as well as the rest of the mortgaged premises. According to several cases, such an entry on one piece is good for all in possession of the party within the same county whenever it is so intended. Co. Litt. 253a; Green v. Liter, 8 Cranch [12 U. S.] 229, 250; Stearns, Real Act. 45; Thayer v. Smith, 17 Mass. 429, 431. It was treated like the rest in the subsequent deed of it with the rest to Webster. And it would not answer in equity to let the complainant, who stands in Ether Shepley's shoes, as his grantee, and by agreement seeks no greater rights than his grantor would have, or stands open to all the equities and law, that exist against Ether Shepley, set up in behalf of himself, that his entry for the whole, as agent for the bank, and his writing a deed for the whole to Webster, and taking the acknowledgment of it for the whole, ought now to be considered as operative only for a part. If parties, claiming an interest in lands, look on and see it conveyed, or take part in the transaction without complaint or objection, they are usually estopped in equity from afterwards setting up a title against the grantees and those holding under them. This rule rests rather on the tendency of such conduct to mislead, than on any deceit actually intended, or actually practised in each case. 1 Story, Eq. Jur. § 385; Hatch v. Kimball, 16 Me. 146; The Sarah Ann [Case No. 12,342];

2 Cow. 246. The rule is similar now at law in sales of personal property. 1 Story, Eq. Jur. § 385. See a strong case in Thompson v. Sanborn, 11 N. H. 201, and cases there cited; 2 Kent, Comm. 483, note ("qui tacet, consentire videtur"); 1 Johns. Ch. 354; 12 Ves. 85; and other cases cited in Kent, Comm.

In the present instance no design whatever appears to have existed to defraud, but the omission to set up a claim to the three acre piece, or give notice of an hostile interest in it, arose probably from forgetfulness. If we look into the general features of the transaction, independent of this objection, the equities of the case favor the title of the respondent rather than the complainant. Provided no decisive principle stands in the way, it is manifestly proper, that the conveyance by the bank to Webster should be construed according to the real intent of the parties in interest in making it. Wade v. Howard, 11 Pick. 289. The trustees of the bank evidently knew that Spring understood and expected that the mortgage should not be considered as foreclosed, so as to prevent him from obtaining the premises from the bank on paying the amount due at the time the check became payable. And on the other hand, the trustees were willing to accede to this, so far as they might, without relinquishing any advantage and security for their debt, which they had obtained. In order to accomplish safely both of these ends, the parties might be considered as agreeing in substance to the foreclosure of the mortgage, for the stronger security of the bank, because actual payment had not been made; but at the same time agreeing further to a conveyance of the premises to Spring or any of his creditors, who might complete the payment of the mortgaged debt as soon as the check should fall due. It would be unjust to treat the transaction as a payment and a mere discharge of the mortgage. Willard v. Harvey, 5 N. H. 252. Because that would strip Webster, who advanced most of the money of all security for it; and it would do this also against the clear intent of Spring, the mortgagor, who not only procured a conveyance of the premises to be made to Webster by the bank, which is inconsistent with an intent merely to discharge the mortgage, but took back a writing from Webster, stipulating to permit Spring to pay him the sum advanced at any time within three years; and then to receive back a conveyance of the premises. All this shows explicitly Spring's intention not to have the money paid to the bank applied simply to discharge the mortgage, but rather to have the bank's title under it conveyed to some third person. See on this Pow. Mortg. 1088; 2 Cow. 248; Gleason v. Dyke, 22 Pick. 390; Smith v. Moore, 11 N. H. 55, 62, and cases there cited; 5 N. H. 252, 430.

Under these views, it is quite clear, that the parties must in equity be regarded as intending to have an absolute estate exist in the bank, but under a stipulation that it should be conveyed to Spring or his appointee, at the time the check became payable, if the money was then paid; that such an estate was conveyed to Webster by the bank, he being properly selected by Spring to receive the conveyance on account of his having advanced most of the money, and that Webster thenceforward held an absolute estate, and not an assignment merely of a mortgage. James v. Johnson, 6 John. Ch. 417. It was not an assignment of the mortgage merely, for other reasons, because it had become foreclosed, and must be so considered in order to enforce the views of the parties, and the equities of the case. Nor does it purport to be a mere assignment, as the note and mortgage deed were given up to Spring rather than transferred to Webster,—he getting a conveyance of the premises only. Had he been a mere assignee of the mortgage, the respondent's extent on his interest would probably be irregular and invalid, and hence of no avail. Blanchard v. Colburn, 16 Mass. 345; Eaton v. Whiting, 3 Pick. 484. So if Webster's writing executed to Spring could have converted the title he acquired into a mortgage, no legal interest, that could be extended on, remained in him. But Webster's writing to Spring was not sealed, nor given the same day with the deed; nor was it an agreement between the parties to the deed. And this would prevent it from being what it otherwise might be, a defeasance, and the deed coupled with it a mortgage on its face. Wendell v. New Hampshire Bank, 9 N. H. 404. It is clear, that, but for the circumstance of the writing not being between the grantor and grantee in the deed, it might be held in chancery, if Webster could sue Spring for the money, that such writing converted the deed into a mortgage. 6 Johns. Ch. 417; James v. Morey, 2 Cow. 246; Flagg v. Mann [Case No. 4,847]; 4 Kent, Comm. 141; 2 Story, Eq. Jur. § 1020; Porter v. Nelson, 4 N. H. 130; Dey v. Dunham, 2 Johns. Ch. 182, 15 Johns. 555. Possibly Spring, if he choose, might in chancery have the land charged with a trust or mortgage, before any third person had bought or levied on the premises without notice of Spring's claims. But as to such third person's levying on it, or purchasing as here, without notice, the title of Webster must be deemed an absolute one; and although the court would go far, when the rights of no third persons had intervened, to enforce a specific performance of this contract, if not to charge the land with it in trust or mortgage in case of seasonable payment by Spring or his assignee, and application for that purpose, yet this does not change the interest that passed from the bank. In Rangely v. Spring, 21 Me. 130, 137, it seems to have been settled, on a state of facts much as in this case, that a freehold estate at least has vested in Rangeley.

These conclusions seem well to protect every interest, that has been concerned in the transaction, whether in lending or borrowing; and do not affect unfavorably, in an equitable view, any subsequent purchasers from Spring, like Shapley, of the three acre lot. Shapley has

paid nothing since to entitle him to any new position, coming in, as he did, originally after the bank, and therefore should so come now. Nobody else has paid any thing in his behalf with a view to give him a new or better position. On the contrary, he has looked on in silence, and seen others perfect their prior rights; nor have they as yet, it is supposed, realized any thing beyond the prior debts from all the mortgaged premises. And if the evidence were less doubtful as to the value of the whole compared with the whole debt, it does not, after a foreclosure, authorize us to recal a part of the premises as in this bill is prayed, nor to re-open the right to redeem in behalf of him, when this is not prayed for. But the proper course for the complainant, if the whole mortgaged premises near the time of the foreclosure were worth more than the debt, was to have gone forward and paid it, and got an assignment of the whole before the time expired. That would have vested an absolute estate in him of the three acre piece, if Mrs. Spring be not interested in it, and Spring could not have redeemed the rest of him without paying the whole debt. Saunders v. Frost, 5 Pick. 259. But on the case, as it now stands, we see no equity that requires us to interfere. More especially is this the case if Mrs. Spring did not join in the deed to him, provided she is interested in the three acre lot. But her rights we do not examine, as it does not become necessary for a just disposal of the case.

Bill dismissed, with costs.

SHARDLOW v. NEWARK PLANK ROAD CO. See Case No. 9,620.

SHARDLOW v. NEW JERSEY R. CO. See Case No. 9,620.

Case No. 12,708.

The SHARK.

[Blatchf. Pr. Cas. 215.] [1]

District Court, S. D. New York. Sept., 1862.

PRIZE—VIOLATION OF BLOCKADE—ENEMY PROPERTY—LOYAL OWNER—BRINGING IN CAPTURED CREW.

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

2. The master, who was part owner of the vessel, and who was the only witness examined in preparatorio, testified that he was ignorant of the blockade; but the court, on all the facts, *held* that he knew of it.

3. A loyal citizen, or a resident of a loyal state, cannot, with impunity, employ his vessel in trade with the enemy, or in favoring the insurrection.

4. The omission of the captors of a vessel to bring in the captured crew will not inure to defeat a capture by a government vessel.

In admiralty.

BETTS, District Judge. The capture of this vessel and cargo was made by the United States war steamer South Carolina, July 4, 1861, in the Gulf of Mexico, off Galveston bar, the vessel being then in the act of steering into Galveston. The vessel and cargo were sent by the captors to this port for adjudication, and were here libeled as lawful prize August 24th thereafter. A judgment by default was subsequently vacated at the instance of the master of the vessel, and he was permitted to intervene, and file his claim and answer in the suit, and contest the case before the court on the proofs in preparatorio. The master having been examined before the prize commissioners, and his evidence being offered by the district attorney on the hearing in court, the testimony previously taken, on the order of the court, of a witness not on board of the captured vessel, was, on the motion of the proctor for the claimant, excluded, and the case was heard solely upon the papers found on board of the vessel and the examination in preparatorio of her master.

The vessel was built in Portsmouth, New Hampshire, under the direction of the master, in November, 1860, for the other two owners, resident in Galveston, and was taken thence by the master in January, 1861, and, by agreement at that place with them, the master became joint owner with them of the vessel. She was enrolled, on the oath of ownership made by the master and claimant, at the customhouse in Galveston, January 16, 1861, the master swearing that he owned one-fourth, Theodore Holmes three-eighths, and R. Jameson three-eighths, and that all the owners were residents of Galveston. She was licensed to him on the same proof. The enrollment and license were not changed to the time of her capture.

The master intervened and claimed the vessel for all the owners, and the cargo as carrier for the shippers. On his examination in preparatorio, he testifies that he took title to one-fourth of the vessel merely to secure his advances in building and fitting her, and took and retained command of her from the time she was launched with that object. He also swore that he was a resident of New York, and never had been of Galveston.

The vessel, when arrested, was on a voyage to Galveston, from the port of Berwick, Louisiana. The cargo was shipped by Wakefield & Wilder, agents for residents or owners in New Orleans or Berwick, one of whom was on board at the time, consigned to various persons at Galveston. No one intervened as owner of the cargo. It consisted, as appears on the manifests and bills of lading, of miscellaneous articles, malt, hops, sugar, salt, medicine, coils of rope, whiskey, cigars, bagging, etc. Louisiana seceded from the Union January 26, 1861, and Texas passed its secession ordinance March 4th, thereafter. The ports of Louisiana and Texas were declared to be under blockade by the president's proclamation of April 19, 1861 [12 Stat. 1259], and more than two months after that this vessel and cargo were seized in the act of making

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

the port of Galveston, with the intention, as the captain testifies, to enter that port, having left the port of Berwick, in Louisiana, for that purpose. In this attempt the vessel was intercepted and captured by a vessel of war on blockade duty off the port. The master testifies, on his examination, that he had no knowledge or notice of the blockade. Very possibly he may not have received direct personal and reliable notice of any actual blockade already carried into effect, but he had heard that the United States steamer Brooklyn was blockading New Orleans at the Southwest Pass. It has appeared before the court, in the progress of these prize suits, that commanding officers of the navy had assigned and stationed ships of war to the duty of blockading ports on the Gulf of Mexico, along our southern coast, about the middle of June, 1861, and the master says that he had, previous to his arrest, made several voyages along the coast of Texas, to the different ports, with cargoes of corn, flour, country produce, and merchandise. The court is also judicially apprised that the United States war vessels were active in endeavoring to enforce the blockade, by repeated seizures within the period during which this vessel was probably so employed. These facts, coupled with the knowledge avowed by the master, that a blockading ship was then lying before the mouth of the Mississippi, but a few miles, topographically, from Berwick bay, and with his practice of conveying cargoes to and from New Orleans by the way of Berwick bay, and an intermediate transportation, by railway, of eighty miles (not by inland navigation, by canal or other water course), afford a very strong presumption that this course of business was favored because of the hazards of exposure to blockading cruisers expected to be hovering outside, and that the danger of such exposure could not have escaped the notice of the claimant. I shall, at all events, hold the circumstances sufficiently impressive to require the corroboration of further evidence than the bald assertion of a part owner of the vessel, to satisfy me of his real ignorance of facts liable to be of general notoriety, and which immediately affected his personal interests and employments. Should he deem it important to offer further proofs to this particular, the court will be ready to listen to an application on his behalf to that end; otherwise, I shall consider the circumstances as sufficiently importing notice to a person so connected as he was with the coasting trade along that exact territory, that the government were enforcing the blockade there, and as showing also that he was knowingly concerned in attempts to evade it. This would render him guilty of the double acts of running the blockade out of Berwick bay, and of endeavoring to evade it in making an entrance into a port of Texas.

But, under the facts in proof in the case, it is of slight importance whether the vessel was technically guilty of a violation of blockade or not. Nor in this case is it of any particular moment to determine whether Patterson is a loyal subject and an actual resident of the city of New York, because he could not, in these capacities, with impunity, employ his vessel in trade with the enemy, or in favoring the insurrection. His property would, in either alternative, be subject to confiscation therefor, both by the laws of prize and the statutory law, and irrespective of his ignorance of the law. 12 Stat. 319; 1 Chit. Law Nat. c. 1; 1 Kent, Comm. 66, and notes; The Hoop, 1 C. Rob. Adm. 196. So, also, the whole of the cargo, and certainly three-fourths of the vessel, were enemy property, and therefore confiscable as prize of war wherever apprehended at sea. The vessel was owned in Texas, and the cargo in Texas or Louisiana, and both were in a course of sea transportation, in the use and for the benefit of the enemy. The title made on the oath of the claimant, at the enrollment of the vessel, is all vested in declared residents of Texas. The verbal assertion of the claimant in his preparatory proof will not overbear the proofs in the ship's papers—the enrollment and license—that she belonged to Galveston. Moreover, if she had been nominally transferred to a loyal citizen or a neutral friend, and was still permitted to continue in the enemy's trade, she would be also liable to condemnation for that cause. The Vigilantia, 1 C. Rob. Adm. 2; The Princessa, 2 C. Rob. Adm. 51.

The irregularity on the part of the captors in omitting to bring in with the vessel and cargo the crew captured on board, will not inure to defeat the capture by a government vessel. The laches of the officers or crew in conducting the public service cannot defeat the rights acquired by the nation by the seizure. It might be different in case of an arrest by private cruisers.

A decree of condemnation of vessel and cargo must be rendered on both grounds.

Case No. 12,709.

SHARP v. DITTENTHALER.

[The case reported under the above title in 25 Int. Rev. Rec. 313; 8 Reporter, 456; and 11 Chi. Leg. News, 415,—is the same as Case No. 12,710.]

SHARP (GARDNER v.). See Case No. 5,236.

Case No. 12,709a.

SHARP v. PHILADELPHIA WAREHOUSE CO.

[19 N. B. R. 378;[1] 9 Reporter, 572.]

Circuit Court, E. D. Pennsylvania. Feb. 10, 1880.

BANKRUPTCY — PREFERENCES — FRAUDULENT TRANSFER OF PROPERTY.

1. Where the title to property is in the party who has made advances thereon, the delivery of the possession thereof, subsequent to the failure of the bailee, is not in conflict with the

[1] [Reprinted from 19 N. B. R. 378, by permission.]

terms or the spirit of the bankrupt act [of 1867 (14 Stat. 517)].

2. The exchange of goods, covered by a warehouse receipt, in the warehouse of the vendor, for others of equal or less value, within four months prior to the filing of a petition in bankruptcy, is allowable, and not in conflict with the thirty-fifth section of the bankrupt act.

3. The transfer of merchandise, however, by the bankrupts, after their insolvency, in place of goods previously abstracted (although honestly intended), is a preference within the terms as well as the spirit of the act.

4. Where there is no fraud, the assignee of a bankrupt firm is estopped from denying the validity of warehouse receipts, issued by the bankrupts.

[2] [Equity. The bill in this case, filed by the assignee in bankruptcy of Stokes & Co., set up that between July, 1874, and January 16, 1878, Stokes & Co. issued receipts for goat skins and sumac, purporting to be stored upon the premises of Stokes & Co.; that the holders of said receipts obtained from defendant loans, pledging said receipts as security therefor; that at the time of the advances an agent of defendant examined the goods, ascertained that they corresponded with the receipts, and set them apart, marking them with the defendant's mark; that besides these advances, about December 29, 1877, defendant loaned to the bankrupts $30,000 on the security of certain goods in the bankrupts' possession, taking a lease from them of their cellar at the nominal rent, in order to evade the law of Pennsylvania as to the necessity of possession to establish a lien on personalty; that goods were placed in the cellar without any notorious change of possession to indicate any change of ownership; that goods were stored in the cellar which were not included in the security, and other goods, supposed to be included therein, were not in said cellar; that Stokes & Co. failed about January 19, 1878; that two days afterwards defendant made an examination of the goods for which it held receipts, as well as those in the cellar, on which the advances had been made, and discovered great deficiencies, whereupon defendant put a watchman in charge of the premises until January 24th, when a lease of the premises was executed by Stokes & Co. to defendant for nine months at the inadequate rent of $50 per month, whereupon defendant entered and took possession of the premises and all the goods; that at the time there was on the premises a large amount other than those attempted to be pledged by the bankrupts; that the assignee, plaintiff, had refused the rent and demanded possession of the premises and goods, which defendant refused, claiming to hold certain of the goods on the premises as securities substituted for the goods mentioned in the receipts; that defendant had delivered some of the substituted goods to the pledgors of the receipts on the surrender thereof, and payment of the advances thereon, had sold others and claimed to hold yet others as subject to the lien for the loan made in December. The bill prayed a cancellation of the leases of December 29, 1877, and January 24, 1878; that the pledge of December 29, 1877, be declared void as to the plaintiff; that defendant be restrained from interfering with the plaintiff's possession of the bankrupt's premises, from removing goods therefrom, and be compelled to make discovery and to account for all goods removed since January 24, 1878, and to deliver to plaintiff the goods still stored on the premises. The evidence showed substantially the facts alleged in the bill, and that defendant made the advances with knowledge that the goods for which the receipts were issued had been purchased in some cases on the same day or the day before from the bankrupts; that the goods were left as they stood when sold to the persons to whom defendant advanced money on the receipts; and that a large part of these goods were afterwards sold by the bankrupts and sent away. It appeared by the record that the petition in bankruptcy was filed February 22, 1878, and an adjudication of bankruptcy made March 27, 1878.

[S. F. Hollingworth and R. L. Ashhurst (with them, S. H. Alleman), for plaintiff.

[As to the goods sold by E. & C. Stokes, the sale was fraudulent in law, and void as to the creditors of the vendor, because there was no change of possession, although they were capable of actual delivery. Clow v. Woods, 5 Serg. & R. 275; McKibbin v. Martin, 14 P. F. Smith [64 Pa. St.] 352; note to Twyne's Case, 1 Smith, Lead. Cas. p. 39, with supplement in 18 Am. Law Reg. 137; Streeper v. Eckart, 2 Whart. 302; Cadbury v. Nolen, 5 Barr [5 Pa. St.] 320; Dunlap v. Bournonville, 2 Casey [26 Pa. St.] 72; Milne v. Henry, 4 Wright [40 Pa. St.] 352; Brown v. Keller, 7 Wright [43 Pa. St.] 104; Steelwagon v. Jeffries, 8 Wright [44 Pa. St.] 407; Barr v. Reitz, 3 P. F. Smith [53 Pa. St.] 256; Billingsley v. White, 9 P. F. Smith [59 Pa. St.] 464; Davis v. Bigler, 12 P. F. Smith [62 Pa. St.] 242; Trunick v. Smith, 13 P. F. Smith [63 Pa. St.] 18. The defendant knew that the goods had been purchased from the bankrupts, and that there had been no actual or constructive delivery, hence it was cognizant of the fraud. The defendant, having advanced money on the receipts held by vendees, whose title to the goods were known to it to be fraudulent, only acquired a lien subject to the rights of creditors, and took no better title than the vendees. Decan v. Shipper, 11 Casey [35 Pa. St.] 239; Transportation Co. v. Steele, 20 P. F. Smith [70 Pa. St.] 188; The Idaho, 93 U. S. 575; Abb. Shipp. 536; Vertue v. Jewell, 4 Camp. 31; Benj. Sales, § 866; 2 Kent, Comm. 557; Cuming v. Brown, 9 East, 506. The act of July 13, 1866 [14 Stat. 98] does not apply, because E. & C. Stokes were not warehousemen, but dealers; hence their receipts are not warehouse receipts, even assuming warehouse re-

[2] [From 9 Reporter, 572.]

ceipts to be of the nature of bills of lading. Shepardson v. Cary, 29 Wis. 34. The lien of the defendant was not made better by the possession obtained after the failure. Carpenter v. Mayer, 5 Watts, 483; Casey v. Cavaroc, 96 U. S. 467.]

[George Junkin, contra.] [3]

BUTLER, District Judge. Stokes & Co. were extensively engaged in the importation and sale of goat skins and sumac, in the city of Philadelphia, between July, 1874, and February, 1878. From time to time they issued "warehouse receipts" for such merchandise, representing the same to be stored with them, the holders of which receipts obtained advances thereon from the defendants. The merchandise had been sold by Stokes & Co. to the holders of the receipts, who had left it on storage—excepting only that covered by a receipt held by German Smith, which was for goods sent to the store on his account. The bill states that "at the time the advances were made by the defendants the goods were examined by their agent, to see that they corresponded with those called for by the warehouse receipts, were placed in separate lots, and identified by a tag of the company." Among the advances so made by the defendants was one to George W. Hummel & Co., for thirty-two thousand dollars, on receipts covering the last six items specified in the plaintiff's Exhibit A, accompanying his bill. In December, 1878, Hummel & Co. having resold these goods to Stokes & Co., subject to the defendant's claim upon them, it was arranged between Stokes & Co. and the defendants that the loan should be reduced to thirty thousand dollars; that the latter should lease from the former the cellar of the store, deposit the goods therein, and take the keys. This arrangement was carried into effect on the 29th day of the month. The goods pointed out by Stokes & Co., when the defendants' agent called with the German Smith receipt, were not, in part, those specified in it, though similar in kind. On the 18th of January, 1878, Stokes & Co. failed to meet their business engagements, and, as subsequent events show, were insolvent. On the 24th of the same month the defendants took a lease of the premises, where the merchandise covered by the receipts which they held were stored, and entered into possession. They then discovered that a large part of the property had been fraudulently abstracted and disposed of by Stokes & Co., who, to meet the claim made on this account, handed over other merchandise to the defendants, worth about two thousand three hundred dollars. On the 22d of February following, a petition was filed against Stokes & Co., by creditors, and on the 27th of the same month they were adjudged bankrupts.

On the argument several important questions were raised and discussed, which, in the view we take of the case, need not be considered. As respects the goods placed in the cellar, we see no room for controversy; and did not, indeed, understand the claim made on this account to be seriously pressed. Leasing the cellar and removing the goods thereto, constituted a sufficient delivery to satisfy the requirements of the law. That the transaction was free from taint of actual fraud is not doubted. Indeed, it is not suggested that such taint attaches to either of the defendants' transactions respecting any part of the goods in controversy.

The other merchandise covered by the receipts, was, as we have seen, also delivered to the defendants. As, however, this delivery did not take place until after Stokes & Co. had become insolvent (though before proceedings in bankruptcy had been commenced), the plaintiff regards it as a fraud on the bankrupt law. We cannot adopt this view. The title to the property was in the defendants, who could have recovered the possession from Stokes & Co. by law. The surrender of the possession was not, therefore, a violation either of the terms or the spirit of the bankrupt act. It did not deprive the creditors of anything which they were entitled to receive. It is unimportant that the surrender could not have been made after seizure on execution. No such question is raised. The effect of the proceedings in bankruptcy alone, is before us for consideration. The case in this aspect cannot be distinguished in principle from Sawyer v. Turpin, 91 U. S. 114, where the defendant (sued by the assignee) had taken a bill of sale from the bankrupt without acquiring possession of the property purchased, and, subsequent to the insolvency, exchanged it for a chattel mortgage—provided for by a statute of the state. The court held that the sale vested the title to the property in the purchaser, as against the bankrupt, that the creditors could not take advantage of the non-delivery, except by execution or attachment, and that the mortgage given in exchange for the bill of sale was therefore valid. In the opinion, Strong, J., says, "The conveyance was by a bill of sale, absolute in terms; * * * but it was understood by the parties to be a security for an existing debt. * * * Having been executed more than four months before the petition in bankruptcy was filed, there is nothing to show that it was invalid. * * * True, no possession was taken under it by the vendee, but for neither of these reasons was it less operative between the parties. It might not have been a protection against attaching creditors, if there had been any. It was in the power of Mr. Turpin, the purchaser, to take possession at any time before other rights against it accrued." The statute which authorized the chattel mortgage referred to in this case in no wise affected the question—which turned upon, and was disposed of according to, general principles governing the sale and transfer of personal prop-

[3] [From 9 Reporter, 572.]

erty. The case of Casey v. Cavaroc, 96 U. S. 467, is readily distinguished from Sawyer v. Turpin, and the case before us. The defendant there had but an agreement to pledge the property involved. The transaction amounted to nothing more. And inasmuch as the statute of Louisiana requires a transfer of possession to vest an interest in property pledged, the defendant necessarily failed in his contest with the assignee. While the opinion of the court recognizes this distinction, as is apparent on page 490, it may be conceded that general terms are employed which are not inconsistent with the plaintiff's interpretation of the case. They must be read, however, in connection with what precedes and follows them, and as applicable to the facts involved. It is worthy of remark that in this case three of the justices dissented—holding the defendant's title to be good, as the circuit court had done. We regard it as unimportant that other goods, to some extent, were substituted for those named in the German Smith receipt. At the time this was done the power of Stokes & Co. over their property was not liable to question. Having represented the goods (which the defendants afterward got) to be those specified in the receipt, and the defendants having acted upon this representation, Stokes & Co. could not assert the contrary. The transaction effected a transfer of the property, at a time when no one could object.

As respects the merchandise transferred to the defendants after they became insolvent, to meet the demand which arose out of their previous abstraction of the defendant's property, we agree with the plaintiff. This transfer (though honestly intended) was a violation of the bankrupt laws. We cannot regard the property as having passed to the defendants when the abstraction occurred. It did not. Stokes & Co. continued to own it until after their insolvency. It was then too late to apply it to the defendant's claims. It is unimportant that the claim does not arise upon contract. The defendant's rights against the bankrupt's property were not superior to those of the other creditors; and the transfer made was a preference within the terms as well as the spirit of the statute.

[See 10 Fed. 379.]

SHARP (REISSNER v.). See Case No. 11,689.

Case No. 12,710.

SHARP v. STEPHENS et al.

[6 Sawy. 48;[1] 25 Int. Rev. Rec. 313; 8 Reporter, 456; 11 Chi. Leg. News, 415.]

Circuit Court, D. Oregon. Aug. 25, 1879.

PUBLIC LANDS—PATENT TO HUSBAND AND WIFE—NAMES.

In an action at law, a patent to a married settler, under the donation act of Oregon, and his wife, India, can not be contradicted and avoided by showing that the true wife of such settler was another person named Angeline.

[Cited in Cahn v. Barnes, 5 Fed. 332; Cutting v. Cutting, 6 Fed. 268; Pengra v. Munz, 29 Fed. 836.]

[This was an action of ejectment by Cragir Sharp against James B. Stephens and others.]

W. Scott Bebee, for plaintiff.

Joseph N. Dolph, for defendants.

DEADY, District Judge. The plaintiff, a citizen of California, and claiming to be the successor in interest of India Stephens, the alleged wife of Edward S. Sexton, brings this action against the defendants, citizens of Oregon, to recover the possession of a half section of land, situate in Washington county, the same being the wife's half of the donation of said Sexton.

The answer contains a detailed statement of the facts of the case. To this there is a demurrer by the plaintiff, and a stipulation by the parties, to the effect that the only question to be determined on the demurrer is, do the facts constitute a legal defense to the action?

The answer states substantially, that in January, 1843, said Edward S. Sexton was lawfully married to his wife, Angeline, in the state of Illinois, who remained his lawful wife until his death; that prior to September 27, 1850, said Sexton left said Angeline in said Illinois, where she has ever since resided, and came to Oregon, where, on March 20, 1850, he unlawfully married India Stephens, with whom he lived and cohabited until his death; that on September 1, 1853, said Sexton settled upon six hundred and forty acres of land, including the premises in controversy, as a married man, under section 4 of the donation act of September 27, 1850, and resided upon and cultivated the same for more than four consecutive years thereafter; that afterwards, on June 31, 1868, in pursuance of the premises, a patent certificate was issued by the proper officers of the local land office for said donation to said Sexton and his wife, the said Sexton then and there fraudulently pretended to said officers that said India was his wife, and thereby procured her name to be inserted therein as the name of his wife; that on May 5, 1873, a patent was issued by the United States for said donation to said Sexton and wife, the south half thereof to the former, and the north half to the latter, and, by reason of the error in said patent certificate as to the name of the wife of said Sexton, the name of said India was wrongfully inserted in said patent as the name of the wife of said Sexton; that after the issue of said patent certificate, said Sexton died intestate, leaving said Angeline and her two children and one grandchild as his only heirs at law; that the defendant, James B. Stephens, is now, and for more than six

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

years has been, the owner of the interest of said Angeline and children in the premises, and entitled to the possession thereof, and the defendant Dittenthaler is in possession of said premises by permission of said Stephens, and that whatever interest the plaintiff has in said premises is derived from said India, and not otherwise.

The defendant maintains: (1) That a settler under the donation act takes a grant under and by virtue thereof from the date of his settlement, and that therefore the patent is only a record of the previously existing rights of the donee; (2) that one-half of the donation of a married settler inures, by operation of the act, to his wife; and (3) that a patent issued without authority of law is void, and can not affect pre-existing rights; and from these premises seeks to establish the conclusion that this patent, so far as it states and records that the one-half of Sexton's donation, inured to India rather than Angeline, is false and void.

The propositions contained in this argument are undoubtedly sound, and have repeatedly received the sanction of this and the supreme court. But I do not think they authorize the deduction sought to be made from them.

It is not claimed that this patent is in this or any particular void because issued contrary to law, or on account of any fraud or mistake which appears upon its face. Now it is an elementary principle that a patent can not be avoided for matter dehors the record, except by a suit in equity, in which the fraud or mistake is directly pleaded. Mouncey v. Drake, 10 Johns. 25; Polk's Lessee v. Wendal, 9 Cranch [13 U. S.] 98; Doe v. Wenn, 11 Wheat. [24 U. S.] 381; U. S. v. Stone, 2 Wall. [69 U. S.] 535; French v. Fyan, 93 U. S. 169; Moore v. Robbins, 96 U. S. 530.

Who was the wife of the settler, Sexton, is a question of fact, and there is nothing upon the face of the patent which indicates that a mistake was made in its determination by the officers of the land office. To admit evidence in this action to show that Angeline and not India was such wife is to contradict the patent upon such point, and to show a mistake therein by matter outside of itself, which we have seen cannot be done in an action at law.

Sexton was required to make proof in the land office of the facts which entitled him to this donation to himself and wife, one of which was that he was a married man. Strictly speaking, it may be that such fact could be established without proving who the wife was, without naming her; and the only ground upon which the right to make the defense can be put is that the finding and allegation in the patent that the wife of Sexton was India was unnecessary, and may therefore be disregarded as surplusage. But the question of marriage naturally, if not necessarily, includes the inquiry, who are the parties to it? The land office found that Sexton was a married man because he was the husband, not of Angeline, but of India; and although this latter conclusion appears now to have been an error caused by the false and fraudulent representations of Sexton, yet it cannot be corrected in this action without violating the salutary rule which precludes a patent from being avoided in an action at law for matters not apparent upon its face. The case of French v. Fyan, supra, is like this in principle, and very similar to it in fact. A grant of swamp land was made to the state of Missouri. The statute also made it the duty of the secretary of the interior to select the lands, and cause patents to be issued to the state therefor. A party claiming under one of these patents, being sued by one claiming under a railway grant for the same premises, gave the patent in evidence. The plaintiff then offered to prove by parol that the land described in the patent was not in fact swamp or overflowed, but the offer was refused. The supreme court sustained the ruling. Mr. Justice Miller, who delivered the opinion of the court, quoting the opinion in Johnson v. Towsley, 13 Wall. [80 U. S.] 72, said: "That the action of the land office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principles above stated; and in all courts, and in all forms of judicial proceedings where this title must control, either by reason of the limited powers of the court or the essential character of the proceedings, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand, there has always existed in the courts of equity the power, in certain classes of cases, to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action, however solemn the form which the result of that action may assume when it invades private rights; and by virtue of this power the final judgment of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown or other executive branch of the government have been corrected or declared void, or other relief granted." And although this was a case in which the patent was only the record of a pre-existing grant, the learned justice said it was within "the operation of that rule," and that the court was "of opinion that, in this action at law, it would be a departure from sound principle and contrary to well-considered judgments in this court, and others of high authority, to permit the validity of the patent to the state to be subjected to the test of the verdict of the jury on such oral testimony as might be brought before it. It would be substituting the jury, or the court sitting as a jury, for the tribunal which congress had provided to determine the question, and would be making a patent of

the United States a cheap and unstable reliance as a title for lands which it purported to convey." In my judgment, this case furnishes the rule of decision for the one under consideration. The facts set up in answer, being contradictory of the patent upon the point in controversy, cannot be given in evidence in this action at law, and therefore, whatever may be their effect in equity, they do not constitute a legal defense thereto.

There must be a finding for the plaintiff.

[NOTE. A suit was subsequently brought by the defendants to enjoin the plaintiff from enforcing the judgment obtained by him in the above action. There was a demurrer to the bill, which was overruled, and the relief prayed for was granted. Case No. 13,410.]

SHARP (STEVENS v.). See Case No. 13,410.

SHARP (UNITED STATES v.). See Cases Nos. 16,264 and 16,265.

Case No. 12,711.

SHARPLEIGH et al. v. SURDAM et al.

[1 Flip. 472; [1] 11 West. Jur. 203.]

Circuit Court, W. D. Tennessee. Feb. 15, 1876.

TAX TITLES—EQUITY JURISDICTION—CLOUDS ON TITLE.

1. A court of equity has jurisdiction where the owner of real estate is in possession, and the holder of a tax title holds it as a cloud over the title, refusing to prosecute it.

2. Within the meaning of the act of congress of 1862 (12 Stat. 422), providing for the collection of direct taxes in insurrectionary districts within the United States, a city, township, or subordinate taxing district within which military authority shall have been established, constitutes a district for the purpose of taxation, although not a parish, district or county within the meaning of the law of the state, creating its civil and political divisions for other purposes.

3. The clause creating a penalty for non-payment of the tax is not unconstitutional as being a discriminating tax. Nor is it an ex post facto law, ample opportunity being afforded to pay subsequent to the assessment.

4. The judgment upon tax titles where courts have refused to administer the political policy plainly indicated by the law, inducing the necessity of legislative interference with the canons of construction set up by the courts reviewed and disapproved; and the rule announced that a tax law should be interpreted like any other enactment intended to enforce political duties.

5. The cases which have decided that enactments declaring tax deeds should be evidence of the "regularity of the sale," meant the proceedings attending only the motion itself, and did not include the preliminary steps to authorize it, said not to rest in sound principles of construction, but were too many in number and from courts of too high respectability and authority to be disregarded by a circuit judge of the United States.

6. Those which hold that clauses declaring that tax deeds shall vest in the purchaser a title in fee simple, where no exceptions are named in the statute, vest such title only where the statute is substantially complied with, approved and distinguished from the case at bar.

7. A tax deed under the act of congress, for the collection of direct taxes within insurrectionary districts (12 Stat. 422), which provided that the deed should be evidence of the regularity and validity of the sale, should be defeated only by proof of non-subjection to taxation, payment of the tax, or that the land had been subsequently redeemed, and can be avoided in no other way. Irregularities will not affect the validity of the title, provided the proceedings are colorable and free from fraud, accident or mistake.

(Syllabus by the Court.)

In equity.

Smith & Hill and Smith & Stephens, for complainants.

Smith & Kittredge and D. K. McRae, for defendants.

EMMONS, Circuit Judge. In all the cases where the complainants are in possession, judgments already rendered in the federal courts fully sustain the jurisdiction. In Gilman v. Sheboygan, 2 Black [67 U. S.] 510; Slater v. Maxwell, 6 Wall. [73 U. S.] 268; Dows v. City of Chicago, 11 Wall. [78 U. S.] 108, and the New York, Virginia, and Illinois cases, cited and approved in them, the irregularity complained of did not appear on the face of the proceedings, but extrinsic evidence was necessary to show it. When the deed threatened or executed is made evidence by the statute, and the subject of the tax and suit is real estate, equity will interfere. The rule is more extensive, but the part applicable here alone is noticed. The New York, Virginia and Illinois cases approved by the supreme court, as explained and since applied in the courts which pronounced them, go quite beyond the necessities of those now before us where the defendants are out of possession. See Hanlon v. Supervisors of Westchester, 57 Barb. 383; Crooke v. Andrews, 40 N. Y. 547. Those where they have entered and retain possession under their titles demand a different remedy. The Orton v. Smith, 18 How. [59 U. S.] 263, announces the familiar rule that in order to authorize a court of equity to interfere in reference to an asserted right to real estate, the complainant must be in possession, unless there is ground of fraud, accident, mistake, discovery, multiplicity of suits, irreparable mischief, or other ground of equitable jurisdiction. In the numerous cases cited for the complainants, generalities may be found seemingly covering the cases where complainant is not in possession. But all must be referred to the circumstances in reference to which they are announced. Thus read, they require possession in all instances where there is not some other element of equitable cognizance. Still, in actual practice, the courts, desiring to afford relief, have seized on so many and so slight circumstances to take cases out of the old rule, that they will not enjoin a mere trespass where there is ample remedy at law. As the precedents now stand, there are few exceptions

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in practice to the rule that a court will inquire into the validity of a tax sale which the defendant refuses to prosecute, and which he holds over the head of a complainant as a cloud upon his title. There is no necessity for this remedy where the owner is out of possession and may bring ejectment where there are no special circumstances of equitable relief. We approve of the rule in Blackwood v. Van Vleet, 11 Mich. 252, and similar cases.

The language in Slater v. Maxwell, 6 Wall. [73 U. S.] 268, is quite capable of an interpretation, that in all cases where extrinsic evidence is necessary to show the invalidity of proceedings, the owner may go into equity, and that it is only where proceedings are void on their face that the remedy is wholly at law. This is so at war with what we deem well settled principles in this department of the law, that we think no such meaning should be imputed to the court.

Substantially, it is indifferent upon which side of a court having jurisdiction of the subject and the parties, its decree is valid when collaterally questioned, and both being willing to accept its judgment, a party shall proceed. But the supreme court have not so treated it. As if it were a question of power and jurisdiction in a plenary sense, it will sua sponte dismiss proceedings in a court of last resort, if a majority of that tribunal deem the case one more fit for the law side than the equity side of the court. See Noonan v. Lee, 2 Black [67 U. S.] 509, and Hipp v. Babin, 19 How. [60 U. S.] 271, and other cases in that court. Looking to the vast number of irreconcilable and conflicting judgments in reference to jurisdiction at law and in equity in all its departments, such a rule ought to be corrected by legislation. We have no doubt of the jurisdiction in this case.

The sixth section of the act of 1862 (12 Stat. 423) directs the commissioners to enter upon their duties whenever the commanding general of the forces of the United States entering into any insurrectionary state or district shall have established the military authority "throughout any parish or district or county of the same."

It is insisted that the authority was not so established throughout the county in which the city of Memphis is situated, and that the occupation of the city alone is not sufficient to authorize the assessment and sale of this land for taxes. We do not go over the conflicting testimony in reference to the military situation, or deem it necessary to decide that the general orders of the commanding general will in all cases conclusively determine the establishment of military authority within the lines described in them. We can conceive of cases where such a rule would work unjust results. The word "district" is used in this section not necessarily to designate any civil division in the state occupied, but as synonymous with "region," "section of country," or "locality occupied." The same word is used in describing the whole territory into which the commanding general enters, and the subjugation of parts of which will authorize the tax. Within the nomenclature of the law there is necessarily an insurrectionary district, the whole of which need not be occupied in order to justify the tax. The statute so provides in express terms. We know of no civil divisions in the insurrectionary states where there were districts within districts. But this law declares that where the commanding general enters into any state or district, and within it establishes the authority throughout any parish or county, the tax may be collected. Within this law the occupation of the entire city of Memphis, having a distinct municipal organization, is a taxing district. It is not a parish or a county; but both the title and the reason of the law show that distinct political divisions and tax districts are contemplated by it. This is the most familiar phrase in the nomenclature of the tax laws of the whole nation. Its common use and application has no reference to the statutory or constitutional names of civil divisions for other political purposes. "Taxing district" is a phrase long known in our elementary treatises, judicial discussions, and statutory enactments, to describe the territory or region into which, for the purpose of assessment merely, a state, county, town, or other political district, is divided; and without going further and saying what we think true, viz.: that a region of territory permanently subdued, although parts of several political divisions in a state might constitute a district under this law, we are quite clear that a whole city, municipality, town, or other civil division, for the purposes of government and taxation, may do so, although not in the statutes of the state before known by the name of "parish, district or county." The exigency in which the assessment became lawful, we have no doubt existed in this case. Wayne Co. v. City of Detroit, 17 Mich. 390; Attorney General v. Supervisors of St. Clair, 11 Mich. 63, and kindred cases, although not very applicable so far as the facts are concerned, are instances where the words of laws have been extended to include civil divisions known in the constitution and laws by other names.

The 1st section of the act (12 Stat. 422) provides that, when in any state rebellion shall prevent the collection of the tax, the land shall be charged with a penalty of fifty per cent. in addition to the assessment. The 3d section authorizes owners within sixty days after the assessment, to redeem on paying the tax. By section 7 they may redeem after sale by payment of the tax and a penalty of ten per cent. per annum interest.

The question raised by complainant's counsel is, can congress impose this penalty? If it can, that answers the objection that the tax is unequal and not in proportion to the census enumeration. It does not raise the question of ex post facto laws, because

there is liberty of paying the tax within sixty days after assessment. It is substantially, when read in connection with the interpretation put upon it, in Bennett v. Hunter, 9 Wall. [76 U. S.] 326, which authorizes any person interested to pay the tax, but a penalty is imposed for delinquency after the act is enacted. The law itself applies to all states and districts coming within the exigencies described—Vermont as well as Tennessee.

In Pullan v. Kinsinger [Case No. 11,463], we had occasion to consider a kindred subject in reference to the power of the general government to create special tribunals and exceptional modes of enforcing the performance of all political duties. We do not desire to go again over the cases, and have no doubt of the constitutionality of the penalty of 50 per cent. It is but a penalty and not a discriminating tax. The tax without any penalty may be paid after the assessment and the passage of the law. The statutes have been several times before the supreme court in circumstances calculated to provoke this objection if deemed tenable. See Bennett v. Hunter, 9 Wall. [76 U. S.] 326; Corbett v. Nutt, 10 Wall. [77 U. S.] 464; and other subsequent cases.

That the sale was irregular we have no doubt. There was no sufficient advertisement either in time or manner. If the statute did not make the certificate conclusive of these things, the title under it would be invalid. We think, however, it is subject to be defeated only by proof of the three facts mentioned in the provision of the 7th section, and that mere irregularities will not affect it.

We have no time to go over any considerable part of the extraordinary history of American adjudications in reference to tax titles. We shall briefly notice the leading cases cited by counsel, and a few others like them, to show that they are not precedents for the judgment asked here by complainant, and that there is nothing in their history in the least calculated to induce the court to adopt their spirit and rules of interpretation. We consider them briefly to show why their disregard of legislative intention, and their attempted administration of political policies in conflict with that plainly announced by successive laws, is not only not followed, but most pointedly rejected. The canons of interpretation which have construed statutes so as manifestly to defeat the will of the law maker belong to departments of learning where scholastic refinements and subtle definitions force conclusions, and sustain creeds, irrespective of reason and practical truth. They should have no place in efforts to ascertain what is the rule of civil conduct prescribed by the supreme power in the state.

In Allen v. Armstrong, 16 Iowa, 508, Dillon, J., says: "From a comparison of the law with adjudicated cases, it seems to have been drawn to outwit the courts, and to prevent them from resorting to those refined and astute constructions so frequent in cases of this kind," etc., etc. The remark was quite justified by the legislative and judicial contest in that state.

In Gwynne v. Neiswanger, 18 Ohio, 400, Judge Hitchcock says, the practice had prevailed for that state in that class of cases to sell lands for taxes, until in consequence of the astuteness of the courts in declaring tax sales void for the least error, it came to be understood that no bidder could be obtained, and for some years the practice was discontinued. This difficulty led to the stringent enactments we elsewhere notice, and which he said had never injured any one who duly paid his taxes. It provided the deed should be conclusive of all else save the nonpayment of the tax.

A kindred impolitic severity has resulted in several other states from this irrational and wholly unprincipled refusal on the part of judges to administer in good faith the clearly expressed will of the legislature.

Blackw. Tax Titles, p. 88, after a long review of the more extravagant and unjustifiable judicial interpretations of laws intended to give efficacy to proceedings to sell property for taxes, says: "Where statutes have broken in upon these rules of construction set up, the courts have discountenanced them, and given effect to the intent only as manifested by the words used, disregarding the spirit of the rule prescribed, by refusing in every instance to give an equitable construction to the statutes." This, he says, is commendable and sanctioned by reason and authority in analogous cases. What analogous cases in the common law authorize the judiciary to refuse to administer the true spirit of an enactment because an unusual reading of its language will enable it to set the law-making power at defiance, the author does not say. On page 71 he congratulates the profession that out of one thousand cases in court, not twenty have been sustained. It would be difficult to induce a philosopher or upright statesman to believe that this discreditable result was owing, in all cases, to the greater intelligence and higher character of the courts as contrasted with the makers and administrators of the laws. In modern times judges of great ability have frankly conceded that in a large degree it has sprung from an unwarranted encroachment of the judiciary upon powers vested solely in our legislatures. It is for them to say what shall be the political policy in reference to coercing the citizen to a performance of this public duty of paying his dues to the government and declaring the consequences of his neglect.

In Vance v. Schuyler, 1 Gilman, 160, the statute provided the deed should be evidence of the regularity and legality of the sale. Held, this included all preliminary proceedings. In this case is the singular conces-

sion that an enactment by the legislature of the familiar old common law rule of interpretation, "that no objection should have been deemed valid except such as were consistent with a liberal and fair interpretation of the intention of the legislature," was a repeal of the rules which the court had before then applied to such statutes. Several of the judgments made in disregard of this sound rule for reading laws were cited by counsel for complainants as precedents. They are not applicable to the case before us, but would by no means be followed if they were. It requires no act of congress in order to secure in this tribunal a liberal and fair interpretation of laws according to their intention. We understand that our oaths and the common law already compel this, and force us to reject as precedents all judgments which concede they do not enforce the legislative will. And, see, also, Messinger v. Germain, 1 Gilman, 631; and Rhinehart v. Schuyler, 2 Gilman, 473.

Beekman v. Bigham, 5 N. Y. 366, says, that, originally in New York the laws declaring that deeds should be evidence of the regularity of sales, were held to include the prerequisites, as well as the mere auction, but that since Striker v. Kelly, 2 Denio, 323, the rule had been changed by the courts; but the legislature again corrected the reading and restored the law. In Arkansas and Iowa are notable instances of this contest. They are, however, not exceptional. Such is the history everywhere. As often as the courts have by metaphysical refinements and scholastic readings defeated the statutory intention, an additionally stringent law has been enacted, until, in some instances, we have no doubt, sound constitutional limits have been exceeded. The present law, however, fairly construed, carries us to no such extreme in order to dispose, as we do, of the bills before us.

We have thus glanced at a few of the long list of similar cases to indicate that we do not disregard these canons of interpretation in ignorance of their existence and that we go to the construction of this tax law as we would to the reading of any other declaration of the legislative will. In so doing we shall not intentionally disregard well settled precedents, or render any judgment at all revolutionary. The ruling here involves no dissent from any judgment relied upon by the complainant. The general rule that an ex parte statutory power, where the property of the citizen is to be divested without notice or opportunity for hearing and contesting, unless the statute directing the proceeding otherwise provides, must be strictly complied with, is well settled law. In no tribunals is it more firmly established than in the national courts. Moore v. Brown, 11 How. [52 U. S.] 414; Games v. Stiles, 14 Pet. [39 U. S.] 322; Stead's Ex'rs v. Course, 4 Cranch [8 U. S.] 403; Williams v. Peyton's Lessee, 4 Wheat. [17 U. S.] 77; Roukendorf v. Taylor's Lessee, 4 Pet. [29 U. S.] 350, and numerous other cases fully so determine. The quite plain distinction between this conceded rule and the effect of a statute which repeals it in whole or in part, has been often overlooked in these discussions. If a statute declares that irregularities shall not defeat the title, or that certain certificates shall be prima facie or conclusive evidence that there are none, the old rule of strict and full compliance with the statute is no warrant for misconstruing or refusing fairly to carry out its purposes. The rule which undoubtedly exists without such provisions is one thing; the duty of the court to administer such enactments where they exist is quite another.

The cases cited which hold that statutes declaring tax deeds shall be prima facie or conclusive evidence of the regularity of sales, do not include the regularity of proceedings preceding them; but mean only that the auction itself was regular. That it was at the proper time, place, the land sold to highest bidder for cash, etc., etc., have, it will be seen, no application here. For many years in several states they were differently construed, and we might, we think, successfully criticise the principle upon which they rest; but they are too many in number and from courts of too high respectability to be disregarded. They have embodied this canon of interpretation in our American tax law. Statutes may now be presumed to have been framed in reference to it. At least such should at this day be the judicial presumption. The rule they establish, however we may disapprove many of the instances of its application, will in no way be violated in our judgment. Were that the question here we should follow Striker v. Kelly, 2 Denio, 323; Bunner v. Eastman, 50 Barb. 639, and many similar cases. They have been fully adopted in several judgments of the United States supreme court.

There is a class of cases, some of which were cited by complainant's counsel as decisive of this case. Jackson v. Morse, 18 Johns. 441; Varick v. Tallman, 2 Barb. 113, and others like them, construed a statute which declared the deed should vest in the purchaser a title in fee simple. There were no other exceptions in the law. If the clause was construed literally and broadly, payment of the tax, in the absence of all advertisement and assessment, would be unavailing. The deed would divest the citizen's estate where he had paid his tax and been guilty of no wrong. Of course no such monstrous result was intended by the law. In holding that the statute meant only to declare what estate the deed should vest in the purchaser when the law was complied with, was carrying out what, beyond doubt, the law-makers intended. It is a clause quite familiar in legislation, and has always necessarily received the same construction. In proceedings to condemn property, under the power of eminent domain, for court houses, public parks,

railroads, and other public and governmental objects, such clauses are always inserted. They declare that the proceedings shall vest an estate in fee for life, or for years according to the purposes of the law. But we know of no exception in their interpretation. They are held to be descriptions of the kind and duration of the estate to be created by the proceeding where it is pursued as required by the statute. That such an estate could be created without it has never been decided. Such precisely are all the cases construed in Jackson v. Morse, 18 Johns. 441, and its kindred judgments in reference to tax certificates and deeds. We have no doubt of their correctness, and should go quite beyond some of them in narrowing the effect of the proceedings.

The difference between such enactments and judgments and the law before us, and the ruling to be made, is most manifest. The provision is pointed directly to the effect of the certificate as evidence of compliance with the requirements of the statutes. By no possible interpretation or collaterally adduced intention can this be said to be descriptive of an estate only when all the statutory requirements are fulfilled. It expressly declares it shall be evidence that they are fulfilled, and that this evidence shall be impaired only by proof of three specified things. None of them are offered by the bill in this case.

Provisions like those in the law before us have always been administered as we construe this. In Gwynne v. Neiswanger, 18 Ohio, 400, the law declared the deed should not be invalidated unless it was shown the tax had been paid. The court had no doubt that when the legislature had expressly stated the sole grounds upon which the proceedings should be attacked, the court could hear no other, and the tax title, although there were irregularities, was sustained.

In Allen v. Armstrong, 16 Iowa, 508, a similar law provided that only three things should be shown to invalidate the proceedings. They were the same as those in the federal statute. The advertisement was defective. The court, by Dillon, J., now of the 8th circuit, held, no other evidence was admissible, and upheld the title. Henderson v. Staritt, 4 Sneed, 470; Tharp v. Hart, 2 Sneed, 569,—are illustrations of enforcing such stringent laws according to their true spirit. There are similar judgments in Arkansas, Iowa and other states. It is somewhat singular that such discussions arise at all, and they would not, but for the professional belief that the courts had some peculiar power of absolving the citizen from obedience to laws intended to enforce taxation. In Thomas v. Lawson, 21 How. [62 U. S.] 331, the supreme court had before it the statutes of Arkansas, and held the clause in reference to the effect of the deed did not render it conclusive, because when taken in connection with the provisions in reference to a subsequent proceeding in equity, it was clear such was not the intention, although the words would have borne such a construction. Had it stood alone, like that before us, it would have been conclusive. The latter proceeding the court held was so. And, see Parker v. Overman, 18 How. [59 U. S.] 137. The only case cited by counsel or which our own investigations have discovered, having any tendency to authorize the liberty we are asked to take with this law, is Garrett v. Wiggins, 1 Scam. 335, where, under a law substantially like this one, providing that the title should not be invalidated unless it was shown that the land was not subject to taxation, or the tax had been paid, or the land redeemed, it was held, nevertheless, that a defective advertisement rendered the sale void. That the general principle upon which the court went, and which authorized it to say there were some other necessarily implied conditions besides those mentioned in the statute was correct, we shall soon say. But from its application in that case to a defective advertisement we fully dissent. It was a practical repeal of the law and would let in any other irregularity the presence of which, irrespective of the statute, would have invalidated the sale. It reduced the provision from a conclusive to a prima facie effect. The legislature, as we have seen, soon legislated away so irrational and unwarrantable an interpretation. And this the same tribunal conceded, had been done, where a subsequent statute declared its laws should be "fairly administered according to their intention." This was a plenary concession by the court itself, that it had deliberately refused to administer the real meaning of a public statute. We can hardly follow as a precedent a judgment conceded by the court which pronounced it to have been in violation of old and statutory rules. A directly contrary ruling was made in Allen v. Armstrong, 16 Iowa, 508, where some suggestions are made in reference to the constitutionality of a law which went further than to raise the effect of mere irregularities. We should not doubt its constitutionality, so as there existed a lawful tax and delinquency.

But we should say where there was a complete defect in the proceedings no matter what it was, so as to make it impossible for the citizen no matter however much he desired to do so, to pay his tax, the statute as matter of construction would be held not to apply to such a case. In such instances it would be warring with and not enforcing the legislative will if it did not restrain the general words of the law to such conditions as we knew it alone contemplated. In order to effectuate the intention of the law, words may properly be read with most unusual meanings, or the application of their literal signification be restrained to facts which the court is forced to see were alone present to the minds of the law-makers. And although there are numerous instances where

courts of respectability have said in such instances they must administer the law irrespective of its consequences, we consider by far the greater number of the judgments erroneous in which such a rule has been administered. In the case before us, if there had been no sale whatever, if there had been no advertisement, if there had been no assessment, or other complete defect which wholly prohibited the citizen's paying his tax, we should readily and with full confidence rule that such cases were not within the spirit, although within the letter of the law, and be fully justified by numerous judgments, both English and American. The supreme court of the United States have repeatedly sanctioned Chancellor Kent's declaration, modified slightly from older authors, that what was within the letter, but not within the spirit of the law, was not within the law itself. The numerous instances of such constructions are too familiar to require citation. Even fraud, accident, or mistake are not enumerated in this proviso. Beyond doubt they are included by implication. They are not within its reason or intention. Neither are any of the extraordinary exigencies imagined at the bar by way of showing the hardship and improbability of the construction claimed by the complainant. The statute demands some proceedings before it can have any possible application. They must be colorable, embodying a fair and honest attempt to afford the delinquent citizen the opportunity the statute contemplates, to perform his public duty. There must always be a colorable proceeding in which irregularities may occur. Without this, the exigency in which the law is to have force does not occur. Thus treated (as every court intelligent upon this subject would treat it), it is but what in modern times is a wholly common-place enactment. It says, if the land is subject to taxation, if a tax was in fact assessed, so as to give the citizen an opportunity to pay it, and he neglects it, and a colorable attempt, free from all fraud and unfairness, has been made by public officers to sell his land and collect what he has been delinquent in paying, that mere irregularities shall not defeat the title. It requires much prejudice and hostility to efficient government to pronounce such a law tyrannical or impolitic. Looking at it in a proper spirit, free to read its enactments as intended to effectuate a necessary and protective public policy, it remains to consider whether the clauses in question authorize the rule contended for by complainants, or that argued by the defendants.

"Validity" has a well understood technical, as well as popular acceptation, and must receive such meaning in the courts if its use in the statute does not suggest a different one. In the general nomenclature of the law, no word is so frequently used to signify legal sufficiency in contradistinction to mere regularity as this one. We say a deed is regular but invalid for want of power in the attorney or officer. When a lawyer says he concedes the regularity of a sale, but objects to its validity, it is known the conditions are questioned upon which the power to make it depended. Elementary books, in treating of questions of both business and official agency, employ it as a compendious word, as always including every incident of complete legality. Regularity, on the other hand, never does so. An official sale, an order, judgment or decree may be regular. The whole practice in reference to its entry may be correct, but still invalid for reasons going behind the regularity of its forms. But, when we say a judgment, decree, or sale is valid, it fully excludes the idea that it is void for any reason.

Blackw. Tax Titles, 86, in criticising the opinion in Rhinehart v. Schuyler, 2 Gilman, 473, says the provision in the statute was, that the deed should be evidence of the regularity and legality of the sale, both of which are necessary to its validity. The word "validity," according to this writer, includes all the requisites of power to sell. This statute uses that very word, and by it includes alike the regularity of the sale and the preliminary acts upon which the power to make it rests. It is hardly germain to our present argument to say that the criticism itself was illy sustained by the facts of the judgment. The statute in Rhinehart v. Schuyler declared it should be evidence of the regularity and legality of the sale. The addition of this latter word is wholly overlooked by this writer, and he erroneously supposes the decision at war with those which had given a different meaning to provisions relating to regularity only.

On page 90, speaking of the recitals where they are evidence, he says, in order to make them full evidence without any proof aliunde, they must state all the prerequisites to constitute a "valid" sale. He is discussing the cases which made deeds evidence of the regularity of sales and uses this word "validity" to include all the particulars for a perfect title. There are numerous similar employments of the term in his treatise. His nomenclature agrees with all the judgments he cites. A valid sale means one having the quality of legal sufficiency and complete obligation. If less than this, it has no validity within any meaning we have ever seen imputed to that word.

During the few hours only we have been able to command for this investigation, we have noted from the discussions the following instances where the words "valid" and "validity" have been pointedly employed to denote a complete and indefeasible title or right as distinguished from merely regular proceedings subject to be invalidated by the proof of irregularities in the want of power. Carlisle v. Longworth, 5 Ohio, 368; Allen v. Armstrong, 16 Iowa, 513; Jackson v. Morse, 18 Johns. 441; Gwynne v. Neiswanger, 18

Ohio, 407; Henderson v. Staritt, 4 Sneed, 470; Tharp v. Hart, 2 Sneed, 569; Foster v. Smith, 10 Wend. 379. Nearly every other case before referred to in this opinion uses the word in the same way. In no instance do courts deem it necessary to employ any accompanying adjective when they desire to say, a deed, title, or proceeding, is in a plenary sense lawful and indefeasible.

Dictionary definitions seldom throw much light upon statutory meanings. Where the latter are obscure or doubtful, the reason and policy of the law as derived from all the fit sources of inquiry are far more enlightening. But where a legal and technical term is so well understood that the ordinary lexicons adopt it, such fact may well be referred to as an answer to the argument made at the bar that such professional and judicial meaning was not probably in the minds of the law-makers. Webster's Dictionary, after giving the popular meaning of "validity," thus gives its legal and technical signification, as used by the profession. "Law—legal strength or force, that quality of a thing which renders it supportable in law or equity, as the validity of a grant, the validity of a will, or the validity of a claim of title." That this legal signification had become so well known as to find its place in our ordinary dictionaries is not unworthy of consideration, when we are ascertaining in what sense the law-maker used it. It cannot be said they were unaware that it imported in its popular use, and in its legal application, substantial rectitude as distinguished from merely formal regularity. We must conclude that when it is enacted that the validity of a sale shall be attacked but in three ways, it is saying expressly you shall in no other way show it has not that quality which renders it supportable in law or competent to give title to what it purports to convey. It seems an unauthorized reading to declare that the statute in using the words "regularity" and "validity," two words of definite, well understood, technical meaning, long used to signify wholly different ideas, meant no more than if the word "regularity" alone was used. It requires us to expunge the word "validity" or say it has no meaning in the sentence. But the statute defines its own terms by the modes in which alone the certificate is to be defeated.

The things required by the law to invalidate the sale have no possible connection with its regularity—with its validity they have. The three subjects of proof, non-subjection to taxation, payment of tax and redemption of land after the sale, every one of them are wholly inapplicable to the mere auction. They constitute reasons going to its validity only as we have defined it.

The law provided a means to collect a tax from lands where the civil power of the nation had been overthrown by rebellion.

Looking to the great certainty of much disturbance in government, to only a partial restoration of forms under military rule, and anticipating great irregularity in the process of enforcement, it declared that the regularity and the validity of the sale, validity as including what is necessary to make the sale valid, should be defeated only by three substantial defenses. They are specified, and they, we think, include the entire scope of defense admissible. Even if the advertisement was imperfect, or the assessment inaccurate, so as the land was really subject to tax, and was, in fact, sold free from fraud, accident or mistake, such as would authorize equitable relief in other cases, we think the proceedings were intended to be conclusive, and so hold them.

NOTE. There were a number of similar cases, but this was the only one tried. The principles embodied in this decision were affirmed in the supreme court of the United States, in the case of De Treville v. Smalls, April term, 1879. That opinion has been followed in three later cases by the same court. See 98 U. S. 517, and 99 U. S. 441 and 496. Judge Emmons dictated the syllabus in this case as he did in Memphis v. Brown [Case No. 9,415]. The case was first published in the Western Jurist.

Case No. 12,712.

SHARPLESS v. KNOWLES.

[2 Cranch, C. C. 129.] [1]

Circuit Court, District of Columbia. Dec. Term, 1816.

BAIL—RIGHT TO TAKE DEBTOR.

Bail, in Pennsylvania, may follow their principal into the District of Columbia, and there take him out of custody of the person who has become bail for him in that district; and if the principal be brought into the circuit court of that District to be surrendered to the marshal, he will be ordered by the court to be delivered up to the Pennsylvania bail.

On the 18th of January, 1817, the following entry was made upon the minutes of the circuit court of the District of Columbia, for the county of Washington: "John Okely, a citizen and inhabitant of the District of Columbia, having been arrested for debt in Philadelphia, in the state of Pennsylvania, by a writ from the court of Philadelphia county, Jesse Sharpless, a citizen of Pennsylvania, at the request of the said Okely, became his bail. The said John Okely afterwards came to the county of Washington, in the District of Columbia, where he was arrested for debt by a writ issued from the circuit court for that District, in which writ Henry Knowles, a citizen and inhabitant of the District of Columbia, became his bail. Judgment having been rendered in the county court of Philadelphia against the said John Okely, in the suit in which the said Sharpless was bail, he took a bail-piece from that court, and came to the county of Washington, in the District of Columbia, and on the 6th of January, 1817, showed the said bail-piece to the said John Okely, and took him into

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

his custody, and required him to go to Philadelphia county aforesaid, to be there surrendered according to the laws of Pennsylvania, in discharge of the said Sharpless as his bail. The said Okely promised to settle the business, and upon the faith of that promise, the said Sharpless refrained from taking the said Okely away by actual force, but left him in his, the said Okely's, own house; after which, on the same day, the said Okely gave notice to the said Knowles, his other bail, of the said demand of the said Sharpless, and the said Knowles, being then at court and engaged as a juror in the trial of a cause in the circuit court of the District of Columbia, the counsel of the said Knowles directed the said Okely to apply to the clerk of the said court for a bail-piece; who issued the same; which being delivered to the said Okely, he afterwards, on the same 6th day of January, 1817, delivered it to the said Knowles, who thereupon took the said Okely into his custody, as bail as aforesaid, but did not actually confine the said Okely, but permitted him to return and remain at his own house in the county of Washington aforesaid. . On the morning of the 8th of January, 1817, the said Sharpless called at the said Okely's house with a carriage and two assistants, and took the said Okely into his custody, and informed him that he should compel him to go with him to Philadelphia, for the purpose of surrendering him there, in his discharge as aforesaid. While the said Okely was thus in custody of the said Sharpless, the said Knowles, being sent for by Okely, came and claimed him as being in his custody, as bail as aforesaid, and gave the said Sharpless a written notice thereof. Whereupon the said Sharpless agreed with the said Okely and Knowles that he would carry the said Okely into the circuit court for the District of Columbia, then in session in the county of Washington, that the said court might decide whether he was lawfully in custody of the said Sharpless, or not; and accordingly brought the said Okely into the court-room, the said Knowles being permitted by the said Sharpless to accompany them in the same carriage, and entering the court-room at the same time. While the parties were thus in the court-room, the said Knowles, by his counsel, stated to the court that he offered to surrender the said Okely to the custody of the marshal, in discharge of the said Knowles, as bail of the said Okely, in the suit aforesaid; to which surrender the said Sharpless objected, contending that the said Okely was lawfully in his custody, as his bail, in manner aforesaid. Whereupon (the court taking time to advise,) the said Okely was, by consent of the parties aforesaid, and by order of the court, committed to the custody of the marshal of the District of Columbia, for safe keeping, without prejudice to the rights of the contending parties, until the court should be advised thereon. But the court, after hearing the argument of counsel, and taking time to consider thereupon, ordered and directed the marshal of the district to deliver the said John Okely into the custody of the said Jesse Sharpless. And the marshal having represented to this court, that since the said Okely was brought into this court as aforesaid, and while he was remaining in custody of the said marshal for safe keeping as herein stated, by the court with the consent of the parties, a writ had been put into his hands by one Alpheus J. Hyatt, against the said Okely, and having prayed the direction of the court as to the service of the said writ under said circumstances, the court were of opinion, and so directed the said marshal, that the said Okely could not lawfully be arrested under such writ, and that, notwithstanding such writ, the said Okely should be delivered up by him, as above ordered, to the said Sharpless."

In the argument, Mr. Jones, for Knowles, cited 1 Tidd. Prac. 190; 7 Mod. 231; Ex parte Gibbons, 1 Atk. 239; Marshall v. Vincent, Moore, 400; Trinder v. Shirley, 1 Doug. 45; Merrick v. Vaucher, 6 Term R. 50; Wood v. Mitchell, Id. 247; Postell v. Williams, 7 Term R. 517; Cathcart v. Cannon, 1 Johns. Cas. 28; and Biggnell v. Forrest, 2 Johns. 482; and contended that bail was only the substitute for the actual walls of the jail. That the party is still in custody, and is at liberty only at the will of the bail. That Okely was in custody of the law as much as if he had been in the keeping of the marshal, and that foreign bail had no more right to take the prisoner from the custody of his bail, than to take him out of the walls of the prison. And that Sharpless would be exonerated by the impossibility of having the defendant at the court in Philadelphia, when he was in custody of the law in this district.

Mr. Key, contra, cited the constitution of the United States, and contended that Sharpless had the prior right. That in other respects their rights were equal. That the states are not foreign to each other; and that the citizens of each state are entitled to all privileges and immunities of citizens in the several states. That Sharpless has the same right to take Okely and surrender him as if he had been his bail in this district. That if this were not the case, bail would never be safe, as the debtor might slip away into another state and procure himself to be arrested and held to bail there, and so from time to time during his whole lifetime.

THE COURT (CRANCH, Chief Judge, contra) was of opinion that Sharpless had such a right to the person of Okely as to prevent Knowles from surrendering him in discharge of himself.

CRANCH, Chief Judge, was of opinion that Okely was in the custody of his bail here, who had a right to hold him, and surrender him. When the laws of two states come in conflict, the laws of the state, in which the parties are, must prevail.

Case No. 12,713.

SHARPLESS et al. v. ROBINSON.

[1 Cranch, C. C. 147.] [3]

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

JUDGMENT—DEFAULT—CASE REOPENED—EXECUTION ISSUED.

If execution issue before the end of the term in which the judgment was rendered, it may, on motion, be quashed and the judgment rescinded.

At last term, the garnishee [Benjamin Robinson, garnishee of Henry and Peter Bowman] having been returned summoned, and not appearing, judgment of condemnation was entered against him for £119, being the whole amount of [Sharpless & Smith's] the plaintiffs' claim. A ca. sa. issued on 14th December, 1803, returnable to this term, which commenced on the 26th of December, 1803. On Saturday, 24th December, 1803, at an adjournment of the last term, Mr. Peacock, for the garnishee, moved to appear and set aside the judgment and plead. The motion (supported by the garnishee's affidavit) was continued over to this term. 1. Shall the judgment be set aside? 2. Upon what terms as to costs of the execution?

Judgment opened and execution quashed on the garnishee's paying the costs on the execution, pleading to issue, and going to trial this term unless cause of continuance be shown.

SHARP'S RIFLE MANUF'G CO. (SMITH v.). See Case No. 13,106.

SHATTUCK (HILLER v.). See Case No. 6,504.

Case No. 12,714.

SHATTUCK v. MALEY.

[1 Wash. C. C. 245.] [1]

Circuit Court, D. Pennsylvania. April Term, 1805.[2]

MARITIME TORT—SEIZURE OF NEUTRAL VESSEL—EXCUSE—PROBABLE CAUSE OF SEIZURE—DAMAGES.

1. An officer of a public armed vessel of the United States, who made a seizure of a neutral vessel on the high seas, may excuse himself, by showing probable cause for having made it; but the ground of excuse should be very strong—stronger than in case of a capture of a neutral, by a belligerant.

[Cited in The Malaga, Case No. 8,985; Smith v. Averill, Id. 13,007; Averill v. Smith, 17 Wall. (84 U. S.) 93; McGuire v. Winslow, 26 Fed. 306.]

2. If such an excuse is made out, he is not liable for consequential damages; but otherwise, he is liable for all damages which have followed the seizure.

[Cited in The Malaga, Case No. 8,985.]

3. What will be deemed probable cause of seizure.

This was an appeal from a sentence of the district court, entered, pro forma, against the appellant. The appellant filed a libel in that court, stating, that being, in May, 1800, a naturalized subject of the king of Denmark, and resident at St. Thomas, and owner of the Mercator, an American built vessel, which he had bona fide purchased from the owner, in November, 1799; he, in May, 1800, put on board of her a cargo, and sent her to Jaquemel, or Port au Prince, in the island of St. Domingo, consigned to the captain, and properly documented to prove her neutrality. That on the 14th of May, when near the port of Jacquemel, she was met with by Captain Maley, commander of the United States' armed vessel the Experiment, and carried away, without having proceeded to adjudication; and prays a monition to compel him to do so. Maley appears, and answers under protest: admits the capture, but states, that the Mercator being an American registered vessel, owned and employed by citizens residing in America, sailed from Baltimore, and at the time of the seizure she was proceeding directly, or from some intermediate port, to Jaquemel, within the dependencies of France, and not to Port au Prince, agreeable to her letter of instructions. That the captain appeared to be an Italian, and his crew Portuguese and Italian. The captain did not show his burgher's brief. Shattuck was a citizen of Connecticut, and had never expatriated himself. That under all these suspicious circumstances, he took her as violating the non-intercourse law, and sent her, with an officer and men, to Captain Talbot, the commander on that station, lying off Cape Francois, for his orders. Six hours after she left the Experiment; she was captured by a British privateer, carried into Jamaica, libelled as belonging to France or Spain, and condemned. Of this, the libellant had notice; and his captain interposed a claim; but the vessel and cargo, (except the captain's part,) was condemned. An appeal was prayed, but was afterwards abandoned. The replication gives the proofs of the naturalization of Shattuck in 1789 or 1790. That the original destination was to Port au Prince, and so were the instructions; but just before sailing, verbal orders were given to touch at Jaquemel. That the libellant was the sole owner of the Mercator; that she was navigated as a real Danish vessel; she had on board, when seized, the king's passport, a certificate of measurement, muster-roll, a bill of sale, a burgher's brief of the captain, clearance, invoice, and bill of lading, duly attested as to the ownership and neutrality thereof; the captain's instructions, and the certificate on oath of sundry respectable merchants of the island of St. Thomas, attesting the citizenship of the replicant.

Mr. Duponceau, for the appellant, insisted: 1st. That the capture was not such as to ren-

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

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

[2] [Affirmed in 3 Cranch (7 U. S.) 458.]

der Maley a bona fide possessor; because, being properly documented, and no circumstance to render her suspected, he had no right to capture her. But if he did take her, it was his duty to send her immediately to the United States, for adjudication; and not to Cape Francois, out of her course to the United States, to be examined by the commodore. See 4 Laws U. S. [Folwell's Ed.] 166 [1 Stat. 578]. 2d. Even if he were a bona fide possessor, he has forfeited the protection of that character, by not resisting or remonstrating against the capture by the British, and by not afterwards endeavouring to defend the property in the court of admiralty. 4 C. Rob. Adm. 280. 3d. That the capture by the British was the consequence of his illegal conduct, and he is liable for all consequent damages. 1 C. Rob. Adm. 98, the case of The Betsey. 4th. The sentence in Jamaica is not conclusive. But if it be, the capture by Maley was illegal: as the Mercator, it is admitted, was unarmed. 5th. The claim at Jamaica, put in by the captain of the Mercator, does not bar the appellant's remedy. 2 C. Rob. Adm. 308.

The principal answer, by Dallas, for appellant, was, that the destination of the vessel differing from the written instructions to the captain; the former citizenship of Shattuck in this country; the instructions to the officers of the American navy; justified Maley in sending her in for examination. That it does not appear that the loss proceeded from his having done so.

WASHINGTON, Circuit Justice. Previous to the inquiry, whether the appellant has shown sufficient reasons to excuse him for having captured the Mercator, and to what degree his responsibility for having done so extends; there is a preliminary question, which deserves examination. It is, whether the commander of an armed neutral vessel, in the execution of a law of his country, can excuse himself for the violation of the rights of other nations, on the high seas; by showing sufficient ground to suspect, that the vessel thus captured, came within the scope of the law, and of his authority? In other words, whether probable cause, to any and to what extent, will excuse him, if the event should prove, that he judged wrong upon the fact which he has to decide? This question was very much agitated in the cases of Murray v. The Charming Betsey [2 Cranch (6 U. S.) 64], and The Flying Fish [unreported], in the supreme court; but did not receive a positive decision by the court.

The common law doctrine, as to torts, committed by officers acting under authority of law, is certainly very rigid. They act at their peril; and if they by mistake act wrong, there are but few cases in which they can be excused. But a reason may exist for this severity, in cases happening on land, which does not exist where similar cases occur at sea. In the former, the means of obtaining correct information are more within the power of the officer; and the officer may, in most cases, if he doubts as to the fact, insist upon being indemnified by the party. But at sea this cannot be done.

The act of congress [2 Stat. 528], prohibiting the intercourse of the American merchants with the dependencies of France, considered strictly as a municipal regulation, unconnected with war; was binding upon our citizens, whether within the limits of the United States, or at sea. Those officers, who were in any manner charged with the execution of that law, were bound to obey it. The courts of this country, when cases arising under it are brought before them, must decide in such a manner as to give effect to the law; whatever may be the hardship which such decisions may impose upon the subjects of other nations. The law authorized our armed vessels to stop, and examine any vessel of the United States, on the high sea, which there may be reason to suspect to be engaged in traffic, contrary to the provisions of that law; and if it should appear, that she was sailing to any port within the territory of the French republic, contrary to that law; the commander of our vessel was to seize, and send the vessel engaged in such illicit trade, to the nearest port in the United States.

Every thing incident to the power here granted, and without which it could not be executed, is impliedly granted. But as the character of a vessel at sea, could not always be discovered but by her papers; it necessarily followed, that the commanders of the armed vessels of the United States, might, under the sanction of this law, stop the vessels of other neutral nations, in order to make this examination; for otherwise, it would be impossible to say, whether she was not a vessel belonging to American citizens, engaged in this illicit trade. The right of examination, essentially implies the right of judging, upon the evidence exhibited to them, whether the character assumed was real or covered. To hold the officer responsible, according to the event, would be to render the law nugatory; since few men would be found bold enough to insure the eventual solidity of his judgment, however strong he might suppose the grounds of it to be. But to excuse him from damages, if he should, in the execution of this limited authority, violate the rights of others; he must show such reasons as were sufficient to warrant a prudent, intelligent, and cautious man, in drawing the same conclusions. This is what is called probable cause; which excuses a belligerant for an unauthorized seizure of a neutral vessel; which he has reason to believe to be, in fact, an enemy, or engaged in a trade which renders her liable to confiscation. The principle of the two cases is the same; though the facts which would afford probable cause in one case, would not in another. For instance:

vessels belonging to neutral states, must not only act so as to entitle them to the protection of that character; but they must carry with them the documents necessary to satisfy any of the belligerent powers, who may demand it, that she is neutral. If this be not done, the neutral cannot complain, that he is arrested on his voyage, and exposed to all the losses which may result from an examination into the fact of his neutrality, in the courts of the captor. But as she is under no obligation to prove her neutrality to another neutral nation, it would be no excuse for her capture, by such neutral nation, that she did not exhibit the same proofs as a belligerant might have required. But, if, as in cases within the non-intercourse law, there be reasons to suspect the vessel to be the property of Americans, and engaged in a trade prohibited by the laws of the United States; it would be incumbent on the commander of such vessel, to free himself from those suspicions; and if the officer of the American armed vessel, had reasons, apparently well founded, to warrant the belief, that she came within the law, which he was bound to execute; I should hold him excused. But these reasons ought to be very strong, to entitle him to the character of acting bona fide; a character which ought most undoubtedly to protect him against any consequential damages, provided they are not produced by any subsequent misconduct of his own, or of those intrusted by him with the property.

These being the principles which ought to govern this case, how do they apply to it? The Mercator, when met with at sea, was found possessed of every necessary document to prove her to be the property of a Danish subject, and employed in a lawful commerce, not only in relation to the American government, but to the belligerent powers. I cannot discern, in the history of this transaction, a single circumstance, which ought to have excited a suspicion, that she was not, in fact, what she appeared to be. The certificate found on board, attested by the oaths of respectable men at St. Thomas, fully established the fact that Shattuck was a subject of his Danish majesty. The bill of sale proved the vessel to be Danish, not American property. The invoice and bill of lading afforded the usual and proper evidence of the voyage she was pursuing, and which she was authorized to pursue. These facts being established, what was it to this government, whether she was sailing to a port different from that mentioned in the written instructions? The circumstance of the captain's appearing to be a Frenchman, which has been mentioned as sufficient to excite suspicion, was of itself calculated to dispel it. For, is it likely that an American owner, engaged in this trade, would intrust his property to a French captain and consignee, in a vessel navigated entirely by foreigners? In short, I cannot imagine a case so totally destitute of the means of being defended, as the present. Without inquiring into the subsequent conduct of the appellee, it is sufficient to say, that the taking the Mercator out of her way, was an unlawful act, and makes Captain Maley answerable for all the damages which have accrued.

This decision was affirmed in the supreme court. 3 Cranch [7 U. S.] 458.

Case No. 12,715.

SHATTUCK v. MUTUAL LIFE INS. CO.

[4 Cliff. 598; 7 Ins. Law J. 937; 7 Reporter, 171; 19 Alb. Law J. 138.] [1]

Circuit Court, D. Massachusetts. May, 1878.

INSURANCE—WHEN CONTRACT COMPLETE—PLACE OF CONTRACT—PROPOSALS—AGENT.

1. Contracts of insurance are completed when the proposals of one party have been accepted by the other by some appropriate act signifying such acceptance.

2. The place or seat of the contract is the place where it is accepted.

3. If an agent appointed in a state other than the one that chartered the insurance company, or in which it has its home office, forward the papers to that office, and the policy is thereupon executed and sent to the applicant, the contract is made in the state where the home office is situated.

[Cited in Smith v. Mutual Life Ins. Co. of New York, 5 Fed. 583.]

4. Since acceptance of the proposals is the test of completion, it follows that a transmission of the policy by mail to the agent, to be by him delivered, if the policy conforms to the proposals, would have the like effect, unless it was not to be binding until countersigned by the agent.

5. In this case the contract was complete, because the proposals were submitted by the decedent, were accepted by the company at its home office, and the acceptance made known to the applicant in the accustomed way.

The following is the substance of the agreed statement upon which the case was argued: This is an action on a policy of insurance, issued by the defendant upon the life of the plaintiff's intestate, Noah G. Shattuck. The plaintiff [Mary W. Shattuck] is a citizen of the state of Massachusetts. The defendant is a corporation organized under the laws of the state of New York, and having its place of business in the city of New York, and is engaged in the business of issuing policies of insurance upon the lives of persons residing in the various parts of the United States. It has agents appointed for certain specific purposes. As appears on the face of the policy, these agents "are not authorized to make, alter, or discharge contracts or waive forfeitures." It also appears on the face of the policy that the same is issued by the company in consideration, among other things, of the payment by the assured of the first and each succeeding pre-

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission. 19 Alb. Law J. 138, and 7 Reporter, 171, contain only partial reports.]

mium at its office in the city of New York, that the policy is executed at said office and the loss payable thereat. It appears, by the receipts for premiums delivered to such of the assured as transmit their premiums to said office in the city of New York, that, for the convenience of such assured, the company appoints agents who are authorized to receive such premiums, but only on the production of the company's receipt duly signed by the president, vice-president, secretary, assistant secretary, or cashier thereof. These agents are only authorized to receive applications from persons desiring insurance, and forward such applications to the office of the corporation in New York, where, if the application is accepted, a policy is issued and sent by mail to the agent in the state in which the application is made, to be there delivered by said agent to the insured upon payment by the assured to the agent of the first premium. But such applications are not forwarded by said agents to the office of the company in New York until the applicants have been examined by physicians appointed by the company in the state in which the applicants reside, and have been recommended by said physicians, upon said examination, as suitable subjects for insurance in said company. For convenience of the policy-holders, receipts for all subsequent premiums are forwarded from New York to said agent, to be delivered by him in his state to the insured upon payment of the same.

The defendant corporation, on November 22, 1869, at its office in New York, issued a policy of insurance on the life of the said Noah G. Shattuck, the plaintiff's intestate, for one thousand dollars ($1,000). At the time said policy was issued said defendant corporation was doing business in this commonwealth, in accordance and in compliance with the laws of this commonwealth, and especially in accordance and in compliance with the law of this commonwealth as found in Gen. St. Mass. c. 58, §§ 68, 69, in reference to foreign insurance companies, viz.:

Section 68: "Every foreign insurance company, before doing business in this state, shall in writing appoint a citizen thereof, resident therein, a general agent upon whom all lawful processes against the company may be served with like effect as if the company existed in this state; and said writing or power of attorney shall stipulate and agree, on the part of the company making the same, that any lawful process against said company, which is served on said general agent, shall be of the same legal force and validity as if served on said company. A copy of the writing, duly certified and authenticated, shall be filed in the office of the insurance commissioners, and copies certified by them shall be sufficient evidence. This agency shall be continued while any liability remains outstanding against the company in this state, and the power shall not be revoked until the same power is given to another, and a like copy filed as aforesaid. Service upon said agent shall be deemed sufficient service upon the principal."

Section 69: "The general agent shall, before any insurance is made by said company, give a bond to the treasurer of the commonwealth, with one or more sureties to be approved by him, in the sum of $2,000, with condition that he will accept service of all lawful processes against the company in the manner provided in this chapter. Every agent of a foreign insurance company doing business in this state shall, before any business is done by him for said company, give a bond to the treasurer, with one or more sureties to be approved by him, in the sum of $1,000, with conditions that he will, on or before the 15th day of November in each year, make a return on oath, to the treasurer, of the amounts insured by him, the premiums received, and assessments collected during the year ending on the 31st day of the October preceding, and at the same time pay to the treasurer the taxes provided in the following section."

Said policy was sent by mail to the said defendant's agent in said commonwealth of Massachusetts, and by him delivered to the said Noah G. Shattuck, in Massachusetts, upon payment of the required premium to said agent. Noah G. Shattuck died Nov. 8, 1876, and due notice and proof of his death was given by the plaintiff to the defendant. Quarterly premiums, in accordance with the conditions of the policy, were payable on the 22d of February, May, August, and November respectively in each year. These premiums were paid by the assured, and received by the defendant, up to and including the payment due May 22, 1874, since which date no money on account of said premiums has been paid by the insured or received by the defendant. By reason of the non-payment of said premiums and in accordance with condition number two (2) of said policy, said company was "not liable for the payment of the sum assured or any part thereof, and this policy" ceased and determined unless it was kept in force by the provisions of St. Mass. 1861, c. 186. It was further provided by said policy, that in every case wherein the said policy should cease or determine, all the premiums paid should be forfeited to the company. All other conditions in said application and policy were complied with by the assured, except the payment of the quarterly premiums subsequent to May 22, 1874.

If, upon the foregoing facts, the court shall hold that St. Mass. 1861, c. 186, applies to the contract made between the defendant and the insured, and that by reason of said statute the policy was in full force and effect at the death of said Noah G. Shattuck, judgment is to be entered for the plaintiff, for $925.00, being the amount of said policy less the unpaid premiums; otherwise judgment for the defendant.

T. H. Sweetser and G. A. A. Pevey, for plaintiff.

We are to undertake in this argument to ascertain whether or not St. Mass. 1861, c. 186, applies to the contract made between the defendant and the assured. See St. 1872, c. 325, § 7, in reference to the same; also, St. 1870, c. 349, § 5; St. 1867, c. 267, § 5. Upon the facts as agreed in this case, it becomes material in the first place to ascertain the place of the contract. Add. Cont. (Am. Ed.) § 241, note 1, and cases cited; Chit. Cont. (10th Ed.) p. 90, note b, and cases cited; Story, Cont. (5th Ed.) § 802. When, therefore, was the contract of insurance in question completed? At what place did the minds of the parties meet, and the proposals offered by either assented to by the other? The defendant at New York accepted the application, issued the policy at their office in New York, and sent it by mail to the agent in Massachusetts, "to be delivered there by said agent to the insured upon payment by the assured, to the agent, of the first premium." May, Ins. § 66. The defendant assented to the policy provisionally, that is, upon payment to the agent of the first premium. Before the premium was paid the applicant had not assented to the policy, and had not complied with the conditions upon which the policy was issued. Mutual Life Ins. Co. of New York v. Young, 23 Wall. [90 U. S.] 85. We will suppose that the agent handed the policy to the applicant merely for inspection, and the applicant had retained it, not paying the premium, and no waiver of payment being made. In such a case, can it be said that the applicant could lawfully hold the policy or have any rights under the same which he could enforce against the defendant company, or could he in such a case be called the assured? It appears not. In Markey v. Mutual Ben. Life Ins. Co. of New Jersey, 103 Mass. 78, the facts show that the policy was handed by the agent to the applicant merely for inspection, so that the applicant might determine whether or not to accept the policy and pay the premium. The court say: "At the most, this (delivery) was a mere proffer of the instrument which contained the contract; requiring, upon the other side, acceptance and payment of the premium to give it (i. e. the policy) legal effect and operation as a contract. The payment of the premium and delivery of the policy were dependent upon each other. The mere act of manual possession, under the circumstances, does not vest the legal title in the plaintiff, nor prove that it was so delivered." Id. 89. One party is not bound by such a proposal until the other is bound by the acceptance. Hoyt v. Mutual Ben. Life Ins. Co., 98 Mass. 539, 544. Hence, the place of the delivery of the policy and the payment of the premium is the place of the contract. Bliss, Ins. (2d Ed.) p. 613, § 362; Heiman v. Phœnix Mut. Life Ins. Co. of Connecticut, 17 Minn. 153 (Gil. 127); Schwartz v. Germania Life Ins. Co., 18 Minn. 448 (Gil. 404).

The agreed facts show that the agent had no power to deliver the policy until the premium was paid; and the second condition of the policy apprised the agent, as well as the applicant, that the contract was not to be complete until the premium was paid; and that, upon payment, the policy, as evidence of the same, should be delivered to the applicant, who then became the assured. Faunce v. State Mut. Life Ins. Co., 101 Mass. 279; Bailey v. Hope Fire Ins. Co., 56 Me. 474; Collins v. Insurance Co., 7 Phil. Ch. 201; Tayloe v. Merchants' Fire Ins. Co., 9 How. [50 U. S.] 402. In that case the court say that the offer was continuous until it reached the applicant, and was in due time accepted or rejected by him; and that the place of the contract was the place of the acceptance. Daniels v. Hudson Fire Ins. Co., 12 Cush. 422; Heebner v. Eagle Ins. Co. of Cincinnati, 10 Gray, 131; Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 398. The payment of the premium is always regarded as essential to the contract of insurance by the companies. See, among many other cases, Dodge v. Mutual Life Ins. Co., U. S. C. Ct. Ky.;[2] Rogers v. Charter Oak Life Ins. Co., 41 Conn. 97; Cooper v. Pacific Mut. Life Ins. Co., 7 Nev. 116. In a recent case in Canada, the place of the payment of the premium was held the place of the contract. In that case the policy was executed in the United States, at the office of the company, and sent to the agent in Canada for delivery there. It was held that the contract was made in Canada, and the rights of the parties must be governed by the laws of Canada. Meagher v. Aetna Ins. Co., 20 U. C. Q. B. 607. "Such contracts (i. e., between a foreign insurance company and a citizen of another state) are not inter-state transactions, though the parties may be domiciled in different states. The policies do not take effect until delivered by the agent in Virginia." Field, J., in Paul v. Virginia, 8 Wall. [75 U. S.] 168. This contract, having been made in Massachusetts, is to be construed and interpreted, as before stated, by the laws of Massachusetts then in existence. Blanchard v. Russell, 13 Mass. 16; Paul v. Virginia, 8 Wall. [75 U. S.] 168.

Insurance companies stand in just the same position, in respect to the statements just made, as a natural person. When a foreign corporation comes, by its officers, within the jurisdiction of another state, and there engages in business, it becomes amenable to the laws of the latter state, upon the same principle and to the same extent that companies incorporated by the latter state would be. Austin v. New York & E. R. Co., 25 N. J. Law, 381; Warren Manuf'g Co. v. Etna Ins. Co. [Case No. 17,206]; Columbia Fire Ins. Co. v. Kinyon, 37 N. J. Law, 35; Martine v. International Life Ins. Soc., 53 N. Y. 339. The consent given this defendant company to transact business in Massachusetts

[2] [Unreported.]

may be accompanied by such conditions as Massachusetts may think fit to impose, "and these conditions must be deemed valid and effectual by other states and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with the rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence." Curtis, J., in Lafayette Ins. Co. v. French, 18 How. [59 U. S.] 406; Paul v. Virginia, 8 Wall. [75 U. S.] 168; Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 589; Kennebec Co. v. Augusta Insurance & Banking Co., 6 Gray, 208; Ang. & A. Corp. § 273; Thorne v. Travellers' Ins. Co. (1875) 80 Pa. St. 15. In 1869, at the date of this contract, insurance companies were subject to the law of 1861 (chapter 186). Every contract made by the defendant since said act of 1861 (chapter 186) went into effect, and prior to its repeal in 1877, has been made in view of and in subordination to the law of 1861 (chapter 186), which has thus been substantially incorporated into the contract. Shaw v. Berkshire Life Ins. Co., 103 Mass. 254; Pitt v. Same, 100 Mass. 500; Morris v. Penn Mut. Life Ins. Co., 120 Mass. 503; Chamberlain v. N. H. Fire Ins. Co., 55 N. H. 249; Emery v. Piscataqua F. & M. Ins. Co., 52 Me. 322. Hence, the obligations of this contract depend upon and necessarily refer to Act 1861, c. 186. Cooley, Const. Lim. 285; Ogden v. Saunders, 12 Wheat. [25 U. S.] 259; McCracken v. Hayward, 2 How. [43 U. S.] 612. This defendant company cannot, by its policy, annul the obligations of said statute of 1861 (chapter 186), and said plaintiff's intestate could not be bound by terms in said policy contrary to its mandates. This "statute does not annul this policy, having provisions at variance with its requirements. It simply annuls and renders void these provisions. It leaves the policy, in all other respects, in full force." Appleton, C. J., in Emery v. Piscataqua F. & M. Ins. Co., 52 Me. 322. Consequently, this statute of 1861 applies to this contract, and must determine the rights of these parties under the same, unless it comes within the provisos, before cited in the opinion given by Curtis, J., in Lafayette Ins. Co. v. French, 18 How. [59 U. S.] 406.

It is a well-known maxim of law that forfeitures in insurance policies are always strictly construed by the courts against the companies, and in favor of the assured; and that courts will find a waiver on slight evidence. Young v. Mutual Life Ins. Co. of New York (1873) 23 Wall. [90 U. S.] 85, 4 Bigelow, Cas. 5. And in construing this policy, the same rule will no doubt be applied by this circuit court, in considering the law of 1861 as applied to this contract. The legislature of Massachusetts, in passing said law, and the supreme court, in opinions upon the same, had in view the same law in reference to forfeitures. Said supreme court has decided that said law of 1861 applies both to foreign and domestic companies. Morris v. Penn Mut. Life Ins. Co., 120 Mass. 503. And by the above decision they have passed upon the validity of said law, and from comparison of the decisions of the supreme court of the United States, upon laws enacted by states in regard to foreign companies doing business in a state in which they were not incorporated, we fail to see in what way this statute of 1861 (chapter 186) is repugnant to the rule of law affirmed, as before cited, upon this question. It has been held by the supreme court of the United States that "a bankrupt and insolvent law which discharged both the debtor and his future acquisitions of his property was not a law impairing the obligations of contracts, so far as respects debts contracted subsequent to the passage of said law." Baldwin v. Hale, 1 Wall. [68 U. S.] 231; Sturgis v. Crowninshield, 4 Wheat. [17 U. S.] 199; Potter's Dwar. St. 475, 476. That statute of 1861 (chapter 186), as far as this contract is concerned, is still in existence, and the statute of 1877 (chapter 61) can have no retroactive effect upon the rights and liabilities which the parties respectively incurred when they entered into this contract in November, 1869. Hill v. Duncan, 110 Mass. 238, 240, and cases cited; Kelsey v. Kendall, 48 Vt. 24.

Dwight Foster and Alfred D. Foster, for defendant.

By the express terms of this statute its provisions are limited to life-insurance companies "chartered by the authority of this commonwealth." The defendant corporation was created by the laws of New York and, for the purposes of federal jurisdiction, is held to be a citizen of that state; in Massachusetts it is "a foreign insurance company," liable to be excluded altogether from this commonwealth, or to be admitted to do business here upon any conditions the state may impose and the company accept. Paul v. Virginia, 8 Wall. [75 U. S.] 181; Home Ins. Co. v. Morse, 20 Wall. [87 U. S.] 445; Doyle v. Continental Ins. Co., 94 U. S. 535. Possibly the suggestion may be made that the present case is affected by St. 1870, c. 349, § 5, and St. 1872, c. 325, § 7, as construed in Morris v. Penn Mut. Ins. Co., 120 Mass. 503, the headnote of which case is, "St. 1861, c. 186, relating to the forfeiture of policies of life-insurance, applies by force of St. 1872, c. 325, § 7, to foreign as well as to domestic insurance companies." If so, the following answers, briefly stated, are believed to be sufficient: The present policy, issued November 22, 1869, before the passage of either of these statutes. The Massachusetts non-forfeiture law does not apply to policies issued by Massachusetts companies prior to its passage. Shaw v. Berkshire Ins. Co., 103 Mass. 254. Neither of the other statutes referred to purports to be retroactive, but each is

limited to future contracts made within and governed by the laws of the state of Massachusetts. "All corporations, &c., doing business in this state, &c., shall be considered and deemed to be life-insurance companies within the meaning of the laws relating to life-insurance within this state, and shall not make any such insurance, &c., except in accordance with, and under the conditions and restrictions of, the statutes now or hereafter regulating the business of life-insurance." St. 1872.

A statute affecting the rights of parties is never allowed a retroactive operation when this is not required by express command or by necessary and unavoidable implication. Murray v. Gibson, 15 How. [56 U. S.] 423; Harvey v. Tyler, 2 Wall. [69 U. S.] 347; Sohn v. Waterson, 17 Wall. [84 U. S.] 598; King v. Tirrell, 2 Gray, 333. If these statutes, or any other, expressly undertook to apply the provisions of the Massachusetts non-forfeiture law to previously existing contracts of life-insurance, they would be obnoxious to the constitutional provision which declares that no state shall pass any law impairing the obligation of contracts. Const. U. S. art. 1, § 10. Any deviation from the terms of a contract, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those that are, impairs its obligation. Van Hoffman v. Quincy, 4 Wall. [71 U. S.] 553; Edwards v. Kearzy [96 U. S. 595] Oct. term, 1877. No argument is required to show that a statute which does away with an express condition forfeiting a life-insurance policy for non-payment of premiums, and enlarges the liability of the company beyond the terms of the contract, by extending the duration of the policy, falls within this definition. Furthermore, the policy of insurance in the present instance is not a Massachusetts but a New York contract. No legislation of Massachusetts could possibly affect its provisions. The policy was written, dated, and delivered in New York; the premiums and the loss are there payable. Scudder v. Union Nat. Bank, 91 U. S. 413; New York Life Ins. Co. v. Davis, 95 U. S. 425; Ex parte Heidelback [Case No. 6,322]; Whart. Confl. Laws, § 465; Parken v. Royal Exch. Ins. Co., 8 Ct. Sess. Cas. (2d S.) 365; Ruse v. Mutual Ben. Life Ins. Co., 23 N. Y. 521; Hyde v. Goodnow, 3 N. Y. 265; Spratley v. Mutual Ben. Life Ins. Co. (Ky. Ct. App.; 1875) 11 Bush, 443; 4 Bigelow, Cas. 84; Green v. Collins [Case No. 5,755].

Other pending suits will require a full discussion of the question, what life-insurance policies are governed by the laws of Massachusetts, so that its legislation is incorporated into their provisions as a part of the contract. For the purposes of the present cause it is deemed sufficient to refer to the foregoing, which are only a few of the leading authorities, and to observe that the question is believed to be one of general commercial jurisprudence and not of local law, and that in Morris v. Penn Mut. Ins. Co., 120 Mass. 503, this question was not alluded to in the opinion of the learned judge, who pronounced the judgment of the court, except in the final sentence of his opinion, which treats it as disposed of by the agreement of parties.

CLIFFORD, Circuit Justice. Contracts of insurance are completed when the proposals of the one party have been accepted by the other by some appropriate act signifying such an acceptance, and it follows from that rule that the place or seat of the contract is the place where it was accepted. Consequently if an agent appointed in a state other than that which chartered the company, and in which the company has its home office, forwards the requisite papers to that office, and a policy is thereupon executed there, and mailed directly to the applicant, the contract is a contract made in the state where the home office is situated; and since the acceptance of the proposals is the test of completion, it follows that a transmission of the policy by mail to the agent, to be delivered by him to the applicant, if the policy conforms in all respects to the proposals, would have the like effect, unless by the terms of the policy it was not to be binding until it was countersigned by the agent who forwarded the proposals. May, Ins. § 66; Hyde v. Goodnow, 3 N. Y. 266; Huntley v. Merrill, 32 Barb. 626; Western v. Genesee Mut. Ins. Co., 12 N. Y. 263.

Agents are appointed by the defendant corporation for certain specific purposes, but the agreed facts show that they are not authorized to make, alter, or discharge contracts, or to waive forfeitures. Policies are issued by the company in consideration, among other things, of the payment by the assured of the first and each succeeding premium, at its office in New York, where the policy in this case was issued, and where the loss, if any, is payable. For the convenience of such of the assured as transmit their premiums to the home office, the company appoints agents who are authorized to receive such premiums, but only on the production of the company's receipt, duly signed by the president, vice-president, secretary, assistant secretary, or cashier thereof. These agents are only authorized to receive applications from persons desiring insurance and to forward the same to the home office of the corporation, where, if the application is accepted, a policy is issued and sent by mail to the agent in the state in which the application is made, to be there delivered by said agent to the insured upon payment by the insured, to the agent, of the first premium. Applications of the kind, however, are not forwarded by the agents to the home office of the company until the applicants have been examined by physicians appointed by the company in the state in which the applicants reside, and have been recommended by said physicians as suitable

subjects for insurance in said company. Receipts for all subsequent premiums are, for the convenience of the policy-holders, forwarded from the home office to the agent, to be delivered by him in his state to the insured, upon payment of the same.

On the 22d of November, 1869, the policy in this case, on the life of the plaintiff's intestate, was issued at the home office, in New York, by the defendant corporation, in the sum of $1,000, a copy of which is annexed to the agreed statement. Before that date, the company had complied with the requirements of the General Statutes of Massachusetts in respect to the appointment of an agent in the state, upon whom all lawful processes against the company might be served. Gen. St. c. 58, §§ 68, 69. Said policy was sent by mail to the agent of the company, and was by him delivered to the insured, and the agreed facts show that the insured died November 8, 1875, and that due notice and proof of his death was given by the plaintiff to the defendant corporation. It is admitted by the counsel of the plaintiff, in his argument, that proposals for insurance were made by the decedent in due form, and that they were properly forwarded by the agent of the company to the home office of the defendant corporation; and that the defendant corporation, at their home office, accepted the proposals, and there issued the requested policy, and sent the same by mail to the agent who forwarded the proposals, to be delivered by said agent to the insured upon payment by the insured, to the agent, of the first premium. Beyond all question the admissions of the plaintiff to that extent conform in every particular with the agreed facts, and the plaintiff also admits that the contract in such a case is complete when the proposals of one party have been accepted by the other by some appropriate act signifying the acceptance, and that the place of the acceptance is the place of the contract.

Suppose that is so, of which there can be no reasonable doubt, the court is then of the opinion that the proposals of the decedent were accepted by the defendant corporation, at their home office, within the plaintiff's own rule of law; that the defendant corporation, in issuing the policy in exact accordance with the terms of the proposals, and in sending it by mail to the agent who forwarded the proposals of the applicant, to be delivered there, by said agent, to the insured upon payment by the insured to the agent of the first premium, did signify the acceptance of the proposals by an appropriate act, if not by the only act adapted to make known their intention to insure the life of the applicant. What the plaintiff contends is, that before the premium was paid, the applicant had not assented to the policy and that he had not complied with the conditions upon which the policy was issued; but the agreed facts show that the premiums were paid by the insured and were received by the defendant corporation up to and including May 22, 1874, four years and a half from the date of the policy, since which time no money was paid on account of premiums. Nor can the proposition submitted by the plaintiff be sustained, for three reasons: (1) Because the proposals were submitted by the decedent. (2) Because the contract became complete when the proposals were accepted by the defendant corporation. (3) Because acceptance of the proposals without variation was made known to the applicant in the usual and accustomed mode.

Attempt is made to support the theory of the plaintiff by reference to the case of Mutual Life Ins. Co. v. Young, 23 Wall. [90 U. S.] 85, in which the opinion was given by Mr. Justice Swayne, but it is obvious that the case affords no support whatever to the theory, for reasons which pervade the whole opinion: (1) Because the acceptance was a qualified one. (2) Because new terms were added to the proposals. (3) Because the proposals contained conditions. (4) Because the delivery was conditional. (5) Because the policy did not conform to the proposals.

Much discussion of the other points in the case is unnecessary, as they are the same as those decided in the preceding case, to which reference is made for the reasons which induce the court to hold that the home office of the defendant corporation is the place of the contract, and that the Massachusetts statute referred to is not applicable in such a case. Pursuant to the agreed facts the defendants are entitled to judgment.

Judgment for defendants.

Case No. 12,716.

In re SHAW.

[See 9 Fed. 495.]

SHAW (BANK v.). See Case No. 843.

Case No. 12,717.

SHAW et al. v. The BRIDGEPORT.

[1 Ben. 65.] [1]

District Court, E. D. New York. June, 1866.[2]

COLLISION—AT PIER—FOG—INEVITABLE ACCIDENT—MIDDLE OF RIVER.

1. Where a steamboat was coming down the East river round Corlear's Hook, and a thick fog shut down upon her, and not being able to anchor, the bottom being bad, and the place dangerous by reason of the ferries, she slowed her speed to the lowest point, and proceeded, having two lookouts stationed forward, running by compass till opposite the Grand St. Ferry, whose lights they saw and whose bells they heard, and her master then commenced to turn her, taking a course which he thought

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

[2] [Affirmed by circuit court. Case No. 1,861. Decree of the circuit court affirmed by supreme court in 14 Wall. (81 U. S.) 116.]

would carry her pretty close to the piers below, but would clear them, and though at once stopping and backing when the lookout reported a vessel ahead, ran into the vessel which was lying alongside of a pier below the Hook. *Held*, that this was not a case of inevitable accident.

2. Prudence, to say nothing of the state law, required the master to take such a course as would bring the steamboat into the middle of the river below the Hook, and the collision was occasioned by that error on his part.

[This was a libel by George Shaw and others against the steamboat Bridgeport (Charles Weeks and Robert Haydock, claimants), to recover damages sustained by collision.]

D. D. Lord, Esq., for libellants.

E. H. Owen, Esq., for claimant.

BENEDICT, District Judge. This action is brought by the owners of the ship Margaret Evans, to recover some fourteen thousand dollars, being the amount of damages sustained by that ship in a collision which occurred in this port on the 4th of September last.

There is little or no dispute as to the facts of the case, which are these. The Margaret Evans was lying alongside the pier at the foot of Corlears street, and wholly inside the line of the piers below the Hook. While so moored, and between three and four o'clock in the morning, she was run into by the Bridgeport while she was proceeding down the river to her pier at Peck Slip, in a thick fog. It appears that when the steamboat passed Blackwell's Island, the fog, which had come on during the night, lifted so that both shores could be seen; but when she arrived off Houston Street ferry, it suddenly shut down upon her so thick that it was impossible to see objects at any considerable distance. The speed of the steamboat was at once slowed down to the lowest point, and she proceeded on her voyage; the bottom there being unfit for anchorage and the place dangerous, by reason of the ferries.

As she proceeded she had one chief mate, in addition to a regular look-out, stationed forward, and her master was in the wheelhouse with the wheelsman. Just after she passed Grand Street ferry the look-out saw and reported a vessel ahead, when the engine was instantly reversed; but before more than one and a half turns back could be made, she brought up square upon the starboard side of the vessel ahead, which proved to be the Margaret Evans, lying alongside of the pier as above described. The look-outs were competent persons, and saw the vessel at the earliest possible moment. The engine was in good order, and was reversed as soon as possible after the ship was reported. The speed was as low as she could run and have steerage way. The fog was very thick, but the Grand Street ferry light was seen by the mates of the steamer as she passed the ferry, and after that a light upon the New York shore. The Grand Street bells were also ringing.

These circumstances, the claimants insist, make out a case of inevitable accident. But to this view I cannot give my assent. To make out a case of inevitable accident it must appear that the collision could not have been avoided by the exercise of ordinary care, caution and maritime skill. Here it appears that the Grand Street lights and bells which were 260 feet only from the point of the Hook, and some 900 feet from the Margaret Evans, were seen and heard, and the position of his vessel was then known to the master, as he had seen, by compass from opposite Houston Street ferry, where he was in the middle of the river, and my opinion is that those lights and bells were sufficient to enable any master, by the exercise of ordinary maritime skill, to pass the Hook in safety and at the proper place.

Furthermore, the wheelsmen say, that after they struck the fog they ran by compass till opposite the Grand Street ferry light, which they saw; that they commenced to turn, and took a course which they supposed would carry them pretty close to the piers below the Hook, but yet, as they believed, far enough out to clear vessels lying at them.

This was clearly negligence; for prudence, to say nothing of the state law, required them in such a fog to take a course which would bring them in the middle of the river below the Hook. To accomplish this it was necessary to run some lengths below the Grand Street ferry before commencing to turn, as the master must have known, instead of which he hauled in when opposite the Grand Street ferry, and took a course which he knew was carrying him inside of the middle of the river, and close to the piers.

Had the effort been made to keep in the middle of the river, I doubt not but that it would have been successful, notwithstanding the density of the fog.

The decree must accordingly be for the libellants, with an order of reference to ascertain and report the amount of the damages resulting from the collision.

[This decree was affirmed by the circuit court on appeal. Case No. 1,861. An appeal was then taken to the supreme court, where the decree of the circuit court was affirmed. 14 Wall. (81 U. S.) 116.]

SHAW (COFFIN v.). See Cases Nos. 2,951 and 2,952.

Case No. 12,718.

SHAW v. COLLYER.

[4 Blatchf. 370;[1] 18 How. Pr. 238; 42 Hunt, Mer. Mag. 69.]

Circuit Court, S. D. New York. Oct. 1, 1859.

TRIAL—ADMIRALTY—REFERENCE TO COMMISSIONER.

On the hearing, on a libel in personam, the district court heard sufficient evidence to show that the principal question was as to the amount due by the respondent, as owner of a vessel, to the libellant, as its master, for wages, and then, instead of taking further testimony in open court, referred it to a commissioner to take proofs as to the nature, extent and value of the service, and as to credits for payments: *Held*, that the practice was proper, as not prejudicing the rights of the respondent and saving the time of the court

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

This was a libel in personam, filed in the district court, to recover wages due to the libellant [Albert E. Shaw] as master of a vessel owned by the respondent [Thomas Collyer]. The district court, at the hearing of the cause, heard sufficient evidence to show that the libellant had, as master of the vessel, been in the employ of the respondent, and that the principal question was as to the amount due for the service, if any, and referred it to a commissioner to take proofs as to the nature, extent, and value of the service, and as to the payments made, or other deductions to be allowed, if any, and report thereon. The case was heard, accordingly, before the commissioner, and a balance was reported in favor of the libellant, of $334.74, which report was subsequently confirmed by the district court, and a decree was entered for that amount against the respondent [case unreported], who then appealed to this court.

Welcome R. Beebe, for libellant.
Dennis McMahon, for respondent.

NELSON, Circuit Justice. It is objected, that the court erred in referring the cause to a commissioner, instead of taking the testimony in open court; but I cannot perceive any foundation for this objection. The court had ascertained, from the hearing before it, that the main questions in controversy were in respect to the accounts between the parties, as master and owner of the vessel, and very proper, therefore, to be referred to and heard by a commissioner. The rights of the respondent were not prejudiced, as the whole case could afterwards be presented to the court upon the proofs, and exceptions to the commissioner's report; and much of the valuable time of the court was saved by the reference. Decree affirmed.

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

Case No. 12,719.

SHAW v. GRINNELL.

[9 Blatchf. 471.][1]

Circuit Court, S. D. New York. March 11, 1872.

CUSTOMS DUTIES—FEES TO COLLECTOR—APPEAL—ACTION TO RECOVER.

By the 15th section of the act of June 30, 1864 (13 Stat. 215), the decision of a collector of customs, as to fees, charges and exactions claimed by him in the performance of his official duty, is declared to be final and conclusive, unless an appeal is taken to the secretary of the treasury, and it is provided that no suit shall be maintained to recover any such fees, &c., alleged to have been erroneously or illegally exacted, until the decision on such appeal is had. A vessel from a foreign port, with dutiable goods on board, arrived at New York, and was there sold, under a decree on a libel in admiralty, to the plaintiff. The duties on the goods not being paid or secured, the inspectors in charge, under the order of the collector, took the goods to the public stores, according to the provisions of section 35 of the act of March 2, 1799 (1 Stat. 669), and of the act of March 2, 1861 (12 Stat. 209). The collector exacted from the plaintiff the fees, charges and expenses connected with the removal of the goods, as a condition of granting to him a clearance for the vessel for an outward voyage. The plaintiff paid the amount, under protest, but did not appeal to the secretary of the treasury, and then brought this suit to recover back the amount paid: *Held*, that, although the exaction was in fact, not warranted by law, the suit could not be maintained, because of the failure to appeal to the secretary of the treasury.

[Cited in Hedden v. Iselin, 31 Fed. 270.]

[This was an action by Mark Shaw against Moses H. Grinnell, collector of the port of New York, to recover duties exacted under protest.]

Robert D. Benedict, for plaintiff.
Noah Davis, Dist. Atty., for defendant.

WOODRUFF, Circuit Judge. I am not able to withdraw the claim of the plaintiff, in this case, from the operation of section 15 of the act of June 30, 1864 (13 Stat. 215). That section provides, that "the decision of the respective collectors of customs, as to all fees, charges and exactions of whatever character, other than those mentioned in the next preceding section, claimed by them, or by any of the officers under them, in the performance of their official duty, shall be final and conclusive against all persons interested in such fees, charges or exactions, unless * * * notice that an appeal will be taken * * * to the secretary of the treasury, shall be given within ten days, * * * and unless such appeal shall actually be taken within thirty days. * * * And no suit shall be maintained in any court, for the recovery of any such fees, costs and charges alleged to have been erroneously or illegally exacted, until the decision of the secretary of the treasury shall have been first had on such appeal."

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

About the 1st of April, 1869, the brig Julia Kelly, of Parrsborough, Nova Scotia, arrived at this port, with a cargo of goods, from the port of Hamburg. She was here proceeded against by libel, in admiralty, and, on or about the 12th of May, was sold by the marshal, under the decree of the court. The plaintiff became the purchaser, and received a bill of sale from the marshal, dated May 12th, 1869. Meantime, having dutiable goods on board, and the duties not being paid or secured, on the 5th of May, an order was issued, by the collector of the port, to the United States' inspectors in charge, to take the goods to the public stores, in accordance with § 56 of the act of March 2, 1799 (1 Stat. 669), and the act of March 2, 1861, amendatory thereof (12 Stat. 209). After the purchase above mentioned, the plaintiff applied to the defendant for a clearance of the brig for an outward voyage, and such clearance was refused, unless the fees of inspectors, charges of stevedores, and other expenses of removing the goods, were paid. The plaintiff, protesting against the exaction, paid the charges, amounting to $485.95 over and above the ordinary fees and charges for a clearance, and, without taking any appeal to the secretary of the treasury, brought this suit.

The form of the declaration herein is somewhat equivocal. The summons appears to be in assumpsit. The declaration, while it sounds in tort, for damages, gives a narrative of the exaction, and claims the money, alleged to have been illegally exacted, as damages, and there is no allegation, nor any proof, of any other damages.

I think it quite clear, that the exaction was not warranted by any law relating to the clearance of vessels. Certain papers are required to be produced, and fees for clearance paid, but no statute declares that costs or charges of unlading the vessel, under the order of the collector, shall be paid before the vessel shall be cleared; and, the statute under which such unlading is done, having made provision for those charges, there is no implication of intent to charge the vessel or its owners therewith. The statute directs, that, after the goods have remained in store for a period specified, they shall be sold, the duties, and all charges thereon, shall be deducted from the proceeds, and the surplus shall be transmitted to the treasury, for the use of the owner of the goods. And this should be so. The act was intended not only to secure to the government the duties on the goods, but was designed for the relief of the vessel and owners, not to burthen them. They, being carriers merely, had need of some provision of law whereby, when the owners of the goods, or the consignees, neglected to pay the duties or procure permits for the landing and delivery thereof, the ship might be discharged of her cargo, by delivery to the officers of the customs, and proceed on her future voyage.

The exaction was, therefore, unwarranted, and the plaintiff, if he had taken the requisite steps, would have been entitled to a return of the money which he was required to pay to obtain a clearance. But it is, I think, impossible to escape the provisions of the act of 1864, above cited. If that act related solely, as it does very largely, to duties on goods, it might be possible to construe the 15th section as limited to exactions already in that act mentioned. But the 14th section covers all such exactions. It includes all overcharges of duties on the goods, and also all tonnage duties on the vessel, and requires protest and appeal before suit; and then the 15th section, in the terms above cited, includes all fees, charges and exactions of whatever character, other than those mentioned in the 14th section, claimed by the collector in the performance of his official duty. It is a broad and general provision. It reaches all collectors and officers under them, and all requirements made by them in the performance of official duty.

It will not obviate this provision to say, that, because there is no law to warrant the exaction, therefore, this section does not apply. It is enacted for the express purpose of providing for exactions not warranted by law, and to regulate the manner in which re-imbursement may be had. Every excess of fees, every over-charge of duties, all charges of duty on goods that should be admitted free, are illegal charges. It makes no difference that some exactions are more plainly illegal than others. There was no occasion for a statute regulating a proceeding to recover back legal charges or exactions.

The enquiry is—Was it an exaction made by the collector in the performance of his official duty? Undoubtedly it was. It was his official duty to grant a clearance of the vessel on the production of proper papers and the payment of legal charges and fees. As collector, acting officially on the question whether the plaintiff was entitled to a clearance, he decided that the charges for the previous unlading must be first paid. The subject matter was within his jurisdiction. However great his mistake or error, it was his official act. Herein the case is distinguished from the illustrations suggested by the counsel for the plaintiff, where a collector is assumed to have casually obtained the manual possession of the property of another, and refuses to give up such possession without the payment of money, the collector not having possession or control of the property by virtue of his office, and having no official duty to perform in respect thereto.

In respect to the form of the action, several observations are pertinent: 1st. This is not an action on the case for fraud. There is no allegation of fraud or wilful misfeasance. There is no pretence that the collector acted otherwise in this matter than under a mistake in regard to the charges which could properly be required as a condition of grant-

ing the clearance. 2d. If this be not regarded as, in substance, an action to recover back the moneys illegally exacted, there is no evidence of any other damages. It does not appear that the plaintiff sustained any damage, except that he paid so much money, and there is no proof of any other. 3d. A plaintiff who has paid duties, charges or other exactions, cannot avoid the statute by claiming to recover back the money in an action sounding in tort. No suit can be sustained, in which the exaction shall be the ground, and the amount paid is made the measure of the recovery, without a compliance with the statute.

Although it is eminently just that these moneys should be refunded, I am not able to refuse to the defendant the benefit of the statute referred to. If the defendant paid over the money to the treasury of the United States, it is not only just, so far as it appears by any proofs before the court, that the money should be refunded by the government, but a failure to refund seems to me eminently unjust. Apparently, the government holds the goods themselves. It had full right and power to collect this money from the goods. It is not easy to see why that was not done; and, if the goods were sold and the proceeds are in the treasury, the government now holds the money as twice paid. How, in that state of things, can the plaintiff obtain re-imbursement of what it was wholly unnecessary for the protection of the government, and wholly unjust, to require him to pay? There is to this manifestly unjust result the dry legal answer—he should have appealed to the secretary of the treasury, and, failing to do so, he can maintain no suit. As I am constrained to say that this answer is sufficient in law, I must direct judgment for the defendant.

Case No. 12,720.

SHAW v. HART.

[1 Spr. 567.] [1]

District Court, D. Massachusetts. July, 1859.

CHARTER PARTY—GUARANTY OF DEPTH OF WATER—FULL FREIGHT—LOSS OF RAFT.

1. Where, by a charter-party made in Boston, a vessel was to go up a river in North Carolina, and take a cargo of lumber and convey it to Boston, for $1000, with a guaranty that there should be eight feet of water at the place of loading, which would enable the vessel to take on board a full cargo; and the water there was of that depth, but the cargo could not be conveyed to the sea, because the water below was only seven feet deep: *Held*, that, by the guaranty, the carrier was entitled to eight feet of water, not only at the place of loading, but in the river below, if that depth was necessary.

2. If the master took on board all that the vessel could carry down the river, and was prevented from taking more, by the default of the charterer in not keeping his guaranty, he was entitled to recover the $1000, notwithstanding less than a full cargo was transported and delivered.

3. The master attempted, for the benefit of the charterer, and by his assent, through an agent, to tow a raft down the river to a place where it might be taken on board, to make up a full cargo, and, on the way, the raft was broken and lost by the violence of the waves, *held*, that neither the master, nor his owners, were responsible therefor.

This was a libel for freight upon a charter-party. In December, 1858, the libellant chartered the schooner B. F. Reeves, of which he was master, to the respondent, for a voyage from North river, North Carolina, to Wood's Hole and Boston, with a cargo of ten hundred and thirteen cedar spars, for buoys, to be landed in part at Wood's Hole, and the remainder in Boston, for the round sum of $1000, to be paid at said Wood's Hole and Boston, in proportion to the amount of cargo to be landed at these places respectively. The vessel was lying at Boston, when the charter was made. It was stipulated, on the part of the respondent, that the cargo should be delivered and received within reach of the vessel's tackles, and that there should be eight feet of water at the place of loading. It was also provided in the charter that, on arrival at "Thoroughfare Island," the libellant should report himself to Heman Hinds. To reach Thoroughfare Island, it was necessary to pass Hatteras Inlet, and thence to proceed about seventy miles, through a sound, to the mouth of the North river, thence, across a bar and up the river, about twenty-four miles. At Hatteras Inlet, and over the bar, and in fact for most of the distance up the river, the water did not exceed seven feet in depth. On arriving at Thoroughfare Island, the master reported himself to said Hinds, who thereupon proceeded to deliver to him the cargo. The vessel, while receiving her cargo, lay at a place in the river, near Thoroughfare Island, called "The Gap," where the water was about twenty feet deep. When the vessel had taken in about two-thirds of the spars, she was loaded to the depth of seven feet, and both the master and Hinds agreed that it would be useless to take in more, as, in the ordinary state of the water, the vessel could not get down the river, or over the bar or through Hatteras Inlet, drawing more than seven feet of water. The remainder of the logs were then made into a raft, to be taken in tow, and to be taken on deck after the vessel should have passed the inlet. The master signed bills of lading in the usual form, excepting that they stated the fact that seventy-nine spars were in a raft, to be taken on board at Hatteras Inlet. Hinds took one part of the bill of lading, and forwarded it to Hart, to enable him to procure insurance. The vessel, with the raft in tow, passed safely down the river, but in crossing the bar, and after getting into the sound, she encountered "a short chopping sea," the raft was broken up, and all but about ten of the raft-

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

ed spars were lost, before reaching Hatteras Inlet. The residue of the spars were delivered to the respondent, at the places stated in the charter. It appeared that Hinds had been hired by the respondent, to superintend the cutting and getting out of the spars, and that he was to share the profits, if there should be any, from their sale, but was not to be subject to any loss. There was no other person, at the place, authorized to act for the respondent in shipping the spars. The libellant claimed that the guaranty of eight feet of water at the place of loading, must be construed as a guaranty of that depth both at the place of loading, and thence to the sea; that his failure to take on board the whole cargo, and carry it to its destination, was caused by the failure of the respondent in the performance of this guaranty; that he might well have proceeded on this voyage, when he had taken on board as many spars as he could safely carry over the bar, and upon their due delivery would have earned full freight; that the raft had been made at the request and under the direction of Hinds, who, it was insisted, was the agent of the respondent, in the hope of saving him from loss, and that he ought not to be put in a worse condition, for making this attempt, than he would otherwise have been. The respondent denied that Hinds was his agent for any purpose. but to deliver the cargo to the master, or that Hinds had advised or superintended the making of the raft, or that it was properly made. He contended that the guaranty, as to the depth of water at the place of loading, was performed, and that the master was bound either to use lighters to bring the cargo down, or to wait for a strong north-east wind, during the prevalence of which there would be eight feet of water over the bar. That the contract was entire, and the libellant having failed fully to perform it by bringing all the spars, was not entitled to any part of the freight; or, if he was entitled to any part, it was only in proportion to the cargo delivered, from which must be deducted the value of the spars lost. The evidence as to the extent of Hinds' agency, as to who advised and superintended the making of the raft, and whether or not it was properly made, was very conflicting.

John C. Dodge, for libellant.
F. C. Loring, for respondent.

SPRAGUE, District Judge. The respondent insists that the contract was entire, and that no part of the freight is earned, unless there was a full performance. This cannot be maintained, if full performance was prevented by the default of the respondent himself. This brings us to the inquiry, whether the respondent has performed his guaranty, as to the depth of water, according to its true intent and purpose.

It appears that this small river, in North Carolina, was little known in commerce, being rarely resorted to; that the libellant had never been there, and took this guaranty, because of his ignorance of the depth of water. He knew that he was to go some distance up the river, to a place of loading, and stipulated that there should be eight feet of water at that place, which would have enabled him to take on board a full cargo. I cannot doubt that he believed that, if the water was sufficient for that purpose, at the point farthest up the river, it would be deep enough below, and the respondent must have believed that his guaranty was so understood; for why should the master have required a guaranty that there should be sufficient water to take his cargo on board, if, when on board, it could not reach the sea, but must be in part, at least, unladen, and put into lighters or rafts, conveyed a considerable distance, and then reladen. It is true, that the guaranty was kept according to the letter; there were eight feet of water at the place of loading, and even more, for there seems to have been a hole just at that place, twenty feet in depth, while below, the water was not more than seven feet deep. But the guaranty was not kept according to its real intent and object. The master, then, was not bound to do more than to take on board, at the place of loading, as much of the timber as could be conveyed to the sea; and if he had done so, and delivered it to the respondent, at Wood's Hole, and Boston, he would have been entitled to his whole freight. But he consented, for the benefit of the respondent, to do more, and attempted to tow the raft down the river, for the purpose of taking it on board at Hatteras Inlet, and it was lost, by the violence of the winds and waves, in the attempt.

I do not think that either he or his owners are responsible for this loss. Hinds was the sole agent of the respondent; the extent of his agency is, indeed, in controversy, but the evidence shows that he was employed to procure the timber, convey it to the river and to the vessel, for the purpose of being laden on board of her. There was no limitation of his authority, as to the place to which he was to convey the timber, for the purpose of having it taken on board of the vessel. If, therefore, when it was found that it could not be carried down the river by the vessel, Hinds had, without the aid of the master, rafted this lumber to a place where it could be taken on board, and thence transported, it would have been within the scope of his agency; and it was no less so, if he caused the master of the vessel to do it in his stead. It was done wholly for the benefit of the respondent.

I am satisfied that the raft was properly made, under the superintendence of Hinds, and that the master made every reasonable exertion for its preservation.

Decree for the $1000 stipulated in the charter-party and costs.

SHAW (HART v.). See Case No. 6,155.

SHAW (HINDMAN v.). See Case No. 6,514.
SHAW (KING v.). See Case No. 7,803.

Case No. 12,721.

SHAW v. The LETHE.

[Bee, 424.] [1]

Admiralty Court, Pennsylvania. 1781.

SEAMEN — WAGES — SURGEON — DECREASE IN RISK.

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

[Cited in Gurney v. Crockett, Case No. 5,874; Waring v. Clarke, 5 How. (46 U. S.) 480.]

In admiralty.

HOPKINSON, J. Thomas Shaw, the libellant, entered on board the ship Lethe, as surgeon, and contracted to serve in that capacity from Philadelphia to Bourdeaux, and back again, for the wages of £15 per month. It was then war, and so continued till the vessel arrived at Bourdeaux: whilst she was there in port, peace took place. The libellant continued on board, and returned with the vessel to Philadelphia, and now demands the stipulated wages of £15 per month, notwithstanding the peace. Much has been said respecting the entirety of contracts on the one hand, and the divisibility of contracts, particularly those of insurance and mercantile agreements, on the other.

It has been urged for the libellant, that the voyage to Bourdeaux and back again, must be considered as one entire voyage; and that if this vessel had been insured, or chartered, there could have been no apportionment of the premium or hire on account of the peace. Against this doctrine, the case of Stevenson v. Snow, 3 Burrows, 1237, has been cited, and fully considered. The case was—a ship was insured for a certain premium, to sail from London to Halifax; the insured warranting that she should sail with convoy from Portsmouth. She arrived at Portsmouth, but the convoy was gone. Whereupon a return of premium was demanded, deducting only the customary insurance from London to Portsmouth. The entirety of contracts was here urged against the insurers, but over-ruled by the whole court, who considered the contract as divisible, and having reference to two distinct voyages, viz. from London to Portsmouth, and from thence to Halifax; and determined that as the risk of the second voyage had never been begun, the premium for that had never inured. This case appeared at first view to apply closely to the present; but, on a nearer inspection, I find that the warranty to sail with convoy was the ground of that decision. It was that alone which rendered the voyage divisible, because it was of the essence of the contract. Had the ship sailed without, and been lost, the insurers would not have been answerable. Had she been insured from London to Halifax, without any condition annexed, and had stopped on her way at Portsmouth, and proceeded no further, the voyage would not, I apprehend, have been deemed divisible on that account, nor the premium apportioned; so that the warranty to sail with convoy was the foundation of the contract, which failing, the contract failed, so far as the same had respect thereto. The voyage from London to Portsmouth seems to be no more than a necessary passage to the place where the substantial part of the contract was to take effect; where the premium was to be earned by the commencement of the risk under the condition specified. But I find nothing parallel with this in the articles of the ship Lethe: no contingency mentioned; but only a simple contract for a voyage to Bourdeaux and back again, in consideration of certain services to be performed on the one part, and certain wages to be paid on the other. If there is any similarity in the two cases it consists in this: that, as in the one, the sailing with convoy was the ground of the quantum of the premium; so in the other, the war was the ground of the quantum of wages. In the case referred to, the contingency was fully recognized in the contract: the ship was warranted to sail with convoy, but no contingencies are provided for in the Lethe's articles. If the insured vessel had sailed with the convoy, though but for one day, and returned, it cannot be supposed that any part of the premium would have been restored. That the mere arrival of a vessel at a port or ports cannot be construed as a division of the voyage delineated by the articles, is manifest from a current of law and practice; so it was determined in the case of Bermon v. Woodbridge, Doug. 781, and numberless charter-parties, insurances, and articles for mariners' wages have reference to circuitous voyages. Nor was it understood, that a fortuitous increase or diminution of the risk, or any alteration of circumstances between one port of destination and another, would affect the contract, unless provided for by the terms of the agreement. But it hath been strongly urged, that the high wages promised, and the nature of the service to be performed, have reference to war only; and that as peace took place whilst the vesssel was safe in port, the voyage, from the manifest object of the contract, became divisible: and that it would be very hard to bind the master or owners to the most severe construction of the articles, and make them pay for services, which, from an unforeseen change of affairs, were rendered impracticable.

Although there is an equitable force in this argument, yet, under the circumstances

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

of the case, there seems to have been an obvious duty on the part of the master to have entitled him to an equitable relief from the binding force of the articles. He should have proposed to pay off the crew at Bourdeaux, and tendered a new contract on peace establishment, protesting against the former articles. Nor is this a mere ceremony, but what substantial justice seems to require. The mariners, under the articles, could not leave the ship without incurring a penalty. If then they are detained on board without any explanation, notwithstanding the great change of circumstances, they had sufficient reason to conclude, that they were continued in the service upon the terms of the subsisting contract: and this reasoning will well apply if the case be reversed. Suppose the mariner had engaged in time of peace, and war had broke out during the voyage, and he had made no declaration that he was dissatisfied with the terms of his contract, or expected war wages in consideration of the risk he was to run, I believe there are few masters of vessels who would not urge his silence as an acquiescence in the continuation of the contract, and bind him down to the terms of the original contract. It is so natural to expect some declaration of the will of contracting parties, when circumstances out of the reach of either have occurred, which totally alters the principles upon which the contract was formed, that an omission of such declaration can have no other interpretation, but that of wilful neglect or deep design, neither of which is the law disposed to countenance. Hence, probably, arose the custom of protests, in cases of wreck, illegal capture, fire, and other unforeseen and unavoidable accidents.

One other argument hath been urged for the respondents, viz. that freight is the mother of wages; inferring, that as this vessel received only peace freight from Bourdeaux to Philadelphia, no more than peace wages ought to be allowed for that part of the voyage. It does not appear in testimony what freight this vessel received: but if it did, I see no force in the argument. There is, in fact, no connexion between freight and the quantum of wages; nor are the mariners ever privy to the terms on which a cargo hath been shipped. It is only a law of policy which arbitrarily makes the payment (not the rate per month) of the wages to depend on the safe conduct of the cargo, in order to induce the mariners to exert themselves in case of wreck, to save as much as possible, knowing, that if the whole be lost, they must lose the whole of their wages. If the freight is thus called the mother, the service performed may well be deemed the father, of the mariner's wages, that being the real and legal consideration. There is no doubt but the mariner shall have his wages, in cases where no freight at all is received; as in vessels sailing with ballast only, which often happens. The truth is, the mariner's lien is on the ship, and not on the cargo. Nor was it ever known, that freight could be attached in the merchant's hands to answer for mariner's wages, but the ship is liable under all circumstances.

I have not noticed the ship's going to Teneriffe from Bourdeaux before she came to Philadelphia, as this circumstance, if it has any operation at all, must be against the master, who ought not to benefit by his own deviation from the articles.

After mature consideration, I cannot find sufficient reason to give a different decision now, from what was lately given in the case of M'Culloch v. The Lethe [Case No. 8,738]. The continuation of the libellant on board, after it was known that peace had taken place, without any declaration of the master, that he expected the terms of the contract should be changed, is too strong a circumstance to be got over. But, as I think it a hard case, I would recommend an appeal; that the law and arguments may be again considered by another court.

Judgment.—That the libellant receive wages agreeably to the contract; and that he pay one half, and the respondent the other half of the costs of suit.

An appeal—and the court of appeals confirmed the above sentence; and gave the appellee costs of suit, and interest on his wages, from the date of the decree in the admiralty. [Case not reported.]

SHAW (LOWBER v.). See Case No. 8,563.

Case No. 12,722.

SHAW v. MITCHELL.

[2 Ware (Dav. 216) 220;[1] 5 Law Rep. 453.]

District Court, D. Maine. Oct. Term, 1843.

HUSBAND AND WIFE — RIGHT OF HUSBAND TO WIFE'S CHOSES IN ACTION—POSSESSION—EQUITY—BANKRUPTCY—SETTLEMENT.

1. A husband has only a qualified interest in choses in action belonging to the wife. He has, at common law, the right to make it absolute by reducing them to possession.

2. But if he is obliged to seek the aid of a court of equity for the purpose of obtaining possession, it will be given only upon the condition that a suitable settlement out of the property be made for the benefit of the wife.

3. Where property descended to the wife of a bankrupt before a decree of bankruptcy, and at that time he had not reduced it into possession, it was *held* that the wife was, in equity, entitled to an allowance out of the property, for her support, against the assignee of the bankrupt.

This was a petition by Jane Shaw, wife of Alpheus Shaw, who was decreed a bankrupt March 2, 1842, praying that certain notes, which had descended to her from her father,

[1] [Reported by Edward H. Daveis, Esq.]

and which were included in the schedule of the bankrupt's property annexed to his petition and delivered to his assignee [Nathaniel Mitchell], may be re-delivered to the administrator of her father's estate, in order that the same may be administered by him and distributed to her as her distributive portion of her father's estate. [The petition was filed by Mrs. Shaw's next friend, S. J. Smith.] The following are the material facts: Mr. Doughty, the father of Mrs. Shaw, died Sept. 4, 1838, leaving four children, and certain notes, secured by mortgage, which was all the property that descended. Mr. Shaw was regularly appointed administrator Dec. 4, 1838. The notes in question came into his hands as administrator, and so remained, nothing having been paid upon them, until the decree of bankruptcy and the appointment of an assignee. They were included in the schedule of his property and delivered to his assignee. No distribution has been made of the estate by the administrator, and no account has been settled at the probate court, but the notes still remain due and unpaid. Mr. Shaw has also filed a petition, that the assignee may be ordered to relinquish the notes and restore them to him in his quality of administrator, to be administered and distributed according to law, and for the payment of the debts of the deceased, if necessary for that purpose. Notice of the petition was acknowledged by the assignee, and the case is submitted to the court on the facts stated in the petitions, which are not controverted.

WARE, District Judge. This case has been submitted on the facts disclosed in the petitions of Mrs. Shaw and the bankrupt, which are admitted to be true, for the purpose of having the rights of the assignee and the petitioner determined by the court.

By the common law, marriage amounts to an absolute gift to the husband of all the personal goods and chattels of the wife, of which she is in possession, at the time of the marriage, in her own right, and also of all that may accrue to her during the marriage. With respect to such of the wife's personal property as is not in possession, as debts due to her by contract, or money coming to her by inheritance, these do not pass to the husband as an absolute gift. 2 Story, Eq. Jur. § 1402. Such choses in action are a qualified gift. He has a right to sue for and recover them, but they do not become absolutely his until he has reduced them into his possession. And the same principle applies, whether they belong to her at the time of marriage, or accrue to her during coverture. A legacy, or a distributive share of an inheritance, accrues to her, it is true, for the benefit of her husband, but these do not become at once incorporated into the general mass of his property without distinction. They bear an ear-mark, if such an expression may be allowed, by which they are discriminated from his other property; and if he dies without reducing them into his possession, they do not go to his administrator, but survive to the wife, and she is entitled to them against the personal representative of the husband. And the choses in action of the wife, as debts due to her, or stock standing in her name, are not reduced into the husband's possession so as to exclude the wife's title by survivorship, merely by the notes or certificates, that is, the evidences of property coming into his hands. Wildman v. Wildman, 9 Ves. 174. The debts due to the wife are not reduced to the legal possession of the husband until the money is paid, or, having the present power to reduce them into possession, he has assigned them for a valuable consideration. Purdew v. Jackson, 1 Russ. 56; Honner v. Morton, 3 Russ. 65. A judgment in the lifetime of the husband, it seems, is not sufficient, at least unless the suit was in the name of the husband alone. 2 Story, Eq. Jur. § 1405; 2 Kent, Comm. 137. If he dies in the lifetime of the wife before this is done, her choses in action will survive to her and not go to his personal representative. But although the husband has only a qualified interest in his wife's choses in action, he has always the power of making that absolute by a reduction of them into his actual possession; nor does the common law furnish the wife any means of preventing the husband from so reducing them into his possession as wholly to extinguish her separate interest. But courts of equity have long been in the habit of interposing to protect the interest of the wife. Whenever the husband is obliged to seek the aid of a court of equity to obtain possession of the wife's property, the court will give its aid only on the condition, that the husband settle part of the property on the wife, to be held for her benefit, independent of the husband and his creditors. This right of the wife to a reasonable provision out of her own property, for the support of herself and her children, is called the wife's equity. The general principle, on which the court interposes in her favor, is said to be, that he who seeks equity shall do equity; and the present disposition of courts seems to be rather to enlarge than curtail the beneficial operation of the rule in favor of married women. This is the established rule in all cases where the husband himself, or his general assignee, for the payment of debts, or under insolvent laws, or in bankruptcy, is obliged to have recourse to a court of equity to obtain possession of the wife's personal property. Ordinarily, it is said, that courts of equity will not interfere to control the husband when using the common remedies of the law to obtain the possession of such property. But it is admitted that this rule is subject to some exceptions. Where a legacy to a wife is sued for in the ecclesiastical courts, it is settled that an injunction will be allowed to enforce the equity of the wife.

2 Story, Eq. Jur. § 1403. And for the same reason it has been said, that a suit at law, for a legacy, or a distributive share of an inheritance which has descended to a married woman, ought to be restrained, because such rights of action are of an equitable nature and of equitable cognizance. 2 Kent, Comm. (4th Ed.) 140; Haviland v. Bloom, 6 Johns. Ch. 178. Indeed, upon the ground on which courts of equity interfere at all, that is, that it is equitable that the wife should have a support secured to her out of her own property and placed beyond the reach of the husband and his creditors, it is not easy to perceive what just and reasonable distinction can be made between her legal and equitable rights of action. And it has been suggested by high authority that no such distinction ought to be allowed, but that the court ought, on the principles of justice, to restrain the husband from availing himself of any means at law, or in equity, from possessing himself of his wife's property in action, except on the condition of making a competent provision for her. 2 Kent, Comm. 139; Story, Eq. Jur. § 1403, note.

From this view of the law, it appears to me that the wife would be entitled to her equity out of this property against her husband. It is property which has descended to her by inheritance. It has never by the husband been reduced to possession, but was, at the time of the bankruptcy, in the hands of the administrator of the estate of her deceased father. It makes no difference that the husband, in this case, was the administrator. For he holds this property, not in his personal, but in his representative character, and, like every other administrator, is bound to account for it to those who are legally or equitably entitled to it. The case has occurred in which the wife's equity attaches in all its strength, the husband having, by bankruptcy, been deprived of the means of supporting his wife and her children. It is property, as observed by Chancellor Kent, of an equitable nature and of equitable jurisdiction. If the husband had died after the bankruptcy, it is clearly settled that the wife would have been entitled to the whole fund by survivorship. Pierce v. Thornely, 2 Sim. 167. The case appears to me to fall within the general principles on which this jurisdiction is exercised by courts of equity. And as this court, sitting in bankruptcy, has all the powers of a court of general equity jurisdiction, it has the authority to allow the claim of the petitioner. If it would be allowed against the husband, it will be equally against his assignee. An assignment by operation of law in bankruptcy, passes the property in the same plight and condition as it was possessed by the bankrupt himself, and subject to all the equities that affected it in his hands. 2 Story, Eq. Jur. § 1411; Mitford v. Mitford, 9 Ves. 100. What proportion of the property ought to be allowed to the wife, is a proper subject of inquiry before a master, and a reference to a master will be made for that purpose.

SHAW (OREGON & W. T. INV. CO. v.). See Cases Nos. 10,556 and 10,557.

SHAW (SCHUBERTH v.). See Case No. 12,482.

Case No. 12,723.

SHAW et al. v. SCOTTISH COMMERCIAL INS. CO.

[2 Hask. 246.] [1]

Circuit Court, D. Maine. Sept., 1878.

INSURANCE — FIRE — LOSS — EXAMINATION OF ASSURED—PROOF OF LOSS—FRAUD—SETTING ASIDE VERDICT.

1. The examination of an assured who claims loss by fire under an insurance policy, stipulating that he "shall, if required, submit to an examination under oath by any person appointed by the company, and subscribe thereto when reduced to writing," should be written by a disinterested magistrate, and not by the agent of the company.

2. Such examination, taken at a late hour of night, when the assured is unwell, and written by the agent of the company, carries with it a suspicion that it may not fairly state the whole truth.

3. A verdict will be set aside, when the jury appears to have been influenced by passion, or prejudice, or unwittingly to have fallen into a plain mistake; but it will not be set aside because it does not accord with the views of the court.

4. Falsehood and fraud by an assured in his proof of loss required by a policy of fire insurance, containing the usual provision that such fraud shall invalidate the policy, bar his suit upon the policy, and when proved upon the trial, require the court to set aside any verdict in favor of the assured.

Assumpsit [by E. M. Shaw and others, assignees, against the Scottish Commercial Insurance Company] upon a policy of insurance against fire brought by the assignee in bankruptcy of Joseph F. Clements. The cause was tried upon the general issue, and a verdict was rendered for the plaintiffs. The defendant moved for a new trial because the verdict was against law and evidence.

George F. Holmes and Almon A. Strout, for plaintiff.

Orville D. and Joseph Baker, for defendant.

FOX, District Judge. By their policy, issued by their agent, I. W. Clapp of Augusta, the defendant insured Clements in the sum of $4500 on his stock of dry and fancy goods contained in the store in Bunker block, North Anson, for the term of one year from June 5, 1876.

On the 19th of June, 1876, a fire occurred which consumed nearly the entire stock; and this action was commenced February 27, 1877, upon said policy, Clements having filed

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

his petition in bankruptcy October 30th. The jury having rendered a verdict in favor of the plaintiffs for the full amount insured, the defendant now moves for a new trial.

At the trial it was contended by the defendant that the property was wilfully destroyed by Clements; and much testimony was produced at the hearing by both parties bearing upon this point of the defense. The jury having by their verdict declared that the evidence did not satisfy them that Clements was guilty of this crime, it is sufficient, for the purpose of this investigation, to say that the court concurs with the jury in their so finding, and that in the opinion of the court there was not sufficient evidence to authorize the jury to render their verdict for the defendant upon this branch of the case. Suspicious circumstances were established which fully authorized an investigation; but they were not so conclusive as to justify the jury in saying that the property was wilfully destroyed by the insured.

Another ground of defense was, that the insured, in his proof of loss, had been guilty of fraud and wilful falsehood with the intent to deceive the company; and that by one of the provisions found in the policy, "all fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy." By the eighth condition in the policy, it was stipulated that "the assured shall render a particular account of the loss, signed and sworn to by him, and if required, submit to an examination under oath by any person appointed by the company, and subscribe thereto when reduced to writing; shall produce his books of account and other vouchers, and shall also produce certified copies of all bills and invoices, the originals of which have been lost."

The insured furnished, August seventeenth, a statement in detail of the property destroyed, estimated at $6510, and, on September thirteenth, a written disclosure was made by Clements at the request of one Winterton, a special agent of the defendant. This examination or disclosure was quite irregular, and was not taken in the presence of a magistrate; but, as I fear, was conducted by Winterton, not so much in the cause of justice to discern the real facts, as to entrap the party into such statements as might prove beneficial to his employers.

An examination of this nature should take place at reasonable hours, in the presence of a magistrate, by whom the questions and answers should be reduced to writing in the presence of the parties, and not in the small hours of the night, when the party is unwell, and when both questions and answers are written by the agent of the company. Such examinations are always to be received with suspicion as to their truthfulness; and a court of justice will always be inclined to repose much less reliance in their correctness, when thus conducted, than they would when completed in the presence of an intelligent, disinterested magistrate.

In this examination of Clements, the court does not feel that entire confidence can be reposed as a full and truthful record of all the statements made by Clements at the time, and will not therefore rely upon it in deciding upon the rights of the parties, except so far as it is corroborated by other testimony.

All the presumptions are in favor of the verdict; and courts are quite reluctant to interfere and order a new trial, because the verdict is against the weight of evidence. It is by no means sufficient to justify the court in so doing, that the verdict was not in accordance with the judgment of the court at the trial; but it must, according to the well established rules in this court, appear that in coming to the result, the jury were influenced by passion, or prejudice, or unwittingly fell into a plain mistake. Wilkinson v. Greely [Case No. 17,671].

In the present instance, the court is apprehensive that the jury were thus prejudiced by a different ground of defense presented by the defendant. It claimed that the insured deliberately set fire to and destroyed his store and contents. In the opinion of the court, this matter was unduly urged upon the jury, as there were at most, only circumstances of suspicion, without evidence to establish the guilt of Clements. By endeavoring to thus convince the jury on such slight evidence, it may well be, the sympathy of the jury was excited in Clements' behalf; and finding nothing to justify this branch of the defendant's cause, a prejudice was thereby excited against the defendant in the minds of the jury, and they were led not to regard the testimony upon the other branch of the case and give it that consideration to which it was most clearly entitled. It can not be denied, that, by both counsel and court, their minds were distinctly drawn to its consideration; but it is perfectly apparent that it must have been utterly disregarded.

In repeated instances, amounting to more than a score, were the amounts claimed by Clements in his proof of loss demonstrated, by his own evidence, to be false, any one of which, if the jury had allowed it its legal effect, must have compelled the jury to find their verdict for the company; but all of them were overlooked, and damages were assessed by the jury nearly double in amount of the fair cash value of the property destroyed, as the court is now inclined to believe, after a somewhat extended examination of the documentary evidence.

A verdict ought to be, as the name implies, the very enunciation of truth; but it is not always so. It is frequently bottomed upon a superficial and partial examination of the testimony, and announces a result directly repugnant to the evidence as a whole. It is then a verdict against the evidence, and calls for the interposition of the court. To permit it to remain would be to sanction injustice,

and to deny the court the power to correct the flagrant abuses of the jury, would be to bring the administration of justice into contempt, and render the boasted trial by jury a great public evil.

In the opinion of the court, the verdict in the present case was largely in excess of the value of the property insured, which was destroyed; and the insured is shown to have been guilty of fraud in attempting to establish his loss, which, by the terms of the policy, should defeat any recovery. It is, therefore, the imperative duty of the court to order a new trial, that the case may be submitted to another jury for their examination. Motion sustained. New trial granted.

SHAW (SCOVILL v.). See Case No. 12,552.

Case No. 12,724.

SHAW v. SHAW et al.

[4 Cranch, C. C. 715.] [1]

Circuit Court, District of Columbia. March Term. 1836.

DESCENT AND DISTRIBUTION — TERMS OF SALE OF REAL ESTATE — DELINQUENT PURCHASER — COMMISSIONERS — COURTS — POWER TO GRANT RELIEF IN EQUITY.

1. This court, when sitting in a case of partition of intestate real estate, under the Maryland law of descents (Laws 1786, c. 45), sits as a county court of common law, exercising a summary jurisdiction given by the statute, and has no authority to grant relief as a court of equity.

2. In making sale of the real estate of an intestate, where it will not admit of a specific division among the heirs, according to Act Md. 1786, c. 45, § 8, the commissioners may annex to the terms of sale a condition that, if the purchaser shall fail to comply with the terms of sale within a certain number of days, the property shall be resold at his risk; and it is not necessary that the first sale should have been ratified by the court, in order to charge the first purchaser with the loss upon the resale.

3. If the husband of one of the heirs is a delinquent purchaser, and liable for the loss upon the resale, his wife's share of the estate cannot be charged with the loss; but if one of the heirs becomes a purchaser, and fails to comply with the terms of the sale, his share of the purchase money may be applied to make good the loss, although he may, after his default, have assigned his share of the estate, or of the purchase money, to a stranger. The assignee must take it cum onere.

4. The commissioners appointed, under the act of descents, to sell the real estate of an intestate, are liable to be made defendants to a bill in equity, and may be compelled to answer and account for the money which they have received.

Bill in equity by a feme covert [Mary Eleanor Shaw], by her next friend [Joseph N. Fearson], to have the proceeds of the sale of her share of the intestate real estate of her deceased father vested in a trustee for her sole and separate use, and to charge the loss, which occurred upon the resale, to the first purchasers, one of whom was a coheir with the plaintiff, and the other the husband of another coheir, and to make their shares of the purchase money liable for such loss. The bill states that the complainant's father, James Gannon, in 1829, died intestate, seized of certain real estate in Washington, leaving four children his heirs at law, namely, Michael Gannon, Margaret Drury, wife of Plumer J. Drury, Bartholomew Gannon, a minor, and the complainant, Mary Eleanor Shaw, wife of the defendant, William P. Shaw. That upon a petition for a division of the estate, according to the Maryland act of descents (Laws 1786, c. 45, § 8), the commissioners reported that it was not susceptible of division, without loss, &c., and on the 7th of June, 1832, it was ordered by this court that the commissioners should sell the estate upon certain terms of credit, and take bonds, &c., payable to each representative according to their respective shares, and that they should bring the money and bonds into court. That it was so sold, at public auction, on the 24th of November, 1832, on those terms, and with this further condition and notice; that the commissioners reserve to themselves the right, in case any purchaser should fail to comply with the terms of sale in five days, to resell the property, sold to him, at public auction, on reasonable terms, and after reasonable notice, and to charge and hold the former purchaser responsible for all loss, costs, and charges in consequence of such failure and resale. That the defendant, P. J. Drury, one of the representatives of the said James Gannon in right of his wife, was the purchaser of certain lots, part of the said real estate for $4,400; and that the defendant, Michael Gannon, one of the heirs, purchased another part of the estate, at the same sale, for $2,000. That the whole amount of sales was $6,538, to one fourth of which the complainant is entitled, after paying costs, &c. That Drury and Gannon neglected and failed to comply with the terms of the sale. That the property which they purchased was afterwards, on the 26th of August, 1833, advertised again for sale at their risk, and resold on the 21st of September, 1833, at a loss, to Drury, of $1,430; and at a loss, to Gannon, of $545. That the complainant, since her father's death, intermarried with the defendant, William P. Shaw, who has become insolvent; and if the purchase-money gets into his hands, it will go to his creditors; she therefore prays that it may be secured to her separate use; and that the loss upon the resale may be made good out of the shares of Gannon, and of Drury in right of his wife; and that the commissioners may be enjoined from paying over to Gannon and Drury, their shares of the purchase-money and bonds. William P. Shaw, the husband of the complainant, answered and admitted all the facts charged, and offered himself ready to submit to any decree the court might think proper to make. The bill was, by consent, amended,

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

by charging an assignment of Michael Gannon's share to James Gettys, one of the commissioners, who demurred to the bill. Drury and wife, also, demurred as to so much of the bill as sought to charge Drury with the loss on the resale of the property purchased by him, and to deduct that loss from Mrs. Drury's share of the purchase-money; and they assign for cause of demurrer, that the purchase was at a sale by the commissioners, under and by virtue of an order or decree of this court on an original suit by petition in behalf of the heirs of James Gannon, yet pending in this court, and that the supposed sale to Drury is void, because it has not been reported to and ratified by the court in that cause; and that all questions relating to that supposed purchase belong to this court in that cause only, and not in the present cause; and because the complainant has not shown any title to such relief. And as to so much of the bill as seeks to secure the complainant's share to her separate use, the same defendants demurred, because that question belongs to the said petition-cause, and not to this cause. And as to so much of the bill as seeks to charge Michael Gannon's share for the loss upon the resale of the property purchased by him, the same defendants (Drury and wife) plead, that before this suit was brought he assigned his share to James Gettys in trust for certain purposes in which these defendants are interested. As to the residue of the bill, they answered and admitted that James Gannon died seized, and intestate; that his four children named in the bill are his heirs at law; that a petition was filed by them in this court for a division of the real estate, which is still pending; that the complainant has, since the death of her father, intermarried with the defendant, William P. Shaw, who is insolvent; but they claim to be his creditors, and, as such, protest that his share ought not to be liable for the loss on the resale, &c. Michael Gannon had not answered. The commissioners demurred to so much of the bill as seeks relief against them.

The cause now came on to be heard upon the demurrers and plea, and was argued by C. Cox, in support of the same, and by Mr. Marbury, on the other side.

C. Cox, in support of the demurrer, on the ground of the pendency of the other suit, for the division of the property, cited Brown v. Wallace, 4 Gill & J. 479, 494, 496, 509; Diggs v. Walcott, 4 Cranch [8 U. S.] 179; McKim v. Voorhies, 7 Cranch [11 U. S.] 279; Elliott v. Peirsol, 1 Pet. [26 U. S.] 340; Richardson v. Jones, 3 Gill & J. 163, 186; Butler v. State, 5 Gill & J. 511. To show that the sale was not valid because not ratified by the court, he referred to the Act of Maryland, 1797, c. 114, § 6; Massey v. Massey, 4 Har. & J. 144; Anderson v. Foulke, 2 Har. & G. 354; Richardson v. Jones, 3 Gill & J. 163. To show that the wife's interest was not altered by the sale, he cited State v. Krebs, 6 Har. & J. 31, and Leadenham v. Nicholson, 1 Har. & G. 277, 278.

Mr. Marbury, contra, cited Kenny v. Udall, 5 Johns. Ch. 464; Haviland v. Bloom, 6 Johns. Ch. 178; and to show that the commissioners had power to annex the condition of resale at the risk of the first purchaser, he referred to Sugd. Vend.

Mr. Cox, in reply, referred again to Richardson v. Jones, 3 Gill & J. 163, 186.

CRANCH, Chief Judge, after stating the case, delivered the opinion of the court (THRUSTON, Circuit Judge, absent), as follows:

1. The first ground of demurrer suggested by these defendants is, that there is a suit, depending on the common-law side of this court, in which the complainant may have the relief which she seeks here. But this, I apprehend, is a mistake. The court, in that cause, sits as a county court of common law, exercising a summary jurisdiction given by a statute which gives no power to grant the relief sought by this bill, and which this court can only give when sitting as a court of equity.

2. The second ground of demurrer is, that as the sale was not ratified, it was inchoate, and, therefore, Drury and Gannon were not liable for the loss. But where, according to the terms of the sale, the purchaser agrees to be liable for the loss if he should fail to comply with the terms of the sale according to the contract, and he does so fail, and thereby prevents the ratification of the sale, he becomes liable without ratification.

3. The third ground of demurrer is, that the condition for resale, in case of non-compliance with the terms of sale, is void because the court had not prescribed any such condition; and the commissioners could not add any thing to the order of the court. But by Act 1786, c. 45, § 8, the sale is to be made under the direction of the commissioners; and by Act 1797, c. 114, § 6, it is to be made agreeably to the order of the court. If the terms prescribed by the commissioners are not inconsistent with the order of the court, they are valid, and form part of the contract of sale. The condition of resale at the risk of the first purchaser, was not inconsistent with the order of the court in that case, and, therefore, was not void.

4. The fourth ground of demurrer is, that Mrs. Drury's share cannot be prejudiced by the act or neglect of her husband. This demurrer is to that part of the bill which seeks to render her share liable for the loss occasioned by her husband's not complying with the terms of sale. It seems to me that the same equity which will protect the complainant's share from the debts of her husband, should protect Mrs. Drury's from the consequences of the acts or negligence of hers. I think, therefore, that the demurrer must be sustained as to so much of the bill as seeks to charge the share of Mrs. Drury.

5. The plea that Michael Gannon assigned his share to James Gettys before the commencement of this suit, is no answer to the complainant's equity. The assignee must take it cum onere. The assignment was made after Gannon's default, by which the complainant's equity accrued. I think the plea should be overruled.

6. The demurrer of the commissioners is only to so much of the bill as seeks relief against them. The bill seeks no relief against them, except an injunction to stay the money and bonds in their hands until the further order of the court. But they have the funds and must account for them. This demurrer, therefore, must be overruled, and they should answer to the amount of money and bonds in their hands, in case the court should order the money to be invested in securities for the benefit of the married women.

I think the demurrer, to so much of the bill as seeks to have the complainant's share set apart and laid out in productive securities for her separate use, must be overruled.

MORSELL, Circuit Judge, concurred.

The cause was afterwards set for final hearing, and the court decreed according to the above opinion.

SHAW (SMITH v.). See Case No. 13,107.

Case No. 12,725.

SHAW v. The THOMAS COLLIER.

[See Case No. 12,718.]

Case No. 12,726.

SHAW v. THOMPSON et al.

[Olc. 144.] [1]

District Court, S. D. New York. June, 1845.

CHARTER PARTY — CONSIGNEE — PRESUMPTION OF KNOWLEDGE — FREIGHT MONEY — NUDUM PACTUM — COSTS.

1. A consignee of a charterer, and dealing with him in that character, must be presumed to know the contents of the charter-party.

[Cited in Hatch v. Tucker, 12 R. I. 505.]

2. He cannot deal with the charterer as owner for the voyage, when by the charter-party the entire possession and control of the vessel remains with the master and owner.

3. If the consignee, in such case, credits the freight on the consignment to him, on debts owing him by the charterer, he will not thereby acquit himself of liability to the master therefor.

4. The payment to the charterer will be on the responsibility of the charterer, and not on that of the vessel or her owner.

5. The master, notwithstanding any interference or direction of the charterer, has a right to retain the goods until his lien shall be satisfied, and he may sue the consignees after delivery to them of the goods, and recover the freight, at least to the amount due on the charter-party.

6. Where the consignee has notice that freight must be paid to the master and not to the charterer, it imposes the like obligation upon him as if so reserved in the bill of lading.

7. A consignee has no right to appropriate moneys due for freight to satisfy advances made by him to the charterer, although the bill of lading directs the freight to be paid to the consignee. But a direction to the consignee by the master, to pay a sum out of the freights to the charterer, will be equivalent to payment to the master.

8. An agreement by the master to pay a debt of the charterer to the consignee, without any consideration, is a nudum pactum, and void.

9. A receipt, alleged to be given through mistake, may be explained by parol evidence.

10. A libellant who demands an entire sum, when part of it has been paid according to his directions, and compels the respondent to defend, impairs his equity to costs in a court of admiralty.

11. A respondent who contests the entire demand of a libellant, when a portion of it is justly claimed, although he defeats the suit in the main matters in contestation, loses his equity to costs.

12. Admiralty courts, in adjudging costs in their discretion, regard the essential merits and equities of the parties rather than the result of the litigation.

[Cited in brief in Lubker v. The A. H. Quinby, Case No. 8,586.]

13. They may withhold costs from both parties when neither proposes to do what is substantially just between them without litigation.

[Cited in The Sarah Harris, Case No. 12,346.]

This action was instituted in personam against the respondents, to recover the sum of three hundred and fifty dollars, claimed to be due for freight on a cargo shipped at St. Jago de Cuba, and consigned and delivered to them. The respondents [Jonathan Thompson and others] deny all liability or indebtedness to the libellant [Charles H. Shaw] therefor, and aver that they have paid the whole amount of freight to the charterer of the vessel, with the assent of the libellant. The libellant being master and part owner of the schooner North Star, chartered her to Stearns, for a voyage to St. Jago de Cuba, from New-York and back, at $300 per month, the charterer to pay domestic and foreign port charges. The vessel performed the voyage out and returned to the port of New-York, March 7, 1845, with goods consigned to the respondents, for which $350 freight was payable. The bill of lading contained the singular statement that the $350 freight was "payable to Messrs. Thompson & Adams," who were the consignees, and are the respondents in this action. On the arrival of the vessel, notice was given to the respondents that the freight must be paid the master or owner, and the goods were delivered them under that notice. The charterer (Stearns) was insolvent, and it was proved he was then indebted on the charter-party more than the amount of the freight payable on that shipment. There was due the respondents from the charterer, for advances made him upon the out-

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

ward voyage, $91 90, over the amount of freight received by them thereon; and they claimed that the return freight was to be applied in extinguishment of that balance, and refused to pay on the present bill of lading more than $258 10, which they proffered to the master, or the charterer, whichever of them should consent to receive it. After much altercation it was agreed that the $258.-10 should be paid to the charterer, and that the libellant would look to him for that amount of the freight. The defendants thereupon paid the charterer $258 10, in presence of the libellant, and with his direct assent, and took the charterer's receipt in full on the account current between the respondents and him. The same day the charterer paid the master $251 40, and took from him a receipt in full "for all demands to this date, (March 15,) on account of schooner North Star, chartered from the port of New-York to the port of St. Jago de Cuba, and back to New-York." The bills of lading being retained by the libellant, he subsequently demanded of the respondents $350, the whole return freight, and payment being refused, this action was brought for its recovery. The libellant insisted that the $251 40 paid him by the charterer was received in satisfaction of an outstanding demand against him on the charter-party, subsisting before the delivery of this freight to the respondents, and that the freight money now demanded was left for him to collect from the respondents; and that if his assent to the settlement between the respondents and the charterer is proved, and binds him, it can only affect him to the amount actually paid at that time, $258 10, and that he is entitled to recover the balance, $91 90, in the hands of the respondents. It was also urged that the testimony showed the master was illiterate, and incompetent to comprehend the transaction, and commit himself and his owner in the arrangement between the respondents and the charterer.

S. B. Noble, for libellant.
G. Spring, Jr., for respondents.

BETTS, District Judge. Although the transaction between the respondents and charterer was so conducted as to conclude the libellant, by his assent, that the $258 10 actually paid the charterer, should be accounted so much paid the master towards the freight, yet it is palpably unjust that the earnings of the vessel should be thus diverted to the satisfaction of debts due by the charterer to the respondents, for which the master or the vessel were in no way responsible. But the libellant cannot allege his own incapacity to do the business of the vessel, and he must be deemed, on the proofs, to have adopted the payment actually made in his presence, and with his consent, to Stearns, as made to himself.

The respondents must be presumed to know the terms of the charter-party, and that they could not deal with the charterer as owner of the vessel for the voyage, her entire possession and control being reserved to the master and owners, (3 Kent, Comm. 219, 220,) and, therefore, their advances to the charterer on the outward voyage must be regarded made on his personal responsibility, and not on any right to sequester or reserve the freights which might come into their hands on her return, for advances on the credit of the freight. Whatever stipulations may have been made between the respondents and the charterer for the appropriation of the return freights, the right of the master to collect them from the consignees after delivery to them of the goods, at least to the amount due on the charter-party, cannot be questioned, (Palmer v. Gracie [Case No. 10,692]; Ruggles v. Bucknor [Id. 12,115]; The Volunteer [Id. 16,-991]; Certain Logs of Mahogany [Id. 2,559]; [Marcardier v. Chesapeake Ins. Co.] 8 Cranch [12 U. S.] 39; Gracie v. Palmer, 8 Wheat. [21 U. S.] 605; 3 Kent, Comm., 3d. Ed., 138, 219, 220,) and the English rule unquestionably coincides with the American to that extent, (Abb. Shipp. 286, 287, 288; Smith, Merc. Law, 187). This right he might waive, as he could his lien on the goods, by express agreement with the charterer or consignees, on adequate consideration, otherwise no arrangements between consignees and a charterer, not authorized by the charter-party, will be of avail against the right of the ship to freight. The delivery of the goods to the consignees, and their acceptance of them under the bill of lading, raised an assumpsit against them to pay freight according to the stipulation of the bill of lading. Abb. Shipp. 177, 178; 3 Kent, Comm. 138. And this implied obligation becomes equivalent to a positive one, when the goods are received, as in this instance, with notice that the freight must be paid the master, and not to the charterer. The goods for which freight is now claimed were laden on board at St. Jago de Cuba, under the charter-party, and it must accordingly be assumed that the special provisions in the bill of lading were inserted by the charterer or his agent, for his benefit. The goods were to be delivered to the respondents or their assigns, he or they paying freight therefor, $350 for the whole, payable to said Messrs. Thompson & Adams, (the respondents.) The testimony shows that there was a balance of account due the respondents from the charterer for advances, proceeds of cargo, &c., on the outward voyage; and it was probably with intent to secure that balance that the charterer required the freight, whoever should be chargeable for it, should be placed in the hands of the respondents. This he had incontestably a right to do, provided he fulfilled his engagement in the charter-party; but the law would not permit him to regulate the collection of freights on the return of the vessel, so as to bar the master the

recovery of it from the consignees, if not paid by the charterer. The respondents understood their liabilities, for the evidence is full that they avowed their readiness to pay the freight to the master or charterer, as it might be agreed between the two, and set up no claim to retain the freight in their own right. They pressed the satisfaction of the balance standing on their account current against the charterer, and declined paying over the freight till that was secured, but such appropriation was not claimed on the footing that the freight was subject to their disposition, but that it was money of the charterer in their hands, out of which they were entitled to retain the balance due them. It is clear they had no legal right to apply the money in that manner, there being no surplus belonging to the charterer. The whole sum was insufficient to meet the demands of the owners under the terms of the charter-party, to whom it primarily belonged. Abb. Shipp. 247. So far as the libellant consented to the payment of the freight to the charterer, such payment would be equivalent to one made to himself, and will acquit the respondents from any after accountability to him for it. The respondents insist the libellant agreed they should account with the charterer for the whole freight, knowing it was to go in extinguishment of his debt to them, and explicitly sanctioned such appropriation when made, and expressed himself satisfied to look to the charterer for his pay.

The testimony of Thompson, brother of one of the respondents, who was present at the time the money was paid by them to the charterer, is relied upon as definite and conclusive upon this point. He says his attention was called to the conversation between the parties. He heard his brother say he would pay the money to either, if the other consented to it, and told them they must settle between themselves whom he should pay. The libellant said, "You can pay Mr. Stearns," (the charterer.) The respondent asked, "Will you both, then, be satisfied if I pay Mr. Stearns this money?" The libellant replied in the affirmative. The respondent then asked, "Will you have any claims against me?" The libellant answered, "No." The respondent further said, "You will look to Stearns for your pay;" to which the libellant assented. The following receipt was then drawn by the respondent, subscribed by Stearns, and was in the hands of the libellant: "Recd., New-York, 15th March, 1845, from Messrs. Thompson & Adams, two hundred and fifty-eight $^{10}/_{100}$ dollars in full, for balance due me as per acct. current of 12th instant, which is hereby acknowledged as correct." A receipt was drawn at the same time for the libellant to sign, but he declined executing it, because he said that would be giving two receipts for one payment. The witness did not notice whether the payment was in money or by a check, but thinks he observed the check-book of the respondents on the table. His brother requested him to witness the declaration of the libellant. Todd, a clerk of Stearns, proved the account current, and that the libellant had seen it. It charged Stearns $286 78, and credited him $544 88, including in the credit the $350 freight. He testified that repeated conversations were held between the libellant, Stearns and Parrington, (who obtained the charter,) about the settlement. The libellant claimed $680 as due him on the charter-party, and he knew the respondents would not pay the freight until he and Stearns had settled together. It was agreed that Stearns should receive the money from the respondents, and after the $251 $^{41}/_{100}$ was paid by Stearns to the libellant, the charter-party was cancelled by his receipt in full. The witness testified that he understood the arrangement between the libellant and Stearns to be, that Stearns should take the money, and that the libellant should assent to it in presence of the respondents, and afterwards should sue the respondents and recover the whole $350 from them. The witness qualified this statement afterwards by saying, he was not sure but that arrangement was made between Stearns and Parrington alone; but he accepted it as understood by all those present that such course was to be pursued. Parrington testified that he acted only as a friend in endeavoring to bring about a settlement, and securing the master's rights; that the master was not a man of ordinary capacity for business. The witness was not present when the respondents paid the money, but was when Stearns paid libellant in part. The libellant insisted he was to have the $350, and said he could not understand how it was he was not to get his whole freight, as that was all he was to receive for the entire voyage.

I am satisfied, from the evidence, that the master was not knowingly concerned in any wrongful arrangement with Stearns to circumvent the respondents and compel them to pay the freight-money twice, and that the true nature of the understanding was, that Stearns should receive from them all the money they would consent to pay on the account, and that the libellant would accept such payment as one made to himself. It is undoubtedly true, that the respondents acted upon the understanding that they were only to pay the libellant the balance in their hands beyond the account with Stearns, and that the libellant consented that the indebtedness of Stearns to them should be satisfied out of the money due for freight. The course of the negotiation, and the uniform claim of the respondents in this respect, was calculated to give that impression; but it is to be remarked, that the testimony does not show the libellant ever explicitly and in terms admitted there should be an appropriation of more of the freight

moneys to that debt than the amount which he understood had been paid to Stearns. For the want of full proof of his directions or assent to such appropriation, the respondents cannot be protected in reserving the freight for payment of the debt of Stearns, owing to them. The libellant had no connection with that indebtedness, and was no way liable for it, so as to subject his property to its satisfaction, beyond what he had directly authorized to be paid to Stearns. The further objection would also exist to the respondents' claim, if they proved the most positive consent of the libellant that such appropriation of his money might be made, that it was a parol agreement to satisfy the debt of a third person, and not obligatory in law on him. 3 Kent, Comm. 121, 122. The respondents part with nothing, and are no way made worse by such promise. The whole agreement imputed to the libellant unexecuted, would be without consideration and void. Simpson v. Patten, 4 Johns. 422; Jackson v. Rayner, 12 Johns. 291; 14 Wend. 246; 15 Wend. 343. In either case, because of defective proof, or because such agreement, if proved, would be nudum pactum, the libellant would be entitled to disavow it and demand the money actually due him, irrespective of Stearns' obligations to the respondents. The only point of view in which the case could be placed to justify the appropriation of the money on Stearns' account, would be that Stearns being charterer of the whole vessel for the voyage, on a contract to pay a fixed sum per month for her services, would be primarily entitled to her earnings, and the respondents might, therefore, rightfully contract with him to apply such earnings in satisfaction of his debt to them, and the assent of the master to such appropriation would be no more than a waiver of his right to claim freight of the defendants, and that it is competent to make such waiver by parol.

These propositions may be admitted as sound law without varying the case, because the respondents had express notice that the master would claim the freight, and were directed not to settle it with Stearns, and they do not prove a waiver, or withdrawal of that notice, further than regards the money actually paid him in presence of the master. It is manifest, from the testimony of Doctor Thompson, that the dullness and incapacity of the libellant in matters of business must have been well understood by the respondents. It was, therefore, incumbent on them, in order to raise an equity in their favor against his demand, because of his acquiescence or assent to their paying the freight to the credit of Stearns, in their account with him, to prove that he understood clearly the consequences they claimed from that assent, and that it was intended to divert his right to resort to them for the balance of $350, still retained by them. The receipt subsequently given by him to Stearns, and his discharge of the charter-party, is proved to have been without payment to him of the balance claimed against the respondents. The libellant is permitted by law to show, by parol evidence, that the receipt was given without consideration, and is not binding upon him, if that receipt and discharge of the charter-party between Stearns and the master can be made to support the defence of the respondents. 1 Greenl. Ev. p. 373, § 305; Southwick v. Hayden, 7 Cow. 334. It is plain, from the testimony of Parrington, that the master supposed the arrangement was to secure him the $350 freight in cash; and the evidence of Doctor Thompson goes no further than to prove his positive consent that the respondents might pay to Stearns $258 10 out of the sum. It seems to me, therefore, upon the whole case, that the libellant has established a right to recover from the defendants the balance of freight unpaid by them, to wit, $91 90. If the libellant's action and demand had been framed for the recovery of that sum alone, I should hold he was entitled to recover, in addition, the costs incurred in prosecuting and establishing his demand. The libel, however, proceeds for the whole freight, $350, and asserts that no part of it has been paid, and in the prayer for relief, asks that the court pronounce in his favor for that sum. No distinction is made between the part paid by his direction to the charterer, and the part retained by the respondents, and sought to be applied to their account against Stearns, and the case throughout the trial was treated as a demand for the whole freight money. The respondents, accordingly, were compelled to protect themselves against the action, and have defeated it in the material part. The demand to this extent was inequitable, and the defendants ought not to be punished with costs for resisting it. I think the respondents, also, ought not in equity to be allowed costs against the libellant. The appropriation made by them of the $91 90 of his money cannot be sanctioned under the circumstances in proof. They are exempted from the whole costs of suit only because the libellant did not specifically demand that balance, and thus permit them to avoid contesting the action by tendering it to him or paying it in court. But they do not entitle themselves upon the facts to costs against the libellant, because they put him to the necessity of maintaining his right to the unpaid $91 90.

A court of admiralty, in exercising its discretion in the disposition of the costs of suit, will look to the substantial rights and equities between the parties, rather than to the mere result of the litigation. The Martha [Case No. 9,144]; [Bingham v. Cabbot] 3 Dall. [3 U. S.] 34; 1 Hagg. Adm. 81; Dunl. Prac. 102. And costs may properly be withheld from both parties, when neither of them offers to the other what is substantially right in the case.

Wherefore, it is ordered, adjudged and decreed, that the libellant recover in this case

against the defendant the sum of ninety-one dollars and ninety cents.

It is further ordered, that neither party recover costs as against the other.

SHAW (UNION INS. CO. v.). See Case No. 14,366.

SHAW (UNITED STATES v.). See Cases Nos. 16,266 and 16,267.

Case No. 12,727.

SHAW & WILCOX CO. v. LOVEJOY.

[7 Blatchf. 232.] [1]

Circuit Court, S. D. New York. May 5, 1870.

PATENTS—APPARATUS FOR RECOVERING GOLD—CLAIM.

1. The claim of the letters patent reissued to the Shaw & Wilcox Company, of Bridgeport, Connecticut, June 15, 1869, for an "improved apparatus for recovering gold and silver from waste solutions," namely: "An apparatus for recovering gold, silver, &c., from waste solutions, by means of suitable precipitating ingredients, substantially as herein specified," is not a valid claim.

2. It is, in effect, a claim to the use of the proper chemicals to precipitate the metal from the liquid waste solution, by putting such chemicals into any proper vessel containing the solution.

[This was a bill in equity by the Shaw & Wilcox Company of Bridgeport, Connecticut, against George W. Lovejoy, to enjoin the infringement of reissued letters patent No. 1,651, granted to J. Shaw April 5, 1864, the original letters patent, No. 35,842, having been granted July 8, 1862.]

Thomas M. Wyatt, for plaintiffs.

Ezekiel Y. Bell, for defendant.

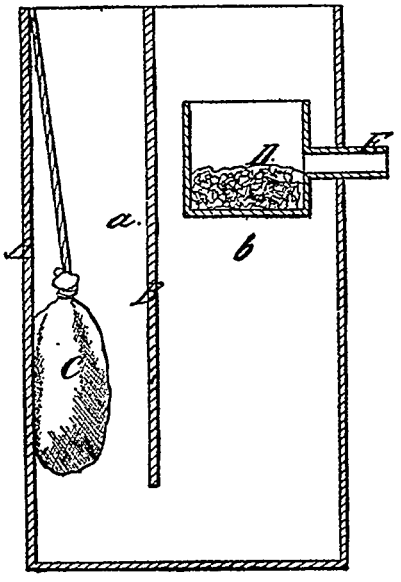
BLATCHFORD, District Judge. This is a suit in equity, founded on reissued letters patent granted to the plaintiffs, June 15, 1869, for an "improved apparatus for recovering gold and silver from waste solutions." The original patent was granted to Jehyleman Shaw, as inventor, July 8, 1862, and was reissued to him April 5, 1864, and the plaintiffs, as his assignees, obtained the reissue of 1869.

The specification says: "The object of this invention is to provide means for recovering from the waste metallic solutions used by photographers and others, the gold, silver or other valuable metal contained therein, after the solution has been used and spent. The invention consists in providing a vessel, into which the discharged waste can be poured or conducted, and in which chemicals are placed to precipitate the gold, silver, or other metal in the waste, so that the latter will be separated from the metal.

"A, in the drawing, represents a vessel made of metal, or other suitable material, of

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

[Drawing of reissued patent No. 1,651, granted April 5, 1864, to J. Shaw, published from the records of the United States patent office.]



suitable form and size. In it may be suspended a bag, C, which contains protosulphate of iron or other ingredients, for precipitating the gold, silver, &c., contained in the solution. Such ingredients may, however, be placed in a loose state in the vessel, A, and will have the same effect, or, in their place, sheet zinc or copper, or other material, may be used. The operation will be simple. The waste solution is conducted or poured into the vessel, A, and is therein separated from its metallic ingredients. When the same have settled, the liquid can be drawn off through a suitable pipe, E, arranged on any suitable part of the vessel, A; or it may be allowed to flow over the top edge of the vessel. On the pipe, E, may be arranged a box, D, containing a sponge, or suitable filtering device, for arresting any particles of metal that may have been carried along in the liquid; but such filtering apparatus can be dispensed with for the majority of solutions. A vertical partition, B, may be arranged in the vessel, A, to cause a double passage of the liquid, and to prevent a current from being formed while it passes off through the pipe, E, or its equivalent. The partition may, however, also be dispensed with. The same apparatus may be used for recovering gold, silver, and other metals from the washings of photographs, and for other equivalent purposes." The claim is as follows: "An apparatus for recovering gold, silver, &c., from waste solutions, by means of suitable precipitating ingredients, substantially as herein specified."

It is impossible to sustain this patent as a valid patent, on the claim it makes, whether such claim be regarded as a claim to a process or a claim to an apparatus. Whether it

claims the recovering of gold, silver, &c., from waste solutions, by means of suitable precipitating ingredients, used in a proper apparatus, substantially as specified, or whether it claims a proper apparatus for recovering gold, silver, &c., from waste solutions, by means of suitable precipitating ingredients, substantially as specified, it is equally open to objection. The specification states, that the object of the invention is to provide means for recovering from waste metallic solutions the valuable metal contained therein, after the solution has been used and spent. The result, that is, the recovering of such valuable metal, cannot be claimed. The means alone can be claimed. In the means, or the providing of the means, or the use of the means, to effect such result, the invention consists. Those means are stated by the specification to be, a vessel, to hold the waste solution, in which vessel chemicals may be placed, to precipitate the valuable metal and separate it from the waste. The specification states, that the vessel may be of any suitable material and of any suitable form and size; that in it may be suspended a bag containing any ingredient that will precipitate the metal, or such ingredient may be placed in the vessel in a loose state; that, after the precipitation takes place, the liquid may be drawn off through a suitable pipe arranged on any suitable part of the vessel, or it may be allowed to fill the vessel and run away over the top; that a filtering device may be used with the pipe, but can be dispensed with for the majority of solutions; and that the vessel may have a partition in it or may not. The sum and substance of all this is, that the result is the thing claimed to be patented. The apparatus is nothing but a vessel to hold the liquid, and the process consists only in putting into the liquid in the vessel the proper chemicals to effect the precipitation of the valuable metal. That a suitable vessel of a suitable form and size must be used to contain a liquid, if the liquid is to be utilized, is no new idea. To discover that a suitable precipitating ingredient will precipitate what it is capable of precipitating, is no invention. The claim is altogether vague and general. It is open to the objections stated in the case of O'Reilly v. Morse, 15 How. [56 U. S.] 62, 119, against the eighth claim of Morse's telegraph patent. It is, in effect, a claim to the use of the proper chemicals to precipitate the metal from the liquid waste solution, by putting such chemicals into any proper vessel containing the solution. The claim, in its present shape, cannot be sustained, and the bill must, therefore, be dismissed, with costs.

Case No. 12,728.

SHAWHAN v. WHERRITT.

[Cited in Beattie v. Gardner, Case No. 1,195. Nowhere reported; opinion not now accessible.]

SHAWK (LATTA v.). See Case No. 8,116.

SHAW-MUX (UNITED STATES v.). See Case No. 16,268.

SHAWNEE COUNTY BANK (WEST ST. LOUIS SAV. BANK v.). See Case No. 17,462.

Case No. 12,729.

In re SHEA et al.

[2 Biss. 156; 3 N. B. R. 187 (Quarto, 46); 2 Am. Law T. 107; 1 Chi. Leg News, 345; 16 Pittb. Leg. News, 85; 1 Leg. Gaz. 46.] [1]

District Court, D. Indiana. June 25, 1869.

BANKRUPTCY — SUSPENSION OF PAYMENT — PRESUMPTION.

1. The failure of a banker, merchant, or trader, who has suspended payment of his commercial paper, to resume within fourteen days, is prima facie evidence of fraud.

2. Unless such inference is affirmatively rebutted, he will, on a proper creditor's petition, be adjudged a bankrupt.

In bankruptcy. The petition herein was filed by J. H. Heinsheimer and others against Patrick Shea and William Boyle, June 7, 1869, charging that they, being partners, traders, etc., committed an act of bankruptcy, in this, "that within six months next preceding the date of this petition, the said Patrick Shea and William Boyle did commit an act of bankruptcy within the meaning of said act, in that they did, on the 28th of January, 1869, fraudulently suspend and stop the payment of their commercial paper, and did not resume the payment thereof within fourteen days thereafter, and have never paid the same." This "commercial paper," the petition alleges to be a note, dated at Cincinnati, January 27, 1869, for $926.55, payable one day after date, to the order of the petitioners, and executed to them by Shea & Boyle. The defendants filed an answer denying the allegations in the petition.

Reid & Carey, for petitioners.

Hendricks, Hord & Hendricks, for respondents.

McDONALD, District Judge. [On the trial it is agreed and admitted that if the note in question is "commercial paper" within the meaning of the bankrupt act, and if the mere fact that the defendants have failed to pay the same up to the time of the filing of the petition, is prima facie evidence of a fraudulent suspension of payment, within the meaning of the thirty-ninth section of the act, then the court shall find for the petitioners. This agreement confines our inquiries to two questions: First, is the note mentioned in the petition "commercial paper?" Second, when traders stop the payment of their commercial paper for fourteen days, and do not afterwards resume it, is this, prima facie, a fraudulent suspension of payment? We will examine these questions.

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 1 Leg. Gaz. 46, contains only a partial report.]

[First. Is the note in question commercial paper? It is payable on its face to the order of the payees. It is dated at Cincinnati; and, in the absence of any evidence to the contrary, I must, therefore, presume that it was executed in the state of Ohio. We need not cite authorities to show that, in such a case, the lex loci contractus governs the contract. Then, the note being executed in Ohio, it is to be construed by the law of Ohio. The law of Ohio puts notes like this on the same footing as inland bills of exchange. The note is, therefore, commercial paper, within the meaning of the bankrupt act.

[Second. When traders stop payment of their commercial paper for fourteen days, and do not afterwards resume it, is this prima facie evidence of a fraudulent suspension of payment?] [2]

The language of the bankrupt act is, that every person, "who, being a banker, merchant or trader, has fraudulently stopped or suspended, and not resumed payment of his commercial paper within a period of fourteen days, shall be deemed to have committed an act of bankruptcy." This question has been much discussed in many of the district courts of the United States; learned judges have given various and different answers to it; and it still remains unsettled. Three views appear to have been taken of it: first, that the mere failure to pay, or to resume payment, is conclusive evidence of fraud; second, that it is only prima facie evidence of fraud; third, that it is no evidence at all of fraud. Without entering upon a discussion of the reasons upon which different judges have come to these opposite conclusions, I conclude that the failure to pay and to resume payment is prima facie evidence of fraud, and no more. I thus decide, for the following reasons:

1. To hold that such failure to pay and to resume payment is conclusive evidence of fraud, and consequently of an act of bankruptcy, would sometimes be followed by unjust and absurd consequences. If we adopt this rule, then we might force into bankruptcy the wealthiest and most prosperous trader in the country. Suppose a trader to be worth $100,000, and to owe $1,000 on commercial paper. At the time when this paper falls due, some accident befalls him—he is prostrated by sickness—all the money he has on hand is stolen or depreciates greatly in value—or suppose that he is necessarily abroad, and cannot reach home within the fourteen days, and by a mere forgetfulness, did not, before leaving home, provide for paying such commercial paper—in these and many other cases that might be supposed, the creditors would be entitled to file their petition against him in bankruptcy on the next day after the expiration of the fourteen days. But in such cases it would be harsh and absurd to hold that his mere failure to pay before the petition was filed, is conclusive of a fraudulent intent on his part, and to preclude him from offering evidence exculpating him from such intent, and evincing his ability and willingness to pay.

2. It is a point of pride, as well as of duty, that traders shall not suffer their commercial paper to be dishonored. Every one knows that such dishonor seriously affects his commercial reputation and business. It is reasonable, therefore, to presume, when he fails promptly to honor his commercial paper, either that he does so fraudulently, or is insolvent. For if he can pay, and does not, that is, among traders, a fraud within the meaning of the bankrupt law; and if he is insolvent and cannot pay, but still carries on his trade, this, I think, is, in view of that law, a fraud—at least, he can, in that case, have no reason to complain if his creditors attempt to have him adjudged a bankrupt. I think, therefore, that a banker, merchant or trader who stops the payment of his commercial paper for fourteen days, and does not afterwards resume it before he is proceeded against as a bankrupt, is not to be deemed prima facie innocent of all fraud.

3. Such a failure to pay on the part of a banker, merchant or trader ought to be so far deemed evidence of fraud as to cast on him the necessity of explaining his conduct, because of the great difficulty in such a case of proving actual fraud. It is generally true, indeed, that, when the question is fraud or no fraud, he who alleges fraud must prove it. But in cases like the present it is almost impossible by direct evidence to prove actual fraud. However great the fraud might be, all that we could reasonably expect the petitioner to be able to prove, would be the failure of the debtor to pay the commercial paper. The intent which led to the failure, it would generally be impossible to prove by anything like direct evidence. But on proof of the failure, I think, the fraudulent intent may be fairly inferred till the contrary is proved. On the other hand, if facts exist which may fairly rebut the inference of fraud, they would in most cases be easily proved. For example, the facts we may suppose to be, as above stated, severe and protracted sickness or unavoidable and unexpected absence from home, and the like. In such cases, the debtor could generally prove the facts, and thus rebut the prima facie case made by proof of the mere omission to pay. This rule making the mere failure to pay prima facie evidence only of a fraud, therefore, commends itself to us on account of its fairness, its plainness, and its easy and general application to cases of this kind. Moreover, it appears to me to be quite consistent with the general scope of the bankrupt act, and to do no violence to the 39th section, on which this question arises. Avoiding extremes, therefore, and following the maxim in medio tutissimus ibis, I conclude that the failure on the part of a banker, merchant or

[2] [From 3 N. B. R. 187.]

trader to pay his commercial paper for fourteen days after it falls due, unless payment is resumed before proceedings in bankruptcy are commenced against him, is prima facie evidence, and only prima facie evidence, that he has committed an act of bankruptcy.

NOTE. To the same effect are the following: In re Jersey City Window Glass Co. [Case No. 7,292]; In re Ballard [Id. 816]; In re Lowenstein [Id. 8,574]; Doan v. Compton [Id. 3,940]; Davis v. Armstrong [Id. 3,624]; In re Hollis [Id. 6,621]. That fraud must be proved. In re Leeds [Id. 8,205]; In re Cone [Id. 3,095]; In re Davis [Id. 3,615]. Since the amendment making the clause read "fraudulently stopped payment, or who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days," it is held that the "fourteen days" applies to the suspension only, and that the word "fraudulently" only relates to the first portion of the clause. In re Wells [Id. 17,387]; In re Cowles [Id. 3,297]; In re Sohoo [Id. 13,162]; In re Thompson [Id. 13,936]; In re Hall [Id. 5,920]; In re Burt [Id. 2,210]; Baldwin v. Wilder [Id. 806].

SHEA (HEINSHEIMER v.). See Case No. 12,729.

SHEA (UNITED STATES v.). See Case No. 16,269.

Case No. 12,729a.

SHEAFE et al. v. KIMBALL et al.

[18 Betts, D. C. MS. 84.]

District Court, S. D. New York. March 24, 1851.

INFANCY — CONTRACTS — PARTNERSHIP — CHARTER-PARTY—BREACH —ACCEPTANCE OF NOTES —AMOUNT OF RECOVERY.

[1. A minor partner is not liable on partnership contracts.]

[2. The acceptance of notes as a liquidation of a claim for breach of charter-party, but not in satisfaction thereof, does not bar the admiralty jurisdiction, if the notes are surrendered into court for cancellation but the amount of the recovery is fixed by the notes.]

[This was a libel by Samuel Sheafe and Horatio Coffin against Edward W. Kimball, Michael P. O'Hearn and Thomas Dunkin, for breach of charter party.]

BETTS, District Judge. The libel charges that the co-partnership of E. W. Kimball, consisting of Edward W. Kimball, Michael P. O'Hearn and Thomas Dunkin, at New York on the 17th day of May, 1849, by their agent John F. Schwander, chartered of the libellants the ship Alhambra, for a voyage from New York to Liverpool and back to New York, and for the charter or freight on the voyage out and back engaged to pay the libellants $1800 and pay all incidental expenses, &c., and to furnish the ship with cargoes of lawful merchandise or passengers on both voyages. The libellants aver a full performance on their part of the terms of the charter-party and they charge that the respondents refused to fulfill it on their part in not supplying the cargoes in New York agreed to be furnished, and when the ship arrived at Liverpool refusing to receive the consignment of her as stipulated, pay her expenses, a portion of the freight, &c., and to load and dispatch her to New York, and claim damages to the amount of $3854, satisfaction of which sum with interest from October, 1849, is demanded. The warrant of arrest was served on O'Hearn and Dunkin. Kimball was returned not found, and a supplemental libel was filed praying process of foreign attachment. It was issued and certain effects attached to compel his appearance, but he did not appear or offer any defence. The other respondents answer separately and by different proctors.

O'Hearn admits the charter of the vessel by the firm by Schwander, but does not know that it was in behalf of the libellants. He is ignorant of the transactions in Liverpool, but alleges the master of the ship by due diligence might have procured a charter there which would have protected the respondents from loss. He admits that on the return of the ship the libellants claimed damages to $3854, and that the matter being in dispute an adjustment was finally made by the respondents giving their two promissory notes dated October 25, 1849, and for $1850 payable in thirty days and one for $1000 payable in 60 days, which notes the libellants still hold and have never restored to respondents or offered so to do; and insists the maritime character of the contract was thereby merged, and the libellants have no right to resort to the original consideration of the notes, nor recover beyond their amount; and denies the jurisdiction of the court.

Dunkin in his answer denies that the firm of the respondent were engaged in chartering vessels for Liverpool, and that, although he is informed and believes one of the firm executed the charter party articled upon, he had no authority to bind the copartnership thereby and the respondent had expressly refused to give authority or be concerned therein. As to the matters of detail he is ignorant, except that he admits the friends of the firm to whom the ship was consigned in England refused to accept the consignment, or take any charge or responsibility on account of the ship, and so notified her master. That the said copartnership was dissolved on the 23d August, 1849, by the respondent retiring therefrom, of which the libellants had notice, and that subsequent thereto the libellants through their agent Schwander settled their demand against the firm of E. W. Kimball & Co. by taking notes in the name of the new firm (continued by other parties) which notes the libellants have still in their possession. That at the settle-

ment the libellants by their agent insisted that the notes should be endorsed by the respondent, but finally consented to take them without such endorsement, whereby he was discharged and the jurisdiction of this court was taken away. That the ship was not of the tonnage stipulated in the charter-party, and that her freight lists on the voyages were sufficient to satisfy her full value. That he never assented to the said charter party, but always dissented therefrom as being contrary to his express agreement with his co-partners. It was executed in his absence. That at the time he was under the age of 21 and did not attain his majority until 30th day of October, 1849, and has never in any way ratified or confirmed the charter-party, but has at all times protested against and repudiated it.

A general replication was put in by the libellants and they also filed interrogatories to be answered by O'Hearn.

(1) The evidence of John Dunkin the paternal uncle, and of Hester Paret the maternal aunt, and of John T. Dunkin, the brother, of the respondent Thomas Dunkin, is satisfactory proof that this respondent did not attain the age of 21 until the thirtieth of October, 1849. The charter-party was executed in May, 1849, and the notes given on the adjustment of the contract were given the 25th October of the same year. This was after Dunkin had withdrawn from the partnership, and after that the old partners had no authority to bind the retiring partners by giving notes in the partnership name. 2 Kent, Comm. 63, note; Colly. Partn. (Perkins' Ed.) §§ 540, 546, and notes. And therefore it is of no consequence in this case whether Dunkin [became of age] before or after the 25th of October, if he did not till after the 17th of May. At both these periods the respondent was a minor, and not bound by the contract, even if entered into by him personally. There is no distinction between the maritime law and common law in respect to the construction and obligation of contracts. The difference in the two laws consists in the remedy afforded for enforcing a contract.

It is proved by James B. Gager that the respondent, a month or two before the charter-party was executed, told the witness in a friendly conversation that he was then married, the father of two children and twenty-five years of age. If this conversation is correctly recollected by the witness, it is evident it must have been mere trifling on the part of the respondent. His brother proves that he was not married till the spring of 1848 or 1849, and had no child at the time of the alleged conversation. Besides the conversation had no relation to any dealings of the respondent, or his capacity to enter into a contract, and worked no deception or wrong to the libellants.

The charter-party or notes cannot therefore be enforced against this respondent without a direct or implied affirmance of them after he became of age. 2 Kent, Comm. (6th Ed.) 232–239; Tucker v. Moreland, 10 Pet. [35 U. S.] 73.

(2) The charter-party was a maritime contract, for breach of which an action lies in this court against the adult parties. [Certain Logs of Mohogany, Case No. 2,559]; Ben. Adm. § 287. Giving and receiving promissory notes for the amount due between the immediate parties does not change the character of the contract. The notes whilst outstanding suspend the remedy in admiralty, but upon being cancelled or surrendered, the libellant is reintegrated to his original privilege, and can pursue his remedy in this court. The Active [unreported]. It is sufficient if the libellant produces in court and surrenders or cancels the note, on the hearing. The General Smith, 4 Wheat. [17 U. S.] 438; [Ramsay v. The Allegre] 12 Wheat. [25 U. S.] 611.

(3) On the 23d August, 1849, public notice was given in the newspapers in the city that the defendant Dunkin had retired from the copartnership, and a witness for the libellant proved that when the notes were given, Dunkin was not a member of the firm. The witness drew the notes and they were signed by O'Hearn in the name of E. W. Kimball & Co., which continued to be the name of the firm after Dunkin retired. Does that change of the responsibility of parties merge the former contract in the new one, and thus take away the remedy of the libellants upon the first?

The new notes did not bind Dunkin, no special authority from him to the former parties to use his name after the dissolution being proved; nor the old copartnership itself. Colly. Partn. §§ 540, 546, and notes; 2 Kent, Comm. (6th Ed.) 63. And therefore they must stand solely upon the footing of obligations of the new firm of G. W. Kimball & Co.; and I take it upon the evidence, that the new firm consists solely of the members of the preceding one who were alone liable in law upon the charter-party.

The debt and obligations created by that contract were accordingly operative as against G. W. Kimball and O'Hearn, they standing, because of the infancy of Dunkin, the only contracting parties in the undertaking. On the retirement of Dunkin from that firm, therefore, no change in the relation of the creditors of the old firm, or in respect to the competency of the continuing members to bind themselves for their own debts, was effected. The debt in question was all the while the debt of G. W. Kimball and O'Hearn and not of Kimball, O'Hearn, and Dunkin. If, then, the new notes given for that debt, had been executed by Kimball and O'Hearn, no question in law could arise whether it operated as an extinguishment of their antecedent debt. The notes appear, however, to have been executed by O'Hearn alone, Kimball not being present; and as Kimball

is not arrested and made a party to this suit personally, it is fairly inferable that giving the notes is the single act of O'Hearn without the presence or assent of Kimball.

In neither aspect of the case does it seem to me that the former debt is extinguished by giving these notes. If they are merely the notes of Kimball and O'Hearn, then the transaction amounts to no more than substituting a direct promise to pay a debt already due by them, and this most clearly does not extinguish or merge the original indebtment. 5 Hill, 448; Waydell v. Luer, 3 Denio, 410.

All the cases are examined and discussed in those decisions, and the result is that joint debtors giving their joint notes or the note of one of them for a debt antecedently due, does not extinguish their liability on the original debt. The distinction established by the decision of the court of errors is, that if the new note is accepted in payment of the debt, then it extinguishes the liability of the parties who do not sign it, upon the former indebtedness. If the new notes given are really obligatory only upon O'Hearn then they fail operating an extinguishment of the prior debt, because there is no proof they were accepted on any such agreement. They were evidently intended to have no other effect than to liquidate the amount due upon the transactions between the parties, and perhaps afford the payees a more ready method of collecting the amount. This does not constitute a different consideration or relation between the original debtor and creditor which affects the right of the latter to resort to the primitive debt. 8 Cow. 77; 21 Wend. 450. And without the express engagement to accept them as the notes of O'Hearn and in satisfaction they do not affect the title of the libellants to the prior debt. Arnold v. Camp, 12 Johns. 409. In my opinion therefore the libellants have a right to maintain their action upon the original contract, on surrendering the notes given by O'Hearn; but I think the arrangement then made must be regarded a definitive adjustment of the amount the libellants are entitled to demand, and the recovery must accordingly be limited to that sum.

The decree will be in favor of the libellants for $2850, with interest from the 25th of October, 1849, and costs against G. W. Kimball & Co., the original debtors, and that the libel as to Dunkin be dismissed. I do not think under the circumstances Dunkin is entitled to recover costs. I should award them against him had he directly or personally taken part in the chartering of the vessel or adjusting the balance payable; but as no act of his is proved misleading the libellants, as to his liability for the demand, further than standing before the public as a general partner in the firm, I do not think he should be subjected to the costs of the suit.

Case No. 12,730.

SHEAFF et al. v. SEVENTY HOGSHEADS AND NINE BARRELS OF SUGAR.

[Bee, 163.] [1]

District Court, D. South Carolina. Oct. 24, 1800.

ADMIRALTY—CONDEMNATION IN FOREIGN COURT—RIGHT TO INQUIRE INTO.

Condemnation in a French court of admiralty of property carried into the ports of an ally, connot be inquired into by the courts of this country.

In admiralty.

BEE, District Judge. This is a suit instituted by libel in this court against 70 hogsheads and 9 barrels of sugar, part of the cargo of the brig Betsey, late the property of Sheaff & Turner of Portsmouth in the state of New Hampshire. It appears from the pleadings and evidence in this cause, that the brig Betsey sailed from the island of Trinidad, then in possession of Great Britain on the 22d April, 1798, bound to Portsmouth; on the 5th of May she was captured by the French privateer Pluvoyer, Pierre Olancier, master, belonging to, and commissioned at, Cape Francois; and carried into the Havanna. That previous to her arrival Captain Turner of the brig Betsey had agreed with the Frenchman to give him 4,000 dollars to restore the vessel and cargo; in consequence of which he was put in possession, and remained so for upwards of twenty-four hours; but, on some difficulties being raised by St. Mary & Cuesta, the merchants to whom he was recommended, and to whom he applied for the money, he was dispossessed of his vessel again, and though he offered the money soon after, yet was refused possession; the French captain telling him she was already sold. It appears that Mr. Cuesta, immediately after he declined the advance of the money, offered the Frenchman 5,000 dollars for vessel and cargo for a gentleman of Charleston, supposed to be Mr. Price, one of the claimants; this happened on or about the 3d of June, 1798. It appears that some time after, the brig Fanny, Captain Ormond, went alongside the Betsey, and took out the seventy hogsheads and nine barrels of sugar which she landed in Charleston about the beginning of September following; soon after which this suit was instituted. It appears from the exhibits that on the 16th June, 1798, the American consul at the Havanna, obtained from St. Mary & Cuesta a guarantee for the legal condemnation of the brig and cargo, or security for a refund of the amount she sold for: and a certificate is also exhibited, signed by the said American consul on the 18th October following, and annexed to a true copy of the original condemnation at the Cape, dated the 29th Messidor, An 6, which answers to

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

the —— day of July, 1798. An invoice has also been produced to shew that these sugars were shipped at the Havanna for Charleston on the 6th August, subsequent to the condemnation.

In arguing this case, three questions have been made and a variety of reasoning and a number of authorities produced on both sides. 1st. Whether any right was transferred by the capture, without being carried infra præsidia of the nation to which the privateer belonged. 2d. Whether the condemnation at the Cape of the vessel in tne Havanna was sufficient to transfer the property sold previous to such condemnation, and 3d. Whether this court can reverse the decision at the Cape and set it aside for irregularity.

As to the first point, it seems at this day to be the general practice of the law of nations, to require a sentence of condemnation to vest the property in the captors and divest the former owner of all right; it is unnecessary, therefore, to say more on this head.

There having been such sentence of condemnation, I will consider the second point, whether that sentence under all the circumstances is legal and binding. It was contended with great earnestness, that the purchase was made previous to condemnation, and that by a court at a distance, not having the subject matter under their immediate jurisdiction: and the case in Sir William Scott's Reports [1 C. Rob. Adm.] 135 et seq. was much relied on. Almost the whole reasoning in that case turned on the legality of a sentence of condemnation in a neutral port, and therefore does not apply in the present case. The judge there declares the irregularity of proceedings where the body and substance of the thing is not in the country exercising the jurisdiction. He nevertheless admits the fact as to two cases of ships carried into foreign ports and condemned in the court of admiralty in England; but he does not pretend to say that the sentence was not binding, but endeavours to shew that the ports of Lisbon and Leghorn, into which those vessels were carried, have a peculiar and discriminate character, that to a certain degree assimilates them to British ports. If we consider the relative situations of France and Spain in the present war, and the practice that has prevailed, we find from the evidence that it is the usual mode of sending the papers of captured vessels from the Havanna to the Cape for condemnation, and that all the vessels and cargoes that have been carried in there have been sold under such sentences. That these papers are lodged with an officer at the Havanna called the receiver of the rights of the republic of France, and copies certified by him are transmitted to the Cape, on which the court there exercises jurisdiction. The inference then must naturally follow, that this officer is authorized by the Spanish as well as the French government, and the proceedings sanctioned by them. Indeed the guarantee taken by the American consul and stipulation entered into with him, is, in my opinion, conclusive evidence on this point; if so, the port of the Havanna has the same peculiar and discriminate character as to France, that Sir William Scott states the ports of Lisbon and Leghorn to bear to Great Britain. As to the sale to the claimants being made previously to the condemnation, no positive proof is before the court to that point; the condemnation is in July, and the invoice of shipment dated 6th August following. The present claimants were not original vendees; but if they had been, as this part of the transaction happened on land, I doubt the jurisdiction of this court to interfere; but it is very common for sales to be made before condemnation sub modo, and the guarantee taken by the American consul appears to be in the nature of a deposit, pendente lite.

As to the third and last point contended—whether this court can reverse the decision of the court of admiralty at the Cape so as to set it aside, I am decidedly of opinion it cannot. In the case quoted from Doug. 559, Lord Mansfield expressly lays down as a clear principle, that all the world are parties to a sentence of a court of admiralty, and that it is conclusive as to that which is within it, against all persons, unless reversed by the regular court of appeal. In that case, which was an insurance cause, Buller differed from the other judges, whose final decisions went entirely on the ambiguity of the sentence of the foreign court, so as to decide between the underwriters and the insured. In the present case, whatever irregularity there may be in other parts of the proceedings, there is no ambiguity as to the final sentence. The tribunal decrees the brig Betsey, Captain George Turner, captured by the French privateer the Pluvoyer, Captain Olancier, and carried into Havanna, a good prize, and this is certified by the American consul to be a true copy of the original condemnation.

On a serious review and consideration of this case, and the arguments on both sides, and after looking into all the cases quoted, I am of opinion that this cause cannot be retained, and I therefore decree that the libel be dismissed with costs.

This decree was affirmed, on appeal to the circuit court. [Case unreported.]

Case No. 12,731.

SHEAN v. TOWERS.

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

Circuit Court, District of Columbia. April, 1801.

BAIL—APPEARANCE BAIL—SPECIAL BAIL.

If no appearance-bail be required, the court will not require special bail, on setting aside the office judgment.

Mr. Swann prayed that the defendant might not be permitted to set aside the office judgment without giving special bail, and stated that he had evidence to prove the account to entttle him to special bail. There was no appearance-bail required.

THE COURT refused to rule bail.

Case No. 12,732.

SHEARMAN et al. v. BINGHAM et al.

[Holmes, 272.] [2]

Circuit Court, D. Massachusetts. Oct., 1873.

BANKRUPTCY — MONEY PAID BY BANKRUPT TO CREDITOR—LIMIT OF TIME IN RECOVERY.

Under the thirty-fifth section of the bankrupt act [of 1867 (14 Stat. 534)], an assignee in bankruptcy cannot recover money paid by the bankrupt to a bona fide creditor more than four months before the filing of the petition in bankruptcy.

[Cited in brief in Norton v. Barker, Case No. 10,349; McGehee v. Hentz, Id. 8,794; Re Tifft, Id. 14,034.]

Suit by [Sumner W. Shearman and others] assignees in bankruptcy [against Osmer A. Bingham and others] to recover money alleged to have been paid to the defendants by the bankrupt as a preference. The case was heard on an agreed statement of facts, the material parts of which appear in the opinion.

[See Cases Nos. 12,733 and 12,762.]

Oscar Lapham and E. P. Brown, for plaintiffs.

C. T. Russell, T. H. Russell, and H. W. Suter, for defendants.

SHEPLEY, Circuit Judge. This court having decided, in an opinion rendered at a previous term, that the district court in Massachusetts had jurisdiction in this case over a controversy between the assignee of a bankrupt and a person claiming an interest adverse to the bankrupt, although the proceedings in bankruptcy were instituted in the district of Rhode Island [Case No. 12,733], the case is now before the court upon a hearing upon the merits. The writ, dated Jan. 25, 1871, was brought by plaintiffs as assignees of Reynolds & Bartlett, and is to recover moneys, claimed to have been paid defendants in fraud of the bankrupt law. About the 1st of March, 1868, the bankrupts became insolvent and suspended payment. They were then indebted to defendants for about a thousand dollars. During the months of March, April, and May, 1868, they formally notified their creditors of their suspension, and offered to pay twenty-five cents on a dollar, provided each creditor receiving such percentage would discharge the bankrupts from further liability. The defendants were notified of the insolvency of said Reynolds & Bartlett, and, after such notice, did, on the fifth day of June, 1868, accept such offer; and received from said bankrupts the sum of $280.69, in payment and full discharge of the said indebtedness of said bankrupts to them. The bankrupts continued settling with their creditors, until they had paid out their entire assets; and there were remaining several creditors with whom no settlement had been made. One, to whom the firm was largely indebted, and to whom the offer to pay twenty-five cents was never extended, Nov. 23, 1868 (more than four months and less than six months after the time of the preferential payment), filed a petition in the district court in Rhode Island against the bankrupts; and on the thirtieth day of December, 1868, they were adjudged bankrupts, and the plaintiffs were duly appointed assignees.

The first clause of the thirty-fifth section of the bankrupt act avoids certain acts of the bankrupt touching his effects, if done within four months before the filing of the petition in bankruptcy. The second clause imposes the like result, if the transaction be within six months of that time. The first clause applies to the case of a creditor, a person having a claim against the bankrupt, or who is under any liability for him, and who receives money or property by way of preference. The second clause applies to cases where the transaction in question was original and complete in itself at the time it occurred, and had no reference for its consideration to any antecedent liability or debt of the bankrupt. This was the construction given to these two clauses of the thirty-fifth section by the supreme court of the United States in Gibson v. Warden, 14 Wall. [81 U. S.] 244; and seems to be the only construction, as remarked by the court in that case, by which the two clauses can be made to harmonize, and full and distinct effect be given to each.

The preference by the bankrupt having been to a bona fide creditor, and more than four months before the filing of the petition in bankruptcy, the time had expired within which its validity could be challenged by the assignee. Judgment for defendants, with costs.

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

[2] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

Case No. 12,733.

SHEARMAN et al. v. BINGHAM et al.

[1 Lowell, 575;[1] 5 N. B. R. 34; 3 Chi. Leg. News, 258.]

District Court, D. Massachusetts. April, 1871.[2]

BANKRUPTCY—COURT WHERE CASE PENDING—ACTION IN ANOTHER DISTRICT.

The district courts of the United States in a district other than that in which the proceedings in bankruptcy are pending have no jurisdiction of suits by the assignees against debtors of the bankrupt by virtue of any provision of the bankrupt law.

[Criticised in Goodall v. Tuttle, Case No. 5,533. Cited in Lamb v. Damron, Id. 8,014; Jobbins v. Montague, Id. 7,330.]

[Cited in Otis v. Hadley, 112 Mass. 106.]

Assumpsit by [Sumner W. Shearman and others] assignees to recover money alleged to have been paid by the bankrupts to the defendants [Osmer A. Bingham and others] by way of preference. A plea in abatement set up that the writ did not show jurisdiction in this court, and that in point of fact there was none, because the proceedings in bankruptcy were pending in the district court of Rhode Island.

C. T. Russell and H. W. Suter, for defendants.

The first and second sections of the bankrupt act confer jurisdiction of actions between the assignee and persons claiming an adverse interest upon the circuit and district courts of that district only in which the proceedings are pending. In re Richardson [Case No. 11,774]. The writ does not allege that the proceedings are pending here, and as the district courts have only the special jurisdiction conferred by the statute, all necessary averments must be made on the face of the record, or the action will be abated or dismissed.

E. P. Brown, for plaintiffs.

It is highly important that the district and circuit courts should take jurisdiction in such cases as this, in order to preserve uniformity in the construction of the act. The language of the statute is broad enough to cover this case.

LOWELL, District Judge. I must assume the fact that the plaintiffs were appointed assignees in Rhode Island, because if it were otherwise they should have taken issue on the plea; but that there may be no miscarriage, they may do so within one week, if the plea should be adjudged valid. The cases cited by the defendants, and one other carefully considered case by Dillon, J. (Markson v. Heaney [Case No. 9,098]), decide that the circuit and district courts of districts other than that in which the proceedings in any bankruptcy are pending, have no jurisdiction in equity to carry out the provisions of the bankrupt law in aid of these proceedings. The decision of Mr. Justice Story in Ex parte Martin [Id. 9,149], in which this auxiliary jurisdiction was affirmed, does not appear to have been cited in the discussion of either of these cases. That eminent jurist exhibits with great force the convenience which will be promoted by the exercise of such a power, and concludes that section six of the act of 1841 is broad enough to confer it. The clauses on which he relies as conferring a general jurisdiction are those which open and close the grant of power, viz.: "The district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act" . . . "and to all matters and things done and to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy," he holds that the intermediate grant of power in particular cases is affirmative only and not restrictive. The learned judge does not refer to section eight, which gives the circuit court for the district where the decree of bankruptcy is passed concurrent jurisdiction with the district of all suits at law and in equity by and against the assignee. He confesses to great doubt as to the true construction of the act, but on the whole upholds it. Judge Prentiss afterwards followed the decision in Ex parte Martin [supra], relying wholly upon it as authority for his action, though it is evident that he had his own doubts upon the question. Moore v. Jones, 23 Vt. 739, 746.

Ex parte Martin having been decided upon a different statute, and one which, though it is hardly to be distinguished from that of 1867 upon this point, does yet differ from it in some particulars, does not bind my judgment absolutely, and I shall therefore consider the case anew. And I must say that it seems to me that sections one and two of the act of 1867 grant jurisdiction only to the circuit and district courts of the district in which the petition in bankruptcy is filed.

Authority is undoubtedly given as under the former law, to hear and adjudicate upon all matters and proceedings in bankruptcy; but if this gives jurisdiction to all federal courts of suits by and against assignees, without reference to the venue of the bankruptcy, it is very difficult to see why the district courts have not jurisdiction of all bankruptcies without reference to the residence or place of business of the bankrupt. The qualification immediately added after the grant to hear and adjudicate, viz.: "According to the provisions of this act," refers us to section eleven, by which we find that the proceedings must be where the debtor resides or carries on his business; and so, when we look to section two, we find the supervisory power of the circuit court is only over cases and questions "within and for the district where the proceedings in bankruptcy shall be pend-

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

[2] [Reversed in Case No. 12,762.]

ing." And the concurrent jurisdiction of such suits as the present, "in the same district," evidently means the district in which the proceedings are pending. This is so understood by Judge Dillon in the case above cited, and I see no other reasonable construction of the words. The corresponding section (eight) of the law of 1841, is so, as we have seen, and I have never heard a doubt expressed of the correctness of this interpretation.

It may not be amiss to repeat that section six of the act of 1841 differs a little from section one of that of 1867 in this: the earlier law gives jurisdiction to the several district courts of all matters and proceedings in bankruptcy, arising under the act or under any other that may afterwards be passed—a very comprehensive form of expression. The present law says they shall have jurisdiction in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same, according to the provisions of this act. Then, as we read on through the section, we find the marshalling of assets and many other proceedings specially mentioned, but all with reference to a bankruptcy supposed to be pending before that court. Mr. Justice Story, as we have seen, considered similar provisions in the law of 1841 as cumulative only; but it seems to me much more logical to construe the first section throughout as giving the most ample powers to the district courts to conduct and settle the proceedings in bankruptcy; but that it does not relate to suits at law or in equity between the assignee and third persons, which are regulated by section two.

It was the practice under the former acts to call upon the court by summary petition to dispose of all these rights; but the better opinion is, that under the act of 1867 the assignee must bring his action at law or in equity, as the nature of the case may require; and I understand the supreme court, at this term, to have recognized this as the true practice. If so, it is because such actions depend on section two, and not on the summary processes mentioned and implied in section one. Now, we have already seen, section two confines the jurisdiction of suits to the courts of the same district where the bankruptcy is pending. Upon the whole, therefore, I am of opinion that the true meaning of the law is that I have jurisdiction of such actions as this only when the bankruptcy is here. And I find in the decisions under this law, authorities which may properly be considered as balancing that of Ex parte Martin [supra], and leaving me free to follow my own judgment. I should be glad to have the point taken to the circuit court for review. I may properly say that I should not regret to have my decision overruled, because I can see that there may, in the long run, be much convenience in bringing these cases in the federal courts, or in having the right to bring them there. Still I cannot admit that there is likely to be a failure of justice without it, because the state courts must deal with all titles depending upon bankruptcy precisely as the courts of the United States do, and must look to the supreme court at Washington as the ultimate arbiter of all doubtful points arising under the law. In point of fact, the larger part of such suits arising in Massachusetts are now brought in the state courts, unless I am misinformed, and it is probable that the practice will continue unless the supreme court should deny the jurisdiction of the state courts, because the forms and modes of proceeding are more familiar to the bar, and the courts are nearer at hand. If this court should absorb the whole of this jurisdiction, it is not certain that a trial could always be had in every case at the first term, as is now entirely feasible if the parties desire it. Another suggestion I will make for what it may be worth. It is possible that in a case such as this appears to have been in its origin—that is, where partners who live in different districts become bankrupt, proceedings could so far be taken in each district as to give both courts jurisdiction. I do not know that this experiment has ever been tried, and I give no opinion on the point.

The plea must be adjudged good, and the suit will be dismissed, without costs, for want of jurisdiction, unless the plaintiffs amend by taking issue on the plea within ten days. They can take exceptions to my ruling within the same time, if so advised. Plea sustained.

[NOTE. A judgment was entered for the defendants, whereupon plaintiffs carried the case by writ of error to the circuit court, where the judgment of the district court was reversed. Case No. 12,762. For a hearing upon the merits, see Case No. 12,732.]

SHEARMAN v. BINGHAM. See Cases Nos. 12,732 and 12,733.

SHE AT v. HALLETT. See Case No. 10,469.

Case No. 12,734.

In re SHEAZLE et al.

[1 Woodb. & M. 66.] [1]

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

EXTRADITION—TREATY WITH GREAT BRITAIN—APPLICATION FOR SURRENDER—EXAMINATION—SURRENDER.

1. Under the treaty with Great Britain of August, 1842, prisoners, charged with piracy, committed contrary to acts of parliament, and on board a British vessel, may be arrested here, and surrendered without any special act of congress to carry that treaty into effect.

[Cited in Re Stupp, Case No. 13,562.]

2. They may be examined, and, if believed guilty, be ordered into custody with a view to a future surrender; and this may be done by a magistrate of a state, though he is not compellable to do it by the United States.

[Cited in U. S. v. Ames, Case No. 14,441.]

[1] [Reported by Chas. L. Woodbury, Esq., and George Minot, Esq.]

3. The order to surrender may be signed by the secretary of state, and issue from the state department.

4. Without such proceedings for a surrender as are in that treaty, the law of nations leaves it optional with the executive.

[Cited in Ex parte McCabe, 46 Fed. 371.]

5. The application for the surrender may be made by the British minister, and need not be founded on a previous indictment found against the prisoners by the British tribunals, or on any warrant issuing therefrom.

This was a petition for a habeas corpus on account of what was averred to be an unlawful imprisonment of the petitioners [Thomas Sheazle and others] in Leverett Street Jail, by means of an illegal warrant from James Buchanan, secretary of state, executed by the marshal of the district of Maine. The writ was issued and the prisoners brought into court the same day, being October 16th, 1845, and the keeper of the prison returned, as the cause of the detention, a warrant against the prisoners in the hands of Virgil D. Parris, marshal of Maine, for the purpose of taking and delivering them to the British consul or vice-consul for trial in Great Britain. The said Parris set out in a supplemental return the warrant itself, as having been issued September 25th, 1845, stating among other things, that Sir R. Packenham, the ambassador from Great Britain, had applied to the American government, under the treaty with that nation, of August, 1842, for the surrender of these prisoners for trial for the crime of piracy, being, as was alleged, the subjects of Great Britain, and guilty of said crime on board the British barque Champlain on the high seas. It was further averred in the warrant, that the prisoners, after the commission of the offence, had landed first in the United States at Machias, in the state of Maine; that they had there been arrested and examined for the offence by Albert Pilsbury, a justice of the peace for said state, who, finding probable cause for conviction of them, had sent them to prison, and, on this requisition under the treaty aforesaid, the warrant from the state department required the marshal of Maine to deliver them up to the consul or vice-consul of the British government, who might be authorized to take them home for trial.

Mr. Rantoul, Dist. Atty., for the United States, in behalf of the government.

Mr. Eldridge, for prisoners.

WOODBURY, Circuit Justice. This case is important, as involving the liberty of individuals on the one hand, and the duties of the government in fulfilling solemn stipulations of treaties on the other. In the first place, it is uncontroverted, that the prisoners were a part of the crew of a British vessel,—were British subjects,—were charged with the commission of a crime under British jurisdiction and against British laws. It was a piracy, created by acts of parliament, and not one under the laws of nations. They are not, then, amenable to our tribunals and laws for final trial or punishment, but ought to be examined, and if guilty, punished by the tribunals and laws under whose jurisdiction they lived when the offence was committed, and whose penalties, if any, they have incurred. It was, then, a proper case, and one expressly enumerated under the stipulations in the treaty of 1842 for a surrender of a supposed offender. But without such a stipulation, however fit it might seem in point of comity or morals to surrender citizens of other countries to answer for offences committed at home against their own laws, it is usually considered that there is no political obligation under the laws of nations to do it. Holmes v. Jennison, 14 Pet. [39 U. S.] 540, 549; U. S. v. Davis [Case No. 14,932]. It is optional to do it or not, though in case of mere political offences, it is seldom done. Mure v. Kaye, 4 Taunt. 34; Short v. Deacon, 10 Serg. & R. 125. But see Ex parte Washburn, 4 Johns. Ch. 106; 1 Am. State Papers, 115; New York v. Miln, 11 Pet. [36 U. S.] 102. See U. S. v. Robins [Case No. 16,175].

The next objection is, that the inquiry into the conduct of the prisoners, preliminary to their commitment, was not had by a competent officer. We have no doubt it is proper for us to look behind the warrant, so far as to see that it was issued in a proper case and by a competent officer. Smith's Case [Case No. 12,968]; Milburn's Case, 9 Pet. [34 U. S.] 704. It is conceded, that the inquiry relied on was not had by any officer of the British government. By the analogy to cases of fugitives from justice in one state to another, there would seem to be some ground for this objection. In that class of cases, it is believed to be customary to accompany the demand for a surrender with some evidence of a preliminary examination, and a warrant or indictment, if not a conviction of the offender at home for some breach of the penal code. At least an affidavit of guilt, made there, seems indispensable by the act of congress of February 12th, 1793, c. 7 (1 Stat. 302). Such may have been the practice also, generally, if not always, under Jay's treaty of 1794. Under a treaty with Prussia, it is said that a consul has been authorized to make such a preliminary examination, as in some cases consuls are authorized to try questions of prize by some governments. But the present application is made by virtue of the tenth article of the treaty of August 9th, 1842, with Great Britain, and which expressly provides for an examination of the evidence of criminality by some magistrate in the place or country where the supposed offender is arrested. He may merely be charged with one of the crimes specified in the treaty as having been committed within the jurisdiction of Great Britain, and may seek an asylum, or be found within our territories; and then a

magistrate here is empowered to issue his warrant and arrest the fugitive, and himself examine into the imputed offence before committing him, and, unless satisfied of the guilt, will not detain him.

This evidently was intended to reach cases where no such examination had been made elsewhere, and the only remaining question under this head is, whether the examination in the present case was made here by a competent magistrate. It has been contended, that no magistrate is competent for this purpose, unless he be one commissioned under the general government. There is some plausibility in this, and it has been held by Judge Roane and others in Virginia, that any duty devolved by the general government on state courts or officers, who hold commissions under the states alone, need not be performed by them, unless they please. Serg. Const. Law, 275–290; Federalist, No. 81; 1 Va. Cas. 321; 2 Va. Cas. 34; 1 Dana, 442; Martin v. Hunter's Lessee, 1 Wheat. [14 U. S.] 304, 354. See, also, Houston v. Moore, 5 Wheat. [18 U. S.] 1, 27, 28; 7 Conn. 239; Car. Law Repos. 300; U. S. v. Lathrop, 17 Johns. 4; Conk. Prac. 399. In Wayman v. Southard, 10 Wheat. [23 U. S.] 1, 40, Chief Justice Marshall says, in relation to the "Agency of state officers" for the general government: "The laws of the Union may permit such agency, but it is by no means clear that they can compel it." It certainly would be an anomaly to hold any such officers, against their wishes, to be amenable and acting as officers for the general government, or to exercise compulsory control over them on subjects where the state authorities have imposed no such obligation. Justice Johnson [Martin v. Hunter's Lessee], 1 Wheat. [14 U. S.] 362. Some other cases sustain their doings in civil matters, though not in criminal ones. U. S. v. Dodge, 14 Johns. 95. It has been customary for congress to authorize suits in the state courts for penalties under some of the revenue laws, and to collect debts there by assignees under the bankrupt laws, if not in other cases. Sullivan v. Bridge, 1 Mass. 511; Brown v. Cuming, 2 Caines, 33; Ward v. Jenkins, 10 Metc. [Mass.] 583. And Tucker, in his edition of Blackstone (volume 1, pt. 1, p. 182), says, congress may vest such power in state courts in small offences against the peace and the revenue laws. Constables in New England have venires directed to them from United States courts to summon juries, and do it. It has been so for half a century, and if they should refuse, perhaps we could not enforce it; but if they act, the juror is in contempt, and has often been fined and legally, if so summoned and he did not come. See the form of venire, &c., in U. S. v. Smith [Case No. 16,346]. So we use state jails and state prisons; but there the state laws usually permit it in express terms. But not so as to constables to serve venires; and as to jails, it is permissive often, it is believed, rather than directory. But at the same time, if duties are previously devolved on magistrates by their own state laws,—such, for instance, as the examination into alleged crimes, and if found not to be triable by them, to hand the prisoners over to the United States or other governments having jurisdiction; and if by treaties or laws of the United States, they are requested to perform these same duties, or their acts in performing them are adopted as valid, the subject assumes a new aspect. In Prigg v. Pennsylvania, 16 Pet. [41 U. S.] 539, 631, Chief Justice Taney and J. Daniels, held, I think discreetly, that states may properly pass laws, if they please, to aid congress in enforcing duties, and, if not conflicting with any by congress, they are valid, and to be encouraged. So if their magistrates, under old powers or new ones, are willing to perform duties and do perform them, without exception taken before magistrates, we think their proceedings can be sustained. Such is this case, and we confine ourselves to this alone. They act virtually in the first instance under their own state laws, which require them to make preliminary inquiries into offences. See cases before cited, and Gord. Dig. 185, note, and [Martin v. Hunter's Lessee], 1 Wheat. [14 U. S.] 336. They act also safely for the prisoners and the government, when a treaty adopts their doings, as they are bound in all cases to respect treaties and the rights under them in the discharge of their duties, no less strongly than officers of the general government; and they do not convict or finally try the guilt, but merely hold the party to answer and be tried elsewhere. Id. 304. They acted here, too, voluntarily, and without objection taken before them. After all this, we do not feel warranted in holding their acts to be void as to these prisoners.

The legislation on this subject by congress, commenced with the earliest operations of the government. By an act passed September 24th, 1789, c. 20, § 33 [1 Stat. 91], the justices of the peace in the different states are empowered to examine and commit offenders in cases arising under the laws and jurisdiction of the United States. The act of July 16th, 1798, c. 13, is similar in character. 1 Stat. 609; Conk. Prac. 399. A treaty has all the binding force of a law, by an express provision of the constitution. Article 6. The treaty of 1842 seems to recognize and adopt the propriety of such an examination under it, "by any judges or other magistrates" having power over similar inquiries, and to certify the fact, if appearing to be guilty. A magistrate commissioned by the general government, would possess no more power in such case than one commissioned by a state, unless the constitution, or a treaty, or an act of congress had conferred upon him authority to carry on such an inquiry, except perhaps that such a magistrate might have power to commit persons charged with offences against the United States, without a special provision. 1 Burr's Trial, 807, 809. We must, then, re-

cur to the acts of congress before mentioned, and the treaty as engrafting or vesting the authority in this case, or the general powers devolved by state laws and usages on justices of the peace, for making the first inquiries into offences that have been committed, and then sending the prisoners where the laws of the state, or the supreme law of the land, to be found in the constitution and treaties, may require. See, in Serg. Const. Law, 281, a case sustained by Judge Cheves, on the ground, that the duty is ministerial rather than judicial, and no trial or prosecution of the offence is carried on before them. So in another case,—Serg. Const. Law, 281. So Com. v. Holloway, 5 Bin. 512, the authority was unquestioned.

The treaty makes express provision that the certificate be made to the proper executive authority, in order that a warrant may issue by him for the surrender of the fugitives. Now, if a treaty stipulated for some act to be done, entirely judicial, and not provided for by a general act of congress, like that before cited, as to examinations such as here before magistrates, it could hardly be done without the aid or preliminary direction of some act of congress prescribing the court to do it, and the form. But where the aid of no such act of congress seems necessary in respect to a ministerial duty, devolved on the executive, by the supreme law of a treaty, the executive need not wait and does not wait for acts of congress to direct such duties to be done and how. There is no appropriation of money required, so as to raise the question, formerly much discussed, as to the power of the house of representatives, in such cases, being either concurrent or merely declaratory. Nor is there any special form, or assignment of authority to be exercised here. which requires detailed provisions by legislation, beyond what is so unusually full in this treaty itself. See on this the debates as to Jay's treaty, and the convention with England of 1818. A case, where an act of congress has been deemed necessary to aid the executive in enforcing treaties, is one passed 2 March, 1829, c. 41 (4 Stat. 359), for imprisoning deserters from foreign vessels, drawn up by myself. And there are several, where appropriations of money are necessary, and some, changing duties on imports, to conform to treaties. It is here only on the ground, that the act to be done is chiefly ministerial, and the details full in the treaty, that no act of congress seems to me necessary. U. S. v. Robins [supra.] See, further, 1 Bl. Comm. Append. (by Tucker) 1–5.

What is "the proper executive authority," under the treaty, is the next question. I think it cannot well be doubted, when we recollect that it is a subject connected with the duties of our foreign relations, and executive or ministerial in its character. Those relations are in charge of the general government, and more immediately of the state department in that government, under the direction of the president. It has very properly been said, in argument, that had the president in person been intended, he would probably have been designated as the president, or the executive. And had not the duty been ministerial, some branch of the judicial department would have been appointed for this duty, or the judiciary generally. In the case of U. S. v. Robins [supra], which at once occurred to me when this petition was first mentioned, the president himself, in the absence of any designation of the officers to surrender under the treaty of 1794, seems to have preferred the request to have the prisoner surrendered, and the court, under that request, delivered him up to the British agents when brought before it by a habeas corpus. That case, when first read, some thirty years since, made a deep impression on my mind, from sympathies for the seaman being rumored to have been impressed, and an American; and from the very able argument by Chief Justice Marshall, then a member in congress, where the case was agitated after the surrender of Robins. But here the facts are entirely different. The averments, that the prisoners were British subjects, voluntarily serving in a British vessel, and offending against British laws, if at all, are not controverted. Had there been no expression in the treaty, looking to some "proper executive authority," the warrant to be issued, which is provided for in this case, and not in the treaty of 1794, might as suitably emanate from the state department as the president. For the president, as such, issues no such precepts in any case; has not the public seal; has no records, nor even executive journals; and his correspondence and action with foreign powers are entirely through the state department; and the acts of the latter on topics connected with them, are generally regarded as his, in point of law. U. S. v. Eliason, 16 Pet. [41 U. S.] 291, 302. They might perhaps in this case be justified as his, if he alone could make the surrender. But the state department, by analogy to England, where it issues many species of warrants, would be most likely to occur to the minds of the negotiators in the treaty of 1842, as the suitable one to issue the warrant therein provided for; and hence, the expression of "proper executive authority," was probably selected to designate it, or coerce its action when convenient, rather than another form of expression, which would confine the power to the president, acting only in his own name and person. One surrender has already been made, it is said, in this district, in this way; and we all recollect another of the Scotch woman, for a supposed murder, made in the district of New York. No objection is urged, that the demand by the British minister does not come from a proper officer. Under these considerations, then, we deem it our duty to order, that the prisoners be remanded to the custody of those from whom they were brought up.

Case No. 12,735.

SHECKLER et al. v. The GENEVA BOXER.

District Court, W. D. Pennsylvania. July 6, 1829.

ADMIRALTY JURISDICTION—INLAND RIVERS—WAGES OF SEAMEN.

Where a crew was shipped at Cincinnati, in Ohio, a regular port of entry, in a vessel of upwards of 10 tons burthen, and proceeded with her to Pittsburg, Pennsylvania, also a port of entry, where the freight and cargo were discharged, without payment of the wages of the crew, the court, upon a libel by the crew, determined that it had jurisdiction, and decreed a sale of the vessel for payment of their wages.

[Decided by WALKER, District Judge. Nowhere reported; opinion not now accessible. The statement of the points determined was taken from Serg. Const. Law, 195.]

[NOTE. This decision, rendered in 1829, was based upon section 9 of the judiciary act of 1789 (1 Stat. 77), which conferred upon the district court exclusive admiralty and maritime jurisdiction, "including all seizures under the laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen." In the Thomas Jefferson (1825), on appeal from the circuit court of Kentucky, a suit for wages earned on a voyage from a point in that state, up the Mississippi and Missouri rivers and return, the supreme court, by Mr. Justice Story, held that, as the voyage, in its commencement, progress, and termination, was several hundred miles above the ebb and flow of the tide, the wages could in no just sense be considered as having been earned in a maritime employment, and, further, that the act of 1789, is limited in its application to the cases therein stated, and would not cover voyages of this nature, unless congress had extended the right to sue in admiralty courts to such cases. 10 Wheat. (23 U. S.) 428. This remained the law until the act of 1845 (5 Stat. 726; Rev. St. § 566), extended the admiralty jurisdiction to matters "arising upon or concerning any vessel of twenty tons burthen or upward, enrolled or licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes and navigable waters connecting the lakes." The Thomas Jefferson was subsequently (1851) overruled by The Genesee Chief v. Fitzhugh, 12 How. (53 U. S.) 443. Mr. Justice Taney pointed out that the early limitation of admiralty jurisdiction in the United States to tide waters was due to the fact that the English admiralty only extends to tide waters, for the reason that there are no other navigable streams in that country, and that for many years after the act of 1789, the commerce of the United States was such that no maritime questions arose on other than tide waters. The act of 1845 was held a constitutional grant of judicial power, under that provision of the constitution which embraces "all cases of admiralty and maritime jurisdiction." The jurisdiction conveyed by Act 1789, § 9, was held "to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable, it was deemed to be public, and, if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the constitution." In 1857, a cause came before the supreme court directly involving the act of 1789. It grew out of a collision on the Alabama river, in the state of Alabama, some miles above tide water, and the district court had dismissed the libel for want of jurisdiction. It was held that that act embraced all waters "navigable from the sea" by vessels of the prescribed class, without regard to the ebb and flow of the tide. Jackson v. The Magnolia, 20 How. (61 U. S.) 296.]

SHEDD (CHEEVER v.). See Case No. 2,634.

Case No. 12,736.

SHEDDEN v. CUSTIS.

[1 Hughes, 246;[1] 6 Call, 241.]

Circuit Court, D. Virginia. 1793.

COURTS — FEDERAL JURISDICTION — FAILURE TO STATE CITIZENSHIP IN DECLARATION—HOW TAKEN ADVANTAGE OF.

1. A plaintiff in a federal court must state himself to be the subject or citizen of a foreign state, in order to entitle the court to jurisdiction. And if he omits it, the defendant may take advantage of the omission by motion in arrest of judgment.

2. For, the general and state governments should be kept separate; and each left to do the business properly belonging to it.

The plaintiff did not state himself in his declaration to be the subject or citizen of a foreign state; and the question was, if this should be done, in order to show that the court had jurisdiction.

JAY, Circuit Justice. If the court has not jurisdiction, it is on account of the disability of the person, which might be pleaded in abatement; and if it could be pleaded in abatement, then can the exception be taken advantage of, by motion in arrest of judgment, after verdict.

Mr. Wickham, for defendant.

The exception appears upon the face of the declaration. For the charge of jurisdiction in the declaration only states that the bond itself was made within the jurisdiction, but says nothing as to the person of the plaintiff. Now, jurisdiction in this court respects the person, and not the place; for the court has jurisdiction as well over contracts made without, as those made within the limits of the state. The difference is, between courts of general, and those of limited jurisdiction. If the cause depended before the court of king's bench in England, or the general court here, and there had been any disability, it should have been pleaded; because their jurisdiction is general. But the jurisdiction of this court is limited, as to persons; and, therefore, should be shown, as well as that of a court whose jurisdiction is limited as to locality and extent. The common law authorities all show that jurisdiction should be averred; and though they may seem to differ, yet the whole difference in any of them is only what amounts to a sufficient averment, on which the authorities do not agree. Now, the only difference between those cases and that at bar is that those were inferior courts, and this a superior court; and therefore it may be argued that the cases in the former turned upon the inferiority of the court; but that

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

argument is not satisfactory. The true reason is, not that they were inferior, but that they were limited courts. So this is. Therefore, the plaintiff must show that the court has a right to discuss his claims, and not merely that he has a right to the thing he claims.

Mr. Campbell, contra.

A motion to arrest a judgment must be grounded on error apparent on the record; and the question is of this case here. Something should manifestly appear to be erroneous; not whether, possibly so, or not. The English authorities do not prove that disability may be urged after verdict. The question, in all of them, was concerning the limits of the jurisdiction of the court where the actions were brought. For, being inferior courts, the superior courts at Westminster confined them, both because derogatory to the common law and for the sake of the venue. This, therefore, is a novel objection, and must stand on its own reasons. Some persons may sue here, others cannot. Therefore, the defendant must point out the disability; for the court will not inquire into circumstances, unless he shows it. Parties are only the instruments of jurisdiction; for the jurisdiction of the court is independent of parties. There must, indeed, be parties before the court; but jurisdiction consists in authority to decide rights. If the defendant does not show a want of jurisdiction, it shall be intended. Carth. 33, 34. The doctrine is, that by pleading you admit jurisdiction. It may be argued that consent does not give jurisdiction, but that is only where want of it appears of record. If, indeed, the declaration had stated that the plaintiff and defendant were both citizens of this state, the defendant's admission would not have given jurisdiction; but the party may dispense with facts if he will. Comb. 254. Therefore, as the case now stands, it is altogether a question as to the subject-matter of complaint, and if the plea does not state facts to oust jurisdiction, the court will intend it as admitted. The court cannot judicially notice districts of country, or the kind of persons who sue, unless it be expressly submitted to them by the pleadings. But after issue joined on the merits, they will not receive proof of residence or other disability, but of the subject-matter in dispute only. For the plea answers the allegations with respect to the debt, and not of the person. If inconveniences should be alleged as that any citizen may sue here, the answer is, that the defendant may avail himself of the incapacity of the plaintiff to sue, by pleading, and if he does not, he must abide by it.

Wickham was about to reply, but was stopped by the court.

IREDELL, Circuit Justice. The jurisdiction of the court is limited to particular persons; and, therefore, must be averred. For the difference has been rightly taken by the defendant's counsel, between courts of limited and those of general jurisdiction. In the latter, exceptions to the jurisdiction must be pleaded; but in the former the defendant is not bound to plead it, for the plaintiff must entitle himself to sue there. If the declaration had alleged that the plaintiff was a foreigner, then the defendant must have pleaded the disability, as he would have admitted his capacity to sue. Ability to sue here is a fact which rests more in the knowledge of the plaintiff than of the defendant; and, therefore, the former should show himself capable of suing here. It is not the same with regard to the place of contract, for that the defendant knows as well as the plaintiff; and, therefore, if there be any exceptions on that ground, it being a thing in the knowledge of the defendant, he should plead it for the same reason that the plaintiff must aver his capacity in the other case. It is important that it should appear upon the record that the court had jurisdiction and has only decided on cases within its cognizance.

JAY, Circuit Justice. I at first thought it questionable on the ground of a difference between jurisdiction over the subject-matter and over persons. But on reflection, I do not think the distinction is important. The English practice has been rightly stated by the defendant's counsel, and those rules are more necessary to be observed here than there, on account of a difference of the general and state governments, which should be kept separate, and each left to do the business properly belonging to it. Therefore, this court should not exceed its limits, and try causes not within its jurisdiction. Consequently, the jurisdiction ought to appear, but it does not in this case; and, therefore, I think the judgment should be arrested.

[PER CURIAM. Arrest the judgment.] [2]

Case No. 12,737.

In re SHEEHAN.

[8 N. B. R. 345.] [1]

District Court, E. D. Michigan. 1873.

BANKRUPTCY—PROVABLE DEBT—LEVY—WAIVER—WRIT OF ERROR.

1. At common law a writ of error and supersedeas of execution leaves the judgment intact, and it is a provable debt in bankruptcy.

2. The levy by a creditor of an execution on sufficient property to satisfy his debt does not estop him from moving to have his debtor adjudged bankrupt, but the filing of the petition in bankruptcy will be held a waiver of the levy, and an election by the creditor to proceed in the bankrupt court.

3. Where a judgment on which a supersedeas and stay of execution has been granted by the state court, pending the decision of a writ of error, is proved in bankruptcy, the bankrupt court will stay the payment of any dividends on the claim during the pendency of the writ of error. Avery v. Johann [Case No. 675] dissented from.

[Cited in Stockwell v. Woodward, 52 Vt. 230.]

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[2] [From 6 Call, 241.]

[1] [Reprinted by permission.]

[In the matter of Daniel Sheehan, a bankrupt.]

On motion to dismiss the petition for adjudication of bankruptcy, and all the proceedings had thereunder. The petitioning creditor's debt is alleged in the petition to be founded on a judgment of the circuit court of the county of Wayne, state of Michigan, for six thousand five hundred dollars in her favor and against the alleged bankrupt, for damages for a breach of promise to marry. The judgment was entered March 7th, 1873. A writ of error was issued on the 8th, and notice of it to plaintiff's attorney served on the 10th of the same month. The petition for adjudication was filed March 15th, 1873, and the order to show cause was made returnable March 24th. On the 22d of March, two days before the return day of the order to show cause, the writ of error was served on the clerk of the court in which the judgment was entered, and at the same time the necessary bond for stay or supersedeas of execution was filed. Before the petition for adjudication was filed an execution had been issued upon the judgment and delivered to the sheriff of the county, but it was found that the judgment debtor had conveyed away and transferred all his property liable to execution since the rendition of the judgment. A levy upon the real estate so conveyed was nevertheless made. The levy was made on the 14th day of March, 1873, and this petition was filed on the next day. The motion is founded on certified copies of the writ of error, and bond for stay of execution, and affidavits.

The grounds of the motion are: (1) That the petitioning creditor has no longer a provable debt in the bankruptcy, on account of the writ of error and bond for stay of execution; and (2) the petitioner having made her election to proceed under the laws of Michigan for the collection of her judgment by issue and levy of execution before this petition was filed, could not abandon the same and resort to the bankruptcy court.

[See Case No. 12,738.]

LONGYEAR, District Judge. First, as to the effect of the writ of error and stay of execution upon the judgment, as a provable debt in bankruptcy. But for these proceedings the judgment is, no doubt, a provable debt. See, also, In re Sidle [Case No. 12,844]. This is not questioned by the learned counsel for respondent, unless the issue and levy of execution deprived it of that quality, which will be considered in its order. If, however, the writ of error and stay of execution deprived the judgment of its provable character within the meaning of the bankrupt act, then, of course, the petition must be dismissed, because, by section thirty-nine of the act, a petition in involuntary bankruptcy can be filed only by a creditor having a provable debt.

By the statutes of Michigan, in relation to proceedings on writ of error (2 Comp. Laws 1871, p. 1970, § 7123), it is enacted that all matters not therein provided for "shall be according to the course of the common law, as modified by the practice and usage in this state, and such general rules as shall be made by the supreme court." At the common law, except in the case of judgments in certain inferior courts, the record and judgment remain in the court in which the judgment is entered, after as well as before writ of error, a transcript merely being sent up. 2 Tidd, Prac. 1159. So, too, under the statutes and rules of the supreme court of Michigan. The judgment is in no manner superseded, invalidated or affected, by the pendency of the writ of error. The execution only is stayed or superseded. This is clearly recognized by that provision of the Michigan statutes (2 Comp. Laws 1871, p. 1969, § 7120), enacting that no writ of error shall operate to stay or supersede the execution in any civil action unless the bond therein specified shall be given. This provision relates to the execution alone. It in no manner adds to, detracts from, or affects the judgment. That remains just as it would be without the statute. But how could an execution issue (in case the required bond be not given), except upon the theory that the judgment remains in full force and effect in the court in which it was entered, notwithstanding the writ of error? Such is clearly the assumption upon which the statute is based. This is further recognized by the following: A judgment may be sued and a recovery had upon it pending the writ of error, although execution will be stayed upon such second judgment (if bond was given), until the writ of error is determined. 2 Tidd, Prac. 1446. The judgment may be vacated and a new trial granted in the court in which the judgment is entered, pending the writ of error. People v. Judge of Wayne Cir. Ct., 20 Mich. 220. The record and judgment may be amended in the court in which it was entered, pending the writ of error. O'Flynn v. Eagle, 7 Mich. 306.

The case on error is not considered a continuation of the original suit. The issue in the original suit is determined by the judgment. A new issue is formed in the case on error, relating to the judgment alone, and not for a re-trial of the cause of action; and it has been said that a writ of error "is less an action between the original parties than a question between the judgment and the law." Allen v. Mayor, etc., 9 Ga. 286, citing 7 Durn. & E. [7 Term R.] 337; 6 Port. [Ala.] 9; 3 Story, Const. Law, § 1721; 2 Sandf. 101. "It is not the action which is to be judged, but the judgment." Id.

I arrive, therefore, at the following conclusion: That pending a writ of error, and until a judgment of reversal, the judgment in the court below remains, and is, a subsisting, valid and binding judgment in that

court, and may be resorted to and used as evidence of a present indebtedness, and for all purposes for which a judgment may be resorted to and used, excepting and barring the one disability to issue execution upon it in case the requisite bond has been given. It results from this conclusion, that in this case the judgment is such a debt as will sustain the petition for adjudication of bankruptcy.

The above conclusions in no manner involve any question of comity or of conflict of jurisdictions between this court and the state supreme court, as was contended at the bar. They are based simply upon the judgment as it now stands, without any relation to and entirely regardless of any questions which can arise before the supreme court on the writ of error. When that court shall have decided those questions this court will be bound by their decision, and will most cheerfully enforce it. There may be a stage in these proceedings at which a conflict might be involved, and that is, in case some proceeding is proposed in regard to this judgment which would conflict with or be an evasion of the disability to issue execution upon it. Such would be the case where the judgment creditor, having proved her judgment in the ordinary course of the bankruptcy proceedings, presents the same for receipt of dividends. In such case this court would see to it that no dividends be paid until the writ of error is determined, when the debt will be ordered to be paid, or expunged, or further suspended, as shall be indicated by the exigencies of the judgment of the supreme court. In the meantime the proceedings in bankruptcy may go on in the usual way to their final orderly termination; and if the judgment creditor shall not, in the meantime, have succeeded in getting her debt in a condition to receive dividends upon it, she will be no better, and perhaps no worse off, than she would have been if she had not commenced these proceedings.

Involuntary proceedings in bankruptcy are not in any sense proceedings merely for the collection or security of the particular debt of the petitioning creditor. They are for the benefit of all the creditors. It is true, up to adjudication, the petitioning creditor controls the proceedings, but when adjudication of bankruptcy passes it relates back and covers the whole intermediate time between the filing of the petition and the adjudication. The adjudication of bankruptcy is not based upon the relation of debtor and creditor alone, but, that relation existing, it is based upon the additional fact that the debtor has committed some act or acts of bankruptcy. The effect of the adjudication is that the debtor then and there, at the time and place of committing the act or acts of bankruptcy, became a bankrupt. The fact that the petitioning creditor has a provable debt to the requisite amount is necessary to be shown for two purposes only, viz.: First, to show that the alleged debtor occupies that relation; and, second, to show that the petitioner has the requisite qualification to commence the proceedings. Its office is then exhausted, and it has not and is never given, any other or further force or effect. The petitioning creditor stands in no better or more favorable position after adjudication than any other creditor. He must prove his debt in the course of the bankruptcy proceedings the same as any other creditor. His debt may be opposed, adjudicated upon and allowed, abated, or expunged the same as any other debt. It therefore cannot be said that the taking of the property of the debtor into the custody of the bankruptcy court by virtue of the adjudication of bankruptcy is a taking upon or for the security or payment of the particular debt of the petitioning creditor, and so, in this case, in conflict with the disability to issue execution upon the petitioning creditor's judgment. How it would be in such a case if it was made to appear that there were no other creditors it is unnecessary here to discuss, as no such fact appears in this case.

As this case is now presented the first ground of objection is not tenable.

Second, as to the effect of the issue and levy of execution upon the petitioner's right to invoke the powers of this court. The argument in support of this ground of motion is based, first, upon an election of remedies; and, second, that the debt was fully secured by the levy. In support of the first proposition, Cohen v. Cunningham, 8 Term R. 123, is cited, where it was held that a judgment creditor having taken the body of the debtor in execution must be held to have elected his remedy, and could not afterward come into the bankruptcy court for relief. That is, no doubt, entirely correct, because at the common law the taking of the body in execution is a satisfaction of the judgment, and of course the judgment creditor could thereafter have no other remedy upon his judgment in the bankruptcy or elsewhere. It is true, the decision is not placed expressly on that ground, but it affords a rational explanation of it, and is in no manner inconsistent with what is said by the learned judge who made the decision. But I have yet to be convinced that the institution of proceedings by a creditor against his debtor, at law or in equity, concludes the creditor from afterwards abandoning such proceedings, and coming into the bankruptcy court at any time before such proceedings have resulted in a satisfaction of the debt. The levy in this case was not a satisfaction, because it was on real estate only. There is, therefore, in my opinion, nothing in this argument as applied to the facts in this case.

In support of the second proposition, Avery v. Johann [Case No. 675] is cited. That case was quite like the present one, except that there had been no writ of error and stay, or supersedeas of execution; and if I

agreed with the learned judge who made that decision in his reasoning and conclusion, perhaps I should be compelled to dismiss the petition in this case. But with great deference to the age and experience of that learned judge, I am compelled to differ with him as to both. In the first place, that decision seems to be based largely upon the assumption that the judgment creditor having elected to proceed by issue and levy of execution he is concluded from resorting to any other remedy, but must follow his levy to its legitimate results in the state courts; as to which doctrine my adverse views have already been given. In the next place, the decision seems also to be based largely upon the fact that it was not alleged and proven that there were other creditors to be benefited by the bankruptcy proceedings, and that the petitioning creditor, being already fully secured, has no need of resorting to them. That it is necessary in the first instance for a petitioning creditor to show, in any case, that there are other creditors, I believe is nowhere else asserted or assumed. The act does not require it, nor the authorized form of petition prescribe it. Ordinarily, bankruptcy proceedings may be instituted and maintained where there are no other creditors. If, however, that fact becomes material in any case, I think the burden is upon the respondent to show it.

But did the petitioning creditor in the present case obtain security by the levy of her execution upon the land in question without further proceedings? She certainly obtained no lien (or at most but an inchoate one) as against the persons to whom the title had been transferred. In order to obtain a perfected lien as to them, proceedings and decree in equity directly against them were necessary, and it certainly does not lie in the mouth of a judgment debtor, under such circumstances, to assert a lien, because he would thereby be asserting his own fraud in derogation of the title of his grantees, perhaps innocent purchasers, to gain an advantage to himself. The allegation in the petition that the conveyances were fraudulent as to creditors, relates to the debtor alone, as an act of bankruptcy; and an adjudication that they were so on his part, in no manner affects the title in the hands of his grantees, or subjects the property to the payment of his debts. Further proceedings directly against his grantees are necessary for that purpose. Throwing out the doctrine of election of remedies, which we have seen is not tenable, I think the fact of the levy has no significance. At all events, if it had any significance at the time it was made, as a step necessary to obtain a lien, the judgment creditor has shown her intention to abandon the same by coming into this court instead of taking the further steps in the state court necessary to perfect it. Whether, under any circumstances, she could be allowed in this court any claim or advantage on account of the levy, it is unnecessary now to decide, but I am at present clearly of the opinion that she could not.

The foregoing considerations are independent of the fact of the stay of all further proceedings upon the execution by the writ of error and bond, under the statute of Michigan before cited. That fact, I think, adds additional force to those considerations. The stay of proceeding upon the execution thus provided, is not conditional or contingent upon affirmance or reversal of the judgment, but it seems, by the terms of the statute, to be absolute and perpetual. This being the case, no further proceedings, of course, could be, nor ever can be had by virtue of the levy, and it is, of course, a nullity. It results that the motion to dismiss the petition must be denied. The respondent will, however, be allowed reasonable time to answer the petition, if he desire to do so.

On the filing of the petition a warrant of arrest and to take possession provisionally was issued, and the respondent was arrested and is now in custody, but no property or effects have been delivered to or taken possession of by the messenger. The arrest is in no manner for security or satisfaction of the petitioning creditor's debt. It is simply to secure the attendance of the respondent from time to time as the court shall order, until the decision of the court upon the petition, or the further order of the court, and it is to that purpose, and no other, that bail is required of him. I cannot see that this in any manner conflicts with, or is an evasion of the restriction against suing out execution for the satisfaction of the petitioning creditor's judgment. The motion to dismiss the warrant of arrest must, therefore, also be denied.

As a warrant to take possession provisionally, it is for the benefit of all the creditors. If, however, it was made to appear that there are no other creditors I should be inclined to say that its execution to that extent should be stayed. But, in the absence of any such showing, the motion in that regard must be denied.

An order must be made denying the motion to dismiss, and allowing the respondent ten days to answer the petition. As the main question is a new one, and presents so many plausible considerations favorable to the respondent, although not sufficient, in the opinion of the court, to entitle him to his motion, I shall not award the costs of the motion against either party.

Case No. 12,738.

In re SHEEHAN.

[8 N. B. R. 353.] [1]

District Court, E. D. Michigan. May, 1873.

BANKRUPTCY—DISMISSAL UPON PAYMENT—COSTS—COUNSEL FEES.

1. Where there are not other debts beside that of the petitioning creditor, on which the debtor

[1] [Reprinted by permission.]

may be adjudged bankrupt, he is entitled to have the proceedings against him dismissed on the payment of the petitioning creditor's debt and the costs.

[Cited in Re Sheffer, Case No. 12,742.]

2. In a case where the adjudication has been resisted, the petitioning creditor may recover the costs that are allowed by law to a party recovering in a suit in equity, as defined by act of February 26, 1853. 10 Stat. 161.

3. In such case a special allowance for counsel fees cannot be made. It is doubtful if it can be legally done in any case.

This matter was heard upon a motion on behalf of the petitioning creditor: First, for an adjudication of bankruptcy against the respondent; or, second, for a reasonable allowance to the petitioning creditor for disbursements in the way of counsel fees and other expenses incurred, the respondent [Daniel Sheehan], having tendered payment of the petitioning creditor's claim, and shown that there are no other creditors to the requisite amount to proceed against him under the bankrupt act. The respondent appeared in response to the order to show cause and put in a denial, but it is conceded that but for the tender, coupled with the fact that there are no other creditors, the petitioning creditor would be entitled to an adjudication of bankruptcy.

Mr. Griffin (Moore & Griffin), for petitioner.
Alfred Russell, for respondent.

LONGYEAR, District Judge. I. The reason of the rule that a petitioning creditor may proceed to an adjudication notwithstanding a tender of the full amount of his claim and costs, and that ordinarily he should do so, is that an acceptance of such tender would, in cases of actual insolvency, be a preference and a fraud upon the other creditors; the object of proceedings under the bankrupt act being an equal distribution of estates of insolvents among all their creditors, and not merely for the collection of debts—the ordinary machinery of courts of law and equity being sufficient for the latter purpose where that is the only purpose. It certainly does not need argument to show that the reason of the rule, and consequently the rule itself, has no application to the present case. The motion for an adjudication must, therefore, be denied, and the proceedings must be dismissed; but as the tender by respondent did not include petitioner's costs in this court, it must be on the condition that he pay such costs, in addition to the petitioner's claim.

II. This brings us to the main question presented, viz: What costs must respondent pay, under the circumstances? In the first place, inasmuch as an adjudication was resisted, and it is now conceded that except for the tender the debtor must have been adjudicated a bankrupt, and no costs were tendered, the respondent must pay full costs, as upon an adjudication after hearing. This is not seriously contested. What is contested, and the question for decision is, whether respondent can be required to pay more than what is legally taxable against him, petitioner's counsel having presented to the court with his motion a bill of costs and disbursements, mostly for counsel fees, and largely in excess of what is legally taxable, and asked that the same may be allowed to be taxed as a special allowance.

The only positive enactment upon this subject, is general order thirty-one which is as follows: "In cases of involuntary bankruptcy where the debtor resists an adjudication, and the court after hearing shall adjudge the debtor a bankrupt, the petitioning creditor shall recover, to be paid out of the fund, the same costs that are allowed by law to a party recovering in a suit in equity, and in case the petition shall be dismissed, the debtor may recover like costs against the petitioner." It was at first contended, on behalf of respondent, that because there was, as yet, no fund in court out of which such costs could be paid, none were recoverable. The court sees no difficulty in that. It is easy enough to create a fund by adjudicating the respondent a bankrupt, which the court would not hesitate to do if he should neglect or refuse to pay the costs after the amount shall have been ascertained. General order thirty-one is so specific that it seems scarcely to admit of question as to what costs may be allowed against the respondent, and that those are such, and such only, as are allowed by law to a party recovering in a suit in equity. What costs are so allowed are readily ascertained by reference to the act of congress covering that subject, (Act Feb. 26, 1853, 10 Stat. 161,) and the equity rules.

But, it is said, it is the uniform practice of the bankruptcy courts to make allowances to petitioning creditors over and above the costs allowed by general order thirty-one. That is very true, but the grounds upon which such allowances are based are entirely wanting here. They are based solely upon the ground of equality of distribution of the estate among the creditors. It is but another mode of compelling all the creditors to bear their just proportion of the expenses of bringing the debtor and his estate into court. Without this element of equality, and as a mere charge against the fund or estate, I think such allowances have no foundation to stand upon; that they are in fact excluded by the express designation of general order thirty-one as to what costs are recoverable, and that they can in no case be legally made. "Inclusio in unius," etc. Such allowances may be, and probably have been made, but I am not aware that the question as to their legality was raised, considered or thought of. This is the first time the question has been raised in this court, and no reported case has fallen under my notice in which it has been presented or considered in any other court. It results that no allow-

ance can be made to the petitioning creditor over and above what is expressly authorized by general order thirty-one, viz.: "The same costs that are allowed by law to a party recovering in a suit in equity."

Let an order be made denying the motion for an adjudication, and for a dismissal of the proceedings, upon the express condition, however, that the respondent pay to the petitioner, or her attorneys, her costs of these proceedings as upon an adjudication of bankruptcy after hearing, on the amount thereof being ascertained by due legal taxation before a proper taxing officer, and granting the parties leave to apply to the court for further directions in the premises as they may be advised.

[For subsequent proceedings in this litigation, see Case No 12,737.]

SHEEHEE (McGILL v.). See Case No. 8,796.

Case No. 12,739.

SHEEHEE v. RESLER.

[1 Cranch, C. C. 42.] [1]

Circuit Court, District of Columbia. Oct. Term, 1801.[2]

MALICIOUS PROSECUTION — GENERAL ISSUE — PROBABLE CAUSE.

In an action on the case for a malicious prosecution, the defendant may, upon the general issue, show probable cause for the prosecution.

Case, for a malicious prosecution. To set aside an office judgment at the third term after it was rendered, the defendant pleaded a special justification which went to show probable cause for the prosecution.

The counsel for the plaintiff objected to the receiving the plea, and cited Bull. N. P. 14; Sutton v. Johnstone, 1 Term R. 493; Cox v. Wirrall, Cro. Jac. 193; Downman v. Downman, 1 Wash. [Va.] 29; Farmer v. Darling, 4 Burrows, 1971.

CRANCH, Circuit Judge. As the gist of the action is malice and the want of probable cause, the plaintiff must show the want of such cause; which will admit the defendant to give in evidence on the general issue the same facts which he has pleaded specially. Consequently, it is not necessary to the merits of the case that they should be specially pleaded. And the defendant having suffered an office judgment to go against him, and this not being a plea to issue, he cannot claim it as a matter of right.

MARSHALL, Circuit Judge, of the same opinion.

KILTY, Chief Judge. Although it is necessary for the plaintiff to give evidence of a want of probable cause, yet that would perhaps only admit the defendant to give evidence as to the same facts which were disclosed by the plaintiff, and might not authorize him to give evidence of other facts within his own knowledge, and which might not be known to the plaintiff. This is a plea tending to an issue, and I think the defendant is in time to plead it.

A bill of exceptions was taken. See this case in the supreme court of the United States (1 Cranch [5 U. S.] 110), where the judgment was affirmed.

Case No. 12,740.

SHEEHY v. MANDEVILLE.

[2 Cranch, C. C. 15.] [1]

Circuit Court, District of Columbia. Nov. Term, 1810.

PLEADING—GENERAL ISSUE—WHEN MAY BE PLEADED—MANDATE OF SUPREME COURT.

The court may, in its discretion, allow the general issue to be pleaded after judgment upon demurrer has been awarded by the supreme court of the United States, and a mandate to this court to enter the judgment and award a writ of inquiry.

The plaintiff being about to execute his writ of inquiry, Mr. C. Lee, for the defendant, moved for leave to plead the general issue.

Mr. E. J. Lee and Mr. Jones, for plaintiff, contra. The mandate from the supreme court (see 6 Cranch [10 U. S.] 253) is peremptory to render judgment for the plaintiff on the first count, and to award a writ of inquiry. But if it be within the discretion of the court, they will not permit the defendant now to amend his pleadings, as the plaintiff's principal witness is dead.

Mr. Youngs, for defendant, cited 3 Bl. Comm. 407; 1 Com. Dig. 467; 2 Strange, 787; 5 Term R. 112, 118; 7 Term R. 132, 133; [Rapp v. Elliot] 2 Dall. [2 U. S.] 184; 1 Wash. 318.

THE COURT refused to permit the defendant now to plead the general issue; because he might have availed himself of the special matter, which he has already pleaded, upon the general issue; and because the plaintiff's witness has died since the former judgment.

THE COURT said, however, that they had little doubt as to their power to allow the plea; but it was a matter of discretion.

The residue of this case as it appeared upon the writ of inquiry is reported in 7 Cranch [11 U. S.] 208.

SHEEHY (MAY v.). See Case No. 9,335.

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

[2] [Affirmed in 1 Cranch (5 U. S.) 110.]

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

Case No. 12,741.

SHEEPSHANKS v. BOYER.

[Baldw. 462.] [1]

Circuit Court, E. D. Pennsylvania. April, 1827.

JUDGMENT — DEFAULT — IRREGULARLY ENTERED — AFFIDAVIT.

An affidavit of merits is not necessary on a motion to set aside a judgment by default irregularly entered. When the counsel of a defendant in ejectment requested the clerk to enter his appearance, who promised to do it, a subsequent judgment by default on a rule to plead in twenty days is irregular.

[Cited in Keyser v. Fendall, 5 D. C. 52.]

The declaration was served on the 11th of April; a rule to plead in twenty days or judgment was entered, and on the 4th of May, on proof of personal service of the declaration, judgment was entered, and habere facias possessionem issued. On the 16th of October, 1827, Mr. Rawle, Jun., moved to set aside, on his affidavit, that before any entry of judgment, he called on the clerk, and directed him to enter an appearance for the defendant, which he promised to do.

The motion was opposed by Mr. Chauncey, on the ground that the judgment was regular, and the defendant had not made an affidavit of merits.

BY THE COURT. An affidavit of merits is necessary where the defendant is in default and the judgment is entered pursuant to the rules of the court. Here there was no default; the application to the clerk, and his promise to enter an appearance, are equivalent to an appearance; the attorney was not bound to enter his appearance on the docket, and though the plaintiff's counsel did not know of the application, yet as he takes judgment at his own risk, he cannot retain it under such circumstances. The judgment and execution must be set aside.

Case No. 12,742.

In re SHEFFER.

[4 Sawy. 363; [2] 17 N. B. R. 369; 1 San Fran. Law J. 117.]

District Court, D. California. Oct. 15, 1877.

INTERVENING CREDITORS — DISMISSAL OF PROCEEDINGS.

1. When, on the return day, or adjourned day, of a rule to show cause in a case of involuntary bankruptcy, the petitioning creditors fail to appear, or to proceed, any creditors to the required amount may intervene, and pray an adjudication on the original petition. It is not necessary that such intervening creditors should constitute one-fourth in number of the creditors, or represent one-third in value of the debts due by the debtors.

2. The dismissal of proceedings in invitum is regulated by the forty-first section of the act [of 1867 (14 Stat. 537)]. A motion to dismiss will be denied unless the requirements of the act be complied with. The court will withhold its approval whenever the granting of the motion will defeat the object, or contravene the policy of the act. Where a motion to dismiss is denied, and the petitioning creditors decline or omit to proceed in the cause, any creditor of the required amount may intervene and pray an adjudication; and this is allowed as the necessary result of the provisions of section 41, and independently of the express permission given in section 42.

In bankruptcy.

I. H. Dickinson and William Craig, for interveners.

H. F. Crane and John Haynes, for alleged bankrupt.

HOFFMAN, District Judge. On the ninth of August, 1877, a petition was filed against C. M. Sheffer, by creditors constituting the requisite number, and representing the requisite amount of his entire indebtedness.

The order to show cause was made returnable August 21. Service was duly made, and on the return day he appeared by counsel, and the hearing was, by successive adjournments, continued until September 25. On the twenty-first of September, a stipulation, signed by all the petitioning creditors, consenting that the proceedings be dismissed, was filed in the clerk's office.

On the adjourned day, September 25, a petition was presented by certain creditors, who had not united in the original petition, praying leave to intervene, and that the court proceed to adjudicate on the original petition.

This petition was opposed on the part of the bankrupt, and a motion on his behalf was made that the proceedings be dismissed, pursuant to the stipulation on file. Leave was given to either side to present affidavits, and on the day set for the hearing voluminous depositions were read, by which all the facts and circumstances of the case were made apparent. It is not denied that the petitioning creditors are sufficient in number, and the debts due them sufficient in amount to satisfy the requirements of the act.

But it appears that, since the filing of the petition, the wife of the alleged bankrupt has satisfied all their demands, taken an assignment of them to herself, and procured from the creditors the stipulation on file.

It also appears that, shortly before the commencement of the proceedings, the alleged bankrupt conveyed away all his visible property, receiving in exchange therefor some lands in Illinois, the deed for which he caused to be made out in the name of his wife. The pretext for this transaction was an indebtedness said to be due his wife for previous advances made to him out of her separate estate. It is charged by the intervening creditors that the transaction was fraudulent in fact, and the conveyance without consideration. The truth of this allega-

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

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

tion cannot now be ascertained. But it is evident that the debtor has at least committed a fraud upon the act by giving his wife an unlawful preference.

The creditors who intervene are the vendors of the identical property disposed of by the debtor, the proceeds or representative of which have been conveyed to his wife. These creditors still hold the notes, or substitutes for them, given for the purchase-money. But since the filing of the petition in bankruptcy the debtor has commenced a suit in the Fifteenth district court in San Francisco, in which he alleges that the notes were obtained by fraud and misrepresentation, and he prays that they may be decreed to be delivered up to be canceled, and also that damages may be awarded him.

To complete the history of the case, it may be added that a warrant was issued, on the application of the petitioning creditors, for the arrest of the respondent as an absconding debtor. He was accordingly arrested at Sacramento and brought back to San Francisco, where he gave bonds and was liberated.

The forty-second section (section 5026, Rev. St.) of the bankrupt act provides that, "if the petitioning creditors shall not appear and proceed on the return-day, or adjourned-day, the court may, upon the petition of any other creditor to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor." The words "such petition," in this section, evidently refer to the petition of the original petitioning creditor; and the act contemplates that if he fails to appear, or to proceed on the return-day, or the adjourned-day, any other creditor may intervene, and on his application the court may proceed to an adjudication. This right cannot be cut off or defeated by any action of the court, or arrangement between the petitioning creditors and the bankrupt. In re Lacey [Case No. 7,965], where the motives and policy of the enactment are very clearly explained by Mr. J. Woodruff.

In the case at bar, no order of dismissal was obtained on the filing of the stipulation by the petitioning creditors. If any such order had been made it would have been erroneous and void. The intervening creditors have regularly appeared on the "adjourned-day," and are therefore entitled to all the rights conferred by the section which has been cited.

It is urged, however, that, in view of the late amendments to the act, the words "any other creditor to the required amount" must be construed to mean "any other creditors constituting one-fourth in number of all the creditors, and representing one-third of the aggregate of all the debts due by the bankrupt;" and this on the ground that it would be unreasonable to permit a creditor to continue and keep alive a proceeding which he would have been incompetent to originate.

But this view is more plausible than sound. The language of the section is explicit. It confers the right to intervene upon any other creditor "to the required amount," i. e., to the amount of $250. It has been suffered to stand notwithstanding the adoption of the amendment, and it is the existing law. The court has no right to disregard so clearly expressed a provision of law, and to substitute for it a provision essentially different, upon a conjecture that the section may have been overlooked, and that it would have been modified if the attention of congress had been called to it.

Whether this section was overlooked or advisedly suffered to stand we cannot know. But it may well be doubted whether sound policy would have permitted its alteration. The motives which led to the adoption of the amendment which requires what, for convenience, we may call the quorum of creditors, to unite in the petition in involuntary cases, are well known. It was thought expedient so far to mitigate the supposed harshness of the law as to deprive any single creditor or creditors representing in number or amounts due them an insignificant proportion of the body of the creditors, or of the total indebtedness of the debtor, from throwing the latter into bankruptcy contrary to the wishes and, perhaps, against the interests of their fellows. As the law stood, a single creditor to the amount of $250 could, from caprice or malice, precipitate the ruin of any one who might be in a condition of technical insolvency, and convert what might have proved a temporary embarrassment into an irremediable catastrophe. The concurrence, therefore, of a certain quorum of the creditors was required. But when that quorum has concurred, and the court has become possessed of the cause, the object of the amendment has been attained, undue severity or oppression has been prevented, and the rights of the other creditors have attached. There seems to be no reason why those rights should be any less or different from those possessed by them under the original act. The failure on the part of the petitioning creditors to appear or to proceed cannot be known until it occurs. In most cases it will not be anticipated. A single creditor may provide for its occurrence by attending at the return-day or adjourned-day with his own petition; but to oblige him to arm himself with a petition signed by the quorum of all the creditors is to subject him to an unreasonable, and what may prove an unnecessary inconvenience. After considerable observation of the operation of the act, from the date of its passage, I have no hesitation in saying that, if called on as a legislator to adopt, as an amendment to the forty-second section, the provisions I am asked as a judge to interpolate into it, my vote would be in the negative. I am, therefore, of the opinion that, under the provisions of the forty-second section, it is the duty of the court to proceed to adjudicate on the original peti-

tion upon the application of the creditors who have intervened.

A motion is also made, on behalf of the bankrupt, that the proceedings be dismissed. This motion is based on the stipulation and consent filed by the petitioning creditors who constitute one-third in value and one-fourth in amount of all the creditors. A consideration of the merits of this motion will confirm the conclusion already reached as to the application for leave to intervene. A proceeding in bankruptcy in invitum differs in many important respects from an ordinary suit inter partes. We have seen that, under the provisions of the forty-second section, it may be continued without the consent and against the wishes of the original parties.

It can be discontinued only by order of the court, on special application (In re Buchanan [Case No. 2,073]); and permission to withdraw will be withheld even in cases not strictly within the forty-second section, where the object and policy of the act would otherwise be defeated (In re Mendenhall [Id. 9,424]).

A petitioning creditor may proceed to adjudication, notwithstanding a tender of the full amount of his claim and costs. And it is ordinarily his duty to do so; for an acceptance of the tender would, in cases of actual insolvency, be a preference and a fraud upon the other creditors. In re Sheehan [Case No. 12,738]; In re Williams [Id. 17,703].

So, under the late amendments, it has been held that, where creditors have, in good faith, joined in a petition in bankruptcy, they will not be permitted to withdraw and have the proceedings dismissed as to them, and thus break up the quorum of creditors; and this for the very sufficient reason that such a practice "would lead to underhand and secret negotiations between the debtor and a portion of his creditors, and be a strong incentive for showing favors to a few creditors at the expense of the many." Per Mr. J. Blodgett, in Re Heffron [Case No. 6,321]; In re Sargent [Id. 12,361]. But we are not left to the guidance of general considerations drawn from the policy and purposes of the act and the nature of the proceedings. It contains explicit provisions regulating the dismissal of proceedings in invitum. The forty-first section, as amended, provides that all proceedings in bankruptcy may be discontinued on reasonable notice and hearing, with the approval of the court, and upon the assent, in writing, of such debtor, and not less than one-half of his creditors in number and amount, or, in case all the creditors and such debtor assent thereto, such discontinuance shall be ordered and entered.

The cases in which a discontinuance can be entered are thus clearly defined by the act. The assent of the debtor is in all cases necessary, and if, in addition, the assent of all the creditors be obtained it is entered as of course. It may also be entered upon the assent of the debtor and one-half of the creditors in number and amount, but in that case only with the approval of the court, upon reasonable notice and hearing. These provisions are absolutely inconsistent with the position assumed by counsel, that the petitioning creditors have, in all cases, the right, with the assent of the debtor, and without the approval of the court, to summarily put an end to the proceedings. It is difficult to imagine a case where the duty of the court to withhold its approval would be more clear than in the case at bar. The wife of the debtor, who has received a conveyance of the proceeds of all her husband's property, certainly as a preferred creditor, and perhaps without any consideration whatever, satisfies the claims of the petitioning creditors, and asks, in the name of the husband, the aid and approval of the court to enable her to consummate the fraud by dismissing the only proceeding in which that fraud can be exposed and defeated, and this against the protest of other creditors, who claim to be the unpaid vendors of the very property the proceeds of which have been conveyed to her. But one answer can be given to such an application.

An additional reason for withholding the approval of the court may be found in the provisions of the twenty-second section of the act. By that section it is provided that "to entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition, * * * setting forth * * * that the claim was not procured for the purpose of influencing the proceeding." With regard to this provision Mr. J. Lowell observes: "I do not know what it means. I see nothing objectionable, in itself, in a person's buying a debt for the sake of influencing the proceedings, except it be in some such way as has been already referred to, that is, to vote for the bankrupt's interest without regard to those of his creditors." Ex parte Jewett [Case No. 7,303]. If the clause has any practical operation whatever, it would seem that it ought to apply to a case where the claim is brought for the express purpose of defeating the proceedings in bankruptcy and securing the benefit of a fraudulent preference.

Whether the wife of the debtor will be deprived of the right to prove the claims she has purchased, by reason of her inability to take the oath required by the statute, it is unnecessary now to determine. It is at least clear that neither she nor the debtor has any right to ask the approval or assistance of the court in carrying out their design. But even if the approval of the court could be obtained, under the circumstances of this case, the debtor is not in a position to ask it. He has not presented to the court "the assent in writing of one-half of his creditors, in number and amount," as required by the act.

The motion to dismiss must therefore be denied, and the cause remains in court. It would seem to follow that any other creditor

must be allowed to continue the proceeding, and this as the necessary result of the provisions of the forty-first section, and independently of the express permission given by section 42. The fact that the debtor has, since the commencement of the proceedings, filed a bill in a state court, to procure the notes held by the intervening creditors, to be delivered up to be canceled, and to recover damages for their alleged fraudulent representations, can have no effect on the proceedings in bankruptcy. By the filing of the petition the court acquired jurisdiction over the cause as a case in bankruptcy. No action of the debtor could thereafter impede this court in the discharge of one of its chief functions under the act, viz.: "The determination of all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy."

The motion to dismiss is denied, and the application of the intervening creditors is granted—unless the bankrupt shall, in an answer, traverse the allegation that they are creditors, in which case the matter will be referred to the register to take proofs and report.

SHEFFEY v. VINT. See Case No. 16,950.

SHEFFIELD v. FOSTER. See Case No. 12,743.

Case No. 12,743.

SHEFFIELD v. PAGE.

SAME v. FOSTER.

Spr. 285; [1] 18 Law Rep. 99.]

District Court, D. Massachusetts. April, 1855. [2]

EVIDENCE—PAROL—CONTRACTS—SEAMEN—WAGES—RECOVERY—MEASURE OF DAMAGES.

1. Where there is a contract, in writing, purporting on its face to contain the whole agreement relative to its subject-matter, parol evidence is not admissible, to prove that a part of the entire contract was omitted.

2. But where the written contract is incomplete on its face, and tacitly refers to parol evidence, such evidence may be admissible.

3. And where a mate had signed shipping articles, for a voyage from San Francisco to Calcutta, in which no rate of wages was named, parol evidence was admitted, to show that his contract was for a voyage from San Francisco to Boston, via Calcutta, for a certain rate of wages per month.

4. The mate having been wrongfully discharged at Calcutta, and not being able to obtain a situation as mate, came to Boston before the mast; and the court allowed him his expenses and wages, till he reached Boston, without deducting what he earned before the mast.

[Cited in The Cornelia Amsden, Case No. 3,234; Worth v. The Lioness No. 2, 3 Fed. 925.]

5. A libel was brought by him against an owner, for his wages to Boston, and one against the master, to recover damages for his discharge; but it not appearing that the master had done any wrong or injury to the mate, in discharging him, except that necessarily resulting from a violation of the contract; it was *held*, that he could recover in one suit only, and might recover all he was entitled to, on account of such discharge, against the owner, and the libel against the master was dismissed.

These two cases were heard together. The first was a libel against a part-owner of the ship Uriel, to recover wages, as first mate, from San Francisco, via Calcutta, to Boston, at $50 per month, from June 20th, 1851, to April 26th, 1852; the second, a libel against the master of the Uriel, to recover damages, for a wrongful discharge of the libellant, at Calcutta. In June, 1851, the libellant shipped in the Uriel, at San Francisco, as first mate, for a voyage, as he alleged, from San Francisco, via Calcutta, to Boston; but, as the respondents contended, only to Calcutta. On the arrival of the Uriel at Calcutta, the libellant was discharged by the master, and came home in another vessel, before the mast, receiving for his services, in such other vessel, the sum of $60; and the libel against the owner, was brought to recover his wages to the time of his arrival at Boston, with certain expenses at Calcutta. The respondents alleged that the libellant had signed shipping articles, for a voyage to Calcutta only, and objected to the admission of parol evidence to show that his contract was for a voyage to Boston. A copy of the articles, brought by the master from San Francisco, and certified by the deputy collector of that port, was produced by them, which did not contain the libellant's name; but another copy was also offered in evidence, subsequently obtained from San Francisco, which did contain his name. Neither copy contained any statement of the rate of wages to be paid to him.

R. H. Dana, Jr., and Geo. S. Hale, for libellant.

F. H. Allen, for respondent.

SPRAGUE, District Judge. Several questions arise in this case. 1st. Were any articles signed by the libellant? 2d. If so, for what voyage? And 3d. If for the voyage alleged by the respondents, can parol evidence be admitted, to show that the parties contracted for a voyage to Boston, via Calcutta; and what effect shall be given to that evidence? On the whole, I think there is satisfactory evidence, that the articles were signed; and I think the articles signed were for a voyage to Calcutta, as claimed by the respondents.

Is parol evidence, then, admissible to show a contract for a voyage to Boston? The argument urged is, that the articles do not contain the whole contract, and are not inconsistent with evidence of a contract to continue the voyage to Boston, after arriving at Calcutta. And there is certainly plausibility in this view. The cases upon this subject are so numerous, and so various, that perhaps it

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

[2] [Affirmed in Case No. 10,667.]

is not easy to reconcile all of them; yet the true principle is not difficult of discovery.

An agreement, distinct from that contained in the writing, can, of course, be proved by parol; but nothing can be introduced to change the written contract; and if the whole matter is one contract, made at one time, parol evidence, that a part was omitted, is not admissible, for that would be inconsistent with, and would affect the writing.

When the writing purports on its face, to contain the whole agreement, relative to its subject-matter, to add anything to it, is to alter and vary it. Suppose a farmer were to hire a laborer, at a specified rate of wages, for six months, from the first day of April, by a contract in writing; could the laborer prove by parol, that the agreement was for twelve months, and thus get the higher rate of wages during the winter? Such evidence would change the contract, as it appeared in the writing, and would make it less favorable to one of the parties than the written agreement. Now, the case before us is substantially the same. Wages were higher at San Francisco than at Calcutta; and to permit the mate to prove a contract to Boston, would make the owner pay a higher rate from Calcutta, and would thus injuriously vary his contract. So, if the reverse were the case, the mariner's contract would be changed to his injury, by parol evidence of an agreement to go farther, at the lower rate. But, in this case, another principle is applicable. Here there is a palpable defect in the written contract. It does not appear to contain the whole agreement. When the written contract is incomplete, on its face, and tacitly refers to parol evidence, such evidence may be admitted. By the shipping articles, the libellant agrees to go, as first mate, to Calcutta, but no wages are specified. Does that mean that he is to go for nothing? That certainly is not the inference to be drawn, in case of mariner's articles. When services are contracted for, and there is no expectation that the seaman will be better off, at the end of the voyage, it is not to be inferred, that his services were to be gratuitous. Compensation was to be made. But that part of the agreement which determined the amount was not reduced to writing, and may be proved by parol. It may be said, that by the agreement, as proved, the mate was to receive $50 a month, and, therefore, we may allow that amount, until the vessel arrived at Calcutta, without admitting parol evidence of the voyage to Boston. But that would not be a true view of the evidence. The rate of wages at San Francisco was more than $50 to Calcutta, but less from that place to Boston. And a part of the compensation to the mate, for going to Calcutta, was the promise of the same rate of wages to Boston. And this part of his compensation is provable, at the same time, and by the same evidence, as the other; both being embraced in one contract. Wages to Boston were an essential part of the consideration; and if the parol evidence come in at all, it must come in to show the exact consideration. Such evidence being then admitted, it is proved very clearly, that the contract was, as is alleged by the libellant, for a voyage from San Francisco, via Calcutta, to Boston.

The libel is sustained, and I decree wages to Boston, with the expenses incurred in Calcutta, and interest up to the date of the decree. I shall not deduct the money earned by the libellant, on his return. It is true, a mariner discharged, under such circumstances, is not at liberty to aggravate the damages for which the owners are liable, by incurring unnecessary expenses, or refusing to earn wages on his homeward passage, when proper opportunity is offered. If this libellant could have had the situation of mate in a vessel home, he might have been bound to accept it; but he was under no obligation to serve as a common sailor, and the owners had no claim to a deduction, by reason of wages so earned. Indeed, he might have taken a cabin passage, at their expense. Allowing him wages, and his expenses, up to the time of his reaching Boston, will not be more than an indemnity.

The libel against the master, depends on the same state of facts, and rests on the ground that a wrong has been committed, for which the libellant is entitled to a remedy against the master, but not against the owners.

The question, then, comes to this: Can he recover anything against the master, which he could not recover against the owners? What is there against the master? Nothing but the violation of the contract.

[If a libellant were a passenger to Calcutta without the rights reserved to a mariner to return home, he might have been put ashore without wrong. There was no other wrong, violence, or injury, except the violation of the contract.] [2]

The master said the contract was at an end, and that the libellant should remain at Calcutta, and left him to take the consequences. But it was not at an end; and being a contract with the owners, made through their agent, they are liable for all the damages sustained by its violation; and there is, in this case, no ground for any additional claim against the master.

[Now the contract of the owners with the mariner was not merely to pay wages in consideration of his services but to provide him with board on their vessel and that he should continue the voyage to the United States, and if this was not complied with, he is entitled to an adequate compensation from them for the damages resulting from the violation of their contract, including his expenses at Calcutta and for his return home. And this would cover all the damages he seems to have sustained.] [2]

[2] [18 Law Rep. 99.]

I shall dismiss this libel, therefore; and, as it was unnecessarily brought, I shall decree sufficient costs to the respondent, to compensate for the trouble of filing the answer, but no more.

In the first suit, decree for the libellant, for $606, the amount claimed, and costs. In the second, libel dismissed, with $10 costs to the respondent.

This decree was affirmed, upon appeal. See Page v. Sheffield [Case No. 10,667].

NOTE. As to rate of wages left blank in shipping articles, and supplied by parol, see Wickham v. Blight [Case No. 17,611]; The Harvey, 2 Hagg. Adm. 79; The Prince George, 3 Hagg. Adm. 376; The Warrington [Case No. 17,208]. As to the measure of indemnity, see Hunt v. Colburn [Id. 6,886].

SHEFFIELD (PAGE v.). See Case No. 10,667.

SHEFFIELD (SEDGWICK v.). See Case No. 12,624.

SHEHEE (McGILL v.). See Case No. 8,797.

Case No. 12,744.

SHEIRBURN v. HUNTER et al.

[3 Woods, 281;[1] 1 Tex. Law J. 319.]

Circuit Court, E. D. Texas. May Term, 1878.

MEXICAN LAND TITLES — EVIDENCE — ASSISTING WITNESSES — GRANT OF LAND WITHOUT THE LIMITS OF THE COLONY—EFFECT.

1. According to the Spanish law, as interpreted by the courts of Texas, assisting witnesses are not necessary to the validity of final titles, extended by alcaldes and commissioners to make sales.

2. The fact that such document is written on unstamped paper is not fatal to its validity.

3. A grant purporting to convey land lying within the limits of a colony will be void if the land in fact lies outside such limits, unless the officer extending the title and the grantee acted in good faith and with reasonable ground to believe that the land was actually situated within the colony.

4. According to the jurisprudence of Texas, a defendant in an action of trespass to try title, who has pleaded not guilty, and has also, in pleading the statute of limitations, set up title in himself, is not precluded from showing the invalidity of the plaintiff's title.

In this case [by J. A. Sheirburn against W. L. Hunter and others] the intervention of a jury was waived, and the issues of fact as well as law submitted to the court.

W. P. Ballinger, T. M. Jack, and M. F. Mott, for plaintiff.

A. H. Willie, C. F. Cleaveland, and Prior Lea, for defendants.

MORRILL, District Judge. Plaintiff's title is a testimonio issued by Jose Jesus Vidawri, a commissioner of Power & Hewitson's colony, dated November 20, 1834, to four named persons jointly, calling for a league of land fronting on Colet's creek and boundaries described, and a conveyance to himself by two of the four grantees.

Defendants' answer is: (1) Not guilty; (2) statute of limitations and occupancy of the land by virtue of their titles and adversely to plaintiff. Defendants also excepted to the sufficiency of the title of plaintiff, because: (1) It was not written on stamped paper; (2) it had no attesting witnesses; (3) the land described did not lie in Power & Hewitson's colony.

Since most, if not all, of the questions raised by the parties in this case have been adjudicated, either by the supreme court of Texas or of the United States, or both, the several points raised will be disposed of by reference to the cases in which the decisions have been made. In Clay v. Holbert, 14 Tex. 189, it was decided that assisting witnesses were not essential to the validity of the acts of possession extended by alcaldes and commissioners in cases of sales, etc. The object of such witnesses was to authenticate the act so that it would prove itself. In the absence of them the genuineness of the document must be proved according to the general principles of evidence. In Jones v. Montes, 15 Tex. 351, the court disposed of the case relating to the want of stamp paper in the same manner as for want of witnesses. In both cases it was decided that assisting witnesses and the stamp went to establish the authenticity or genuineness of the document offered in evidence, and that the want of faith or credit that would arise by the want of the witnesses of assistance and stamp-paper could be established by other testimony. Though this court can not fully appreciate the conclusiveness of the reasoning of the supreme court of the state, yet, as the decision relates to, and adjudicates upon, a local law, it must be regarded by this court as if it were a part and parcel of the statute.

The next exception to the testimonio is, that the land lies outside of, and beyond the boundaries of Power & Hewitson's colony; that the commissioner had no authority to grant it, and that the grant is void. That the conclusion would certainly follow if the premises are true, has been decided, not only in Texas, but in the supreme court of the national government, as well as in other states. Mason v. Russell, 1 Tex. 721; White v. Burnley, 20 How. [61 U. S.] 235; M'Lemore v. Wright, 2 Yerg. 326. In Hamilton v. Avery, 20 Tex. 612, it was held that where part of a colonial grant lay within the colony and part without, and the boundary of the colony was well defined, that the grant was void as to the part lying beyond the limits of the colony, the commissioner having no authority to extend titles to land outside of the colony. The testimony in this case shows that there have been two boundary lines run showing the northern boundary of Power & Hewitson's colony. One of these was run by White,

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

in October, 1834, and the other by Richardson. It further appears from the maps introduced and other testimony, that the nearest portion of the grant, under which plaintiff claims, is a half of a mile outside of and beyond the colony boundary as run by White, and upwards of five miles of the one as run by Richardson. And if we are to be governed by the decisions of the supreme court, as appears in Mason v. Russell, or Hamilton v. Avery, supra, we should be compelled to declare that the title of plaintiff is null and void. But the plaintiff refers to Hamilton v. Menifee, 11 Tex. 718, and contends that the principles decided therein, if applied to the plaintiff's grant, would sustain its legality. As this is a leading case, and as all other cases involving the subject-matter refer to this case as authority, and more particularly as the court, in its decision, necessarily discussed, and virtually decided upon, the boundaries of Power & Hewitson's colony, which is now before this court, it will be necessary to quote, and somewhat extensively, from the opinion of that case. The facts in the case were, that one Buentello applied for a "grant" to the governor of the state; that all the usual preliminaries had been complied with, and that the alcalde of Goliad, on the 28th of July, 1833, decreed that, in consequence of the land having been declared vacant and not pertaining to any person or corporation, and finding it without the literal leagues and within the limits of his municipality, that the designated land be surveyed and title issued. It further appears that afterwards the same land was granted to Dona Dolores Carabagal by Power & Hewitson's colonial agent. The suit was instituted to test the comparative merits of the titles. The Buentello survey lay, mostly, between the two lines run by White and Richardson. If, therefore, White's line was the true line, most of the survey would be in the colony, and if Richardson's line was the correct one, most of it would be beyond the colony. In giving their opinion the court say: "It seems that the authorities of the municipality of Goliad, the surveyor and the grantee, were confident that the land was without the coast leagues. It would be an act of great injustice to permit titles, fairly and honestly granted, with reference to a line of boundary not traced by the government, but honestly determined upon by the authorities on the best lights which they had on the subject, to be impeached, because they are two or three miles within or without what may now be supposed to be the exact line. We are of opinion, therefore, that a variation of two or three miles from what may now be determined upon to be the exact line should not defeat titles, if, when issued, they were supposed to be in conformity to the line, and which, on fair principles, can not be deemed to have been located or deeded in wanton disregard and in violation of the laws imposing restrictions on titles in the territory embraced by such line. The mode of running a line adopted by Richardson, as we understand it, is one sufficiently accurate. Adopting this line as the best adapted for the definition of the limits of the grant of Buentello, except a small portion being without such line, it is good, in itself, for all parts without the line. White's line was not run till October, 1834." Such are the quotations from the opinion of the chief justice, and which have been substantially followed in other cases. In Ledyard v. Brown, 27 Tex. 393, the court say: "We think it could hardly be seriously urged that a title issued in good faith and within the limits in which the officer issuing it was accustomed to exercise his jurisdiction, and within the limits to which he might reasonably have concluded his authority extended, should be declared void upon the ascertainment of the fact, years afterwards, that it was a short distance beyond his colonial limits." Again, in Elliott v. Mitchell, 28 Tex. 105: "If the conclusion may fairly be drawn that the commissioner and grantee might reasonably believe that the lands were within the limits of the colony, the grant must be sustained."

From these opinions there can be no difficulty in adjudicating upon the merits of the case now before this court. It is beyond doubt that White's line was run in October by the order of Vidawri. On what day in October does not appear, but if it was on the last day it would then be twenty days previous to the issue of the title under which plaintiff claims. Vidawri, then, must have known that the land was beyond the limits of the colony when he made the grant on the 20th of November, afterwards. Even without this positive knowledge that the land was beyond the colony limits of ten leagues, it seems, from the opinion herein before quoted, that it was so considered by the community at large. The very fact that Buentello, an old citizen of the country, who could have obtained his land as a colonist of Power & Hewitson, as well as from the alcalde of Goliad, applied to the alcalde instead of the colony, and the fact that the public authorities who issued this grant extending, as it did, at least five miles nearer the divisional line than the land now under consideration, furnishes, itself, strong testimony to rebut the presumption that the title was "fairly and honestly granted," and that it was "honestly determined upon by the authorities on the best lights which they had on the subject."

It may be further added from the fact that it does not appear that two of the parties to whom the "grant" was issued have ever attempted to claim the same, and that one of them has come into court as a witness, and testified that he knew nothing of the grant till more than four years after it was issued, and till he had obtained his land by virtue of the laws of the republic of Texas; from the fact that no one of the four of the grantees ever signed a petition for the land, there is good ground to infer that the grant was issued without the request or

knowledge of the grantees. From the fact that the boundaries of the land set forth in the grant do not call for any object in any corner or any line, notwithstanding the map shows that one of its lines crossed a large creek, and the testimony shows that the tract was heavily timbered, and from the additional fact that there is no report of a surveyor relative to the land, as is issued in such cases, there is good reason to believe that there never was such a survey. From all the facts in the case, I can come to no other conclusion than that the land was at least five miles beyond the real boundary of the colony, and that the commissioner Vidawri had reason to believe, both from the general opinion of the people, and from the surveyor appointed by him to run the line, that the land was not in the colony when he issued the title, and that the defendants were not guilty of any trespass upon plaintiff's land, and that his title is a nullity.

The plaintiff has assumed, in argument, the position that because the defendant, in addition to the plea of "not guilty," has pleaded a special title in himself, that the defendant is precluded from showing the invalidity of plaintiff's title, and refers to Custard v. Musgrove, 47 Tex. 218, to sustain this position. I have carefully examined that case, also Shields v. Hunt, 45 Tex. 426, and Rivers v. Foote, 11 Tex. 662. None of these cases decides the position assumed, but, on the contrary, in the case relied upon by plaintiff, Custard v. Musgrove, the chief justice states, "the rule to which plaintiff refers" may not apply to a claim of title under the statute of limitations, which is required by law to be specially pleaded. In this case the defendant pleaded the statute of limitations in addition to the plea of "not guilty," and, therefore, the position assumed does not apply.

Finding and judgment for defendants.

SHEKEN (GRAHAM v.). See Case No. 5,675.

Case No. 12,745.

In re SHELBOURNE.

[19 N. B. R. 359.] [1]

District Court, S. D. New York. Nov. 26, 1879.

NOTES — EQUITIES BETWEEN ORIGINAL PARTIES — RULE IN NEW YORK—BANKRUPTCY—AMOUNT PROVABLE—FOLLOWING STATE DECISIONS.

The bankrupt, in 1869, executed a note for ten thousand dollars, payable, in three years, to one C., for the purpose of settling an account between them. It was indorsed by C., and left in his possession. A disagreement arose, however, about the items of the settlement, and no final agreement was made as to the disposition to be made of the note. One T. purchased the note before maturity, and without notice of any equities between the maker and payee, for one thousand five hundred dollars. All the parties were citizens and residents of the state of New York. In an action on the note in the state court, T. recovered a judgment for the whole amount of the note, which judgment was reversed on appeal and a new trial granted, unless plaintiff should consent to reduce the judgment to the amount paid by him and interest. On proof of claim, *held*, that the judgment of the appellate court was not a conclusive determination of the rights of the parties in this proceeding; that the note having been negotiated in the state of New York, and all parties being residents thereof, the rights of the claimant are controlled by the law of that state, and that in accordance with the decisions of that state, the claimant is only entitled to prove for the amount paid by him with interest.

[In the matter of Sidney F. Shelbourne, a bankrupt.]

F. G. Salmon, for opposing creditors.

Jas. G. Thompson, for petitioner.

CHOATE, District Judge. The question in this case is whether the holder of a promissory note made by the bankrupt is entitled to prove for the whole amount of the note or only for the sum he paid for the same, with interest. The facts are agreed upon as follows: The bankrupt was adjudicated upon his own petition, which was filed August 28, 1878. The claimant, Henry B. Todd, made proof upon a promissory note signed by the bankrupt, dated October 26, 1869, whereby he promised to pay, three years after date, to James Cummings, or order, ten thousand dollars for value received. This note was made for the purpose of settling an account between Cummings, the payee, and the bankrupt. It was indorsed by Cummings and left in his possession. Cummings and the bankrupt, however, disagreed about the items of the settlement, and no final agreement was made between them as to the disposition to be made of the note. In October, 1872, Cummings sold the note to the claimant Todd for one thousand five-hundred dollars. At the time of the purchase, Todd supposed, from an examination of the books of Cummings, that the bankrupt owed Cummings an amount exceeding the amount of the note. Todd purchased the note without any notice of the transaction between Cummings and the bankrupt as to the delivery of the note. The bankrupt, Todd and Cummings were at the time the note was made and have ever since been all citizens and residents of the state of New York. In October, 1872, Todd brought an action on the note in the supreme court of the state of New York against the bankrupt, and after a hearing upon the merits the court rendered a judgment in said action against the bankrupt for the whole amount of the note and interest with costs. The bankrupt appealed from said judgment to the general term of the said court, and the general term reversed the judgment and ordered a new trial, unless the plaintiff (Todd) should consent to reduce the judgment to one thousand five hundred dollars and interest. Neither party has appealed from the order of the general term, nor has the consent to reduce the judgment been given, and

[1] [Reprinted by permission.]

the action is still pending in said court awaiting trial. All of these proceedings were prior to the filing of the petition in bankruptcy.

On these agreed facts it must be held that the claimant Todd took the note before maturity for value without notice of any equities between the maker and the payee; that as between the maker and the payee there was no consideration, and the payee indorsed the note to Todd in violation of the terms of the agreement on which he held it, and that he held it without any authority to negotiate it.

Two questions have been discussed: 1st, whether the decision of the general term of the supreme court is conclusive in this proceeding against the creditor's right to recover more than the amount paid for the note and interest; and, if not, 2dly, for what amount the creditor should be allowed to prove.

1. The proceedings in the state court are not a conclusive determination of the rights of the parties. There is no judgment that can be pleaded as an estoppel of record. The judgment that was entered has been reversed, and is of no new effect, and no new judgment has ever been entered. There is simply a suit pending between the parties undetermined. It is true that the court in which it is pending has expressed a very decided opinion as to the rule of law by which the rights of the parties are to be determined, and, doubtless, in that suit, the question argued and passed upon would be deemed no longer an open question of law, unless the case should reach the court of appeals; but in any other court that determination would only have the weight and consideration to which the reasoning of the judges rendering the decision seems to entitle it. It certainly would not be conclusively binding on any other court of concurrent jurisdiction to which the same case might be presented. If the claimant Todd should discontinue his suit in the supreme court, or become nonsuited, and afterward commence another action on the note in another state court, and the same facts precisely should be shown in the second suit as in that now pending, the decision in the supreme court would not conclude him, if the court in which he afterward sued should come to a different conclusion on the same question of law. See Wood v. Jackson, 8 Wend. 9; Delaunay v. Burnett, 4 Gilman, 454, 497.

2. It is, therefore, open to this creditor to claim the whole amount of the note, if entitled thereto. There is, I think, no doubt that according to the authoritative decisions of the courts of New York, this creditor, Todd, can recover in the courts of this state only the amount he paid for the note, and interest on the same from the time of the purchase. The principle of these decisions is that while as against the maker of the note, who has apparently put it in the power of the payee to represent the note to be a valid promissory note, the holder of the note, who took it in good faith for value before maturity, is entitled to an indemnity on the ground of an estoppel in pais, yet in reality the note is invalid, and not in fact commercial paper, and the holder does not become vested with the rights of such bona fide holder of commercial paper according to the law merchant. It was so held in this creditor's own suit in the state court, and the ruling there made is abundantly supported as the law in this state by the authorities cited in the opinion of the general term. Todd v. Shelbourne, 8 Hun, 510. The basis of the decision is that the paper sued never became a promissory note at all, never having been delivered as such to the payee; but the maker having carelessly entrusted the possession of it with the payee, under circumstances calculated to lead a purchaser to believe that the payee had authority to negotiate it, the loss caused to the purchaser by reliance on this deceptive appearance of authority must fall, not on the innocent purchaser, but on the maker who himself created the deceptive appearance. And, as in all other cases of estoppel in pais, the amount that can be recovered by the party deceived is the loss he has suffered, and no more, as the court say in that case: "The paper derives its vitality wholly from the circumstance that it has been obtained for value without notice by an innocent purchaser. For his protection it is maintained in his hands as a legal obligation. The object of the law is to save him from loss; and to do that, a recovery of the amount he may have advanced is all that can be required. To go beyond it would be inequitable and unjust to the party after that equally entitled to be protected from unnecessary loss." As here expressed, the idea seems to be that a partial or quasi validity, for the purpose of and up to the extent of an indemnity, is by a species of legal fiction, and to prevent injustice, given to the note. And in accordance with this idea the mode of pleading allowed is as upon a promissory note and not specially upon the case; and this mode of pleading is proper and logical on the theory of an estoppel, because the very meaning of an estoppel is, that the party estopped is prevented from denying the truth of the fact represented by him to be true, which in this case is, that the paper is a promissory note duly delivered, as its purport and the possession of the payee clearly indicate. But the rigor of this estoppel, or inability to deny the fact, is mitigated so far that for all purposes of recovery beyond the loss sustained by reliance on the representation the estoppel ceases, and the party estopped may show the truth. The true ground of the decision, therefore, is an estoppel, and neither the form of pleading allowed nor the ex-

pression in the decision to the effect that the paper has validity as a legal obligation for the protection of the innocent purchaser, are inconsistent with this view.

It is insisted, however, that the true rule of the commercial law is that the purchaser for value before maturity of what purports on the face to be commercial paper, without notice of any want of authority of the payee to negotiate it, becomes vested with the title thereto unaffected by any equities existing between the maker and the payee; that the note, by its negotiation, becomes by the law merchant a valid obligation of the maker to its full extent, and not merely a quasi or limited obligation by way of estoppel, even though the note has been put in the possession of the payee by the maker without authority to negotiate it. It is argued that unless this is so, the security of the purchaser of commercial paper, which is very greatly favored and protected in the interests of commerce, is greatly impaired. And it is further insisted that this is the rule of commercial law as declared by the supreme court of the United States; that by the rule so declared this creditor is entitled not to an indemnity only, but is fully vested with the rights of a bona fide indorsee for value before maturity, and entitled to recover the whole amount of the note and interest; that this court is bound in this case to administer the law as held by the supreme court of the United States and not the local law of New York.

It is not to be denied that in passing upon the rights of a bona fide holder for value before maturity of what is on its face commercial paper, the supreme court of the United States has differed from the courts of New York and many other states, and has, in the interest of commerce, as understood and declared in its decisions, held more rigidly to the general principle which is admitted by all courts, of excluding, by way of defence, the equities existing between the prior parties (Goodman v. Simonds, 20 How. [61 U. S.] 343; Brown v. Spofford, 95 U. S. 474), and in favor of a party who, under the constitution and the laws of the United States, is entitled to relief in the courts of the United States; that is to say, aliens and citizens of a state other than that of which a party sued is a citizen, and who in the particular case is not bound by the local law under which the other party seeks to defend, the courts of the United States administer the law as declared by the supreme court, even though in conflict with the law of the defendant's state (Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 175; Butz v. City of Muscatine, 8 Wall. [75 U. S.] 575; Township of Pine Grove v. Talcott, 19 Wall. [86 U. S.] 666; National Bank of Republic v. Brooklyn City, etc., R. Co. [Case No. 10,039]).

Whether the particular question involved in this case in respect to the right to show the invalidity of the note in the hands of the payee for the purpose of limiting the recovery to the amount paid and interest has been determined by the supreme court of the United States, has been discussed in the present case. Most of the decisions touching the subject have been cases where the holder paid full value, and this precise question could not arise in such cases. This is true of the case chiefly relied on by the learned counsel for this claimant, Cromwell v. County of Sac, 96 U. S. 51. But I have not found it necessary to determine this question because it seems to me that however that may be, the rights of the claimant as the purchaser of this paper are controlled by the law of New York. The note was made and sold to this claimant in the state of New York, and the question whether or not the purchaser took the title of a bona fide indorser for value before maturity must be determined by the local law. In Trimbey v. Vignier, 1 Bing. N. C. 151, it was held that where by the law of France the indorsement in blank of a promissory note gave the indorsee no right to sue on it in his own name, but only the right to sue for it in the name and as the agent of the indorser, the indorsee could not sue on it in his own name in England. The court say: "The interpretation of the contract must be governed by the law of the country where the contract was made; the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought." And they held that the rule of the local law by which an indorsement in blank does not operate as a transfer of the note was "a rule which regulates the interpretation of the contract," and not "the mode of instituting and conducting the suit." So where by the law of the state where a note was indorsed, the indorser was not liable until after judgment had been obtained against the maker, it was held that without the recovery of such judgment he could not be held as indorser in another state, on the ground that this was not a matter affecting the remedy merely, but a condition of liability which was part of the contract itself. Williams v. Wade, 1 Metc. [Mass.] 82. The parties must be held to have had reference to the law of New York where the note was indorsed and delivered to the purchaser as regards the determination of the rights created by that indorsement and transfer. Aymar v. Sheldon, 12 Wend. 439. This rule, that the law of the place where a contract is made governs in respect to its validity and interpretation, is recognized and applied by the supreme court of the United States in the case of commercial paper made and passed within one of the United States. Tilden v. Blair, 21 Wall. [88 U. S.] 241. In the present case I think it is clear that the rule of the New York courts, which limits the recovery of the purchaser of the note to the amount paid and interest, is not a mere

rule affecting the remedy, but is a rule regulating the validity and interpretation of the contract. Those courts in effect hold that in New York the title to the note as a note does not pass, that the note has no validity, and they give the holder damages by way of indemnity only, for the very reason that no title passes.

Ordinarily, I think the rule in bankruptcy must be that a creditor can prove only for that sum which he would be entitled to recover in an action if there were no bankruptcy, and in this case the claimant Todd could in no way, nor in any court, recover of the bankrupt more than he paid and interest. It is possible, of course, that by reason of a difference in the laws of different states, or of the notes of the bankrupt being sold in different states, purchasers in one state may have very different rights from those in another state. It is possible that another purchaser of a similar note of the bankrupt, for the same price at which this claimant bought this note, might make good his claim to the whole amount, either as a creditor proving in bankruptcy or in a suit in a court of the United States. But this possible inequality between creditors is no greater after bankruptcy than it is independently of bankruptcy, and it rests on a real difference in the rights of the parties as fixed by the different laws of the states in which the negotiation of the paper is made. But I think there is no ground for the claim that the courts of the United States apply as between the citizens of a particular state any other law than the law of that state, as respects the validity and interpretation of contracts made in that state, whether the contract be one arising out of the making or negotiation of what purports to be negotiable paper or anything else. No question is here involved of the rights of citizens of other states, or of the effect of the negotiation of commercial paper in another state, as affecting the rights of the holder acquired thereby or of the effect of subsequent legislation for judicial interpretation operating as an attempted violation of the obligation of a contract valid when made —questions which arose in some of the cases cited where the courts of the United States have refused to apply the law, as held in local tribunals, to invalidate the title of holders of commercial paper, who are entitled, as citizens of another state or as aliens, to sue in the courts of the United States. Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 175; Township of Pine Grove v. Talcott, 19 Wall. [86 U. S.] 666; Butz v. Muscatine, 8 Wall. [75 U. S.] 575. While in these and other similar decisions it is declared by the supreme court that, upon questions of commercial law, the courts of the United States are not bound by the decisions of the courts of the state where the cases arise, yet the cases before the court, in respect to which the rule was so held, were in every instance cases of a "controversy between citizens of different states," or "between citizens of a state and subjects of a foreign state," to which the judicial power of the federal courts, by the constitution, extends. Many of them were cases where the paper had been negotiated out of the state whose local law it was sought to apply. In the leading case of Swift v. Tyson, 16 Pet. [41 U. S.] 1, where the court refused to follow the settled law of New York, as established by the decisions of the courts, to invalidate the title of an innocent indorser for value of commercial paper on the principle above stated, the plaintiff was a citizen of Maine, suing as indorsee of what purported to be commercial paper, negotiated in Maine, and transferred to the plaintiff there; and there was nothing to show that the law of Maine, where the contract of indorsement was made, was different from the common law upon the point in question. In that case, therefore, and those that have followed, the question that arises in the present case, whether the rights of a citizen of New York, claiming under a contract made in New York, are not bound by the law of New York, as declared by its judicial tribunals, and independently of any statute governing the case, did not and could not arise. This distinction between the rights of persons who are entitled to sue in the courts of the United States, and those of parties to a contract, who are both subject to the law of the same state, is clearly pointed out by the supreme court in the case of Watson v. Tarpley, 18 How. [59 U. S.] 517. In that case the question was whether the statute of a state, forbidding a suit from being brought by the indorsee of a bill, before its maturity, in case of non-acceptance, had any effect on a suit brought in a court of the United States. Mr. Justice Daniel, delivering the opinion of the court, said: "While it will not be denied that the laws of the several states are of binding authority upon their domestic tribunals, and upon persons and property within their appropriate jurisdiction, it is equally clear that those laws cannot affect, either by enlargement or diminution, the jurisdiction of the courts of the United States, as vested and prescribed by the constitution and laws of the United States; nor destroy or control the rights of parties litigant, to whom the right of resort to these courts has been secured by the laws and constitution. This is a position which has been frequently affirmed by this court, and would seem to compel the general assent upon its simple enunciation. The general commercial law being circumscribed within no local limits, nor committed for its administration to any peculiar jurisdiction, and the constitution and laws of the United States having conferred upon the citizens of the several states and upon aliens the power or privilege of litigating and enforcing their rights acquired under and defined by that general commercial law, before the judicial tribunals of the United States, it must fol-

low, by regular consequence, that any state law or regulation, the effect of which will be to impair the rights thus secured, or to divest the federal courts of cognizance thereof in their fullest acceptation under the commercial law, must be nugatory and unavailing." This decision cites and approves Swift v. Tyson, which case gave an interpretation of the thirty-fourth section of the judiciary act [1 Stat. 92], providing that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trusts at common law in the courts of the United States in cases where they apply, "limiting that provision to the local statutes or local usages of a fixed and permanent operation," and holding that on questions of commercial or common law the courts of the United States were not bound to follow the decisions of the local tribunals; and the case of Watson v. Tarpley, cited above, properly limits this principle to cases of those persons who, under the constitution of the United States, are secured in the right or privilege of litigating their controversies in the courts of the United States; that is to say, aliens and citizens of different states.

I think, therefore, both upon reason and authority, that the rights of this creditor are to be determined by the local law, unless the fact that the question arises upon the proof of debt in bankruptcy brings the case within the principle of the decisions above referred to. I think not. It was the purpose of the bankrupt law [of 1867 (14 Stat. 517)] to secure the ratable distribution of the bankrupt's property among his creditors,—not to enlarge or alter the rights of the creditors, but simply to ascertain them, for the purpose of this distribution, as they were at the time of the bankruptcy. This creditor's rights were then fixed and certain. There was no court to which he could resort which would give him more than the amount he paid for the note and interest. This view, drawn from the general purpose of the bankrupt law, is confirmed by some of its special provisions. In case of a dispute as to the amount due a creditor, this court may permit a pending suit to go on to judgment for the purpose of determining the amount due. As between citizens of the same state such suit must go on in the state court. This court could not authorize a suit in such a case in a federal court. Undoubtedly the bankrupt court may assume the determination of the question itself, but it would be a very singular result if, in determining the amount due to the creditor, it should be found to fix a larger sum than the creditor could recover in the court to which this court is authorized to send him for the same purpose.

The decision of the register, reducing the claim to one thousand five hundred dollars and interest, is affirmed.

SHELBOURNE (MORRIS v.). See Case No. 9,836.

SHELBY (NORTON v.). See Case No. 10,353

Case No. 12,746.

SHELBY v. YANCY.

[See 1 Overt. 236.]

SHELBY COUNTY (AMY v.). See Case No. 345.

SHELDEN (NESSMITH v.). See Case No. 10,125.

SHELDEN (PENNOYER v.). See Case No. 10,943.

Case No. 12,747.

In re SHELDON.

[8 Ben. 67;[1] 12 N. B. R. 63.]

District Court, S. D. New York. April, 1875.

BANKRUPTCY — DISCHARGE — FIFTY PER CENT CLAUSE—CONSENT OF CREDITORS—DEBTS CONTRACTED BEFORE JAN. 1, 1869—JUDGMENT—ACT JUNE 22, 1874, SEC. 9.

1. A voluntary petition in bankruptcy was filed on November 10, 1873. The only debt proved was a judgment against the bankrupt in favor of S., recovered March 1, 1873, which judgment was recovered on a former judgment entered on July 26, 1862, which was recovered on a promissory note endorsed by the bankrupt. The bankrupt applied for his discharge and S. objected that he could not be discharged, because the assets of his estate were not shown to be equal to 30 per cent of the debt proved and no consent of S. to his discharge had been given. *Held*, that the debt of S., under the ninth section of the act of June 22, 1874 (18 Stat. 180), was not the judgment but the endorsement, and was contracted prior to January 1, 1869.

[Cited in Re Derby, Case No. 3,816; Re Townsend, 2 Fed. 563.]

2. The bankrupt was entitled to be discharged without showing any percentage in assets, or any assent of S..

[Cited in Re Gifford, Case No. 5,408.]

3. The act of June 22, 1874, did not repeal any part of section 5112 of the United States Revised Statutes. or of any prior enactment embodied therein, except the provision requiring "fifty percentum of such assets."

4. The decision in Francke's Case [Case No. 5,046], is reaffirmed.

[In the matter of George H. Sheldon, a bankrupt.]

H. E. Tremain, for creditor.

J. A. Welch, for bankrupt.

BLATCHFORD, District Judge. George H. Sheldon filed a voluntary petition in bankruptcy in this court on the 10th of November, 1873, and was adjudicated a bankrupt. Subsequently, Walter W. Seymour proved, as a debt against the estate of the bankrupt, a judgment recovered in the supreme court of

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

New York, March 1, 1873, by him against the bankrupt, for $1,543.17. That judgment was recovered on a prior judgment recovered in the same court against the bankrupt July 26, 1862, for $860.80. No other debt has been proved by any person. The bankrupt has applied for a discharge. Seymour appeared before the register to oppose the discharge, and objected to the register's entertaining any proceedings on the application for discharge or making any report thereon otherwise than to dismiss the same, on the ground that the bankrupt had not filed the consent of Seymour to the discharge, and that no payment either of 30 per cent. or otherwise, had been made to Seymour. The judgment of 1862 was recovered upon a promissory note endorsed by the bankrupt for the accommodation of one A. H. Sheldon.

The thirty-third section of the bankruptcy act of March 2, 1867 (14 Stat. 533), provided that, "in all proceedings in bankruptcy commenced after one year from the time this act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty per centum of the claims against his estate, unless the assent in writing of a majority in number and value of his creditors who have proved their claims is filed in the case at or before the time of application for discharge." By the first section of the act of July 27, 1868 (15 Stat. 227), that provision was amended so as to read, that, "in all proceedings in bankruptcy commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, be filed in the case at or before the time of the hearing of the application for discharge." By the first section of the act of July 14, 1870 (16 Stat. 276), it was declared that such provision of the act of 1867, as amended by the act of 1868, "shall not apply to those debts from which the bankrupt seeks a discharge which were contracted prior to the first day of January, eighteen hundred and sixty-nine." Section 5112 of the Revised Statutes of the United States, passed June 22, 1874, enacts in these words the provision of the act of 1868, as amended by the act of 1870: "In all proceedings in bankruptcy commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per cent of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, is filed in the case at or before the time of the hearing of the application for discharge; but this provision shall not apply to those debts from which the bankrupt seeks a discharge, which were contracted prior to the first day of January, eighteen hundred and sixty-nine." The ninth section of the act of June 22, 1874 (18 Stat. 180), provides as follows: "That, in cases of compulsory or involuntary bankruptcy, the provisions of said act" (the act of March 2, 1867), "and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner, and with the same effect, as if he had paid such per centum of his debts, or as if the required proportion of his creditors had assented thereto. And in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number and one-third in value; and the provision in section 33 of said act of March 2, 1867, requiring fifty per centum of such assets, is hereby repealed." Section 21 of the act of June 22, 1874, repeals all acts and parts of acts inconsistent with its provisions.

It is contended for the creditor, that the provisions of the ninth section of the act of 1874, require that no discharge shall be granted to this bankrupt, who is a voluntary bankrupt, unless his assets are shown to be equal to 30 per cent. of the debt of such creditor, (such debt being alleged by him to be one upon which the bankrupt is liable as principal debtor), or unless he procures the assent of such creditor to the discharge.

It is contended for the bankrupt, that this debt was a debt contracted prior to the 1st day of January, 1869; that the provision of the ninth section of the act of 1874, in regard to discharges in cases of voluntary bankruptcy, does not apply to debts contracted prior to the 1st day of January, 1869; and that the declaration in the first section of the act of 1870, and in section 5112 of the Revised Statutes, that the requirements then in force in regard to the conditions of amount of assets, or of assent of creditors, on which alone a discharge could be granted to any bankrupt, whether voluntary or involuntary, shall not apply to debts contracted prior to January 1, 1869, is still to be applied as a qualification to the provision of the ninth section of the act of 1874, in regard to discharges in cases of voluntary bankruptcy.

I still adhere to the opinion expressed by me in Francke's Case [supra], that the provisions of the ninth section of the act of 1874, in respect to discharges, both in cases of involuntary bankruptcy, and in cases of voluntary bankruptcy, apply only to cases to

be commenced after the passage of that act. My views expressed in that case have not been overruled by superior authority, and I believe them to be sound in principle. Under such views, as the petition in the present case was filed before the passage of the act of 1874, the ninth section of the act of 1874, would not apply to the present case; and it would be left to be governed by the provisions of section 5112 of the Revised Statutes, under which this bankrupt would not be required to show any percentage in assets or any assent of creditors, because the debt of Seymour, the only debt proved, was contracted before January 1, 1869. Although the judgment, proved as the debt in this case, was recovered in 1873, yet the contract on which the judgment of 1862 was based, and which contract was, therefore, the basis of the judgment of 1873, was made prior to the judgment of 1862. In one sense, the contract of endorsement made by the bankrupt on the promissory note sued on in the judgment of 1862 was merged in that judgment; but, for the purposes of the provision as to debts contracted prior to January 1, 1869, it would be subversive of the intent and meaning of such provision to hold that the debt in this case was contracted on the 12th of March, 1873, and that the entry of the judgment was the contracting of the debt, and that the judgment was the contract, and that the endorsement of the note was not the contract.

But, even though the ninth section of the act of 1874, should be held to be applicable to the present case, the bankrupt would, I think, be entitled to a discharge without showing any percentage in assets or any assent of the creditor, Seymour, for the reason that, the debt of Seymour having been contracted prior to the 1st of January, 1869, no percentage in assets and no assent of the creditor is required.

Neither the first section of the act of 1870, nor that section as re-enacted in the last clause of section 5112 of the Revised Statutes, is directly or by implication repealed by the act of 1874. Nothing in said section 5112, or in the previous legislation before recited, is repealed, except the provision "requiring fifty per centum of such assets." and what is inconsistent with the provisions of the act of 1874. All that section 9 of the act of 1874 purports to do, in regard to discharges in voluntary cases, as a change of the previous law, as embodied in said section 5112, is, to require that the amount of assets shall be 30 per cent. instead of 50 per cent., and that the assent of creditors, when necessary, shall be the assent of one-fourth in number and one-third in value, instead of the assent of a majority in number and value. There is nothing inconsistent with the provisions of section 9 of the act of 1874, in regarding the provisions of that section respecting a percentage in assets and an assent of creditors as not being applicable to debts contracted prior to the 1st of January, 1869. The act of 1874 does not, in its ninth section, or in its twenty-first section, or in any other section, directly repeal any provision of said section 5112, or of any prior enactment embodied therein, except the provision "requiring fifty per centum of such assets." The effect of such repeal was, in my judgment, merely to substitute 30 per cent. for 50 per cent., as the percentage, in cases where a percentage in assets was required before, and would still continue to be required—that is, in voluntary cases, and in respect of debts in such cases contracted after December 31st, 1868. At the time the ninth section of the act of 1874 was enacted, a voluntary bankrupt had a right to a discharge in respect of debts contracted prior to January 1, 1869, without showing any percentage in assets or obtaining any assent of creditors. The said ninth section, not only does not take away such right, but impliedly preserves it, by repealing nothing except the requirement as to 50 per cent. in assets, in cases where a percentage in assets was before necessary and still continues to be necessary, namely, in voluntary cases and in respect of debts in such cases contracted after December 31, 1868, and by substituting for such repealed requirement a requirement of only 30 per cent. in assets. The structure of the ninth section of the act of 1874, is peculiar; and, to ascertain its meaning, it must be looked at as a whole. The first sentence in it relates to compulsory or involuntary bankruptcy alone, and purports to legislate in regard to such provisions of former acts respecting discharges in involuntary cases as required a percentage in assets, or an assent of creditors, and to legislate in regard to such provisions alone. It says that such provisions "shall not apply;" and supplements that declaration by the synonymous one, that the involuntary bankrupt, if otherwise entitled to a discharge, may be discharged in the same manner and with the same effect as if he had paid the required per centum of his debts, or as if the required proportion of his creditors had assented thereto. The provisions in regard to percentage in assets and assent of creditors in involuntary cases thus being abrogated in regard to all debts, whenever contracted, of course were abrogated in regard to debts contracted prior to January 1, 1869. The second sentence in the said ninth section, relates to voluntary bankruptcy alone; and, as the first sentence purports to legislate only in regard to the requirement, in involuntary cases, of a percentage in assets or an assent of creditors, so the second sentence ought to be regarded as legislating only in regard to such provisions of former acts respecting discharges in voluntary cases as required a percentage in assets or an assent of creditors. The substance of such second sentence is to declare, in pari materia with the previous declaration, (that, in involuntary cases, the requirement as to

any percentage in assets or any assent of creditors is abrogated,) that, in voluntary cases, such requirement shall not be wholly abrogated, but shall be changed from a percentage of 50 per cent. in assets to one of 30 per cent. in assets, and from an assent of a majority in number and value of creditors to an assent of one-fourth in number of creditors, and one-third in value. This leaves unaffected the provision that the requirement as to percentage in assets and assent of creditors where applicable, shall not apply to debts contracted prior to January 1, 1869. The enactments in the said ninth section, are properly to be regarded as amendments of section 5112 of the Revised Statutes, in the particulars of the rate of percentage in assets and the number and value of creditors required to assent, and in those particulars alone. The changes made in those particulars are not inconsistent with the former provision, that any requirement as to percentage in assets or as to assent of creditors shall not apply to debts contracted prior to January 1, 1869.

From these considerations, it results that the bankrupt is entitled to his discharge without showing any percentage in assets, or any assent of the creditor who has proved his debt. The clerk will certify this decision to the register.

SHELDON (AMERICAN DIAMOND ROCK BORING CO. v.). See Cases Nos. 296 and 297.

SHELDON (DIBBLEE v.). See Case No. 3,889.

Case No. 12,748.

SHELDON et al. v. HOUGHTON.

[5 Blatchf. 285; [1] 23 Leg. Int. 12.]

Circuit Court, S. D. New York. Dec., 1865.

PROPERTY—GOOD WILL—FORBEARANCE.

1. What the incorporeal right, called "good will," considered as property capable of conveyance, does and does not carry with it.

[Cited in Yuengling v. Schile, 12 Fed. 106.]

[Cited in Rawson v. Pratt, 91 Ind. 19.]

2. "Good will" may adhere to or spring out of corporeal property, but corporeal property cannot adhere, as an incident, to "good will."

3. A "good will" which rests only on the voluntary and unconstrained forbearance of those who are engaged in a particular trade, is not property, in any sense known to the law.

This was an application for an injunction and a receiver, in a suit in equity [by Smith Sheldon and others against Henry O. Houghton].

George T. Curtis, for plaintiffs.

William M. Evarts, for defendant.

SHIPMAN, District Judge. This is a case of novel impression. I am of the opinion that it cannot be sustained, either upon principle, or by the application of any of the authorities submitted on the argument, or of any which I have been able to discover, after a somewhat diligent search. A full discussion of the vital points in the case will not now be attempted; and I shall, therefore, confine myself to a brief notice of such features of it as will disclose the grounds on which this motion is denied. The first material allegation of the bill is, "that, by the custom of the trade of booksellers and publishers in the United States, when any person or firm engaged in that business has undertaken the printing, publication and sale of a book not the subject of statute copyright, and has actually printed, published, and offered an edition of such book to the public for sale, other persons and firms in the same trade, having respect to the trade priority so acquired in the publication and sale of such book, or the particular edition thereof, refrain from entering into competition with such publisher by publishing such book in a rival edition, and that thereby, and by reason and operation of the custom aforesaid, the publication of such book becomes a good will in the hands of the person or firm so first publishing the same, where such book is one for which there is an extensive popular demand, and especially in the case of foreign authors of established reputation, whose works are not the subject of statute copyright in this country, and that such good will is often very valuable, and is often made the subject of contracts, sales, and transfers, among booksellers and publishers." It is, also, averred in the bill, "that such custom is a reasonable one, and tends to prevent injurious competition in business, and to the investment of capital in publishing enterprises that are of advantage to the reading public." The bill then sets forth, "that, prior to the year 1861, one O. W. Wight projected the publication of a uniform edition of the works of Charles Dickens, a distinguished author of Great Britain, whose works are not the subject of statute copyright in the United States, and who is an author of great reputation in the United States as well as Great Britain, but whose collected works had not at that time been printed, published and sold in the United States in a uniform edition, and in the style projected by said Wight; that the said Wight contracted with W. A. Townsend & Co. for the publication of the edition aforesaid of the works of the said Dickens, and with Henry O. Houghton, the defendant herein, for the manufacture of stereotype plates from which to print the same; that one James G. Gregory succeeded to the business of W. A. Townsend & Co.; and that, subsequently, and some time prior to the 27th of December, 1861, the said Wight sold and transferred to the said defendant, Houghton, the good will and right of publication, under the custom of the trade, of the edi-

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tion aforesaid." The bill then sets forth and counts upon the following contract, executed between the plaintiff and the defendant on the 27th of December, 1861: "Memorandum of an agreement made this 27th day of December, A. D. 1861, in the city of New York, by and between Henry O. Houghton, of the city of Cambridge, and State of Massachusetts, of the first part, and Sheldon & Co., publishers, (comprising the following persons, viz.: Smith Sheldon, Hezekiah Shailer, Melancthon M. Hurd, and Isaac E. Sheldon,) of the city and state of New York, of the second part, witnesseth: Whereas, the party of the first part is the proprietor of the 'Household Edition' of the Works of Charles Dickens, heretofore published by W. A. Townsend & Co. and James G. Gregory; and whereas, the party of the second part is desirous of becoming the publishers of the same, the following points are agreed to by and between the contracting parties: (1) The profits of each volume shall be equally divided between the two parties to this contract, said profit consisting of the difference between the actual cost of manufacturing each volume, and the wholesale price of the same, said price to be fixed permanently, so far as this contract is concerned, at fifty cents, and the party of the second part agrees to sell the books at that price, except in small lots and on trade account. The cost of manufacturing shall be made up by said party of the first part, by charging the paper used at cost, the printing at his usual rates for works of a similar class, and according to numbers ordered, and the regular price for folding, collating, waste leaves and tissue paper, adding thereto the cost of plate paper, printing plates, cases, and any other expense that would legitimately belong to the manufacture of the book. (2) The expense of circulars and advertising of the series to be divided equally between each party, an accurate account to be kept of the same, and rendered on the first days of July and January in each year, the balance due from either party to be paid to the other in cash. The extent of advertising, and the amount to be expended for circulars and advertising, to be regulated by mutual agreement. (3) The party of the first part agrees to abate the copyright and use of plates on all copies of each new volume given for editorial purposes, to the number of two hundred and fifty copies, said abatement to be made on settlement of advertising accounts, on the first days of July and January of each year, an accurate account to be kept of the copies presented, and to whom given, by the party of the second part. (4) The party of the second part to take, of each new volume, as issued, two thousand copies, and of subsequent editions either five hundred or two hundred and fifty copies, as may seem best to all concerned. (5) Payments to be made by the party of the second part to the party of the first part, by note, at six months from average time of the delivery of the books. (6) The books to be made in the same style, and uniform with, and not inferior in quality to, the previous volumes of the same series, as formerly published by W. A. Townsend & Co. and J. G. Gregory. (7) All copies of the books delivered in sheets, or folded and collated, to the party of the second part, to be subject to the proper deductions for binding. (8) The party of the first part, in consideration of the above, agrees to give to the party of the second part the exclusive right to publish the same. It is understood and agreed that this contract shall be in full force and binding for the term of three years from this date, and thereafter, until one party shall have given to the other one year's notice in writing, signifying their wish to annul this contract, and in case no satisfactory arrangement can be made for the settlement of each party's interest in the same, an arbitrator shall be chosen by each party, which said arbitrators shall choose a third arbitrator, and their decision in the case shall be final and binding on all parties. In case of the insolvency or death of the party of the first part, or the insolvency or such dissolution of the firm of the party of the second part, as shall unfavorably affect their standing and credit, it shall be considered the same as though the three years had expired, and the one year's notice of desire to terminate the contract had been given, and arbitrators shall be appointed to settle the matter as provided above, if the parties or their executors cannot agree to a settlement. Henry O. Houghton. Sheldon & Company, by Smith Sheldon. Signed and sealed in the presence of Joshua T. Davis." The bill also sets forth, that, at the time the last named contract was entered into, a number of volumes of the edition had been published and offered for sale, part by Townsend & Co., and the rest by Gregory, but that the remaining works of the series, amounting to thirty volumes, had been published and offered for sale by the plaintiff, who had, also, since making said contract, published and sold the original volumes put forth by Townsend & Co. and by Gregory. The sales of all of the volumes appear to have been large. It is further averred that, by force of this contract between the plaintiffs and the defendant, they became partners in the business of publishing this edition; that the good will and right of publishing, under the custom of the trade, thereby became partnership property, to be held for the joint benefit of the parties, and to be valued and disposed of as partnership property; that an illustration was engraved expressly for each volume, and copyrighted by Houghton; that these copyrights were, by the contract, agreed to be transferred to the plaintiffs, and they are now the equitable owners of them, in trust for the partnership; that, by reason of the exertions of the plaintiffs, who are eminent and well known booksellers, the

good will of said edition, and the right of publication thereof, according to the custom of the trade, has become, and now is, of much greater value than before the same became partnership property, and, as is believed, is capable of being sold to others in the trade for the sum of thirty thousand dollars; that the defendant gave the notice provided for in the contract, for its termination, on the 27th of December, 1864; and that, unless the publication is continued beyond the 27th of December, 1865, in the same manner as heretofore, under the order of this court, the good will will rapidly deteriorate, and the plaintiff will suffer irremediable injury. The prayer for relief covers all the allegations in the bill. I have not stated all its averments in detail, as that is not necessary for the purpose of this motion. Upon this bill, and certain affidavits, the plaintiffs move "for the appointment of a receiver, to continue the manufacture, publication and sale of the books described in the bill, and which are embraced in the contracts thereto annexed, until the final hearing of the case;" and that "the court direct that the business of manufacturing, publishing and selling the said books, as heretofore conducted under the said contract, be continued by the parties, the plaintiffs and the defendant, under such receiver, until the final hearing and decision of this cause, or the further order of the court, and that an injunction issue to the said parties respectively, directing and commanding them to act herein as the agents of such receiver, in discharging the several duties and obligations, and doing the several acts, provided to be done in and by the said contract, &c."

This bill and motion are sought to be grounded on the principles which govern courts of equity, in dealing with the assets of a partnership, at its dissolution; and the question, whether or not the contract between the parties to this suit amounted to a partnership or not, was discussed at length on the argument. It is possible that, in some of its features, the agreement may be held to establish a relation closely resembling that of partnership; but I do not now go into that question, because I do not deem it necessary, to enable me to properly dispose of this motion. I will, therefore, assume, for my present purpose, that there was a special, limited, and peculiar partnership established between the plaintiffs and the defendant, in the enterprise set forth. The question then arises—what are the partnership assets upon which this court can bring its power to bear, for the purpose of protecting the interests of the parties thereto? As there is no question raised as to the rights of creditors of the partnership, the whole controversy relates to the alleged conflicting interests of the members of the firm among themselves.

This court can deal only with the assets which belong, in law or equity, to the partnership. What are they? I do not find, from the contract, or from any evidence in the cause, that the partnership acquired any title, either legal or equitable, to any corporeal property about which any dispute has arisen. I think that the stereotype plates, the plates from which the illustrations are printed, and the copyright thereto, are, clearly, the sole property of the defendant, and that all right in their use, in the interest of the plaintiffs, must cease when the partnership expires. Laying out of the case the question touching what is called the "good will," I see no ground upon which it could be insisted that the partnership acquired any title to, or interest in, these plates and copyrights, beyond the right to have them used, for the term fixed by the contract, in carrying out the enterprise.

The only assets, then, which can, in any view, be supposed to belong to the partnership, about which there is any controversy, is this species of incorporeal property called "good will." If this could be deemed, under the peculiar circumstances of this case, to be property, capable of transfer, and possessed of value, its conveyance to the partnership, if it ever was conveyed, did not carry with it the printing establishment of the defendant, nor that portion of it which was employed in printing these books, nor the copyrights of the illustrations. If anything which can be called, in any legal sense, property, was transferred to this partnership, it must have been that incorporeal right of publishing this edition of Dickens, which is described in the bill as a "good will," founded upon the custom of the trade to forbear competition. No corporeal property was embraced in this supposed transfer, by the terms of the contract, and none could adhere to it, as an incident. Good will may adhere to, or spring out of, corporeal property, or a tangible locality or establishment; but I think it would be new doctrine to hold the reverse, and treat the material property as an incident of the good will. Good will must always rest upon some principal and tangible thing, and it has, therefore, been held, that it can never arise as an asset of a partnership, where the members only contribute as capital their professional skill and reputation, however intrinsically valuable these may be.

Now, what is this alleged good will, in the present case, which this court is asked to treat as property, and for the preservation and beneficial sale of which its power is invoked, to continue the operation of this contract beyond the time fixed by its terms? It confessedly rests upon no common law of the country, recognized and administered by judicial tribunals. If it has any foundation at all, it stands on the mere will, or, as it is termed in the bill, the "courtesy" of the trade. True, it is called by the plaintiffs, the "custom" of the trade, and is alleged in the bill to be a "reasonable custom." But I apprehend that it is very far from being a legal custom, furnishing a solid foundation upon which an inviolable title to property

can rest, which courts can protect from invasion. It can, therefore, hardly be called property at all—certainly not in any sense known to the law. It may be an advantage to the party enjoying it for the time being, but its protection rests in the voluntary and unconstrained forbearance of the trade. I know of no way in which the publishers of this country can republish the works of a foreign author, and secure to themselves the exclusive right to such publication, in any form of edition, except so far as new matter or illustrations are incorporated into it, and then, to that extent, made a subject of copyright. The ornamental designs of the binding or dress of the volumes might possibly be patented; but nothing relating to the edition can come under the protection of the law, except what is new and original, and is covered by copyright or letters patent. For this court to recognise any other literary property in the works of a foreign author, would contravene the settled policy of congress, and be an attempt to enter the field belonging exclusively to the national legislature. Of the wisdom of our legislative policy I have nothing to say here.

This alleged good will rests, therefore, upon no legal foundation, and, consequently, is not a partnership asset possessing any legal value. The books were printed by the defendant at his printing establishment in Cambridge, Massachusetts, and were published and sold by the plaintiffs, at their book store in New York; but neither of these establishments are partnership assets, which this court can decree to be sold, so as to carry with them a good will, in the ordinary sense in which that term is regarded as descriptive of property. Neither are the types, plates, or copyrights, from and under which the edition was printed, such assets. The only thing the court could decree a sale of would be this peculiar advantage, called the good will of the trade toward this particular edition. If this court were to appoint a receiver, he would have nothing to take, but this peculiar incorporeal right or advantage; and, should the business be continued, under this contract, for a period of years, the receiver would take nothing else, as there is nothing else belonging to the partnership which the parties are not agreed between themselves to take, without the interposition of the court. At the end, the court could decree the sale of nothing else. The buyer would take nothing valuable but what he would have been entitled to before, except the negative advantage of having the parties to this suit enjoined against the further use of the implements or materials by which this edition has been produced. This the court would not do if it had the power, because it would tend to destroy, and not conserve, the property. As it could not compel the sale and transfer of these implements and materials to the purchaser of the good will, but only forbid their further use by the defendant, its decree would be only productive of mischief to the defendant and the public, without conferring any benefit upon the plaintiffs, for the sale of this advantage called good will would bring nothing, as it would be worth nothing. The motion is, therefore, denied.

SHELDON (NIGHTINGALE v.). See Case No. 10,265.

SHELDON (ROBERTS v.). See Case No. 11,916.

SHELDON (STEAM CUTTER CO. v.). See Case No. 13,331.

Case No. 12,749.

SHELDON et al. v. SWARTWOUT.

[47 Niles' Reg. 189.]

District Court, S. D. New York. Nov. 12, 1834.

CUSTOMS DUTIES — CLASSIFICATION FOR DUTY — CAMBRIC HANDKERCHIEFS.

[Cambric linen handkerchiefs, cut from the piece, and hemmed and stitched abroad, are not dutiable as millinery, ready-made clothing, or a manufacture of flax, but are free of duty, as "linen cambric." Tariff Act 1832 (4 Stat. 583).]

This was an action to recover $15,804, paid by plaintiffs [F. H. Sheldon & Co.] to defendant [Samuel Swartwout], under the following circumstances: The plaintiffs are extensive importers, residing in this city, and in the month of April last, imported a quantity of cambric linen or Batiste handkerchiefs, by the ship Charlemagne, from France. The handkerchiefs were cut off from the piece, and hemmed and stitched in France. On their arrival here, they were entered as free goods; but the collector asserted that they were subject to duty, and insisted on a new entry. In compliance with the collector's demand, the plaintiffs made a new entry of the goods, and passed a bond for the duty; but, while doing so, informed the collector that it was compulsory on their part, and asked him whether, in case they refused to pay this bond, he would take their bond for the duty that might accrue on other importations. The collector answered them in the negative, and in order to avoid the inconvenience that must otherwise result to them, they paid the bond, and served him with a written notice that they would bring an action to recover back its amount. The collector claimed a duty of 25 per cent. on the articles, under the tariff of 1832 [4 Stat. 583], which subjects all manufacturers of hemp, flax and millinery of all kinds, to a duty of 25 per cent., and averred that the article in question came under the denomination of millinery. Mr. Price, counsel for defendant, also contended, that if the article did not come under the denomination of millinery, it was to be considered a manufacture of flax, also subject to a duty of 25 per cent., and if it was neither of these articles, it might then be considered an article of ready-made clothing, which was subject to a duty of 50 per

cent. It was admitted on the part of the defendant, as a matter of course, that linen cambrics and linen cambric handkerchiefs in the piece, are free from duty; but it was contended that as the handkerchief had been cut off from the piece, and hemmed and stitched in France, it no longer came under the denomination of linen cambric, but assumed a new character, and was either millinery, a manufacture of flax, or ready-made clothing. The defendant, however, chiefly rested his claim on the ground that the article was millinery; and Mr. Coe, an appraiser at the custom house, produced his instructions from the comptroller of the treasury, informing him that the article came under the head of millinery, and was to be charged with duty as such. On the other hand the plaintiffs contended that the article was linen cambric, and as such was free, under the act of 1833, which says that "bleached and unbleached linen, table linen, linen napkins and linen cambrics, are exempt from duty."

A great number of witnesses were examined on both sides. The counsel for both parties, and also the court, took every possible pains to elicit from them a decided opinion—First, whether they considered the article millinery; and, secondly, whether it was denominated cambric by merchants or persons dealing in the article. As to its being millinery, almost all the witnesses deposed that it could not come under that denomination. There was also scarcely any evidence to show that the article could be considered ready-made clothing; and the only question which seemed to admit of any great doubt, was, whether the article, after it was cut from the piece, and hemmed and stitched in the form of a handkerchief, could be still denominated linen cambric, and as such be imported free of duty. On this part of the question the evidence was rather vague and inconclusive; but on the whole, made in favor of the assumption that the article came under the denomination of linen cambric. Counsel for defendant raised a question as to whether the plaintiffs could maintain the present action, as they had voluntarily paid the bond; and the court reserved this question for future consideration.

THOMPSON, Circuit Justice, charged the jury that the government claimed the duty on the article as being millinery; and it was for the jury to decide whether it came under that denomination. They had heard the definition given of it in dictionaries and by the witnesses, but it would also be well to look at the manner in which it was designated by law, and see if congress meant to include handkerchiefs under the denomination of millinery. The act in defining what belongs to millinery, says, "fans, flowers, feathers, caps for women, and millinery of all kinds." When the act therefore began its description by enumerating a series of articles belonging to the head, and then said, "millinery of all kinds," it was fair to suppose that the general term was intended to apply to such articles. According, also, to most of the witnesses, the word millinery was only applicable to ladies' head dress, and in the judgment of the court, the article in question could not properly be denominated millinery. That the article is a manufacture of flax there could be no doubt; and as such the plaintiffs should show that it came under the exemptions of the law relative to linen fabrics. Many witnesses had been examined on the subject, but could not agree as to what constituted linen cambric. Most of them, however, said that it meant pièce goods sold by the yard; and when asked what they understood the handkerchief to be, they said it could not be called linen cambric alone, but required a further designation, and that the term linen cambric did not include linen cambric handkerchiefs. At the custom house, however, handkerchiefs in the piece are considered linen cambric, and admitted free. The question, then, was, whether the handkerchief being cut off and hemmed, took it out of the denomination of linen cambric. If so, it was but reasonable that the government should show it. It was said that the article came under the denomination of millinery, or ready-made clothes; but was there sufficient evidence to enable them to say it was either? If not, then it might come under the denomination of a manufacture of flax, unless it was exempted by the act of 1833 [4 Stat. 629] as linen cambric. It was said, that the reason why this article had been subject to duty, was with a view to protect the labor and industry of the country; but if that was the object which government had in view, it would have adopted a similar course regarding similar articles, and it had been shewn to the jury that silk handkerchiefs, veils and other made up articles were admitted free of duty; and it was but reasonable to suppose that the same principle was to be extended to linen cambric handkerchiefs. The object of congress in admitting silk free of duty, was to encourage its importation; and it was the same in relation to linens. The question then was, did the article amongst buyers and sellers come under the denomination of linen cambric? If so, it was exempt from duty; if not it was subject to it.

The jury retired for a short time and returned a verdict for the plaintiffs of $162.60, being the amount of the money paid the collector with interest.

SHELDON (UNITED STATES v.). See Case No. 16,270.

SHELDON v. The WATER WITCH. See Cases Nos. 1,971 and 2,895.

Case No. 12,750.

SHELLEY et al. v. ELLISTON.

[18 N. B. R. 375; 26 Pittsb. Leg. J. 92.] [1]

District Court, D. Kansas. 1878.

BANKRUPTCY—ATTACHMENT—JUDGMENT—LIEN.

1. Where a creditor commenced suit, and attached goods and chattels of the debtor, and obtained judgment and an order of sale of the attached property, and petition in bankruptcy was subsequently filed and the debtor adjudged a bankrupt, the bankruptcy proceedings do not invalidate the judgment lien, although no execution or order of sale had been issued on the judgment.

[Cited in Claridge v. Kulmer, 1 Fed. 402.]

2. The attachment had become merged in the judgment, and section 5044 of the bankrupt act only operates to dissolve attachments pending when the bankruptcy proceedings are commenced.

Clough & Wheat, for plaintiffs.

Mills & Wells, for defendant.

FOSTER, District Judge. The plaintiffs, J. M. Shelley & Co., present their petition, and ask for an order that said assignee pay over certain moneys, being the proceeds of a lot of goods on which said plaintiffs claim to have had a lien. On the 16th of August, 1877, Shelley & Co. commenced suit against Mary V. Weisbaugh, before a justice of the peace, to recover the sum of two hundred and sixty-nine dollars, and on the same day caused an attachment to be issued and levied upon a lot of goods of said Weisbaugh. On the 20th of the same month the plaintiffs recovered a judgment for said amount with interest and costs, and an order on the justices' docket that said attached goods be sold in satisfaction of said judgment, but no order of sale or execution was issued by the justice on said judgment until the first day of September, 1877, although the same was dated August 20th. In the meantime, to wit, August 25th, the said Mary V. Weisbaugh filed her voluntary petition in bankruptcy, and on the same day was adjudged a bankrupt, and the assignee was shortly thereafter chosen by the creditors. Before any sale of said goods was had on said judgment, the assignee took possession of, and sold the same, and now the plaintiffs seek to recover the proceeds thereof.

Under section 5044 of the bankrupt act the assignment to the assignee relates back to the commencement of the bankruptcy proceedings, and vests the title of all property, real and personal, of the bankrupt in the assignee, notwithstanding the same is then attached on mesne process, and it dissolves any such attachment made within four months before the bankruptcy proceedings.

The first point made by the petitioners is that the date of the execution is conclusive as to the time it was issued. That would undoubtedly be correct if the justices' docket did not show the date to be otherwise. The docket shows it was issued on the first day of September. The law requires the justice to keep a docket, and to enter thereon the date of the issue of the writ (Gen. St. Kan. p. 815, § 188), and the next section makes such entries evidence to prove the facts stated therein. I think the finding of the register as to the date the execution was issued is correct.

The second point made by the plaintiffs is that the adjudication in bankruptcy did not relinquish their lien on the property; that the attachment had become merged into the judgment, and the property having been condemned by the court to pay the judgment was not held on mesne process, and that it mattered not that no order of sale or execution had been issued to the constable to sell the same. It is well settled by all the authorities that if the plaintiffs' claim had not gone to judgment prior to the commencement of the bankruptcy proceedings, the attachment would have been ipso facto dissolved by such proceedings, and no lien would have existed. On the other hand it is equally as well settled that if their claim had gone to judgment, and an execution, or what is the same thing, an order of sale, had been issued thereon and levied on the property, their lien would have been good as against the bankruptcy proceedings.

But this case is unlike either, and I can find nothing in the books directly in point. In the case of Henkelman v. Smith [42 Md. 164], decided by the court of appeals of Maryland, goods had been attached on mesne process, and sold pendente lite by order of the court; judgment was afterwards recovered, and the goods condemned to pay it. Bankruptcy proceedings were commenced subsequent to the judgment, but before an order had been made to pay over the proceeds to the judgment creditors. The court held that the assignee was not entitled to the money; that section 5044 of the bankrupt act referred only to attachments pending at the time the petition in bankruptcy was filed, and that by the judgment the proceeds of the property became vested in the judgment creditors. That case was much like the case at bar, except the goods had been sold, and the proceeds stood in place of the property.

In the case of Howe v. Union Ins. Co., 42 Cal. 528, the creditor brought suit and attached by garnishment money belonging to the debtor in the possession of the insurance company. Judgment was recovered and execution issued and the sheriff demanded the money of the garnishee. Subsequently proceedings in bankruptcy were commenced and the debtor was adjudged a bankrupt. The court held, as the judgment creditor had made no levy on the fund, that neither the judgment nor execution created

[1] [Reprinted from 18 N. B. R. 375, by permission. 26 Pittsb. Leg. J. 92, contains only a partial report.]

any lien on the fund other than that under which it had been previously held. The court says: "But where there is no money or property in the hands of the sheriff under the attachment, prior to the judgment, I do not perceive how the mere fact that a judgment was rendered, and an execution issued but not levied, can have the effect to convert the attachment lien upon a fund in the hands of a garnishee into a lien upon final process." From the foregoing remarks it will be seen that the court makes no intimation as to the effect of a judgment on attached property, actually in the hands of the sheriff at the time. In the case of Hudson v. Adams [Case No. 6,832], the court holds that when a judgment is recovered in an attachment proceeding, and process issued thereon to sell the attached property, its lien relates back to the service of the attachment, and there is no attachment process in existence upon which section 5044 can operate. "That this section by its own terms relates to existing attachments," &c. Now it seems to me that this, in general terms, is the correct construction of that section. That it only operates on attachments pending at the time bankruptcy proceedings are commenced, and when the judgment is rendered, and the property in custody is condemned for the payment thereof, there is no longer any attachment in existence. It is merged in the judgment, and the goods are not held by virtue of the attachment, but by virtue of the judgment.

Section 5075 of the bankrupt act provides for saving and protecting valid liens on the property of the bankrupt. Was it necessary that an order of sale on this judgment should have been in the constable's hands at the commencement of the bankruptcy proceedings, in order to save the plaintiff's lien? What additional sanctity could that give it? It is quite clear that no new levy on the goods was required under the laws of Kansas. Gen. St. p. 786, § 47. It says: "So much of the personal property, if any, as may be necessary to satisfy the judgment, shall be sold by order of the justice under the same restrictions and regulations as if the same had been levied on by execution." I can see no reason why the lien of this judgment would be any more complete because an order of sale had been issued to carry it into execution. The validity of this lien does not, as in ordinary cases of execution, depend upon a levy to make it good. The court having full jurisdiction has adjudicated that the property then in its custody shall be sold to pay the judgment. I cannot think that section 5044 can annul or in any manner affect that adjudication, and unless the plaintiffs have lost their lien by voluntarily relinquishing the property or have waived it by their proof of debt and accepting dividends, they are entitled to the order prayed for. The report of the register will be recommitted for further proceedings.

SHELLMIRE (UNITED STATES v.). See Case No. 16,271.

Case No. 12,751.

SHELLY v. BRANNAN.

[2 Biss. 315; 4 Fish. Pat. Cas. 198.] [1]

Circuit Court, S. D. Illinois. June, 1870.

PATENTS — PRELIMINARY INJUNCTION — WHEN GRANTED—EQUITABLE REMEDY—LIMEKILNS.

1. If the rights under the patent are clear, and the infringement by the defendant free from doubt, and particularly after use of the invention by the patentee for a considerable time without controversy, the modern practice is not to compel the plaintiff in the first instance to proceed at law.

2. Under such circumstances it is the general practice to apply to the equitable side of the court for relief, which in a proper case is given without hesitation.

3. The patent never having been the subject of litigation, the complainant was ordered to file an injunction bond before the issue of the writ.

[Cited in Tobey Furniture Co. v. Colby, 35 Fed. 594.]

4. Griscom and Denn's patent for limekilns construed.

In equity. Motion for a provisional injunction to restrain the defendants from infringing letters patent [No. 18,635] for "an improvement in limekilns," granted to Powell Griscom and Charles S. Denn, November 17, 1857, to which a specification of additional improvements was annexed February 23, 1858 [No. 192].

The nature of the invention consisted in an arrangement embracing, for united operation, the following features: (1) An inverted, oblong, pyramidal lime basin in the base of the kiln, having discharge and clearing passages. (2) Fire grates and ash-pits, extending from the front to the back of the basin on each of the oblong sides of the same, but divided by central partitions. (3) A pyramidal burning stack, with a chamber of oblong, quadrilateral form at its base, and gradually running into an oval form as it terminated, and having fire chambers extending from front to back, but divided at the center by partitions, and having also lateral flame and hot air passages leading directly into the chamber of the pyramidal stack along the whole width of the quadrilateral portion of the burning chamber.

The disclaimers and claim were as follows: "We do not wish to be understood as claiming any of the parts separately; but we claim the peculiar combination and arrangement of the parts and for the purposes set forth."

The claim of the additional improvement was as follows: "We claim the combination of the transverse partition with the oblong, inverted pyramidal basin, oblong stack and enlarged draft flues, when said flues are

[1] [Reported by Josiah H. Bissell, Esq., reprinted by Samuel S. Fisher, Esq., and here republished by permission.]

used as auxiliary furnace doors, the whole being arranged substantially as and for the purpose set forth."

Samuel S. Boyd, for complainant.
Stuart, Edwards & Brown, for defendant.

DRUMMOND, Circuit Judge. This is an application for an injunction by the complainant, as the assignee for the county of Madison, in this state, for a patent issued to Powell Griscom and Charles S. Denn, November 17, 1857, for an improvement in limekilns, together with additional improvements made by them thereto on February 23, 1858. The additions referred to in the latter improvement seem to be connected mainly with the construction of a central partition wall, which divides the basin stack and drain pits, thus constituting substantially two chambers or limekilns, out of one; and as the defendant has not used this, the improvement of February 23, 1858, need not be further considered.

The controversy turns on the nature of the original improvement of November 17, 1857; and as no serious question is made upon the validity of the patent of Griscom and Denn, upon the fact whether the defendant has violated the first patented improvement by the construction and operation of the limekiln used by him at Alton.

Perhaps the claim of the patentees might have been described with more clearness and precision in the schedule. The language is that they do not claim the various parts described separately, but the peculiar arrangement and combination of the parts substantially as described, and for the purposes set forth.

In examining the schedule of their invention it seems to consist of a peculiarly constructed lime basin at the bottom of the kiln, of an inverted, oblong, pyramidal form of fire grates and ash-pits, extending from the front to the back of the basin and on each side of the same and on both sides of the kiln; but the fires are divided by a central partition so that the wind cannot blow through the ash-pits and furnaces from one side to the other of the limekiln, and having open air passages from the furnaces to the stack, the stack itself being constructed of a quadrilateral oval form. These parts are described in detail, and by reference to the drawings annexed to the schedule. Applying the claim to the description, what the patentees regarded as their invention was the combination of these various parts, as set forth by them, and for the purposes named.

Does the defendant use the limekiln thus patented to Griscom and Denn, and of which the plaintiff is the assignee for the county of Madison? We have no model produced by the complainant, as there should have been, of the limekiln described in the schedule, and covered by the original improvement of November 17, 1857; we have, therefore, only the description contained in the schedule and the reference to the annexed drawings to determine the nature of the invention.

There is a model produced which is alleged to be a correct representation of the limekiln used by the defendant, and comparing the affidavits and pleadings of the parties, it remains only to determine upon the substantial identity of the two limekilns. Undoubtedly there are points of distinction as insisted on in the affidavits filed by the defendant.

But treating the model offered in evidence as a true representation of the defendant's kiln, as I believe from the evidence it is, then the two kilns appear to be essentially the same. The basin and stack are substantially of the same form. The defendant's kiln, like the plaintiff's has an oblong, inverted, pyramidal basin, and a quadrilateral oval stack. It has, like the plaintiff's the same construction of furnaces, grates, ash-pits, air passages and central partition to prevent the wind from blowing through the kiln, a peculiarity not known in Barnard's kiln, of which defendant's claims to be a pattern. In these and many other particulars which might be named, the kilns of the plaintiff and defendant seem to be substantially alike. If the kiln of the plaintiff is protected by the patent to Griscom and Denn, of November 17, 1857, which is not seriously controverted, then the defendant is infringing on the rights of the plaintiff.

Some objection was made to the interposition of the court by an injunction before the right at law had been established, and because that law could furnish adequate relief. But the modern practice is, if the rights under the patent are clear, and the infringement by the defendant free from doubt, and particularly after the use for a considerable time, without controversy, of the invention patented, not to compel the plaintiff in the first instance to proceed at law.

In many cases a remedy in that way is found to be incomplete; and, therefore, now in the contingency named, it is the general practice to apply to the equitable side of the court for relief which in a proper case is given without hesitation.

The injunction will, therefore, be granted in this case, but as the patent of Driscom and Denn has never been the subject of litigation, either at law or equity, and the defendants may desire the case should go to proofs and hearing, I will, if the defendant requires it, direct, before the writ issues, a proper injunction bond to be filed.

Case No. 12,752.

SHELTON et al. v. AUSTIN.

[1 Cliff. 388.] [1]

Circuit Court, D. Massachusetts. May Term, 1860.

CUSTOMS DUTIES—DAMAGE DURING VOYAGE—APPRAISAL.

1. If goods from a foreign country have received damage in the course of the voyage, the importer, in order to obtain a reduction of duties, must demand an appraisal before entry.

2. If he enter the goods at the custom-house at the invoice price before demanding an appraisal, he must pay duties assessed according to the invoice price, and is entitled to no reduction on account of the damage.

[Cited in Kimball v. Goodrich, 10 Wall. (77 U. S.) 452.]

This was an action of assumpsit brought by the plaintiffs [Philo S. Shelton and others] against the defendant [Arthur W. Austin], as collector of the port of Boston, to recover back certain duties, which, as they alleged, the defendant unlawfully exacted of them, and which they paid under protest. The case was presented upon an agreed statement of facts, of which the following is the material part: It was agreed that the plaintiffs imported certain hogsheads, tierces, and barrels of molasses into the port of Boston, in the bark or vessel called the Meldon, from Matanzas, in the island of Cuba; that at the period of exportation of the said molasses from the port of Matanzas, in the island of Cuba aforesaid, it was a sound and sweet article; and that on its importation into the port of Boston the same was soured, and that said souring took place during the voyage aforesaid. It was further agreed that there was a material difference between the value of sweet and sour molasses, at the port of exportation and also at the port of importation; that sweet molasses was of a greater value than sour molasses, and that this molasses was entered at the full value of sweet molasses, and the plaintiffs then demanded to have the damages appraised, ascertained and allowed in the computation of duties; and that thereupon the said defendant caused the same to be appraised and ascertained, but afterward, under instructions of the honorable secretary of the treasury, refused to allow the same, and duties were exacted by him on the invoice value, and were paid, but under protest in writing filed with the said collector at the time of the payment thereof.

Milton Andros, for plaintiffs.

C. L. Woodbury, for defendant.

CLIFFORD, Circuit Justice. All importations subject to an ad valorem duty are required to be appraised at the actual market value or wholesale price, at the period and place of exportation; and, to enable the collector to perform that duty, importers are required to make an entry of their respective importations, which must be accompanied by the invoice, and it is provided that, if the appraised value of the goods exceeds by ten per cent or more the value declared on the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected, and paid a duty of twenty per centum ad valorem on such appraised value. Whenever the invoice value is too low, the importer is allowed to make whatever additions on the entry he may think proper, so as to bring up the entered value to the requirement of the law of congress, in order to avoid that additional charge, but there is no corresponding provision authorizing the merchant to make any deduction from the invoice valuation, on any pretence whatever.

Short quantity or goods lost or destroyed during the voyage may be deducted, because it cannot be held that such goods ever arrived in port, and the entry at the custom-house is not required to embrace merchandise which was never imported into the United States. Such an entry at the custom-house is required in order that the actual market value of the importation may be appraised and ascertained, and consequently importers are allowed to make such additions to the invoice valuation as may be necessary to make it conform to the truth; but it is provided by the eighth section of the act of the 30th of July, 1846, that under no circumstances shall the duty be assessed upon an amount less than the invoice value, any law of congress to the contrary notwithstanding. 9 Stat. 43; 11 Stat. 199, § 2. Beyond question that provision is still in force, but I am of the opinion that congress never intended that it should have any application whatever to goods damaged during the voyage, or to goods imported which were unaccompanied with the original invoice. Where goods were damaged during the voyage, or were not accompanied with the original invoice of the cost thereof, the importation was subject to appraisement by the act of the 31st of July, 1789, and it was provided that the duties upon such goods should be estimated according to such valuation. 1 Stat. 41, § 16. Similar provision was made by the thirty-seventh section of the act of the 4th of August, 1790, and its benefits were extended to articles charged with a specific duty, whether the duty was levied by number, weight, or measure. 1 Stat. 167. More detailed provision, however, was made upon the subject by the act of the 2d of March, 1799, which is the act relied on by the plaintiffs. 1 Stat. 665. Merchandise damaged during the voyage, or of which entry was incomplete, either for the want of the original invoice or for any other cause, was required by the fifty-second section of that act to be conveyed in the parcels or packages containing the same to some warehouse or storehouse to be designated by the collector, there

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

to remain at the expense and risk of the owner or consignee "until the particulars, cost, or value" was ascertained in the mode or modes therein prescribed. Articles which had been damaged during the voyage, whether subject to a duty ad valorem, or which were chargeable with a specific duty, either by number, weight, or measure, were required to be appraised, and the appraisers were directed to ascertain and certify to what rate per cent the goods were damaged. And it was also provided that the rate or percentage of damage so ascertained and certified should be deducted from the original amount, subject to duty ad valorem, or from the actual or original number, weight, or measure on which the specific duties would have been computed. Importers were required, by the supplemental act passed on the 30th of April, 1818, to declare on oath that the invoice of the goods produced, if the goods were subject to an ad valorem duty, exhibited the true value of the goods at the place from which they were imported, and it also prescribed certain new and important regulations touching the appraisement of imported goods and the collection of ad valorem duties. Among other things, the twelfth section of the act provides that in all cases where the appraised value shall be less than the invoice value the duty shall be charged on the invoice value in the same manner as if no appraisement had been made. But this provision must have reference only to appraisements made on entry at the custom-house, when the entry is required to be accompanied by the invoice, because it is only in such cases that the entry is necessarily based on the invoice, and this construction is greatly strengthened by the consideration that the fifteenth section of the same act makes a special provision for the assessment of duties upon goods damaged in the course of the voyage, and goods taken from a wreck are by that section placed upon the same footing, and in regard to both classes it is expressly provided that before they shall be admitted to entry they shall be appraised in the manner provided by the ninth section of the act which requires the appraisers to report to the collector the true value thereof when purchased, at the place or places from which the same were imported. Comparing the two sections together, therefore, it is obvious that the former has no application whatever to the regular proceedings prescribed for ascertaining and assessing duties upon goods damaged in the course of the voyage, or upon goods taken from a wreck. Prior to the act of the 20th of April, 1818, there was no act of congress admitting wrecked goods to entry under any circumstances, or any provision upon the subject, other than what related to goods damaged during the voyage. That act was extended by the act of the 18th of April, 1820, and was in full force when the appraisement act of the 1st of March, 1823, went into operation. 3 Stat. 563, 736. Nothing can be more certain than the fact that the twenty-first section of the last-named act prohibits goods damaged in the course of the voyage, and goods taken from a wreck, from being admitted to entry until the same shall have been appraised in the manner provided in the sixteenth section of the same act. By the sixteenth section of the act, the appraisers are required to report the true value thereof, according to the fifth section of the act; and by the fifth section of the act it is provided, in effect, that ad valorem rates of duty shall be estimated by adding all charges, except insurance, to the actual cost of the goods, if the same were purchased, or to the actual value thereof if procured otherwise than by purchase, or to the appraised value if the same were appraised, and also a certain per centum on the cost or value, depending as to the rate on the place or country from which the goods were imported.

Reference is made to these details only for the purpose of remarking that goods damaged in the course of the voyage are as clearly required to be appraised before they can be admitted to entry as goods taken from a wreck; and to verify that remark it is only necessary to refer again to the twenty-first section of the act, which, after expressly making that requirement in regard to the latter class, goes on to provide that the same proceedings shall be ordered and executed in all cases where a reduction of duties shall be claimed on account of damage which any goods shall have sustained during the voyage. All such importations are by that act classed with goods taken from a wreck, and are required to be appraised before they can be admitted to entry; and the twenty-first section of the act also provides that, in all cases where the owner, importer, consignee, or agent shall be dissatisfied with such appraisement, he shall be entitled to the privileges provided in the eighteenth section of the act. Recurring to the eighteenth section of the act, it will be seen that it makes provision for an appeal on the part of the merchant, and a second appraisement, and in case the merchant is still dissatisfied it is made lawful for him to refer the case to the secretary of the treasury. But, whenever the case is so referred, the secretary of the treasury is authorized and empowered to decide thereon, or to require further testimony in the case in such manner as he may deem proper, and to order the goods to be entered accordingly.

Appraisement is to be made, in the first place, by the appraisers appointed under the sixteenth section of the act; but in case the merchant is dissatisfied with their report, he may employ, at his own expense, two respectable resident merchants, who, with the government appraisers, shall examine and inspect the goods in question; and after such examination and inspection they are required to report the value thereof, if they agree

therein, and if not, the circumstances of their disagreement to the collector. Where the appraisers disagree, the practice is for the collector to decide the matter in difference by adopting one or the other valuation, as he may deem just, unless the merchant elects to refer the case to the secretary of the treasury; but if he does so elect, the decision of the department is final and conclusive, and the entry must conform to their decision. Belcher v. Linn, 24 How. [65 U. S.] 522; Rankin v. Hoyt, 4 How. [45 U. S.] 327; Stairs v. Peaslee, 18 How. [59 U. S.] 524. Entry of the goods must be made before the duties can be assessed, but it cannot be made during the pendency of any of these proceedings, because it must be founded on the report of the appraisers, if they agree, or if not, on the decision of the collector, or of the secretary of the treasury. Undoubtedly some of the regulations prescribed in the act under consideration are repugnant to the provisions of the fifty-second section of the act of the 2d of March, 1799, so far as the latter have respect to goods damaged during the voyage, and to that extent the provisions of the last-mentioned act must be considered as modified or repealed. None of the provisions of the act of the 1st of March, 1823, however, have any respect to merchandise of which entry has been made incomplete, either for the want of the original invoice or for any other cause, but in respect to all such importations and entries the proceedings must still conform to the antecedent law upon that subject. Whenever a vessel arrives from a foreign port having merchandise on board which is subject to duty, it is incumbent on the master in every case to present his manifest, and notify the collector of the arrival of the vessel; and when that is done, and the owner, importer, consignee, or agent has presented a true invoice of the goods to the collector, he may then demand, if the goods have received damage in the course of the voyage, that the same shall be appraised in the manner prescribed in the regulations contained in the act of the 1st of March, 1823; and if he acquiesces in the report of the appraisers, and does not refer the case to the secretary of the treasury, he may claim, as matter of right, to have the deduction made as prescribed in the fifty-second section of the act of the 2d of March, 1799. Although the goods were damaged in the course of the voyage, yet the importer is not obliged to demand that the same shall be appraised. He may, nevertheless, make entry of the goods in the usual way as sound articles; but in that event the collector has no authority to assess the duties upon an amount less than the invoice value. That rule for the assessment of duties was first prescribed in the act of the 20th of April, 1818, and it has been continued to the present time. 3 Stat. 433; 9 Stat. 213; 11 Stat. 199.

It is insisted by the defendant that this provision in the act of the 30th of July, 1846, operates as a repeal of the fifty-second section of the act of the 2d of March, 1799; but it is obvious that the proposition cannot be sustained.

Looking at the practical operation of the revenue system, it is clear that the two provisions have no necessary connection the one with the other, because they respectively relate to proceedings altogether different. Duties are assessed upon goods entered at the custom-house according to the invoice valuation and the value given in the entry, unless the goods are marked up by the local appraisers. Additions are often made by the local appraisers to the invoice valuation; and in that event the law allows the merchant an appeal to merchant appraisers, whose decision, by the act of the 3d of March, 1851, is declared to be final. But the act of the 3d of March, 1857, re-enacts the proviso contained in the eighth section of the act of the 30th of July, 1846, and extends the limitation to the entered value of the importation, so that under no circumstances can the duty be assessed upon an amount less than the invoice or entered value. On the other hand, goods damaged in the course of the voyage are to be appraised before entry at the custom-house, under the regulations contained in the act of the 1st of March, 1823, and then the entry must conform to that appraisement. Entry in the one case is founded upon the invoice, with such additions thereto as the merchant may see fit to make in order to bring up the valuation to the actual market value, and in the other upon the report of the appraisers. Under the first proceeding, the duties cannot be assessed upon an amount less than the invoice valuation; but under the latter proceeding, the duties must be calculated and assessed according to the report of the appraisers, wholly irrespective of the valuation given in the invoice. Applying these rules of law to the present case, it is obvious that the instructions of the secretary of the treasury to the collector were correct, and that the claim of the plaintiffs cannot be sustained. They did not cause the goods to be appraised under the law applicable to goods damaged in the course of the voyage, and no such appraisement has ever been made; but, instead thereof, they entered the goods at the custom-house according to the invoice valuation, took out a damage warrant, caused the amount of damage to the goods to be appraised and ascertained, and then claimed to have the amount deducted from the invoice and entered value. Referring to the acts of congress already cited, it is clear that the request of the plaintiffs could not be granted either by the collector or by the department without violating a positive law; and it is no answer to this objection to say that the invoice valuation was the full value of the article in a sound state, because that

admission does not give any different character to the proceeding on which the instructions of the secretary of the treasury were based. Protest was made upon the proceedings as they actually took place, and it does not vary the rights of the parties now to admit that the molasses was entered at the full value of sweet molasses.

That admission cannot change the fact that the goods were entered at the custom-house before any appraisement was made according to law, or that the duties were exacted and paid on the invoice valuation; and if not, then clearly the duties could not lawfully be assessed upon any less amount. Several other questions were discussed at the bar which it is not necessary to decide at the present time, as the point ruled will dispose of the case. According to the agreement of the parties, a verdict must be taken for the defendant.

[NOTE. The cause came on for final hearing and, pursuant to the direction of the court, judgment was entered for defendant. That judgment was affirmed by the supreme court, where the cause was carried by writ of error. 5 Wall. (72 U. S.) 113.]

SHELTON (CHURCH v.). See Case No. 2,714.

SHELTON v. The MARY. See Cases Nos. 9,182-9,191.

SHELTON (UNITED STATES v.). See Case No. 16,272.

Case No. 12,753.

In re SHEPARD.

[1 N. B. R. 439 [1] (Quarto, 115); 7 Am. Law Reg. (N. S.) 484; 1 Am. Law T. Rep. Bankr. 49.]

District Court, N. D. New York. March 31, 1868.

BANKRUPTCY—CITIZENSHIP—LIMITATIONS—PROVEN DEBT—DISCHARGE—WHO MAY OPPOSE.

1. A debt against a bankrupt's estate may be proven before a United States commissioner, although the bankrupt and creditor both reside in the same judicial district.

[Cited in Re Merrick, Case No. 9,463.]

2. A debt barred by the statute of limitations of the state in which the bankrupt resides, may still be proven against his estate in bankruptcy.

[Cited in Re Cornwall, Case No. 3,250; Re Noesen, Id. 10,288; Nicholas v. Murray, Id. 10,223.]

3. A creditor who, after making his deposition to prove his debt, retains possession of the deposition, and does not allow it to pass into the hands of the assignee in bankruptcy, is not a creditor who has proven his debt.

4. Any creditor of a bankrupt may oppose the discharge, whether he shall have proven his debt or not.

[Cited in Re Boutelle, Case No. 1,705; Re Groome, 1 Fed. 469.]

[Cited in Burpee v. Sparhawk, 108 Mass. 114.]

[1] [Reprinted from 1 N. B. R. 439, by permission.]

[In the matter of Luther Shepard, a bankrupt.]

E. Gorham, for bankrupt creditor.

E. Gardner, for creditors.

HALL, District Judge. This case came on to be heard upon the petition of the bankrupt for "a full discharge from all his debts, and a certificate thereof;" and upon due proof of the service and publication of notice of the order to show cause against such discharge, as required by the bankrupt act [of 1867 (14 Stat. 517)], the general orders in bankruptcy, and the rules of this court. At the time fixed for showing cause, two of the bankrupt's creditors, whose debts were set forth in the schedules annexed to his original petition, entered their appearance, and proposed to contest his right to a discharge; whereupon it was objected that they were not "creditors who had proven their debts," and consequently had no right to be heard. It was also insisted that the alleged debts, which such creditors had attempted to prove, were barred by the statute of limitations of New York, where such debtor and creditors resided; and that such alleged debts, being so barred by the statute, the parties appearing were not creditors, and had no right to contest the bankrupt's discharge. It was conceded that a deposition in proper form for the proof of the debt of one of the creditors had been made before a commissioner appointed by the circuit court, and that such deposition had been duly transmitted to the assignee; but it was insisted that the commissioner had no authority to take proof of such debt, inasmuch as the creditor was, at the time, a resident of this judicial district.

The question thus presented is not free from doubt. The 22d section of the bankrupt act declares "that all proofs of debts against the estate of the bankrupt, by, or in behalf of, the creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall be made before one of the registers of the court in said district, and by, or in behalf of, non-resident creditors before any register in bankruptcy in the judicial district where such creditors, or either of them, reside, or before any commissioner of the circuit court authorized to administer oaths in any district." There is, in the language of this provision, no clear indication that congress intended that the right to prove their debts before a commissioner should be confined to creditors not residing within the judicial district in which the proceedings were pending. The sentence is punctuated by commas only, so that we have not even the indication of that intention, which would have been given if a semicolon, instead of a comma, had been inserted after the words, "said district;" but on the other hand there is not the indication of a different intention which would have been given if a semicolon, instead of a comma, had been inserted after the word "reside." So far as the punctuation,

the particular language, or the grammatical construction of the sentence furnish any evidence of the intention of congress in respect to this question, it is more favorable to the construction which would sustain the authority of the commissioners in this case than to the opposite construction; for the concluding portion of the sentence is, in these respects, as closely connected with the first portion of the sentence as with the second or middle portion. It is true that the concluding portion of the sentence is separated from the portion of it which provides for the proof of debts by resident creditors, but this separation furnishes no reliable evidence that congress intended to deny to resident creditors the right to prove their debts before a commissioner, for the connection of the three provisions in one sentence necessarily required that those placed first and last should be separated by the interposition of the other. The intent to require all proofs made before registers to be taken before a register of the judicial district in which the creditor resides, is clearly expressed; and it is probable that the concluding lines of the sentence, which authorize proof before commissioners, were added by way of amendment,—perhaps by another hand,—without a careful consideration of their import when connected with the preceding provisions. The difference between the concluding provision and the two preceding ones is strongly marked. In the first two of these provisions the authority of the registers is expressly limited by the words, "in said district," in the one case, and by the words "in the judicial district where such creditors, or either of them, reside," in the other; but no words of limitation are found in this concluding provision. On the contrary, there are very clear indications that this provision was intended to be more general and comprehensive; for the unlimited term any is twice used, first in reference to the commissioner, and again in reference to the district. If it was not intended to give a creditor residing in the judicial district where the proceedings are pending the right to prove his debt before a commissioner, it would seem that the right would have been limited by the use of the words "in said district" at the conclusion of this sentence, as had been done in the first clause; but instead of this the general words "in any district," are used. And these words, which conclude the sentence, can have no legal effect unless they are held to give the alternative right to resident as well as to non-resident creditors. If the words "in any district" had been omitted, this right would still have been clear as to non-resident creditors, though more doubtful than it now is in respect to creditors residing within the judicial district where the proceedings are pending. This alternative right to prove debts before a commissioner was doubtless conceded for the convenience of creditors; and the reasons of convenience which required it to be extended to non-resident creditors, equally required its extension to resident creditors also. So far as the convenience of the creditor is concerned, it is immaterial whether the debtor's petition is pending in the judicial district in which the creditor resides, or in another district.

If it be suggested that congress may have desired to secure to the registers, rather than to the commissioners, the fees for taking such proofs, the ready answer is, that if such a desire was allowed to influence the action of congress in respect to resident creditors, it is impossible to assign any satisfactory reason for limiting its influence to the case of resident creditors, instead of extending it to both resident and non-resident creditors. These considerations seem to require that the provisions of the statute should be so construed as to give this alternative right to resident as well as to non-resident creditors. And I adopt this construction more willingly, as a different construction would invalidate the proof of many debts taken in good faith before commissioners, when the creditors were residents of the district in which the proceedings were pending; for the more liberal construction has been frequently, if not generally given to this provision, by registers and commissioners, as well as by practitioners in bankruptcy. Indeed, in the present case, it was shown by affidavit that the proof was made before a commissioner, under the advice of the register having the case in charge, that the creditor, though resident in this district, might make proof of his debt before a commissioner as well as before the register. The proof referred to will be held sufficient and the creditor regarded as one who has proved his debt and is entitled to oppose the discharge.

Before reaching the conclusion just stated, I have necessarily considered the objection that the debts of the opposing creditors were barred by the New York statute of limitations. This statute (like the statutes of limitations of most of the states of the Union) does not, in terms, provide that the debt shall be extinguished by the lapse of time required to constitute the statute a defence to an action brought in the courts of New York, and it is a good defence only when specially set up by answer, as a defence to an action brought in this state. The statute, therefore, simply affects the remedy, and it leaves the creditor at liberty to pursue in another state any remedy authorized by the laws of that state.

It is believed that in some of the states, as in Iowa (Code 1851), Indiana (Civ. Code, 1852), and in Ohio (Rev. St. 1854), it is provided by statute that actions shall not be brought on demands barred by the statutes of limitations of the states where the cause of action arose; and in some states their statutes may, in terms, provide that the debt shall be extinguished by the lapse of time; but the statute of this state contains no such

provision. And it does not purport to extinguish or destroy the debt; and such is doubtless the case in all, or nearly all of the states of the Union. That the operation of such statutes does not annul or extinguish the debt, but only affects the remedy, and that such statutes have no effect out of the state in which they are passed, will sufficiently appear upon an examination of the following authorities: Rawls v. American Mut. Life Ins. Co., 36 Barb. 357; McElmoyle v. Cohen, 13 Pet. [38 U. S.] 312; Townsend v. Jemison, 9 How. [50 U. S.] 407; Gans v. Frank, 36 Barb. 320; Power v. Hathaway, 43 Barb. 214; Ruggles v. Keeler, 3 Johns. 263; Bulger v. Roche, 11 Pick. 39; Dwight v. Clark, 7 Mass. 515; Decouche v. Savetier, 3 Johns. Ch. 190; Lincoln v. Battelle, 6 Wend. 475; Byrne v. Crowninshield, 17 Mass. 55, and Medbury v. Hopkins, 3 Conn. 472. See, also, Olcott v. Tioga R. R. Co., 20 N. Y. 210; 1 Kent, Comm. (10th Ed.) 261, 262, and notes; and 2 Kent, Comm. (10th Ed.) 462, 463; Story, Confl. Laws, §§ 576, 577, 5820, 5826. The debt, then, exists, and in most of the states of the Union an action can be sustained against the debtor if found within their jurisdiction. This right of the creditor, considering the migratory habits of our people, and their known propensities to travel from state to state, is a valuable right, which would be barred by the discharge; and I shall concur in the opinion of my learned brother of the Southern district upon the question, and hold that the fact that the creditor's remedy for his debt, by suit in New York, is barred by the statute of limitations, does not prevent the proof of such debt or bar his right to oppose the discharge of the bankrupt.

It must be conceded that the question is not free from embarrassment, and that it has been differently decided by the learned judge of the Massachusetts district, who relied, in part, at least, upon the English decisions. In that country it has been settled, after much conflict of judicial opinion, that a debt barred by the English statute of limitations is not provable in their bankruptcy courts (Ex parte Dewdney, 15 Ves. 498; 1 Christ. Bankr. 221, and notes), but the circumstances under which the question was decided there are very different from those under which it is presented here. Their statute of limitations and their bankrupt act exist by the same legislative authority, and the operation of the statute is, territorially, coextensive with the proper force and operation of the bankrupt act; but in the United States statutes of limitations have no effect beyond the territory of the single state which enacts them, while a discharge in bankruptcy under the laws of the United States, operates with equal force in every state of the Union. The English statute of limitation operating throughout the whole of England, and it being there held that a foreign creditor (one whose debt was contracted and to be paid elsewhere than in England, whether in the United States, France, Germany, or an English or foreign colony) would not, even when suit for its collection was brought in an English court, be barred by a discharge in bankruptcy granted in England, unless the foreign creditor voluntarily made himself a party to the proceeding (Eden, Bankr. Law, 422, 423; Smith v. Buchanan, 1 East, 6), there is much reason for the adoption of the English rule there which does not apply here.

Our own courts hold that a bankrupt's discharge in a foreign country does not discharge a debt made in and with reference to the laws of this country (Green v. Sarmiento [Case No. 5,760]; Zarega's Case [Id. 18,204]), agreeing in this respect with the English doctrine. It may also be conceded that the propriety of allowing debts barred by the statute to be proved in bankruptcy may be opposed with much force of argument, by reason of the apparent injustice of allowing it in particular cases; but on the other hand, arguments of at least equal force may be urged against the opposite rule. In respect to questions arising under statutes of limitations, the lex fori prevails, and if the statutes of the state in which the bankruptcy proceedings are pending are to furnish the rule of limitation, the New England creditors, by simple contract of a bankrupt who has resided in this state for five years, or for only five months, may prove their debts of twelve years' standing when, if he had not changed his residence, they would not have been provable; and a bankrupt who resided and was largely indebted to relatives in New Jersey, where the statute of limitations would be a good bar, might carry on business for four months in the city of New York, and then present his petition in bankruptcy there, and allow all his New Jersey creditors, whose debts were barred by their statute of limitations, to prove their debts. Again, the states may at any time modify their statutes of limitations, and if the state of Wisconsin or Virginia should provide by statute that no action for any debt, or for any debt due to a resident of another state, should be maintained after six months from the time the cause of action accrued, would the act be binding upon the United States bankrupt courts? Or, if a state should pass an act that no debt should be proved in bankruptcy proceedings in that state after the expiration of six months from the time the debt accrued, would the bankruptcy courts regard such an act? The adoption of the statutes of limitation of the particular state, in which the proceedings in bankruptcy are pending, would, in many cases, give the bankrupt the power to determine whether the statutes should, or should not, be a bar by remaining a resident of the state where he had long resided, and whose statute of limitation would be a good bar; or by re-

moving to, and making his application in, another state, where the statute would be no bar.

But it is unnecessary to pursue this line of argument. The real question is, whether a debt against the statute of limitations of this state has run is still a debt, and that it is there can be no doubt. If it is still a debt there is no statute of the state, or of the United States, which provides that it shall not be proved or allowed in proceedings in bankruptcy; and until some statute of limitations shall be adopted by congress for the guidance of courts of bankruptcy no uniform or satisfactory rule of limitation can be applied by those courts. And even if they could devise a uniform and satisfactory rule, I can find no authority for those courts to provide, or adopt from the statutes of the state, any such rule of limitation.

In respect to the claims of the other opposing creditor, it was shown that he had appeared before the register having this case in charge, and had made a deposition, drawn up by the register himself, in the proper form for the proof of such creditor's debt, but that such deposition had been retained in the hands of the creditor, or his attorney, and had never been delivered or sent to the assignee. It also appeared that the creditor had afterwards commenced a suit against the bankrupt for the purpose of obtaining a judgment in a state court for the amount of his debt, and had retained possession of the deposition referred to until it was filed with the clerk, at the time of entering his appearance in opposition to the bankrupt's discharge. It was insisted, upon this state of facts, that the court ought not to allow the creditor to oppose the bankrupt's discharge.

The 22d section of the bankrupt act, after prescribing the manner and form of making the proof of a debt by deposition, further provides as follows: "If the proof is satisfactory to the register, or commissioner, it shall be signed by the deponent, and delivered or sent by mail to the assignee, who shall examine and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept for that purpose, the names of creditors, who have proved their claims," &c: and it is evidently the intention of the act that the register or commissioner taking the proof shall decide, in the first instance, upon the sufficiency of the proof. If the proof is satisfactory, the officer is to deliver it to the assignee, or send it to him by mail; and this act of the officer is the only evidence, that the proof is satisfactory, which has been provided for, either by the statute or the general orders and forms prescribed by the justices of the supreme court. The return of the deposition to the creditor, when entirely unexplained, would seem to indicate that the proof was not satisfactory; or else that the creditor did not intend to complete his proof and become thereby a "creditor who had proved his debt;" and the subsequent act of the creditor in commencing a suit against his debtor (which, under the 21st section of the act, he had no right to do if he had proved his debt), is prima facie evidence that the proof was not satisfactory to the register, or else that the creditor did not intend, by making the deposition, to become a creditor who had proved his debt.

Under the circumstances stated, I am of the opinion that the creditor, who has now filed the deposition with the clerk, cannot be considered as "a creditor who has proved his debt," within the technical meaning of those terms as used in the bankrupt act. If this conclusion is correct, the question arises whether a person who shows, by affidavit, or otherwise, that he is a creditor of the bankrupt, has a right to appear and oppose his discharge without being, in technical strictness, "a creditor who has proved his debt?" This question is one of great importance, and in respect to which there is much difference of opinion. It was stated on the argument that the learned judge of the Southern district of New York had decided against this right; and I am aware that others, whose opinions are entitled to great respect, have expressed similar opinions. It is probable that in making his decision Judge Blatchford relied upon the decision of his learned predecessor in King's Case [Case No. 7,784], to which I shall presently refer. I have carefully examined that case and other authorities, and after a careful consideration of the provisions of the present bankrupt act, I have reached a conclusion different from that announced by the learned judges of the Southern district. While I regret this difference of opinion, my own convictions are so strong that I feel bound to decide the question in accordance with such convictions, and to state my reasons therefor; and then to leave it to congress to settle the question by legislation, if such legislation shall be deemed expedient.

In discussing the question thus presented, it is proper first to consider the nature and object of the proceeding which requires its determination. The question can only arise upon the application of a bankrupt for a judicial discharge from all his debts, and these applications are to be granted in most cases without even a partial performance of the legal obligations of the bankrupt. The application is to be granted or denied by a court in the regular course of judicial proceedings; and the discharge, if it be properly obtained, is (with few exceptions) a conclusive bar to any suit prosecuted for the collection of a debt, provable against the bankrupt's estate, which existed at the time of the filing of his original petition. That all creditors whose rights may thus be conclusively barred by the decision of a court of justice, should have the right to be heard in opposition to such decision, is a proposition so plain and self-evident, that it would seem that its obvious truth

would be at once admitted, alike by lawyers and laymen, without the thought that either argument or authority might be requisite for its maintenance. If authorities were required it would be easy to produce them in great numbers, and from the highest sources; but two or three will suffice. In the case of The Mary, 9 Cranch [13 U. S.] 126, 144, Chief Justice Marshall, in delivering the opinion of the supreme court of the United States, said: "It is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence he shall have notice, either actual or constructive, of the proceedings against him." But notice to a party is worthless, unless he has the privilege of being heard; and Mr. Justice Story, in Bradstreet v. Neptune Insurance Co. [Case No. 1,793], said: "It is a rule founded in the first principles of natural justice that a party shall have an opportunity to be heard in his defence before his property is condemned," &c. In the case of Hollingsworth v. Barbour, 4 Pet. [29 U. S.] 466, it was declared by Mr. Justice Trimble at the circuit (page 472), that "by the general law of the land, no court is authorized to render a judgment or decree against any one or his estate, until after due notice by service of process to appear and defend." And he added: "This principle is dictated by natural justice; and is only to be departed from in cases expressly warranted by law, and excepted out of the general rule." And he further declared (page 475), that the reason of the rule that judgments and decrees are binding only on parties and privies "is founded on the immutable principles of justice that no man's right should be prejudiced by the judgment or decree of a court without an opportunity of defending the right," &c.: and all this was concurred in by the supreme court (page 470).

In view of the principles thus sanctioned by the highest authority, it would seem to be a reproach to the national legislature to hold that it was intended that any creditor whose claims would be barred by a discharge should be deprived of his just right to be heard, in opposition to such discharge; and certainly an intention to violate those principles of natural justice and deny the creditor's right to be heard should not be imputed to congress unless such intention is clearly expressed, or must necessarily be implied from the language of the statute. Hollingsworth v. Barbour, 4 Pet. [29 U. S.] 472. It is certain that no such intention is clearly expressed in the bankrupt act now in force, and it is believed that no such intention can be reasonably inferred from any of its provisions.

But before discussing these provisions it may be proper to refer to the provisions of the act of 1841 [5 Stat. 440] and to the decision under the act made by the learned judge who then presided in the Southern district of New York, and which, it is supposed, led to the decision lately made by his successor, under the act of 1867. In the case of In re King [Case No. 7,784], Judge Betts decided that, under the bankrupt act of 1841, a creditor who had no interest, except in that character, and who had not proved his debt, could not be permitted to oppose a bankrupt's discharge. That case was decided upon the 4th section of the act of 1841, which provided that no discharge should be granted "until after seventy days' notice in some public newspaper, designated by such court, to all creditors who have proved their debts, and other persons in interest, to appear at a particular time and place to show cause why such discharge and certificate shall not be granted; at which time and place any such creditors, or other person in interest, may appear and contest the right of the bankrupt thereto;" and it was upon this language that Judge Betts held that creditors, "as such, could not rightfully appear in the controversy, but must have the further qualification of having proved their debts." It is clear that there was no express exclusion of the right of the creditor who had not proved his debt by the language of the 4th section above quoted. Such a creditor was a person in interest, and as he was not embraced in the class of "creditors who have proved their debts," he was, by the ordinary rules of construction, embraced in the other class, of other "persons in interest." In the Case of Tebbetts [Id. 13,817], Mr. Justice Story said in respect to parties opposing a discharge: "If they are not strictly, in the sense of the law, creditors of the bankrupt, they are at least equitable creditors;" and declaring that their claims would be enforced in a court of equity, he allowed them to oppose the discharge, although (as I understand the case) they were not "creditors who had proved their debts." In the Case of Book [Id. 1,637], Mr. Justice McLean, in commenting upon and overruling the Case of King, said: "In the Matter of King [supra], (Southern district of New York), it was held that 'the terms other persons in interest used in the 5th section, are employed to designate those who could not prove debts as creditors, and do not embrace, but exclude creditors.' That these words may embrace those who are not properly creditors, but have an interest in the matter, may be admitted; but that they exclude creditors who have not proved their debts, is a gratuitous assumption not warranted by law." In Haxtun v. Corse, 2 Barb. Ch. 506, 529, the decision in King's Case, was commented upon by the late Chancellor Walworth, and that eminent jurist expressed the opinion that Judge Betts's decision was "an erroneous construction of the statute . . . . and that the framers of the law intended to give all persons interested in opposing the bankrupt's discharge, as well as creditors who had proved their debts against him, the privilege of appearing and contesting his right to such a discharge."

Under the provisions of the same section of the act of 1841, it is clear that any creditor of the bankrupt, whether he had proved his debt or not, might impeach the discharge (when pleaded as a defence to the suit of such creditor), for fraud or wilful concealment which might have been urged in opposition to the discharge; and if Judge Betts's decision is correct, a creditor who under this same section could not oppose the action of the court in granting the discharge when applied for, could defeat such action after the discharge had been granted. This would be absurd, and I cannot but think that, both upon reason and authority, it may be properly assumed that Judge Betts's decision in King's Case, was a hasty and erroneous construction of the act of 1841. But the reasoning upon which Judge Betts based his opinion in King's Case, is not applicable to a case arising under the existing bankrupt act. It may be conceded that the 29th section of the present act, which provides for notice to show cause against a discharge, carefully provides for notice to creditors who have proved their debts, and that it does not contain any very clearly expressed provision for giving notice, in terms, to any other parties. It provides that the court shall order notice of an application for a discharge "to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors reside, to appear on a day appointed for that purpose and show cause," &c. Now, though it is not expressly stated that notice must be given to any creditors except those who have proved their debts, it is clearly to be inferred that the publication of the notices is required for the benefit of other creditors; for this publication is in addition to the personal notice required to be given by mail to all creditors who have proved their debts, and in providing for the designation of the newspapers in which the publication is to be made, reference is made to the creditors generally, and not alone to those who have proved their debts. It will also be observed that in this section no reference is made to "other persons in interest;" but the more important, and under Judge Betts's decision the vitally important difference between the acts of 1841 and 1867 is, that although in the act of 1867 there is, in immediate connection with these provisions for giving notice, no provision declaring the right of "creditors who have proved their debts and others in interest," to appear and oppose the discharge, as was the case in the act of 1841, the last of these omissions is supplied by the 31st section of the present bankrupt act, which provides "that any creditor opposing the discharge of a bankrupt may file a specification in writing of the ground of his opposition," thus providing for opposition by "any creditor," and not by any creditor who has proved his debt, as in the act of 1841. This is a very important change from the language of the act of 1841; and if the decision in King's Case, was not erroneous it is not an authority against the right of the creditor in this case, for the term any creditor can by no just construction be limited to a creditor who has proved his debt.

Notwithstanding the provisions of the acts of 1841 and 1867, which are apparently intended to give permission to creditors, or to creditors and others in interest, to appear and oppose a discharge, it is very clear under the authorities before cited and many others of a similar character, that the courts, in administering these acts, would have allowed such opposition if no such permission had been expressly given; and in order to bar the creditor's right to appear and oppose the discharge, the bankrupt must show that such right has been taken away by the statute, either in express terms, or by necessary implication. Hollingsworth v. Barbour, ubi supra. As has been shown, the act of 1867, in the sections which bear upon this question, only speaks of creditors who have proved their debts in the one case, and creditors generally in the other; and yet form No. 51 prescribed by the justices of the supreme court of the United States very properly provides for notice to all creditors who have proved their debts "and other persons in interest;" although "other persons in interest" are not embraced in any of the provisions of the act relating to the application for a discharge, the notice to show cause against the same, or the opposition to be made to such application. Parties who are not creditors are, therefore, to be permitted to oppose a discharge upon principles of justice universally acknowledged by the courts of all civilized countries, and not under any permission given by the bankrupt act.

But it may be said that without any express provision of the statute, or any necessary implication from its language, the bankruptcy courts should require a creditor to show his interest in the proceedings, by proving his debt, before allowing him a standing in court for the purpose of opposing a discharge; and that requiring him to take the position of a creditor who has proved his debt is no denial of the right which has been declared to be founded in the principles of natural justice, for the reason that such requirement is easily fulfilled. It is conceded that proof of his interest, if it does not clearly appear by the schedules of the bankrupt, may properly be required of the creditor; but it being certain that a party, in order to become a creditor who has proved his debt, must in many cases relinquish most important rights, and that to impose upon the creditor, unnecessarily, any injurious terms, as a condition of his being heard, is as inconsistent with the principles of justice; and,

to the extent of the injury inflicted by the imposition of such conditions, as gross a denial of the just rights of the creditor as an absolute refusal to allow him to be heard, he ought not to be required to become, technically, "a creditor who has proved his debt." Very injurious terms will certainly be imposed in many cases if it be held that a party must take the position of a "creditor who has proved his debt" against the estate of the bankrupt, before he can oppose his discharge. In many cases in which the application for a discharge is made at the end of sixty days under section 29, on the ground that no assets have come to the hands of the assignee, it will (under the provisions of section 20) be impossible for the creditor to prove his debt, without relinquishing his lien by judgment or mortgage, at any time before the day fixed for the final hearing on the application for a discharge.

By section 20, it is provided that "when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property and be admitted to prove his whole debt. . . . . If the property is not so sold or delivered up, the creditor shall not be allowed to prove any part of his debt."

By section 21, it is provided that "no creditor proving his debt or claim shall be allowed to maintain any suit at law or equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against said bankrupt, and all proceedings already commenced, or unsatisfied judgments already obtained thereon shall be deemed to be discharged and surrendered thereby," &c. Why should a creditor holding a mortgage or judgment for $15,000, partially secured by its lien on $10,000 worth of real or personal estate, and who is willing that the other creditors of the bankrupt should take all of the property of the bankrupt which is not bound by this mortgage or judgment, be compelled to relinquish his lien, before he is allowed to show fraud on the part of the bankrupt and defeat his application for a discharge, in order to preserve the right to collect his debt out of the subsequently acquired property of the bankrupt? It is quite proper to require a creditor to prove a debt before allowing him to make any motion in respect to the bankrupt's estate in the hands of the assignee; but why should it be required, by the legislature or by the courts, when the creditor only seeks to prevent the bankrupt's discharge? That the legislature has not expressly required it is very clear, and there is strong reason for believing that it was not intended to be required.

By the 35th section of the present act "any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same;" and there is no requirement that he shall prove his debt against the bankrupt's estate. It would seem that to deny a creditor the right to oppose the granting of a discharge because he had not proved his debt and then allow him to apply to the court which granted it to set it aside, at any time within two years, without proving such debt, would be grossly absurd.

If the narrow construction which has been contended for is to prevail and no effect is to be given to the 31st section of the present bankrupt act, it would seem that no one but a creditor who has proved his debt can oppose a bankrupt's discharge, as other persons in interest are not named in the act; and upon the same principles of construction it may well be contended that only such creditors as had proved their debts prior to the granting of the order to show cause can be allowed to appear and make such opposition. I am satisfied that neither of these propositions can be maintained; and after the fullest consideration I have been able to give the whole subject, I am of the opinion that the construction given to the act of 1841, by Mr. Justice McLean and Chancellor Walworth, and not that given by Judge Betts in King's Case, was the proper construction of that act; and that, under the 31st section of the present bankrupt act, there is no sufficient reason for denying the right of the creditors, who have appeared in this case, to contest the discharge of the bankrupt, even if it be conceded that King's Case was properly decided. They will therefore be recognized as having a proper standing in court for that purpose.

Case No. 12,754.

In re SHEPARD.

[3 Ben. 347; [1] 3 N. B. R. 172 (Quarto, 42).]

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

COPARTNERSHIP ASSETS—PETITION BY ASSIGNEE OF ONE MEMBER OF A FIRM.

1. C., a member of a firm, transferred to S., his partner, by a written instrument, all his interest in the firm property, to be applied to the payment of the partnership debts, the assignment stating that the firm was dissolved, "except so far as it may be necessary to continue the same for the final liquidation and settlement of the business thereof." S. thereafter

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

made an assignment of all the firm property, in trust, to pay creditors, with preferences, which assignment was afterwards, in a suit brought by creditors, in the superior court of the city of New York, set aside, as fraudulent and void, as against such creditors, and the assignee was directed to pay the creditors' claims out of the proceeds of the assigned property in his hands, and did so, and also paid other preferred debts, leaving but a small balance in his hands. Thereafter, on the application of another creditor, S. was declared a bankrupt, in a proceeding against him alone, and the assignee in bankruptcy filed a petition against the assignee of S., praying to have that assignment set aside as void, under the 35th and 39th sections of the bankruptcy act [of 1867 (14 Stat. 534, 536)], and to have the property which came to his hands under it, delivered up to the assignee in bankruptcy: *Held*, that the transfer from C. to S. did not dissolve the firm, and the property remained partnership property till the partnership debts were paid;

2. There must be an adjudication of bankruptcy against the partners composing the firm, before any step could be taken in bankruptcy to reach the partnership assets;

[Cited in Re Stevens, Case No. 13,393; Re Brick, 4 Fed. 806.]

[Cited in Kelly v. Scott, 49 N. Y. 597.]

3. The petitioner, being the assignee of S. alone, could not call upon any one to account for such partnership property, and his petition must be dismissed.

This was a hearing, on proofs taken, on a petition filed by Hiram Fisher, assignee of the bankrupt above named, against Andrew V. Stout. Prior to the 26th of February, 1867, the bankrupt and one William D. Cochran were in partnership, perhaps with two other persons, under the firm name of Shepard & Cochran, in the city of New York. On that day, an instrument in writing was executed by and between Shepard and Cochran, of which the following is a copy: "Memorandum of agreement between Thomas S. Shepard and William D. Cochran, made this 26th day of February, 1867. The partnership heretofore existing between the above named parties, in the business of buying and selling crockery and glass ware, is hereby dissolved by mutual consent—the dissolution to date from this date—except so far as it may be necessary to continue the same for the final liquidation and settlement of the business thereof. The said Cochran hereby sells and transfers to said Shepard all his, the said Cochran's, interest in the assets, stock on hand, accounts, and credits due the firm of Shepard & Cochran, and all other property of said firm. The said Shepard is to apply said property, and the proceeds thereof, to the payment of the partnership debts and the necessary expenses of carrying on the business. Thomas S. Shepard. Wm. D. Cochran." The consideration for this transfer by Cochran to Shepard was $3,000 worth of crockery ware, which Cochran took at the time out of the stock in trade of the firm. On the 5th of March, 1867, Shepard executed and delivered a voluntary assignment to Stout, of all merchandise and other personal property lately owned by the firm, and of all claims and demands due to the late firm, with the books of account and papers relating to the same, being all the property in respect of which Cochran had transferred his interest in the same, as a partner in the firm, to Shepard. The assignment was in trust, to convert the property into money, and collect the claims and demands, and, after paying the expenses of executing and carrying into effect the assignment, to pay, with the residue, first, the debts specified in Schedule A to the assignment, and second, the debts specified in Schedule B to the assignment, and then all other liabilities for which Shepard was justly liable. The debts specified in the two schedules were all of them, in fact, debts due by the firm of Shepard & Cochran, and were stated to be such in those schedules. Stout accepted the trust, and entered into possession of the assigned property, and realized from sales and collections a little over $21,000. On the 27th of March, 1867, the National Shoe and Leather Bank, of the city of New York, recovered a judgment in the superior court of the city of New York, against Thomas S. Shepard and William D. Cochran and the other two alleged partners, as joint debtors, for $15,280.88. An execution issued on such judgment having been returned unsatisfied, the plaintiffs therein brought a suit in equity, in the said court, against the four judgment debtors and Stout, setting forth the recovery of the judgment, and the return of the execution, averring that the debt to the plaintiffs was contracted by the four judgment debtors, as copartners, composing the firm of Shepard & Cochran, setting out the transfer by Cochran to Shepard, and the assignment by Shepard to Stout, claiming that the assignment was, for various reasons stated, fraudulent and void, and praying that it might be set aside, and declared to be fraudulent and void, as against the plaintiffs, and that it might be adjudged that the plaintiffs were entitled to payment of their judgment out of the assets and the proceeds thereof in the hands of Stout, and that Stout pay over the same accordingly. Process in the suit in which the judgment was recovered was served on Shepard, and on him only, and process in the equity suit was served on Shepard and on Stout, and on them only, although in the latter suit an appearance by attorney was put in for all of the defendants. No answer or defence was put in in either of the suits. On the 13th of June, 1867, a judgment was rendered in the equity suit, setting aside the assignment from Shepard to Stout, declaring it to be fraudulent and void, as against the plaintiffs, and adjudging that the plaintiffs were entitled to payment of their judgment for $15,280.88 out of the assets assigned to and in the hands of Stout, and directing Stout, as such assignee, to pay the amount of the judgment out of the said assets, or the proceeds thereof in his hands. Stout, on the 14th of

June, 1867, as such assignee, paid to the plaintiffs the amount so decreed to be paid. He also, before the 13th of June, 1867, paid out of the assets assigned to him all the claims specified in Schedule A to the assignment, the debt to the Shoe and Leather Bank having been itself one of the debts specified in that schedule. There still remained in his hands the sum of about $1,700, which he claimed to be entitled to retain, and apply to the purposes of the assignment. On the 3d of July, 1867, the Mechanics' Bank of Brooklyn, as a creditor of Shepard, filed a petition in this court, praying that Shepard might be declared a bankrupt, for certain acts of bankruptcy alleged in the petition, and, among them, the making of the assignment to Stout. In that proceeding, Shepard was adjudged a bankrupt, and Fisher was appointed his assignee, and the usual assignment of the property of the bankrupt was made to Fisher.

The present petition of Fisher was brought to have the assignment from Shepard to Stout declared null and void, under the provisions of sections 35 and 39 of the bankruptcy act, and the property which came into his possession under said assignment, or the full value thereof, delivered up to Fisher, as assignee, on the ground that the assignment was made by Shepard with intent to give preferences, when he was insolvent, and so known to be by Stout. The petition was not founded on the preference obtained by the National Shoe and Leather Bank, by the equity suit in the state court, or on the payment made by Stout to the bank under the decree in that suit. The petition did not set up such suit or decree, but the answer of Stout to the petition set them up in defence.

A. L. Cushing, for petitioner.
E. L. Fancher, for Stout.

BLATCHFORD, District Judge. There is a difficulty in this case, which lies at the threshold of Fisher's right to recover. The agreement of the 26th of February, 1867, whatever effect it may have had to dissolve the partnership between Shepard and Cochran, as to future business and debts to be contracted thereafter, had no such effect as respected the partnership property in which Cochran theretofore had an interest, or as respected the partnership debts named in that agreement, or as respected proceedings under the bankruptcy act to affect such partnership property. The agreement expressly declares, that there is to be no dissolution of the partnership, so far as it may be necessary to continue the same for the final liquidation and settlement of the business thereof; and the transfer to Shepard of Cochran's interest in the property of the firm is expressly made subject, by the agreement, to the trust, that Shepard is to apply the property, and the proceeds thereof, to the payment of the partnership debts. The case is not one where the transfer of the interest of the retiring partner in the partnership property is absolute, and the remaining partner merely agrees to pay and assumes the debts of the partnership, as was done in Robb v. Mudge, 14 Gray, 534. In the present case, Cochran took from Shepard an express agreement that the partnership property assigned, and its proceeds, should be applied by Shepard to pay the partnership debts, and the agreement made by Shepard was to pay those debts with that property. Therefore, as respected Cochran and the creditors of the firm, there was no dissolution of the partnership, and no such transfer to Shepard as would make the property his individual property, until and unless the partnership debts were first paid. This being so, there must be an adjudication of bankruptcy against the partners composing the firm, and an assignee must be appointed in such a proceeding, before any step can be taken to reach in bankruptcy the partnership assets. Shepard alone has been adjudged a bankrupt. As there are partnership assets, the partnership continues, as respects proceedings in bankruptcy. Under the provisions of section 36 of the act, the copartnership property cannot be taken and administered by the bankruptcy court, unless all the persons who have an interest, as copartners in such property, are adjudged bankrupt. In order to reach such property, it is necessary, under section 36, that Fisher shall have been appointed assignee in a proceeding against all of such copartners. He is only the assignee of the individual and separate estate of Shepard, in a proceeding in bankruptcy against Shepard alone. He shows, therefore, no title to call Stout, or any one else, to account in respect of the property which purported to have been assigned by Cochran to Shepard, and by Shepard to Stout.

These views dispose of the case, without reference to any of the other questions raised or discussed. It is not necessary to decide whether any other persons than Shepard and Cochran were members of the firm, as, on the status of the partnership property, as left by the agreement between Shepard and Cochran, it is immaterial whether or not there were other partners in the firm. The petition must be dismissed, with costs.

SHEPARD (MACDONALD v.). See Case No. 8,767.

SHEPARD (NEW YORK & E. R. R. v.). See Case No. 10,198.

SHEPARD (UNITED STATES v.). See Case No. 16,273.

Case No. 12,755.

SHEPHERD v. BAILY.

[1 Brunner, Col. Cas. 242; [1] Cooke, 369.]

Circuit Court, D. Tennessee. 1813.

PUBLIC LANDS—SURVEY—HOW MADE WHEN CALLS INDEFINITE.

If the calls in an entry be indefinite, the survey must be made in an oblong or a square. If the call be for land to lie on a creek, the survey must be made so as to give an equal quantity of land on each side of it.

The plaintiff [Shepherd's lessee] introduced a grant from the state of North Carolina to John Haywood, for five thousand acres of land, dated the 20th of December, 1791, describing the land in contest as follows: "On the waters of Richland creek, a branch of Elk river, on a small creek which the commissioners and guard came down on their return from Elk river, the day before they encamped on the north side of Richland creek, beginning on the bank of said small creek at a white oak, one mile above a large spring; thence west eight hundred and ninety-four poles to a mulberry; thence north eight hundred and ninety-four poles to two dogwoods; thence east eight hundred and ninety-four poles to a stake; thence south eight hundred and ninety-four poles to the beginning. Evidence was also introduced to prove the notoriety and identity of the small creek and spring; but it appeared that no actual survey had ever been made. The defendant claimed under a grant to Stokeley Donelson, issued by the state of North Carolina, for five thousand acres, on the 17th of June, 1790. The plaintiff, for the purpose of giving his title effect beyond the date of the grant to Donelson, introduced the following entry: "25th October, 1783. John Haywood enters five thousand acres on the waters of Richland creek, between said creek and Elk river, on a small creek falling into Richland creek, which small creek the commissioners and guard came down on their return from Elk river the day before they encamped on the north bank of Richland creek, including a large spring about two miles from the mouth of said small creek, beginning on the bank of said small creek, one mile above said spring, running down said small creek for complement." It appeared that the small creek from the spring to its mouth run north 47 west; from a point on the bank of the creek one mile above the spring to the spring is north 87 west; and from the spring with the meanders of the creek to its mouth is seven hundred and seventy poles. The land described in the grant is wholly north of the point of beginning. If the point of beginning had been the center of the base of the survey, by no legal shape to be given to the survey would it include the land in question; nor if the survey were made in a square or oblong, to the cardinal points, and down the creek, making the creek the center of the survey, so far as it extended, would the land claimed by Donelson's grant be included.

The principal points relied upon were that the entry under which the plaintiff claims was not sufficiently special to avoid an elder grant. That the creek "which the commissioners and guard came down" at a particular period, is not sufficiently described. It acquired no notoriety by that circumstance, and if it were capable of identity it would be imposing too much trouble on a subsequent locator; and that the grant of the plaintiff does not cover the same land described in the entry, should the entry be deemed special.

Haywood, Balch & Trimble, for plaintiff.

Whiteside, Cooke, Grundy & Hayes, for defendant.

McNAIRY, District Judge (charging jury). The plaintiff has introduced a grant for the land in question, but of a younger date than the grant under which the defendant claims. To make his title overreach that of the defendant he has had recourse to his entry; but to effect this the entry must be special, and for the same land included in the grant. We have no statute describing in undoubted terms what shall be a special entry. I consider that to constitute a special entry the objects called for should be notorious, or sufficiently described in relation to notorious objects. To give an entry the effect sought to be given to the one in question, it is necessary it should designate with reasonable certainty the precise land intended to be appropriated, and that the description contained in the entry must quadrate with that contained in the grant.

This case involves a question of much importance, and upon which I am reluctantly now compelled to give an opinion, seeing there have been different notions on the subject. Is the entry special for the land included in the survey? To give the construction contended for in support of this entry would be to destroy it altogether. If such a construction be given to an entry that it may include two or more different places with equal certainty, it cannot be good for either. Suppose an entry calls to include the French lick. Now if a survey can be made upon it, to include the lick in any part of the track, can it be pretended that the entry is special for any place? If it were so, might not all the land around the lick which could be included by the sweep of a survey in an oblong or square, made to include the lick at one extremity, be alternately claimed and occupied, and at last surveyed in any direction to the cardinal points, according to the caprice of the owner or surveyor? This is not what I understand by requiring an entry to be special. It is important to give such a construction to an entry as that it shall prevail rather than perish. To give this certainty to the entry in question, the expressions "lying

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

on the creek," and "running down the creek for complement," must be construed to mean that the land shall be equally divided on both sides of the creek. A survey to correspond with this entry must run from the point of beginning on the creek, so far north and south as will, the general course of the creek having been first ascertained, include, as nearly as may be, an equal quantity of land on both sides of the creek, either in an oblong or square; for in this case neither form will affect the defendant.

It is not now necessary to decide the right of the owner or surveyor to survey in a square or oblong at their options; but I incline to believe that if by running an oblong the survey would interfere with a grant previously obtained, the entry would not be a special one for any land beyond the extent of the square, unless the entry by the expressions used in it indicated a contrary mode of surveying. It appears to me that this is the only possible way to construe entries having only general calls so that they may be deemed special. To illustrate this principle I will suppose that the point of beginning was the notorious call in the entry. That it then called to run down the creek for complement; and that the general course of the creek was due west; according to some decisions of the state courts the surveyor might make a survey running along north and west, or south and west. This construction, in my opinion, is the strongest possible argument that the entry is vague, and can hold land nowhere; because you cannot tell whether the land claimed by the entry is to lie on the north or south of the creek. But adopt the construction which I have given, and there is some reason for saying that the entry is special; so in a general call, to include a notorious object, place that object in the center of a square or oblong, and it is with much plausibility we decide it to be a special entry. But to permit the owner or surveyor to place the notorious object in any part of the survey, and permit the survey to be made in a square or oblong at his option, is the very essence of vagueness. In the case now under consideration the survey begins at the point of beginning called for in the entry, and runs west and north, including the creek and spring, with only a small part of the land on one side of the creek; and yet according to the construction contended for, to wit, to include the calls of the entry in any part of the survey, the survey might have been run as far north from the point of beginning as would have included the spring and creek, and then run west and south, taking most land on the south side of the creek. To allow such an option would be in effect to make the entry wholly uncertain, and, therefore, not good for any land.

I cannot conceive any of the ill consequences growing out of the principles here laid down which have been surmised by some of the bar. It is not a matter of interest to society in general, or to the government, whether A. or B. owns a particular piece of property. But it is of the last importance that whichever of them is entitled to it by law and equity should own and possess it. No decision contrary to the one now given is recollected to have taken place in this court; and it is believed that this is in perfect harmony with the spirit of the different acts of the legislature on that subject; and especially with that part of the law which enacts that all grants obtained for land which was previously or first specially located or entered, shall be void and of no effect. This very provision must have been made by the legislature on the equitable principle that the first enterer of the land had an equitable right founded on his special entry which had given notice to the after grantee, and that, therefore, he was a mala fide purchaser. They surely did not intend that the first enterer of a well-described or notorious object should have an equitable claim to three or four times the quantity of land contained in his entry.

SHEPHERD (KING v.). See Case No. 7,804.

SHEPHERD (UNITED STATES v.). See Case No. 16,274.

SHEPHERD, The ELMIRA. See Case No. 4,418.

Case No. 12,756.

SHEPLEY v. RANGELY.

[2 Ware (Dav. 242) 246;[1] 5 N. Y. Leg. Obs. 5.]

District Court, D. Maine. Oct. Term, 1845.

QUIETING TITLE—POSSESSION—EVIDENCE INCONCLUSIVE—BILL TO PERPETUATE TESTIMONY —ACTION AT LAW.

1. In a suit in equity for a perpetual injunction, it appeared that the plaintiff claimed title under a deed from John Spring, dated April 14, 1832. The defendant, under a levy on an execution of July 9, 1839, traced back his title to a mortgage of Spring, of January, 1830. Neither party was in possession of the land, but Spring was in possession, holding adversely to both. *Held*, that if this was to be considered as in the nature of a bill quia timet it could not be supported until the title was determined by a suit at law.

2. A court of equity has jurisdiction in such cases, to decide on facts without the intervention of a jury, but will not usually do so when the evidence is contradictory or inconclusive.

3. This was more properly in the nature of a bill of peace. To maintain such a bill when the interest of the plaintiff is present, and not future, as in remainder or reversion, and he has a present right to the possession, three things must concur. 1. He must have the actual possession. 2. That possession must be disturbed. 3. His right must have been previously established at law.

[Cited in Stark v. Starr, 6 Wall. (73 U. S.) 409; Holland v. Challen, 110 U. S. 19, 3 Sup. Ct. 497; Sharon v. Tucker, 144 U. S. 543, 12 Sup. Ct. 722.]

4. Where a party cannot bring his title to an immediate judicial examination because his in-

[1] [Reported by Edward H. Daveis, Esq.]

terest is future, as in remainder, or because he is in possession, the only bill which can be maintained, is a bill to perpetuate the testimony.

5. A court of equity will not entertain a bill, under the pretext of quieting the possession, to determine the rights of parties where there has been no suit at law to try the title.

The facts of this case, as they appear in the pleadings and evidence, are shortly as follows; John Spring and Olive, his wife, on the 4th of January, 1830, mortgaged the land in controversy, together with other real estate, lying in the town of Saco, to the Saco Bank, to secure the payment of a note of $6000. Spring, April 14, 1832, conveyed, by a quitclaim deed, to Ether Shepley, the equity of redemption of certain lands mortgaged to Sarah Parkman, and by the same deed conveyed this land now in controversy, which was included in the mortgage to the bank, for the consideration of $1000. On the 9th of May, or of June, 1833 (for the evidence leaves it uncertain which), the bank by their attorney, Ether Shepley, the plaintiff's grantee, entered on the land for condition broken, and on the 9th of June, 1836, three years having elapsed, the mortgage, as contended for the defendant, became foreclosed, and the title of the bank absolute. On the 13th of September, 1833, the bank conveyed all its estate and effects to trustees to sell and dispose of, for the purpose of winding up the business of the bank and dividing its effects among the stockholders. On the day when the time of redemption expired, that is, on the 9th of May or June, 1836, Spring offered in payment of the debt, the check of Webster, payable at a future day, but the trustees refused to receive it as payment, and it was left with them as collateral security for the debt, and the following day Spring assigned to them a policy of insurance on his house, which was included in the mortgage as further security. On the 13th of July, 1836, one month or more after the foreclosure of the mortgage, on the payment of the full sum due to the bank, the trustees, at the request of Spring and his wife, by a deed of quitclaim conveyed the land to Webster; the money, to the amount of $5000, having been advanced by him; and the balance, $200, was paid by Spring. The deed recites, that entry had been made to foreclose the mortgage, and that the right of redemption had expired, and that, Webster having, at the request of Spring, paid the amount that would have been due on the mortgage, the conveyance was made at the request of Spring and his wife, to Webster, and was intended to discharge all the title acquired by the bank. The deed was drawn by the plaintiff's grantor, and the acknowledgment taken by him. Webster, as is alleged in the bill and not denied in the answer, conveyed the land by deed, April 12, 1832, to Daniel Burnham; but the defendant [James Rangely] alleges, that before that time, he attached the land as the property of Webster in a suit against Webster and Burnham, and prosecuted his suit to judgment, on which execution was issued in June, 1832, and within thirty days after the rendition of the judgment levied on the land. On the 5th of April, 1843, Ether Shepley conveyed his title by a deed of gift to the plaintiff [John R. Shepley], and he claimed to hold the land under Spring's deed to his grantor, of April 12, 1832. The defendant claimed title under his levy, tracing it back to the mortgage to the bank, of January 4th, 1830. The prayer of the bill was, that the land may be declared to stand redeemed from the mortgage, that the levy of Rangely may be declared to be inoperative and void, and that the defendant be required to release his title to the plaintiff, and be perpetually enjoined from setting it up against the plaintiff.

G. F. Shepley, for plaintiff.

G. S. & E. H. Daveis, for defendant.

WARE, District Judge. I have not thought it necessary to examine all the questions which arise out of this record, and which have been so elaborately and learnedly argued at the bar, because, from the view I have taken of it, the decision of the cause must turn on the single question of the jurisdiction of the court. The bill seeks to draw into equity questions which seem to me properly belong to the forum of law. The plaintiff claims title under a deed to his grantor, Ether Shepley, of John Spring, dated April 14, 1832, and the defendant under a levy of an execution in his favor of July 9, 1839, against Webster and Burnham, and traces back his title through Webster and the bank to the mortgage of Spring and his wife, of January 4, 1830. The titles of both parties are strictly legal, nor do I see that they are affected by any equities that should withdraw them from the cognizance of a court of law to the jurisdiction of equity. There is nothing in them that I see, which will prevent a court of law from doing complete justice between the parties. In truth, the bill does not suggest nor rely on anything of the kind, or at least on anything that should give jurisdiction to equity until the title of the plaintiff is established at law.

The bill sets out the title claimed by the defendant, and alleges that nothing passed by the levy, inasmuch as there was no foreclosure under the mortgage: First, because there was no valid entry to foreclose the three-acre lot in controversy; secondly, because the mortgage was discharged by the payment of the debt. Then, as a ground of giving the court jurisdiction, it is contended that this outstanding claim of superior title by the defendant, may hang as a cloud over that of the plaintiff, and that he is entitled, in equity, to have that removed, that is, to have the pretended title of the defendant declared void, and to have a perpetual injunction against his ever setting it up in a court

of law in opposition to that of the plaintiff. The bill may, therefore, be considered as in the nature of a bill quia timet and bearing an analogy to that class of bills which are brought to have void instruments delivered up and canceled. 2 Story, Eq. Jur. §§ 694, 698. In these cases the old practice of the court was, when the validity of the instrument was in controversy, to direct a trial by jury, to ascertain the fact. But, as the court has jurisdiction to determine matters of fact without the intervention of a jury, latterly the more convenient and less expensive course, in some cases, is adopted for the court to determine the fact itself. Smith v. Carll, 5 Johns. Ch. 118; Newman v. Milner, 2 Ves. Jr. 484; Jervis v. White, 7 Ves. 413. Still it is the present practice of the court when the facts are doubtful and the evidence contradictory and not entirely conclusive, to take the opinion of a jury. 2 Story Eq. Jur. § 702.

The validity of the defendant's title, which the plaintiff asks the court to declare void and restrain him from setting up at law, depends on questions partly of fact and partly of law. It is founded on a levy on the land as the property of Webster, who derived his title under a deed from the trustees of the bank. It is not disputed that the legal estate was transferred by the bank to the trustees, and that the deed of the trustees was sufficient to convey whatever legal interest was vested in them at the time of the conveyance. If any interest was transferred, and that was such an interest as could be taken in execution, then it is not denied that the levy was good to pass that to the defendant. The questions, then, which arise and have been argued at the bar are, whether any, and, if any, what estate passed to Webster. The argument of the plaintiff is, first, that the deed was entirely inoperative and nothing passed; or secondly, if anything passed, it was only an estate in mortgage. The argument of the defendant is, that an estate in fee passed.

In the first place, was the deed wholly inoperative? If so, it must be because the title of the trustees was extinguished before the conveyance by a payment of the debt. The debt was paid on the 12th of July, 1836, and the deed to Webster bears date, July 13th, the day following. If it be admitted that the mortgage title was extinguished by the payment of the debt, and that no reconveyance was necessary to revest the title in Spring, the mortgagor (Gray v. Jenks [Case No. 5,720]), it is still true that it is the payment of the debt that has the operation to revest the title in a mortgagor. Now the money was advanced by Webster, and the conveyance was made to him by the direction of Spring. The payment was the consideration of the deed, and in order to carry into effect the manifest intent of the parties, both must be considered as parts of one transaction, and the deed as operating from the time of payment. If the deed bears a later date, so as to give time for the estate to revest in Spring before the execution of a deed, and thus defeat its operation, the day of the date must be considered as a mistake, otherwise it will operate as a fraud on Webster. Indeed King in his deposition, who fixes the day of the payment, says that it was the 12th of July, the day when the deed was executed. There is, therefore, no doubt either that King is mistaken in the day of the payment, or that there is a mistake in the date of the deed. The deed must, therefore, be considered as having an operation to convey whatever title was vested in the trustees.

What, then, was the title that was transferred? The plaintiff's argument is that, if anything, it was only a title in mortgage, at least, as to this lot; because there was no valid entry to foreclose the lot in question. If the deed operated merely as an assignment of the mortgage, then Webster, as mortgagee, had no interest in the land which could be taken on execution, and of course the defendant took nothing in this lot by the levy, however it might be with respect to the other lands set off. Blanchard v. Colburn, 16 Mass. 345; Eaton v. Whiting, 3 Pick. 484. The entry of the bank was into the mansion-house only, and the land in controversy is a separate lot, not adjoining the one on which the entry was made. Whether the entry was sufficient to operate on this lot, the facts being admitted, is a question of law, and if the case is properly before the court, it may as well decide the question sitting in equity as it may sitting as a court of law, and, in my opinion, it was sufficient. It was open and peaceable, and the only objection is, that a special entry was not made on this lot. But it is well-settled law, that where a party having title enters on one parcel in the name of all lying within the same county, it is a valid entry to give him seisin of the whole, unless there are several tenants in possession claiming a freehold in several parcels. Litt. Ten. § 417; Co. Litt. 252b; Green v. Liter, 8 Cranch [12 U. S.] 250. This lot, though not adjoining the mansion-house, was in the same town and in the possession of Spring. If the entry, then, was good to foreclose the mansion-house, it was good to foreclose the mortgage of this lot.

The entry on the land was made either on the 9th of May, or on the 9th of June, 1833, and the time of redemption expired as early, therefore, as the 9th of June, 1836. The title of the trustees, then, became a fee unless there was a waiver of their rights. It is said that if there was a foreclosure, the forfeiture was waived and the title brought back to a mortgage, by the trustees receiving, after the time for redemption had expired, other collateral securities for the debt. The argument proceeds on this ground, that as the foreclosure was by entry in the pres-

ence of witnesses, that is by matter in pais, it may be waived by matter in pais and the absolute title cut down to a mortgage, and that the trustees, by receiving additional securities for the debt after the foreclosure, virtually admitted and acknowledged their title to be a mortgage. Now if it be admitted that these securities might be received under such circumstances as would amount to a waiver of the forfeiture, and give the mortgagor further time to redeem, I think it difficult to be maintained that they might not have been deposited with the trustees under such circumstances and on such terms as would not amount to a waiver of the forfeiture; and King, who transacted the business, says in his deposition that he did not intend to do anything that would prejudice the rights of the trustees under the foreclosure. Taking, then, the case as it is put by the plaintiff's counsel, as this is a question of legal title depending on matters in pais, and to be determined on the weight and effect of evidence, if the evidence is not quite clear, it is precisely such a case as a court of equity is in the habit of sending to a jury. But without going into an examination of the evidence at large, it may be safely said that it is far from being clear and free from doubt in favor of the plaintiff, and, therefore, I think the defendant has a right to have his title submitted to a jury. If this bill, then, is to be considered as in the nature of a bill quia timet, and to be governed by the analogy of bills brought for the delivery up and cancelation of void instruments, my opinion is, that the defendant's title ought to be ascertained to be void, by a trial at law and the verdict of a jury, before a court of equity is called upon to enjoin him from setting it up.

But this suit appears to me to come more properly within the analogy of one species of another class of bills, technically called bills of peace. Of these bills, there are two species, one where a party is in possession of a right, which may be successively controverted by many persons, as a parson's claim of tithes, or a person claiming an exclusive right to a fishery, or claiming tolls. He may in a single bill, by making a sufficient number of persons parties who claim adversely, have his right established against the whole. 2 Story, Eq. Jur. § 854. Another case is where a person is in possession of lands and his possession is disturbed by another claiming title; he may in some circumstances maintain a bill, against the party that disturbs him, for the purpose of quieting his possession, and to enable him to have that undisturbed enjoyment to which in conscience and right he is entitled. The relief granted in such a case, is that which is prayed by the present bill.

But to maintain a bill of this kind, three circumstances must concur. The plaintiff must have the possession; that possession must have been disturbed; and his right must have been previously established at law. It is not enough that he may fear that his possession may be disturbed, or that his right may be controverted or brought into litigation. This doctrine is clearly stated by Lord Redesdale, in the case of Devonsher v. Newenham, 2 Schoales & L. 208. Whenever a person, he says, claims title against another, who is in possession and his enjoyment disturbed, a suit may be entertained by the latter, for the purpose of quieting the possession, and he illustrates this doctrine by the case where several ejectment suits have been successively tried. In such cases, after the title has been sufficiently established at law, a bill of peace will be sustained and a perpetual injunction granted, to put an end to vexatious litigation. But he adds, "when the question is merely whether A or B is entitled to the property, and there has been no actual suit between them, there has been no instance where such a suit has been entertained." He refers to the case of Welby v. Duke of Rutland, 2 Brown, Parl. Cas. 39, as precisely in point, to show that a mere adverse claim, and that asserted by an act which does not disturb the possession and actual enjoyment of the party, is not a sufficient foundation for a bill, simply because it may at some future time bring a cloud over the plaintiff's title. In that case, Welby, the plaintiff, claimed a manor, of which he had the possession, and the Duke of Rutland, the defendant, also claimed title to it, and appointed a gamekeeper. It was said in answer to the bill, that if Welby was disturbed in his possession, he might bring an action and have his title established at law, and when that was settled have an injunction. But there must first be such a disturbance as would support an action, and then the title ascertained at law. The naked assertion of a title, or the doing an act in support of that assertion, which did not interfere with the plaintiff's possession and enjoyment of the property, would not authorize a court of equity to inquire into the foundation of the title and enjoin a party claiming adversely from prosecuting his rights at law.

The case of Welby v. Duke of Rutland, is precisely parallel to the case at bar, with this distinction against the present bill, that this plaintiff has not, and never has had the possession. Spring, a third person, has the possession, not holding under either of the parties to this suit, but so far as appears from the record, adversely to both. Both parties also set up titles, by which, if they have any rights, they have against him a right to the immediate possession. The object of this bill is to obtain a decree, not to quiet and protect the plaintiff's possession, nor to establish his own title against a number of persons who might in separate suits controvert it, but to have the defendant's title declared void as against him. It is, in fact, to have the court decide, which of these

two parties, each having the color of title, has the better right, when, for any which the court can say in this suit, a third party, who has the actual possession, may have a title paramount to both. The defendant might, with just as good cause, file a bill against the plaintiff, and with precisely the same reason ask the same relief against him. He might allege that the deed of 1832, threw a cloud over his title, and ask the court to declare that deed void and inoperative to affect his rights, and that he might be enjoined from setting it up. To sustain a bill under such circumstances would, I apprehend, be a perfect novelty in jurisprudence. If the plaintiff were in actual possession of the land, and the defendant threatened to disturb him by setting up a paramount title, this bill could not be maintained, unless his possession and enjoyment had been actually disturbed, and his title established by a suit at law. The only bill which the plaintiff would then be entitled to, would be a bill not to establish his title, but to perpetuate the testimony, if there were danger of its being lost. But even such a bill he could not maintain, without first obtaining the possession. Then, being in possession and not having the power to bring a suit at law to have the right determined, if his title was denied and he was in danger of having it litigated at a future time, when his proof might be lost by the deaths of witnesses, he would be entitled to a bill to perpetuate the testimony. 2 Story, Eq. Jur. § 1002; Angell v. Angell, 1 Sim. & S. 83; Lord Dursley v. Fitzhardinge, 6 Ves. 251, in which all the cases on perpetuating testimony are critically examined. Jervis v. White, 7 Ves. 413. My opinion is that the bill must be dismissed with costs for the defendant.

[See Case No. 12,707.]

SHEPPARD, In re. See Cases Nos. 12,753 and 12,754.

SPEPPARD (HOWE v.). See Cases Nos. 6,772 and 6,773.

Case No. 12,757.

SHEPPARD et al. v. PHILADELPHIA BUTCHERS' ICE CO

[3 Wkly. Notes Cas. 565.]

District Court, E. D. Pennsylvania. March 16, 1877.

ADMIRALTY JURISDICTION—DEMURRAGE—DAMAGES FOR DETENTION—MEASURE OF DAMAGES.

[1. An admiralty court has jurisdiction of a libel to recover damages in the nature of demurrage, although there is no stipulation for demurrage in the bill of lading.]

[2. While demurrage eo nomine is never payable unless expressly stipulated, yet damages for detention in the nature of demurrage may be recovered.]

[3. A libel for damages in the nature of demurrage is properly filed in the name of the shipowner, and the authority of the master to use the owner's name will be implied.]

[4. The consignee is not liable, merely as such, for damages for detention, where no demurrage or lay days are mentioned in the bill of lading, but if he is the owner of the cargo, he is liable for any unreasonable delay.]

[5. Under a libel to recover damages in the nature of demurrage, where demurrage is not provided for, the burden is upon the consignee, being the owner of the cargo, to prove that the detention was reasonable.]

[6. In such case the measure of damages is the gross freight which the vessel would have earned under ordinary circumstances from the time when she ought to have been discharged to the time when discharge was actually completed.]

Sheppard and others, owners of the schooner Curtis Tilton and other vessels, filed several libels against the Butchers' Ice Company for damage in the nature of demurrage caused, as was alleged, by the neglect of the company to unload their vessels promptly. The cargoes had been shipped in Maine, consigned to the ice company, as owners, at Philadelphia. The bills of lading stipulated for the delivery of the ice to the company at the Christian street wharf, on the river Schuylkill in said city, the consignee to pay freight. No demurrage clause was inserted. The libels alleged that the Curtis Tilton arrived at Philadelphia on May 29, 1876, at Christian street wharf, with her cargo aboard; that the company accepted the cargo and commenced to receive the ice, but detained the vessel till the 15th day of June, by reason of which the libelants suffered damages, etc. The answer alleged that there was no improper delay in unloading; that when libelants' vessel arrived, there were other vessels occupying the wharf, which compelled the libelants' vessels to await their turn, which they did, and that the masters well knew, when they shipped the cargo, that this would probably be the case; that there was no liability on the part of respondents because the bill of lading stipulated only for the payment of freight and nothing more.

At the hearing of the cause, on January 12, 1877, THE COURT (CADWALADER, District Judge) said:

In these cases the impression of the court, after the reading of the papers and proof, is that the respective libelants are entitled to decrees in their favor. But, if so, it will be necessary to ascertain the damages in every case by a commissioner. Therefore, Edward F. Pugh, Esq., is commissioned to inquire and report what damages, in every one of the cases, ought to be assessed if the libelant is entitled to recover, and to report specifically any proposition of law or fact which may be material on the question of the right to recover.

On February 23, 1877, the commissioner reported as follows:

"1. The actions were properly brought in the court of admiralty; no authorities requiring them to be brought at law.

"2. While it is true that demurrage, eo nomine, is never payable, unless expressly stipulated (Robertson v. Bethune, 3 Johns. 342); yet damages for detention, in the nature of demurrage, may be recovered (Horn v. Bensusna, 9 Car. & P. 709).

"3. The libels were properly filed in the names of the owners of the vessels, and not in those of the masters (Evans v. Forster, 1 Barn. & Adol. 118; Brouncker v. Scott, 4 Taunt. 1); but the authority of the master to use the owners' names will be implied.

"4. When the bill of lading has in it a demurrage clause, the consignee, accepting the cargo, is responsible for the payment of the demurrage, according to the terms of the bill of lading; or, if the charter party stipulates for demurrage, and the stipulation is referred to in the bill of lading, he is responsible (Jesson v. Solly, 4 Taunt. 52; Wegener v. Smith, 28 Eng. Law & Eq. 356; Falkenburg v. Clark, 16 Am. Law Reg. [N. S.] 90); even if he had no actual notice of the arrival of the vessel (Harman v. Clarke, 4 Camp. 159). But he is not liable for demurrage, eo nomine, if the bill of lading contain no provision for its payment, even if he accept the cargo. Gage v. Morse, 12 Allen, 410. See, also, Young v. Moeller, 5 El. & Bl. 755; Chappel v. Comfort, 10 C. B. (N. S.) 802. Nor is he liable when the delay was not from his own default. Smith v. Siereking, 30 Eng. Law & Eq. 382, affirmed 5 El. & Bl. 589; Rodgers v. Forresters, 2 Camp. 483. The consignee, merely as such, is not liable for damages for detention, where no demurrage or lay days are mentioned or referred to in the bill of lading. Abb. Shipp. 221; Sprague v. West [Case No. 13,255]; Gage v. Morse, 12 Allen, 410; Donaldson v. McDowell [Case No. 3,985]. But, when the consignee is the owner of the cargo, there is an implied agreement that he will provide for its discharge within a reasonable time, and he must explain delay. Cross v. Beard, 26 N. Y. 85. Especially if he be in reality, though not in name, the freighter. Sprague v. West, supra; Donaldson v. McDowell [supra]; The Hyperion [Case No. 6,987]; Clendaniel v. Tuckerman, 17 Barb. 190; Cross v. Beard, 26 N. Y. 85; The Woodbine, 1 Law T. (N. S.) 200; Falkenburg v. Clark, 16 Am. Law Reg. (N. S.) 90. The burden of proof that the detention was reasonable lies upon the respondents, and, being the real freighters and owners, and having detained the vessels a longer time than was reasonable, they should be held responsible.

"5. The proper measure of damages is the gross freight which the vessels would have earned, under ordinary circumstances and in their usual course of employment, from the time when they ought to have been discharged to the time when the discharge was actually completed, deducting the amount which would have been expended in earning the freight. The Narragansett [Case No. 10,020]; Sprague v. West [supra]; Vantine v. The Lake [Case No. 16,878]; Swift v. Brownell [Id. 13,695]; Williamson v. Barrett, 13 How. [54 U. S.] 110; Jolly v. Terre Haute Bridge Co. [Case No. 7,441]; The Cayuga [Id. 2,535]; The Corier Maratimo, 1 C. Rob. Adm. 287; The Gazelle, 2 W. Rob. Adm. 279; Talbot v. Janson, 3 Dall. [3 U. S.] 133; The Apollon, 9 Wheat. [22 U. S.] 363.

"In the present cases, where the crews were discharged, the wages which would have been paid them and the amount of their board are deducted. In all the cases, the port charges and the amounts which would have been paid for discharging a cargo are also deducted. Subject to these deductions, the libelants are allowed the gross freight which they would have earned in the carriage of a cargo of coal from Philadelphia to Boston, that being their usual employment."

To this report the respondents filed exceptions.

H. B. Freeman, for exceptants.
H. R. Edmunds, contra.

THE COURT (CADWALADER, District Judge). Exceptions dismissed, and decree for libelants according to the above report.

SHEPPARD, The B. S. See Case No. 2,072.

Case No. 12,758.

In re SHERBURNE.

[1 N. B. R. 558 (Quarto, 155).] [1]

District Court, E. D. Missouri. 1868.

BANKRUPTCY—MOTION TO DISMISS.

After an adjudication has been made, it is too late to make a motion to dismiss the proceedings and settle with the debtor. If, however, the parties desire to make a settlement they may proceed under section 43 of the bankrupt act [of 1867 (14 Stat. 538)], and have the estate wound up by trustees.

Upon petition of creditors, the debtor had been adjudged a bankrupt. Motion was made for leave to dismiss proceedings and to settle with the debtor.

TREAT, District Judge. This motion comes too late. After the adjudication all the creditors have a right to present their claims and have the estate of the debtor wound up under the proceedings in bankruptcy. If the parties desire to make a settlement, they may proceed under section 43 of the act, and have the estate wound up by trustees. Motion overruled.

[1] [Reprinted by permission.]

Case No. 12,759.

SHERBURNE v. KING et al.

[2 Cranch, C. C. 205.] [1]

Circuit Court, District of Columbia. June Term, 1820.

CLERK OF COURT—ERROR OF OMISSION—CORRECTION.

A replevin discontinued by the non-appearance of the defendant at the first term, may be reinstated at the next, if the omission to enter the appearance was the error of the clerk.

[Cited in Reiling v. Bolier, Case No. 11,671; Blagden v. Broadrup, Append. Fed. Cas.]

This action of replevin was discontinued at the last term (the return term), by the non-appearance of the defendants [King and Langley], no steps having been taken by the plaintiff to continue the process.

Mr. Ashton, for defendants, now moved to reinstate it upon affidavit of himself, and one of the defendants, stating that the clerk was at the last term ordered to enter Mr. Ashton's appearance for the defendant.

And THE COURT made the following order: It appearing to the satisfaction of the court that the appearance of the defendant by his attorney was omitted to be entered, by the mistake of the clerk, at the last term, it is ordered that his appearance be entered as of the last term, and the cause brought forward upon the docket of this term.

Case No. 12,760.

SHERBURNE v. SEMMES et ux.

[2 Cranch, C. C. 446.] [1]

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

COURTS—APPELLATE JURISDICTION.

Quære, whether this court has jurisdiction of an appeal from the judgment of a justice of the peace upon the verdict of a jury.

This was an appeal from the judgment of a justice of the peace, who tried the cause by a jury, under the late act of congress for enlarging the jurisdiction of justices of the peace in the District of Columbia, March 1, 1823 (3 Stat. 743).

THE COURT, having doubts concerning their jurisdiction, requested the gentlemen of the bar, if so disposed, to argue the question, whether this court can try a case, either with or without a jury, which has been tried by a jury before a justice of the peace; and for that purpose, continued until the next term, all the appeals in cases over the value of $20.

SHERBURNE (SEMMES v.). See Cases Nos. 12,655 and 12,656.

SHERBURNE (TAYLOR v.). See Case No. 13,805.

SHEREBECK (UNITED STATES v.). See Case No. 16,275.

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

Case No. 12,761.

SHERIDAN v. FURBUR et al.

[1 Blatchf. & H. 423.] [1]

District Court, S. D. New York. Feb. 4, 1834.

SEAMEN — SHIP'S CARPENTER — DISOBEDIENCE — DAMAGES FOR FLOGGING—MOTIVES—ORDERS FROM SUPERIOR.

1. A ship's carpenter ranks with an ordinary seaman, and cannot disobey the orders of the second mate.

2. General orders from one officer will not excuse the disobedience of a seaman to the specific orders of another officer.

3. Where a carpenter disobeyed the orders of the second mate, on an occasion of no pressing emergency, under the erroneous impression that he was warranted in so doing, and the master had him flogged, without hearing the excuse which he offered: *held*, that the master was liable in damages.

4. In measuring the amount of such damages, the court will regard the motives of the libellant in instituting the suit.

5. In an action against a mate for an assault and battery, it is a sufficient justification, that he acted under the orders of the master, not knowing them to be illegal.

This was a libel in personam, by [Francis Sheridan] the carpenter against [Edward S. Furbur and another] the master and first mate of a vessel, for an assault and battery upon the high seas. The libellant had been ordered by the first mate, several days before the assault complained of, to open a port-hole, which job was still unfinished, when the second mate, at the time the only officer on deck, ordered the libellant to assist in washing down the deck of the vessel. This the libellant refused to do; whereupon he was reported to the master. Although he asked to be heard, the master declined to hear his excuse, which was, that he was at the time under the orders of the first mate, and also, that being of equal rank with the second mate, he was not bound to obey his orders. He was seized up to the rigging, under the orders of the master, by the first and second mates, and a dozen blows were inflicted on him by the second mate, with a nine-thread rattling. This transaction took place near the commencement of a voyage to the East Indies. Other assaults were charged in the libel, but were not sustained by the proofs. It seemed that the libellant had not been heard to complain of the treatment he received on board of the vessel, and had said, since the filing of the libel, that he was sorry he had instituted the suit, but he had been put up to doing so.

Edwin Burr and Erastus C. Benedict, for libellant.

Gerardus Clark, for respondents.

BETTS, District Judge (after stating the pleadings and proofs). In our service and in the English, the carpenter stands upon the footing of an ordinary seaman. He signs the articles, is bound to do, at times, the duty of

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

a mariner, and has a lien in admiralty for his wages, because of his character as a mariner. The Lord Hobart, 2 Dod. 104. The French ordinance of marine prescribes minute regulations in respect to the qualification and employment of the ship's carpenter; but he is not, in that service, regarded in any other light than an ordinary mariner. 1 Valin, Comm. (Ed. 1776) 589. The cook and steward are equally hired for particular services, yet they are placed on the footing of mariners (Black v. The Louisiana [Case No. 1,461]) and are liable to do duty as seamen whenever, in the opinion of the master, their services are so required. But it is, undoubtedly, the fair understanding of the contracting parties, that ordinarily the duties of the individual shall be confined to the services for which he specifically shipped. He is only to be employed out of the line of his engagement, upon emergencies which require his assistance in relief or aid of the ship's company. In consonance with these general principles, this court has decided, that a mariner, shipped as cook, cannot be put statedly to the duty of a caulker, without being also entitled to the increased wages of that position. The Exchange [Id. 4,594]. There is, however, no foundation for the assumption that the libellant was not bound to obey the orders of the second mate because of his equality of rank with that officer. There was no common rank between them, nor had the libellant any right of command on board, nor did he possess any exemption from the authority of the second mate when in command of the vessel, unless such exemption was secured him by the terms of his contract. In the discharge of his duties when the sole officer on ship-board, the second mate executes the power of the master, and is entitled to the same obedience from the seamen. In the present instance, the second mate was the sole officer in charge of the deck at the time, and his orders, in fulfilling his charge, were accordingly of the same authority with those of the master, for the time being. Whether or not the duty required on ship-board is demanded by the exigencies of the vessel, must be decided, in the first place, by the officer in command, and it is the duty of the crew to submit to his decision. It would be perilous to the ship and her company to permit a disobedience on their part, at sea, to a lawful command. They have always their redress in a home port, against any oppressive or unnecessary exercise of authority over them. Though carpenters, riggers, cooks or stewards ship as such, and their ordinary employment on board be in the line of their business, still it must be discretionary with the master whether or not they shall perform other occasional duties to which they are competent, in common with the ship's crew. There can be no impropriety in imposing on them a share of labor calculated to promote the health and comfort of the ship's company, and which they are competent to perform, even if it is not connected with the navigation of the vessel, or called for by any manifest exigency at the time; as, when a vessel needs to be ventilated, fumigated or cleansed at sea, the court is not aware of any unfitness in requiring the carpenter, steward, rigger, &c., to assist in the service. When the state of the weather will permit, it is a wholesome usage, in the merchant service, to wash the vessel's decks daily. The libellant, on this occasion, was called upon to aid in this proper business. It can be as well performed by one laborer as another, there being nothing about it especially connected with the skill or experience of a seaman. If the carpenter is exempt from such duty, it must be by force of positive agreement or indisputable usage. Neither is shown in the case, and I shall hold that the order from the second mate to the libellant was a lawful one, and that he was bound to obey it. Neither is there any foundation for the claim, that the libellant was at the time employed under the directions of the first mate, and could not be detached from that duty by the order of the second mate. He had been put to a job of work some time previously, without injunctions to complete it within any specific time; and the first mate testifies that he had given him no order on the day in question. Every general order is of course subject to the changes required by the exigencies of the service as they occur. As well might the helmsman refuse to obey the mate's orders to vary his course, because he had received from the master general directions as to the course the ship was to keep. The conduct of the libellant, in refusing obedience to the second mate, was accordingly unjustifiable, and the question now arises, whether the respondents employed proper means of correction for his misbehavior.

This court has, on various occasions, declared its acquiescence in the general doctrine, that the master of a merchant vessel may apply personal chastisement to the crew whilst at sea, to compel the execution of lawful orders, or to restrain a spirit of insubordination, and that the power is not limited to merely suppressing or punishing mutinous acts. A power so little in consonance with our ideas of personal independence, is yielded to shipmasters only in consideration of its imminent necessity. 3 Kent, Comm. 181. Its employment at this day is to be justified, not so much by precedents recorded in the jurisprudence of past ages, though even there it will be found that the maritime codes exacted extreme forbearance and moderation on the part of masters in exercising the power (Abb. Shipp. (Ed. 1829), 136, 137; Butler v. McLellan [Case No. 2,242]), as upon the principle that the emergency of the service demands of seamen implicit obedience, and that no other means have been found adequate to ensure it promptly and efficiently. Although a sounder phi-

losophy and a more enlightened experience may lead us to doubt the solidity of the principle upon which the authority rests, it does not belong to courts of justice to declare a new law on the subject. Their province is to administer the law as it is delivered to them. The experiment is in progress, how far this mode of punishment may be safely dispensed with in the army and navy, and, when congress becomes satisfied of the efficacy of more humane substitutes in those branches of public service, we may hope this may then be abolished in our mercantile navigation also. The solicitude of courts of justice to render the exercise of this power as little injurious as possible, is manifested in the restrictions imposed on masters of vessels with reference to it, and in the prompt satisfaction administered in every case of its vindictive or unnecessary use. Abb. Shipp. 136; Watson v. Christie, 2 Bos. & P. 224; Butler v. McLellan, before cited; 3 Kent, Comm. 181, 182. A great variety of cases have been presented to the consideration of admiralty courts and courts of law in the United States, in all of which the general authority of the master to apply personal chastisement in correcting offences against the police and discipline of the vessel, or in coercing prompt obedience to orders, has been recognised; but, at all times, he is admonished to use great caution and consideration, and not to allow his punishment to be disproportionate to the offence, and is reminded that he will be treated as a trespasser whenever the bounds of reasonable moderation are passed, or any unnecessary or intemperate use is made of his power. Rice v. The Polly & Kitty [Case No. 11,754]; Thorne v. White [Id. 13,989]; Brown v. Howard, 14 Johns. 119; Sampson v. Smith, 15 Mass. 365. There seems to be no wavering in the doctrines of the numerous cases upon this subject, and, applying them, with liberal indulgence, to the acts of the master in this instance, it does not appear to me that he has made out a reasonable justification for his conduct. The disobedience of the libellant was not in a spirit of insubordination, but was based upon a claim to rightful exemption from the particular service exacted of him. He was entitled to be heard upon that subject, and to have his objections disposed of on the provisions of the shipping articles, or by the express decision of the master. The emergency of the occasion did not demand an instant execution of the order, right or wrong, and it was accordingly every way fitting that the claim should be calmly considered and temperately determined.

The authority of a master at sea is represented by the law as corresponding to that of a parent over his child, or that of a master over his apprentice. But this is by way of description, and to mark the moderation and feeling of kindness with which the authority should be exercised, and not to measure its extent; because its exercise is not left so largely to the discretion of a shipmaster, even supposing that a father would be excused for inflicting a blow upon his child for every act displeasing to him, or a master be suffered to visit with a disgraceful flogging every trivial deviation from duty on the part of his apprentice. But, with regard to a ship-master, the persons over whom his authority is to be exerted are entitled to the privileges and immunities of citizens in all respects other than in their qualified subjection to the discipline on ship-board; and every provision of law which sanctions the deprivation of their rights as freemen, evinces, at the same time, a jealous solicitude in their behalf, by imposing on the master a heavy responsibility in the employment of his power. The experience of this court by no means sanctions the epithets often applied to sailors as a class. There is more of metaphor and fancy than of just discrimination in imputing to their dispositions and tempers the wildness and impetuosity of the elements on which they are employed, controllable only by an unremitted exhibition of menace or of physical force. I am satisfied that this is an unwarranted estimate of the character of American seamen. It is undoubtedly necessary that their whole exertions should be at the instant command of their officers, and that they should not be allowed to interpose their own inclinations or judgments to intercept or delay an order given them, and considered necessary by the officer giving it. But I am persuaded it would strengthen and not diminish the discipline and efficiency of crews, to impress on them the conviction, that if they would be tractable and attentive on their part, reliance would be placed on their experience and disposition to do their duty, and no resort would be had to compulsory and harsh means for overawing them or compelling their services. Judicious conduct of masters in their treatment of crews would better command confidence and fidelity than ropes-ends and hand-cuffs. Reasonable kindness, mingled with firmness, with mariners at sea, no less than with troops on land, would, no doubt, stimulate their endeavors far better than the dread of bodily sufferings or scurrilous or boisterous reproaches and oaths. Though seamen, as a class, are heedless and improvident, they go into their employment as a business for life, and many of them, of the younger classes, are in possession of no inconsiderable intelligence. They look forward to advancement by means of their good conduct and capacity; and I am persuaded it can rarely happen, in an American vessel full manned with our own seamen, that a master cannot obtain officers, from the men before the mast, competent to navigate the ship. In the numerous cases brought into this court on claims for wages and for damages for personal torts, I have generally found seamen

prompt to do justice to their officers, however rigid in discipline and urgent in carrying forward the work on board, when fairly treated themselves by the officers. Insubordination and disorders among the crew are too generally found to have had their origin in the unfitness of sub-officers for their places, and in their passionate, reckless and wrongful bearing towards the men. The crew have a common concern in requiring every man to perform his share of service. Vessels avoid taking supernumerary hands. The work neglected by one will fall upon his shipmates, and they will, out of selfishness, if from no higher motive, discountenance idleness or disorder in any of their companions, and be no less solicitous than the officers, that every man shall stand to his post and do his duty. These observations fairly apply to the average conduct of seamen. There are exceptions, to which the attention of this court is too frequently called; but it is not within the experience of this court that just cause of complaint often exists against native seamen, or in respect to mixed crews, without a very painful degree of blame being discovered in the conduct of the officers, tending to produce the difficulty. I am satisfied it is time the experiment should be made, under resolute and temperate masters, to enforce fidelity and police on board of merchant vessels, without the use of the lash or other bodily correction, and thus to elevate the character and ambition of seamen, and render them deserving the great trusts constantly confided to their hands. I can entertain no doubt of its practical good effects, and this court will lend an active agency in aid of the reform, by withholding pay from or awarding damages against seamen for misconduct, according to its powers and the justice of the case.

The discipline in this case was unnecessarily abrupt and severe. There was no occasion for rigorous or prompt proceedings, and the master was bound to have at least inquired into the causes of complaint, if not to have given the orders himself, in the first instance, directly to the libellant. Instead of doing either, he fell upon him, and had the punishment inflicted instantly, without making any effort to persuade him to his duty, and without allowing him to offer an excuse or apology. Indeed, he was peremptorily forbidden to speak. I should be disposed to visit such intemperate conduct with a punishment in damages corresponding to the wantonness of the wrong, were it not that the declarations of the libellant, since the voyage ended, very clearly import that he did not bring the action to vindicate his rights and redress the injury he received, but to satisfy the malevolence or hostile feelings of some one else against the master and mate. This fact takes away all the libellant's claim to damages, beyond a remuneration for his actual injury; and, as he does not himself regard the indignity of a disgraceful punishment, the court will not make it a ground for exemplary compensation. The law gives him some damages, because he has sustained a wrong not fully justified. But, under the circumstances of the case, the court might properly limit the decree to nominal damages, were it not that it seems fit and important to enforce upon masters of vessels the necessity of being always able to show a reasonable occasion for the application of personal chastisement to seamen, and to make it clear that they were unable at the time to vindicate their authority over the ship by milder means. The French ordinance of marine required the master to assemble his officers and receive their deliberate assent before he inflicted chastisement on his sailors. The Code Napoleon has given no sanction to such a punishment. The rule of the English admiralty is, that the master must look well to see that he has the means of justifying himself before the courts of his country, when called to account for correcting a seaman. And our law, without pointing out any specific mode by which the master is to proceed, cautions him that he must conduct himself with calmness and prudence when he assumes to exercise the prerogative of personal chastisement or imprisonment. Upon consideration of all the particulars, I shall decree against the master the sum of $25, with costs.

The case of the mate stands upon a different footing. There is no evidence against him other than that he assisted in bringing the libellant aft and tying him to the rigging to be punished. All this was done under the express orders of the master. Those orders he was bound to obey. There was nothing immoral, or, so far as the mate was authorized to decide, illegal in those orders. He would, accordingly, have been guilty of a breach of duty had he refused to execute them. It belongs to the master to determine what punishment shall be inflicted for offenses on board. He having decided that the libellant was guilty of disobedience, and having ordered him to be flogged for that, the mate and crew were bound to carry his orders into execution; and, though the master acted without legal justification, his authority is a sufficient protection to them. This would not be so, if they had known he was acting illegally, or if he had punished with weapons or in a way to endanger life or limb. Then it would have been their duty to refuse to aid him, and, under extreme circumstances, they would have been justified in even interfering to protect the seaman against the violence and wrong of the master. So, also, if the mate had been himself designedly the cause of the punishment which he inflicted, by urging or advising it, he might be held to have been a co-trespasser with the master. There is no evidence of the kind against this respondent. He only acted in aid of the master, and in pursuance of his direct commands. This was well known to the libellant. The libel must accordingly be dismissed as to

him. I shall also give him costs, because the libellant, by his own declarations, shows that he had no ground of complaint against him. Decree accordingly.

In Richard H. Dana's Seaman's Friend (page 154) it is said: "The carpenter must, when all hands are called, or, if ordered by the master, pull and haul about decks, and go aloft in the work usual on such occasions, as reefing and furling. But the inferior duties of the crew, as sweeping decks, slushing, tarring, &c., would not be put upon him, nor would he be required to do any strictly seaman's work, except taking a helm in case of necessity, or such work as all hands join in. The carpenter is not an officer, has no command, and cannot give an order even to the smallest boy, yet he is a privileged person. He lives in the steerage with the steward, &c., and, in all things connected with his trade, is under the sole direction of the master. The chief mate has no authority over him, in his trade, unless it be in case of the master's absence or disability. In all things pertaining to the working of the vessel, however, and, as far as he acts in the capacity of a seaman, he must obey the orders of the officers as implicitly as any of the crew would, though perhaps an order from the second mate would come somewhat in the form of a request. Yet there is no doubt that he must obey the second mate, in his proper place, as much as he would the master in his."

SHERIDAN (HOLMES v.). See Case No. 6,644.

SHERIDAN (WHALEN v.). See Case No. 17,476.

SHERIFF (DALY v.). See Case No. 3,553.

SHERIFF OF CHARLESTON (UNITED STATES v.). See Case No. 16,276.

SHERLOCK (UNITED STATES v.). See Case No. 16,277.

SHERMAN (BENNETT v.). See Case No. 1,324.

Case No. 12,762.

SHERMAN v. BINGHAM et al.

[3 Cliff. 552;[1] 7 N. B. R. 490.]

Circuit Court, D. Massachusetts. Oct. Term, 1872.[2]

BANKRUPTCY — JURISDICTION OF COURTS UNDER ACT—DISTRICTS.

1. Under the act of March 2, 1867 [14 Stat. 517], an assignee in bankruptcy of a person declared a bankrupt in one district, may maintain an action to recover moneys paid the defendants residents of another district, in violation of the bankrupt act, in the district court of such district, and such district court in the district where such defendants reside, has jurisdiction of the subject-matter and the parties.

[Cited in Tifft v. Iron Clad Manuf'g Co., Case No. 14,035.]

[Cited in brief in Cook v. Whipple, 55 N. Y. 156. Cited in Markson v. Haney, 47 Ind. 34.]

2. The whole tenor of the present bankrupt act shows that congress intended to provide for the complete administration of the bankrupt system in the federal courts and through the instrumentality of federal officers.

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

[2] [Reversing Case No. 12,733.]

By section 1 of the bankrupt act, the several district courts of the United States are constituted courts of bankruptcy, and the provision is, that they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and that they might hear and adjudicate upon the same, according to the provisions of the bankrupt act. On the 21st of March, 1871, the plaintiff [Sumner U. Sherman], as assignee in bankruptcy of the estate of the bankrupts named in the record, brought an action of assumpsit against the defendants [Osmer A. Bingham and others] to recover back certain moneys, which he alleges were paid to them by the bankrupts, in violation of the bankrupt act. Both the bankrupts were resident in the county of Providence, and state of Rhode Island, and were doing business in that county under the name and style of Reynolds & Bartlett, and the record showed that the petition in bankruptcy was filed in the district court for that district, and that all the proceedings took place in the court where the petition was filed. Service was made, and the defendants appeared and pleaded as follows: "That the proceedings wherein the plaintiff alleges that he became, and is assignee, as aforesaid, were all instituted in the district court of the United States for the district of Rhode Island, and not in this district, and that the district court here hath no jurisdiction over the subject-matter, or the parties to the suit." The parties were heard, and the court entered judgment for the defendants [Case No. 12,733], and thereupon the plaintiff sued out a writ of error and removed the cause into this court.

E. P. Brown, for plaintiff in error.

C. T. & T. H. Russel and H. W. Suter, for defendants in error.

CLIFFORD, Circuit Justice. Two propositions are submitted by the defendants in support of the theory assumed in the court below that the district courts have no jurisdiction in such a case.

That no jurisdiction is conferred in such a case, by section 9 of the judiciary act [1 Stat. 76], or by any other act of congress than the bankrupt act giving jurisdiction to the district courts in common law suits between party and party, which may well be admitted, as nothing of the kind is pretended by the plaintiff.

That the bankrupt act does not confer jurisdiction in such a case, in a district other than that where the proceedings in bankruptcy are pending, which is the question presented by the plea to the jurisdiction of the district court.

District courts have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and the argument is, that inasmuch as the jurisdiction must be exercised in the district for which the district judge is appointed, the district court, sitting as a court of bankruptcy, can-

not exercise jurisdiction in any case except in the district where the bankruptcy proceedings are pending; but section 1 of the bankrupt act contains no such limitation, nor does it contain any words which, properly considered, justify any such conclusion.

General superintendence and jurisdiction of all cases and questions under the act are conferred upon the several circuit courts, except where special provision is otherwise made by the first clause of section 2 of the act; but the subsequent language of the same clause makes it clear that the jurisdiction conferred by that clause can only be exercised within, and for the district "where the proceedings in bankruptcy shall be pending." No such limitation, however, is found in the clause of section 1 conferring jurisdiction upon the district courts as courts of bankruptcy. Judges of the district courts must sit undoubtedly in the districts for which they are respectively appointed, and no doubt is entertained that the process of the court in proceedings in bankruptcy cases, is restricted to the territorial limits of the district; but the language of section 1 of the bankrupt act describing the jurisdiction of the district courts, sitting as courts of bankruptcy, is, that they shall have original jurisdiction in their respective districts "in all matters and proceedings in bankruptcy," showing unquestionably that they can only sit, and exercise jurisdiction in their own districts; but the limitation that the proceedings in bankruptcy must in all cases be pending in that district, is not found in that clause of section 1 of the act. On the contrary, the same section provides that the jurisdiction conferred, that is, the jurisdiction of the several district courts, shall extend to all cases and controversies arising between the bankrupt and any creditor, or creditors, who shall claim any debt or demand under the bankruptcy act, and also to the collection of all the assets of the bankrupt, to the ascertainment and liquidation of the liens, and other specific claims thereon, to the adjustment of the various priorities and conflicting interests of all parties, and to the marshalling and disposition of all the different funds and assets, so as to secure the rights of all parties, and the due distribution of the assets among all the creditors, and to all acts, matters, and things to be done under, and in virtue of the bankruptcy.

Unless the assignee can collect what is due to the bankrupt he can never perform the duty assigned to him as the representative of the bankrupt, and section 1 of the act expressly provides that the jurisdiction of the district courts shall extend to the collection of all the assets of the bankrupt, and to all acts, matters, and things to be done under, and in virtue of the bankruptcy. Nothing of greater importance is required to be done under and in virtue of the bankruptcy than the collection of the assets belonging to the estate of the bankrupt. Bankrupts, as all experience shows, have debts due them in districts other than the one where the proceedings against them are instituted, and section 14 of the act provides that all "debts due" to the bankrupt, as well as all his rights of action for property, or estate, real or personal, and for any cause of action which the bankrupt had against any person, arising from contract, or from the unlawful taking, detention, or injury to property of the bankrupt, etc., shall, in virtue of the adjudication of the bankruptcy and the appointment of the assignee be at once vested in such assignee. Power and authority to sell, manage, dispose of, sue for, and recover, or defend the same, are also vested in the assignee by virtue of the same adjudication and appointment. 14 Stat. 523. He is empowered to demand and receive from any and all persons holding the same, all the estate assigned, or intended to be assigned, under the provisions of the bankrupt act, and shall have the like remedy to recover all said estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. Assignees, if they request it, are to be admitted to prosecute actions pending in the name of the bankrupt at the time he was adjudged to be such, no matter where the action was pending, if it was an action for the recovery of a debt, or other thing, which might, or ought to pass to the assignee by the assignment. They are to be chosen by the creditors, but the provision is, that as soon as the assignee is appointed and qualified, the judge, or where there is no opposing interest the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt. Such assignment being made it becomes the duty of the assignee within six months to cause the same to be recorded in every registry of deeds, or other office in the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded, and it is enacted, that such records, or a duly certified copy of the same, shall be evidence thereof in all courts, and that in suits prosecuted by the assignee, a certified copy of the assignment made to him by the judge or register, shall be conclusive evidence of his right to sue. His duty to sue as well as his right, if necessary to collect the assets of the bankrupt, is shown beyond all doubt: but it is as clear as anything in judicial investigation can be, that he cannot perform that duty, nor exercise that right in the federal courts, unless the jurisdiction in this case is sustained, and it is not pretended by either party that the process of the district court in such a case extends beyond the limits of the district.

Debts due to the bankrupt from persons resident in the district where proceedings

are pending, it is conceded, may be collected by suit in such district court, which proves to a demonstration that it is the subject-matter, and not the citizenship of the parties, which gives the jurisdiction, as in that case it must be understood that both parties are citizens of the same state.

Power to establish uniform laws on the subject of bankruptcy is conferred upon congress by the constitution, and it is quite clear that the bankrupt act and all its provisions were framed in pursuance to that authority. Whatever jurisdiction, therefore, the district courts have in actions brought by assignees to collect the assets of the bankrupt, or to recover any of his rights of property, real or personal, is derived from the bankrupt act, passed in pursuance of that authority. Comprehensive and explicit as that clause of the constitution is, it is not possible to doubt that it empowers congress, not only to establish uniform laws on the subject of bankruptcies throughout the United States, but also to commit the execution of the system to such courts of the United States as congress shall see fit, and to prescribe such modes of procedure and means of administering the system as congress in their discretion shall deem best suited to carry it into successful operation. Congress accordingly passed the existing bankrupt act, and conferred the exclusive, original jurisdiction, except in a limited class of cases, upon the district courts, giving the circuit courts, within and for the district where the proceedings in bankruptcy shall be pending, except where special provision is otherwise made, the power to revise all such cases and questions arising under the act, as in a court of equity, in term time or in vacation.

Original jurisdiction is also conferred upon the circuit courts, concurrent with the district courts of the same district, in all suits at law, or in equity, which may be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property, or rights of property of said bankrupt, transferable to, or vested in, such assignee. District courts, in the exercise of their exclusive original jurisdiction, may act in administrative matters, or matters of mere discretion, as well in vacation as in term time. And a judge, sitting at chambers, in such matters has the same powers and jurisdiction as when sitting in court, and all such adjudications, orders, and decrees may be revised in the circuit court, within and for the district where the proceedings in bankruptcy shall be pending under the first clause of section 2 of the same act. Morgan v. Thornhill, 11 Wall. [78 U. S.] 72; Hall v. Allen, 12 Wall. [79 U. S.] 453.

Jurisdiction is also conferred upon the district courts, in actions at law, or suits in equity to collect the "assets of the bankrupt," or as the enactment is expressed in section 14 of the act, "to sue for and recover" all rights in equity, choses in action, patents and patent rights and copyrights, all debts due to the bankrupt, or any person for his use, and all property real and personal, and all damages for injuries to the property of the bankrupt, and also to redeem all his property or estate as fully as the bankrupt might or could have done, if no assignment had been made. Actions at law or suits in equity, under those clauses, cannot be heard and determined by the district court at chambers nor in vacation, nor can any judgment or decree entered by the district court, in such a case, be revised by the circuit court, under the first clause of section 2 of the bankrupt act. Knight v. Cheney [Case No. 7,883]; Smith v. Mason [14 Wall. (81 U. S.) 419].

Writs of error may be allowed in such cases to the circuit courts, in actions at law, and appeals may be taken to the same courts in all cases in equity, when the debt or damages claimed amount to more than $500, and the like remedy is given to the losing party, in the circuit court, to remove the cause into the supreme court, where the matter in dispute shall exceed $2,000. Judgments or decrees in the district courts, where the debt or damage does not amount to more than $500, are final in that court, and judgments and decrees in such cases in the circuit courts, where the matter in dispute shall not exceed $2,000 are final in the circuit court, where the judgment or decree was rendered. The execution of the bankrupt act, to the extent already described, is committed to the federal courts organized under the judiciary act. Provision is also made, by section 3 of the act, for the appointment in each congressional district, of one or more registers in bankruptcy, to assist the judge of the district court in the performance of his duties under the act, showing that congress intended to provide every necessary instrumentality to execute the system, in all its details. Important duties, under the act, also devolve upon the marshal of the United States, and the settled practice is, that oaths must be administered by the court, clerk, or register, or a commissioner of the circuit court, and that neither a justice of the peace, nor any other state officer, not authorized to administer oaths in the federal courts, by an act of congress, can administer oaths in such proceedings. Viewed in the light of these suggestions as the question must be, the court is of the opinion that congress, in framing the bankrupt act, intended to provide federal instrumentalities for its complete execution, and such as are sufficient to carry it into full effect. State courts may doubtless exercise concurrent jurisdiction with the circuit and district courts in certain cases growing out of proceedings in bankruptcy; but congress, in the judgment of the court, intended to provide the means for the execution of the law, in all cases, even though the state courts should refuse

to exercise jurisdiction. Confirmation of that view is derived from section 32 of the act, which provides that all proof of debts against the estate of the bankrupt, by or in behalf of creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall be made before one of the registers of the court, in said district, and by or in behalf of non-resident creditors, before any register in bankruptcy, in the judicial district, where such creditors or either of them reside, or before any commissioner of the circuit court authorized to administer oaths in any district tribunals of federal creation. Methods are also provided for the execution of the bankrupt law in the District of Columbia, and in all the several territories of the United States, and the provision is, that in judicial districts not within any organized circuit of the United States, the power and jurisdiction of a circuit court in bankruptcy, may be exercised by the district judge, showing that the intention of congress was that the jurisdiction created by that act should everywhere, within the territorial limits of the United States, be exercised, and the law be administered by federal tribunals and officers appointed under federal authority.

Unless the case before the court constitutes an exception, no act required to be done in execution of the bankrupt law can be named or pointed out which may not be done in the designated federal tribunal or by the federal officer designated in the bankrupt law. Enough has already been remarked to show that congress never could have intended to constitute any such exception, which sufficiently appears from the fact that section 1 of the act contains no language to support any such theory. And also from the fact, that such a limitation applied to the circuit court is plainly expressed in the first clause of section 2 of the act, giving those courts general superintendence and jurisdiction in all cases and questions arising under the bankrupt act, except when special provision is otherwise made. Subsequently the same limitation was also incorporated into the third clause of section 2, by which jurisdiction is given to the circuit courts, concurrent with the district courts of the same district, in suits at law or in equity brought by the assignee against any person claiming an adverse interest, or by such person against such assignee in the cases therein described. Such jurisdiction is concurrent with the district court of the same district, which means that the plaintiff may bring his suit either in the circuit or the district court of the district, at his election, plainly showing that congress, when they mean to enact a limitation, find no difficulty in selecting appropriate words to express such an intention. Beyond doubt congress, in enacting the bankrupt law, intended to make it uniform throughout the United States, and in order to secure such uniformity congress obviously intended to create or to designate tribunals and officers to execute all its provisions; but it is clear that if the supposed defect of jurisdiction exists in the district courts, that the act neither creates nor designates any tribunal which is obliged to exercise any such jurisdiction. Suppose it be conceded that such a suit may be prosecuted in a state court, the concession will not give any support to the theory of the defendant, as it is settled constitutional law that congress cannot compel a state court to entertain jurisdiction under an act of congress in any case; that it is optional with them, in all cases, whether to entertain any jurisdiction or not; that they are left to consult their own duty from their own state authority, and some courts have held that congress cannot confer any jurisdiction upon a state court in a matter within the exclusive jurisdiction of the federal government. Martin v. Hunter, 1 Wheat. [14 U. S.] 330, 331; McLean v. Lafayette Bank [Case No. 8,885]; Stearns v. U. S. [Id. 13,341].

Criminal jurisdiction cannot be conferred upon state courts, by an act of congress, and it seems to be everywhere admitted, that they are not bound to exercise jurisdiction, even in civil cases, but that they may decline to do so if they see fit, or if the laws of the state forbid it. Stearns v. U. S. [supra]; Houston v. Moore, 5 Wheat. [18 U. S.] 27; 1 Kent, Comm. (11th Ed.) 399, 400; 2 Story, Cont. (3d Ed.) §§ 1752–1755.

Grant that the theory of the defendant is correct, and it follows that the bankrupt law cannot be executed, except by the consent of the several states, and it is quite clear that the state courts cannot exercise jurisdiction in such cases, if they are forbidden to do so by their respective state legislatures. Strong support to the theory, that the jurisdiction exists, is also derived from a comparison of the language of section 6 of the prior act, with the language of section 1 of the existing act, in view of the authoritative construction, which was given to the provision in the prior act. Provision was made by section 6 of the prior act, "that the district courts in every district shall have jurisdiction in all cases and proceedings in bankruptcy, arising under the act." And that the jurisdiction shall extend "to all cases and controversies" in bankruptcy, arising between the bankrupt and any creditor or creditors and the assignee of the estate, whether in office or removed, to all cases between such assignee, and the bankrupt, and to all acts, matters, and things to be done, under and in virtue of the bankruptcy, etc. 5 Stat. 545.

All must admit that no words are contained in the prior law to support the theory, that the jurisdiction was intended to be conferred, which are not contained in section 1 of the existing act. Nothing of the kind is suggested, nor could it be, as the comparison of the two provisions shows that the language

of the existing act affords stronger evidence that congress intended to confer the jurisdiction, than anything found in the prior act, as the clause enumerating certain matters cognizable in the district courts contains the words, "that the jurisdiction shall extend to the collection of the assets of the bankrupt," which words are not contained in the corresponding provision in the prior law. Judge Story decided in Ex parte Martin [Case No. 9,149], that the language of the prior law was not, in terms or by fair implication, necessarily confined to cases of bankruptcy originally instituted, and pending in the particular district court, where the relief is sought. On the contrary it is not unnatural to presume, said the same judge, that in cases originally instituted and pending in one district, an assignee may apply to reach persons and property situate in other districts, and require auxiliary proceedings therein to perfect and accomplish the objects of the act; the intention of congress was, that the district courts in every district should be mutually auxiliary to each other for such purposes and proceedings. Speaking of the language of the act, the same judge remarked, it is sufficiently comprehensive to cover such cases, adding that he could perceive no solid ground of objection to such an interpretation of the provision. Relief cannot be granted by the district court of the district, where the bankrupt proceedings are pending, as the process of that court is inoperative beyond the territorial limits of the district, and it is clear that the state courts are not obliged to entertain jurisdiction in any such case. Refusal to pay a just debt, is a wrong for which the assignee ought to have a remedy not dependent upon the option of a state court, but it is clear that the plaintiff has none such in this case, unless the jurisdiction of the district court in this district is sustained. States in providing their own judicial tribunals have a right to limit, control, and restrict their judicial functions and jurisdiction, according to their own mere pleasure. They may, as Judge Story remarked in a later case, refuse to allow suits to be brought there under the laws of the United States, for any one of the reasons mentioned by the learned judge, or for many other reasons which might be suggested. Mitchell v. Great Works Co. [Id. 9,662].

Bankrupt courts throughout the United States, it is believed, adopted those views in all their adjudications made subsequent to that decision, in administering the prior bankrupt law. Direct adjudication to that effect is found in the case of Moore v. Jones, 23 Vt. 746, in which the opinion was given by the learned district judge of the Vermont district. The equity jurisdiction of the district courts of the United States, under the bankrupt act, said Prentiss, J., is not confined to cases of bankruptcy originally arising and pending in the particular court, where the relief is sought, as cases of bankruptcy originally instituted and pending in one district, may apply to reach persons and property situate in other districts, and as they may require auxiliary proceedings in such districts, to perfect and accomplish the objects of the act, it is held, that the intention of congress was, that the district courts in every district should be mutually auxiliary to each other for such purposes and proceedings. Goodall v. Tuttle [Case No. 5,533].

Contrary decisions have been made by several of the district judges, and in one case by a circuit judge, but it must suffice to remark in respect to those decisions, that the reasons assigned in support of the conclusions, do not appear to be satisfactory. They assume what is not correct, that the jurisdiction of the district courts is confined to the district in which the proceedings shall be pending. Such an expression is contained in the first clause of section 2 of the act, which describes the revisory power of the circuit courts, but it is not contained at all in section 1 of the act, and courts of justice have no right to enact any such amendment. Suits to collect the assets of the bankrupt, except to a very limited extent, cannot be maintained in the circuit courts, so that if the theory of the defendant is correct, there is no right under the bankrupt act to maintain suits for such a purpose in any federal court in a case where the debtor resides out of the district in which the proceedings in bankruptcy are pending, which cannot be admitted, as the whole tenor of the bankrupt act shows that congress intended to provide for the complete administration of the bankrupt system in the federal courts, and through the instrumentality of federal officers. Confirmation of that view is also derived from the fact that congress borrowed the language employed to describe the jurisdiction of the district courts from the corresponding section in the prior law, which had uniformly been so construed by the federal courts, and also from the fact that it is settled law that congress cannot compel the state courts to entertain such jurisdiction in favor of an assignee for the collection of the assets of the bankrupt.

These and many other considerations which might be adduced go to show, that the cases which deny the jurisdiction of the district court in such a case, are not well decided. Judgment reversed.

[For a hearing upon the merits, see Case No. 11,732.]

Case No. 12,763.

SHERMAN v. CLARK.

[3 McLean, 91.] [1]

Circuit Court, D. Michigan. Oct. Term, 1842.

COURTS—JURISDICTIONAL AMOUNT—NOTES—NOTICE OF PROTEST—PRESUMPTION.

1. Jurisdiction is taken from the damages laid in the writ and declaration, and not from the amount due, proved by the plaintiff.

[Cited in brief in Healy v. Prevost, Case No. 6,297. Cited in Victor Sewing-Mach. Co. v. Mingos, Id. 16,936; Kanouse v. Martin, 15 How. (56 U. S.) 208; West v. Woods, 18 Fed. 665.]

[Cited in Abbott v. Gatch, 13 Md. 335.]

2. A notice of the protest and non-payment of a note to the indorser, is good, if directed to a post office where the party is in the practice of receiving his letters, though it may not be the nearest post office.

3. A promise to pay by an indorser is presumptive evidence of notice, as it acknowledges a legal liability.

At law.

Mr. Seaman, for plaintiff.

Mr. Howard, for defendant.

OPINION OF THE COURT. This action is brought against the defendant as indorser of a note. Proof of demand was given, at the bank, where the note was payable, and notice directed to Palmer post office. The amount of the note and interest, was $293, but the damages were laid in the declaration at six hundred dollars. On these facts a question is raised as to the jurisdiction of the court. But there is clearly jurisdiction, as that is taken from the damages laid in the writ, which exceeds the sum to which the jurisdiction is limited.

It was proved that at the time of the notice the defendant lived two and a half miles from the Palmer post office, to which the notice was directed. That he was post master of China post office, and that he was president of the St. Clair Bank, established in Palmer. Talbert, a witness, corresponded with the defendant, and in 1835 directed letters to him at Palmer. The notice was sent in March of that year. Defendant afterwards requested witness to direct to him at China. During the above year the defendant was a carrier of the mail in a steam boat, and called three times a week at Palmer, and as often at the China office. The defendant wrote a letter to the counsel of the plaintiff in which he said, that "he had not the means to pay them, but would be down shortly and would make some arrangement on the subject."

THE COURT instructed the jury that it was not indispensable to send the notice to the nearest post office, if the defendant was in the practice of receiving letters at an office more remote from him. That if they shall find from the evidence the defendant was in the practice of receiving his letters at the Palmer office, and also at China, the notice being directed to either was sufficient.

The jury were also instructed that where there is a promise to pay by the indorser, it is received as presumptive evidence that notice was given in due time, so as to fix his liability.

The jury found for the plaintiff.

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

Case No. 12,764.

SHERMAN v. COMSTOCK.

[2 McLean, 19.] [1]

Circuit Court, D. Michigan. Oct. Term, 1839.

PLEADING AT LAW—AGENCY—AVERMENT IN DECLARATION—NOTICE—NOTES.

1. An averment in the declaration that A B, by C D, made a certain bill, or check, is sufficient.

2. The holder of a check must give notice to the drawer, if payment by the bank be refused. And a declaration on such an instrument is defective, if notice be not averred.

[Cited in Purcell v. Allemong, 22 Grat. 742.]

[This was an action on a note by Robert S. Sherman against Horace H. Comstock.]

Atterbery & Pitts, for plaintiff.

Mr. Howard, for defendant.

OPINION OF THE COURT. The first count in the declaration states that, on the 14th of December, 1838, the defendant made his certain note, or check, in writing, in the words and figures following: "Detroit, 14th December, 1838. Cashier of the Michigan State Bank, pay to Morgan and Clark, or bearer, $674 96, thirty days from date. (Signed) Horace H. Comstock, by Joel Clemens," —and then and there delivered said note or check, to said plaintiff, for value received. And said plaintiff, in fact, saith, that afterwards, and when said note or check, became due, and payable, according to the tenor and effect thereof, the same was presented and shown to said Michigan Bank, and was not paid, &c.

To this count, the defendant demurred, and for cause of demurrer, states: First: Because it does not appear in the declaration that the said Clemens was authorized to act as the agent of the said defendant, in making said note or draft. And, second: That it is not averred that the defendant had notice of the dishonor of the said note or check.

As it regards the execution of the note by the defendant, it is sufficiently averred in the declaration. He signed it by Joel Clemens; and that Clemens was authorized to act in the premises appears; for, that his act is alleged to be the act of his principal. The declaration might have contained an averment that Clemens was duly authorized to act as the attorney in fact of the defendant, but

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

such an averment is unnecessary. [Childress v. Emory] 8 Wheat. [21 U. S.] 642. Bayley, Bills, 103; 2 Phil. Ev. c. 1, pp. 4–6.

And, as it respects the second ground of demurrer, a notice of nonpayment is considered indispensable. This instrument is in form and substance a bill of exchange. There is a drawer and a drawee, and the holder of the bill, who is bound to present it at maturity, and give notice of nonpayment to the drawer. There is the same reason to require notice in this case as in any other; and it is essential that the declaration should contain an averment of notice. On this ground the demurrer is sustained.

The plaintiff then moved for leave to amend his declaration, which was granted, on payment of costs.

SHERMAN (DOUBLEDAY v.). See Cases Nos. 4,019–4,022.

SHERMAN (EDWARDS v.). See Case No. 4,298.

SHERMAN, The (The GARY v.). See Case No. 5,259.

Case No. 12,765.

SHERMAN v. INTERNATIONAL BANK et al.

[8 Biss. 371.] [1]

Circuit Court, N. D. Illinois. Dec., 1878.[2]

BANKRUPTCY — AMENDMENT TO PETITION — ASSIGNEE—WHEN ASSETS VEST—SPECULATIVE OPERATIONS.

1. Amendments to a petition in bankruptcy relate back to the time of the filing of the original petition, and have the same force and effect as though included in the petition itself.

[Cited in Re Ward, 12 Fed. 326.]

2. Where a party was adjudicated a bankrupt solely on the acts of bankruptcy stated in an amendment to the petition filed against him; and prior to the filing of the amendment, but subsequent to the filing of the original petition, he had disposed of certain securities: *held*, that the assignment to the assignee related back to the filing of the petition, and had effect from that date to transfer all assets of the bankrupt to the assignee, and that the bankrupt had no power to make any transfer of such securities, and that no title passed by his transfer and delivery.

3. The bankrupt and certain other parties made a contract by which a speculation in real estate was arranged, the bankrupt to have a certain per cent. interest and a division of the profits: *Held*, that the bankrupt had such an interest in the assets, which grew out of the real estate operations, as would pass to the assignee.

4. It was not the case of a partnership where all the partnership property vested in the other partners.

This was a bill in equity [by Hoyt Sherman, assignee, against the International Bank and others], filed for the purpose of reaching certain assets which, it was alleged, belonged to the bankrupt, B. F. Allen, and which were then held by some of the defendants.

John E. Burke, for complainant.

Rosenthal & Pence and John P. Ahrens, for defendants.

DRUMMOND, Circuit Judge. There are but two questions involved in the case, and I have resolved them both in favor of the plaintiff. The bankrupt was the president of the Cook County Bank, in Chicago, and failed in January, 1875. On the 23d of February following, a petition in bankruptcy was filed against him in the district court of Iowa. That petition alleged a certain act of bankruptcy committed by him; and Allen, on the 16th of March following, filed an answer denying the act of bankruptcy alleged in the petition. On the 22d of April, 1875, the petition in bankruptcy was amended by alleging other acts of bankruptcy; but Allen made no further objection, and the adjudication of bankruptcy followed on the same day. The adjudication was on the acts of bankruptcy stated in the amendment, and set out in the adjudication. Between the time that the petition was filed and the date of the amendment and adjudication, certain securities, which are the subject of controversy in this case, were transferred by Allen to the defendants under the following circumstances: He was arrested on a capias, and held by the officer under the process. In order to relieve himself from arrest, he transferred these securities, and was accordingly released. This was on the 20th of March. The question is as to the status of these securities at the time this took place. Had the bankrupt the right to transfer them? And could the defendants acquire property in them? I think not. The assignment which was made to the assignee related back to the 23d of February, when the petition in bankruptcy was filed, and had effect to transfer all the assets of the bankrupt from that time to the assignee; and the bankrupt, therefore, had no power over his assets to transfer them, and no party could acquire any right in them. By operation of law they vested in the assignee from the 23d of February, and the bankrupt neither could transfer them, nor could others acquire property in them.

It is claimed that inasmuch as the adjudication in bankruptcy was made upon the amendment which was filed, and as the transfer to the defendants was made before the amendment was filed, the legal effect was, that the assignment did not vest the assets of the bankrupt on the 23d of February, but on the 22d of April, when the amendment was made, and the adjudication took place. I am not prepared to say but that there might be a case where this principle would be true, as, for example, if there was a petition in bankruptcy filed, upon which the court could not render any decree—which could not be considered, within the meaning of the law, a

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

[2] [Affirmed in 101 U. S. 403.]

real, genuine petition in bankruptcy, then it might be true that where an amendment was allowed so as to give it effect as a petition in bankruptcy, the assignment would only take effect from the latter date; but where a legal petition in bankruptcy is filed, it is subject always to the right of the parties who are petitioners, whether the bankrupts, or creditors, to make amendments to the petition. It is filed subject to the power of the court to allow amendments, and, therefore, that is a condition which must always be understood, that it is subject to the right of the petitioners to make amendments, and to the power of the court to permit them; and when made, they, as a general rule, relate back, and take effect from the time that the petition in bankruptcy was filed. It is still a petition in bankruptcy; it still takes effect from the time that it is filed, and the property of the bankrupt is vested in the assignee, in my opinion, from the time that the petition is filed. So that in this case, as the bankrupt undertook to transfer assets of his after his petition in bankruptcy was filed, he had no power over them. The act gave no right, and the defendants acquired none by the transfer. The property by operation of law was vested in the assignee.

The next question is, whether or not these assets were a part of the estate of the bankrupt. I think they were. They grew out of a contract made between the bankrupt and certain other parties, by which a speculation in real estate was arranged, and the agreement contained in the contract was carried into effect, mainly by Allen, the bankrupt. He was to advance the money to purchase the real estate. Upon the advances he was to have ten per cent. interest; and the profits of the speculation were to be divided between him and certain other parties. At the time the petition in bankruptcy was filed, no one else, I think, was interested, although there were other parties originally interested in it; no one else, perhaps, except Mr. Tracy, now dead, and Mr. Withrow. The interest of Withrow, as I understand, has been ascertained by decree of the court against the assignee, and his rights have been adjudicated. I can have no doubt that there were rights in these assets which grew out of these real estate operations, and which were in the hands of Allen, which should properly vest in the assignee. It is not like the case of a partnership where all the partnership property is vested in the surviving partners, in the case of the death or bankruptcy of one of the partners, and where there are only certain interests which go to the assignee or to the estate. In this case, there was an actual interest such as could pass, and did pass, to the assignee, in this property and in these assets. Allen had made very large advances for the benefit of those who were interested with him. For those advances they owed him, and he had a first claim upon these assets for the advances, amounting to over $60,000, I think; so that, that was such an interest in Allen at the time his petition in bankruptcy was filed, as would pass to his assignee. If there are any equities in other parties, of course, these equities can be adjusted by proper proceedings against the assignee. The assignee, as the representative of Allen, has the right to control these assets, subject to any equities that may exist.

Now, it may be said, and such is undoubtedly the fact, that this is a hard case for the defendants; but it is like any other act that is done where there are proceedings pending, which proceedings operate as a seizure of the property which is sought to be transferred. For the reasons I have given, I think that the bankruptcy proceedings did operate upon all the assets of the bankrupt from the time that the petition was filed, depriving the bankrupt of all right over them; and, of course, he could exercise none, and could clothe no one else with any right. It is, therefore, the ordinary case of a party who, under circumstances like these, deals with a person who has no right over the property. A great many cases of that kind occur in business matters, where an innocent party has to suffer in consequence of the want of power of another person to convey the property.

I think, therefore, that the plaintiff is entitled to a decree in this case. The questions are important, and especially the one in relation to the bankruptcy—the effect of the petition in bankruptcy and the amendment; and I think there is no decision exactly in point in such a case, although there are some which indicate pretty clearly the general current of authority as to the effect of a petition.

The opinion in this case was affirmed by the supreme court on appeal in Bank v. Sherman, 101 U. S. 403.

As to amendments to petitions in bankruptcy, see, also, In re Williams [Case No. 17,700]; In re Patterson [Id. 10,815]; Stone v. Connelly, 1 Metc. (Ky.) 652; Stoddard v. Myers, 8 Ohio, 203; Gibbon v. Daugherty, 10 Ohio St. 365.

SHERMAN (LAWRENCE v.). See Case No. 8,144.

Case No. 12,766.

SHERMAN v. MOTT.

[Cited in Sherman v. Mott, Case No. 12,767. Nowhere reported; opinion not now accessible.]

Case No. 12,767.

SHERMAN et al. v. MOTT et al.

[5 Ben. 372;[1] 15 Int. Rev. Rec. 56; 11 Am. Law Reg. (N. S.) 716; 7 Am. Law Rev. 574.]

District Court, S. D. New York. Nov., 1871.

COLLISION—VESSEL AT ANCHOR—INEVITABLE ACCIDENT.

1. A brig, a schooner, and a bark lay at a wharf at Galveston, Texas. A heavy storm

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

arose, which broke the brig loose from the wharf, but she was brought up by her anchors about 75 or 100 yards from the schooner. Not long after, the bark was driven against the schooner, injuring her, so that there was danger of her sinking at the wharf. The master of the schooner thereupon, in order to save her, cut her adrift, but, before her anchors could be let go, she was driven upon the brig, in spite of all efforts to the contrary. The owners of the brig filed a libel against the owners of the schooner to recover for the damage: *Held* that, inasmuch as the act of the master, in cutting loose from the wharf, was a voluntary one, the collision was not an inevitable accident.

2. The schooner was liable for the collision. [Cited in The Chickasaw, 38 Fed. 361.]

[This was a libel by Benjamin P. Sherman and others against John W. Mott and others to recover damages sustained by collision.]

F. R. Sherman, for libellants.

E. H. Owen, for respondents.

BLATCHFORD, District Judge. The libellants, owners of the brig Isola. file their libel against the respondents, owners of the schooner Anne E. Glover, to recover for the damages sustained by the libellants through a collision which took place between the brig and the schooner, in the harbor of Galveston, Texas, on the 3d of October, 1867. On the morning of that day the brig and the schooner were both of them lying, heading to the westward, with their port sides against the outer end of a wharf which was in the shape of the capital letter T. The brig lay farther to the westward than the schooner did, and was in ballast, ready for sea. The schooner lay with her bow toward and near to the stern of the brig, and was loaded with cargo, having just arrived from sea and not yet discharged. Astern of the schooner lay a bark with her starboard side to the wharf and her stern to the stern of the schooner. These three vessels were all of them made fast by lines to piles on the wharf. A violent wind arose, blowing quartering on the wharf, from abaft the beam on the starboard sides of the brig and the schooner. As the wind increased, the brig broke loose from her moorings, tearing out the piles to which she was fastened, and was driven along the face of the wharf until she cleared the end of it, when an anchor from her bow caused her stern to swing around by the west, until she was brought by the anchor head to the wind, when a second anchor was put out, which brought her up, so that she rode safely at anchor, at a distance of from 75 to 100 yards from the schooner. Not long afterward, the stern of the bark was driven by the wind against the stern of the schooner, and broke in the stern of the schooner, so that the sea entered, and there was danger that the schooner would sink, with her cargo, at the wharf. In this emergency, as stated in the answer, the master of the schooner, "acting for the benefit of all concerned, for the purpose and with the motive and intention of saving her and her cargo from total loss, cut her loose from her moorings, but before her anchors could be let go, and she could be thereby brought up, she was, notwithstanding every effort which it was possible to make to the contrary, driven upon the brig." The answer sets up that it was impossible, under the circumstances, to prevent the collision; that such collision, so far as respected the schooner, arose from an inevitable accident, by reason whereof each vessel should sustain her own loss; and that there was no fault on the part of the schooner. The brig was greatly damaged by the collision, and the schooner, after remaining for some time in contact with and entangled with the brig, was cleared, and then drifted still further. until she grounded in shoal water.

The contention on the part of the respondents is, that, inasmuch as the schooner was in a proper place when she was cut loose, and was sufficiently secured to the wharf, and it was proper for her safety and that of her cargo to cut her loose, after she had been injured by the bark, so that she might be driven by the wind and drift ashore in shoaler water, the case is one of inevitable accident, or vis major, unless there was some fault or negligence on the part of those in charge of her, in managing her after she was cut loose, whereby she collided with the brig. I cannot assent to this view of the law as to inevitable accident. The act of the schooner, in being adrift, was, on the pleadings and proofs, a voluntary act on her part. It was wilful and deliberate. It was done to save herself from a greater peril by endeavoring to incur a less one. It is established, by the proofs, that, if she had not cast herself loose, she would have remained where she was, only, perhaps, sinking, and would not have collided with the brig. A collision would have been impossible if she had not cut herself loose, as a matter of voluntary choice. How, then, can it be properly said that the collision was an accident which could not have been avoided, when it clearly appears that it would have been avoided, if the schooner had not thus voluntarily chosen to cut herself loose? It may be that, after she was cut loose, all proper skill and caution on her part were observed. But that is not the proper test. In cutting herself loose she took the risk of hitting the brig, and must bear the consequences of having hit her. The brig ought not to be held liable to bear the risk of the voluntary act of the schooner, adopted for the benefit of the schooner, and having no connection with the question of any benefit to the brig.

There must be a decree for the libellants with costs, and a reference to a commissioner to ascertain the damages sustained by them by means of the collision in question.

NOTE. This decision was affirmed by the circuit court, on appeal, in August, 1873. In its opinion, the court (Woodruff, Circuit Judge)

said: "I think the conclusion of the district court in this case was correct. In a voluntary endeavor to deliver the appellants' vessel and cargo from the great peril of loss, the master cut her loose, in circumstances involving great risk of collision with the respondents' vessel, and, after she was cut loose, he omitted to cast her anchors, or put up a sail, or, in fact, do anything to arrest her, and for the like reason, namely, that taking such measures might prevent his delivering the vessel and cargo from the peril he was seeking to avoid. His acts and omissions in this respect were at the risk of his own vessel and her owners, and they are responsible. The master had no more legal right to do acts or omit precautions, which acts and omissions directly tended to injury to another, in order to save property to its owners, than he would have in order to earn property for them. On the question, whether the grounding of the libellants' vessel and the resulting damage were caused by the collision, the testimony is conflicting. But I find no sufficient reason for reversing the conclusion of the commissioner and of the district judge. The decree must be affirmed, with costs."

Case No. 12,768.

SHERMAN v. The NEVADA.

[See Case No. 5,839.]

Case No. 12,769.

SHERMAN et al. v. PENNSYLVANIA R. CO.

[8 Wkly. Notes Cas. 269.]

Circuit Court, D. Pennsylvania. Jan. 23, 1880.

RAILROADS — MOB — RIOTS — STRIKE — TRANSIT — COMMON CARRIERS — LIABILITY OF, IN THE EVENT OF LOSS OF PROPERTY BY VIS MAJOR.

1. Plaintiffs shipped goods from Chicago to Philadelphia by rail, and took a bill of lading from the company defendant exempting the defendant, inter alia, from liability for "loss or damage on any article or property whatever by fire or other casualty while in transit or while in depots or places of transshipment." The goods, owing to a general strike of defendant's employés, were stopped en route outside of, but near, the company's depot at Pittsburgh, an intermediate point. During this detention the defendants' property, including these goods, was threatened by a mob, and finding it impossible to maintain their property in security, they called upon the proper county and state authorities for their aid, which having proved ineffectual, the goods were burnt up by the mob. The detention lasted three days, during which the defendants were forcibly dispossessed of their property, including the plaintiffs', by the superior force of the mob. Trains continued to arrive during the time, which were stopped at Pittsburgh by the mob. At the time the mob obtained possession, a train of petroleum cars was standing braked at some distance from the plaintiffs' property, and at or before the fire, these cars were moved to those which contained the plaintiffs' property, and all were burnt up together. In a suit to recover the value of the goods, *held*, that the defendants were not liable, as the facts disclosed no negligence on their part that had contributed to or caused the loss. The loss of the goods occurred while they were in transit, and was caused by fire within the meaning of the exception in the bill of lading, protecting the defendants.

2. It is the duty of common carriers to convey the goods shipped to the point of delivery without unavoidable delay, and apart from the conditions in the bill of lading, they are liable for loss from any cause, save the act of God or a public enemy. The defendants continued subject to all the liabilities of common carriers, except for losses happening from causes named in the exception, in which there had been no negligence of defendant's servants, while in the discharge of their duty. The defendant, as a common carrier, is liable for any interruption to the transit, caused by the refusal of its servants to perform their duty, which occasioned loss to the plaintiffs.

3. The loss here was not caused by the strike of the defendant's employés, nor was there any permissive allowance by the defendant that the plaintiffs' goods should be stopped in transit. The defendant's default was merely technical, and did not cause, or contribute to the loss. The defendant, under the condition in the bill of lading, was exempt from liability for loss by fire while the goods were in transit, unless occasioned by its default, and its inability to resist the superior force of a mob; and the consequent involuntary relinquishment of possession of the goods and the forced detention of them by the mob was not such default; nor is there any evidence of defendant's default in permitting the arrival of freight trains at Pittsburgh on three consecutive days, during which the mob took and retained possession of the defendant's property, or in their leaving under the circumstances a large number of cars loaded with petroleum in their yard near the plaintiffs' property. The transit of the plaintiffs' goods continued in law, so as to protect the defendant, under the exception in the bill of lading, during the whole period of the continuation of its duty as a carrier to protect the goods. The goods not having reached their destination, were, therefore, legally in transit, until they were destroyed.

Assumpsit, by Sherman, Hall and Co., against the Pennsylvania Railroad Company to recover the value of fifty-three sacks of wool.

A stipulation was filed by counsel waiving a jury trial and referring all facts to the circuit judge under section 649 of the Revised Statutes (page 117), and requesting the court to pass upon, and find specially the facts alleged in the points submitted. The facts, as found by the circuit judge who tried the case, were as follows:

(1) The value of the goods in controversy was, on the 22d day of July, 1877, at the point of shipment, $18,060.38, and at the point of destination $20,972.97.

(2) The said goods had, in course of transit from their place of shipment to their respective destinations, reached the city of Pittsburgh at least twenty-four hours before the fire occurred in said city, on July 21 and 22, 1877, and were then in defendant's custody in the cars in which they had been shipped, and the said cars and the said goods were burned in said fire.

(3) The defendant, about July 19, 1877, found itself unable to maintain, against the force of a mob, entire possession and control of its own property, and the property in its custody, including that of the plaintiff, and to operate its road. It then called upon the proper authorities, including the sheriff of Allegheny county, for assistance and protection; a requisition was made by said sheriff upon the governor for the assistance of the military power of the commonwealth.

In pursuance of such requisition, troops were ordered by the governor to aid said sheriff in retaking and redelivering to the defendant entire possession and control of such property, and to enable it to operate its road; and in endeavoring so to do, said troops, on July 21, 1877, came into conflict with said mob and failed to dispossess the same, and immediately after said conflict and failure the property in question was destroyed by fire communicated by said mob.

(4) The goods in question were "received by the defendant on bills of lading of the form of the annexed receipt, being one of what is usually known as the 'Red Star Union Line Fast Freight' receipts, with all and singular the conditions therein contained." This bill of lading is numbered No. 2856, and is thus identified and exhibited as part of the finding in this case. (This was a railroad bill of lading in the usual form, and it contained a stipulation exempting the defendants from liability for "loss or damage on any article whatever by fire or other casualty while in transit, or while in depots or places of transshipment.")

The foregoing facts are found in pursuance of the written admission of the parties filed in the case.

It is further found:

(5) If the transit of the goods in question had not been interrupted at Pittsburgh, and had been continued in regular course, the train containing them would have been at a considerable distance from Pittsburgh eastward before the time of the occurrence of the fire.

(6) When the train containing said goods reached the depot of the defendant in Pittsburgh on July 19th, the hands who had conducted it there left it, and a "strike" of all the regular train hands of the defendant occurred on that day, in consequence of a refusal by the defendant to accede to their demand for an increase of wages.

(7) On the 19th of July there were standing on the tracks in the depot yard at Pittsburgh a number of cars laden with petroleum, about one hundred and fifty yards distant from the cars which contained the plaintiff's goods. They were in the same relative position on the day when the fire occurred. The oil cars were kept in place by ordinary brakes. The grade of the road was descending towards the freight cars, so that the oil cars would run towards the former by their own gravity. At or before the occurrence of the fire the oil cars were caused to move down the grade until they came in contact with the freight cars, and they were all burned up together.

(8) On the 19th, 20th, and 21st of July freight trains continued to be brought into the depot yard of the defendant at Pittsburgh, both from the east and west, in the regular course of transit, and were there stopped, so that there was an unusual accumulation of trains at that point.

John Fallon, for plaintiffs.

Mr. MacVeagh and Chapman Biddle, contra.

McKENNAN, Circuit Judge. This suit was brought to recover from the defendant the value of certain wool, delivered to it at Chicago for transportation to Philadelphia. A jury having been waived, the case was tried by the court upon the evidence submitted by the parties. The following facts are found as established by the evidence (The court here stated the facts set forth in the foregoing part of this report).

The court is requested by plaintiff to find as matter of law:

(1) That defendant's duty as a common carrier was to carry plaintiff's goods from the several points of shipment to . . . Philadelphia, the point of delivery of all, without any unusual or avoidable delay; and apart from the special conditions in the bill of lading, defendant is liable for loss from any cause save the acts of God or a public enemy. Answer. This proposition is affirmed.

(2) That defendant did not cease to be a common carrier by reason of the conditions in the bill of lading, but continued subject to all liabilities of common carriers, except for losses happening for causes enumerated in said conditions, without default or negligence on the part of defendant's servants or employés, while defendant was actually discharging its duty of carrying the goods from the point of shipment, in the usual and proper manner. Answer. This proposition is also affirmed.

(3) That the interruption of the transit by reason of the refusal of the servants of defendant, in charge of its freight trains, on which plaintiffs' goods were being carried, to perform their duty, was a default on part of defendant. Answer. As it was the duty of the defendant, as a common carrier, to transport the goods of the plaintiffs to their point of destination without unreasonable delay, any injurious interruption of such transportation, by the refusal of the defendant's servants to perform their duty, would be a breach of duty imputable to it; and for any loss to the plaintiff, caused by such delay, the defendant would be liable in damages.

(3½) That the strike, and refusal to perform duty on the part of the men, does not justify or excuse the interruption of the transit of plaintiff's goods; and that defendant's election not to pay the ten per cent. additional wages demanded, and in lieu thereof to allow the goods to remain at Pittsburgh, wholly or partly in the control of persons who prevented defendant "operating its road" and performing its contract as a common carrier, makes defendant liable for all the consequences, including the destruction and loss of said goods, during the period that the transit was thus interrupted

and the plaintiff's property thus wrongfully controlled, without proof of any other negligence or misconduct on the part of defendant. Answer. I decline to affirm this proposition. The evidence does not show that the loss complained of was caused by the "strike," nor that any permissive allowance of the retention of the goods at Pittsburgh can be imputed to the defendant. On the contrary, it is admitted by the plaintiff that the defendant was coerced by the superior power of a lawless mob, which usurped control of the train containing the plaintiffs' goods, and prevented the defendant from operating its road; that the defendant took prompt steps to meet the emergency by an appeal to the civil authorities for protection and assistance; that these authorities, with the military force summoned by them, were repelled; and that the train with these goods was thereupon destroyed by an incendiary fire. While these circumstances would not protect the defendant against a failure to fulfil its obligation as a common carrier, yet I cannot say that an involuntary technical default warrants an imputation of negligence to the defendant touching a cause of loss, which is expressly excepted from its liability.

(4) That allowing or suffering others than their own employés to take from defendant the possession or control, whether in whole or in part, of plaintiffs' goods, and to use that control not for the purpose of furthering or continuing the transit, but for the purpose of suspending and preventing it, was a default on the part of defendant. Answer. The defendant was deprived of the control of the train containing the plaintiffs' goods, and was prevented from continuing their transit by a force it was unable to resist. It cannot be held responsible for the purpose of the mob, although the act of the mob in intercepting the transportation of the goods might subject the defendant to compensation to the plaintiff for any loss sustained by him by reason of such interrupted transit of his goods. I decline, therefore, to affirm this proposition.

(5) That, however proper it may have been for defendant to call on the public authorities for protection and assistance, "in retaking and redelivering to defendant the entire possession and control of said property," such act of propriety in no way justifies the previous default in suffering the possession and control thereof to pass out of their hands. Answer. This proposition is affirmed, with the qualification that I do not say that the defendant was in default, otherwise than as, and for the reason, stated in the answer to proposition 3½.

(6) That the various risks enumerated in said conditions, which are assumed by plaintiff in relief of defendant's general liability, and more especially the risk "of fire while in transit," are limited to losses occurring while the defendant is engaged in carrying the goods, in the proper discharge of its duties under its contract, and do not include loss by fire, occurring while the transit is suspended, and the goods in question have been suffered by defendant to pass into the possession and control of persons acting adversely to the duties defendant assumed to discharge. Answer. I decline to affirm this proposition. The exception in the bill of lading is, that the carrier shall not be liable "for loss or damage on any article or property whatever, by fire or other casualty, while in transit, or while in depots or places of transshipment." The engagement of the carrier is to assume the custody of the property entrusted to him at the point of shipment, and to deliver it at the place of destination, and the obvious intent, as well, I think, as the clear import, of the exception is to protect him against the consequences of fire during the continuance of his duty as a carrier. His qualified liability is coextensive with his duty, and he forfeits its protection only by some fault of his own, in connection with the casualty to which the exception refers. Nor can I regard it as within the reason of the exception to hold, that it is eliminated from the contract when the property in the carrier's charge is wrested from him by a hostile force, which he is unable to resist, and it is consumed in an incendiary fire, although his exclusion from the possession and control of it may last for two days before it is thus destroyed.

(7) That it was gross default and negligence on the part of defendant to allow freight trains to come into Pittsburgh on the 19th, 20th, and 21st of July, under the circumstances in the 7th clause of the facts, which the court is requested by plaintiff to find, mentioned. Answer. I decline to affirm this proposition.

(8) That it was gross default and negligence to allow cars loaded with petroleum to continue to stand on the track, under all the circumstances and manner, and for the period of time in the 8th clause of said facts mentioned. Answer. I decline to affirm this proposition, for the reasons that the petroleum cars were presumably in the usual and proper place for them in the depot yard; that they were at a safe distance from the cars containing the plaintiffs' goods, and were there secured by mechanical appliances usually employed for that purpose, that they might lawfully be kept there, and that their removal into contact with the other cars was the act of the incendiary mob which had, for two days before, maintained a forcible mastery of the situation.

(9) That defendant is responsible for the misconduct and default of the persons whom it suffered to take control and possession, wholly or jointly with itself, of plaintiff's property, and to continue in such control for the space of two or three days, during the period of time while that control and possession continued, and for all loss

resulting from such misconduct. Answer. I decline to affirm this proposition.

(10) On the facts and law aforesaid, plaintiff prays the court to enter judgment for $20,973.97, and interest from July 22d, 1877, to the day judgment is rendered.

Upon the whole case I am of the opinion, and so find, that the loss complained of was caused by fire while the plaintiffs' goods were in transit by the defendant within the meaning of the exception in the bill of lading; that the defendant is not shown to have been guilty of any negligence by which the efficiency of the exception is in any wise impaired; and hence that the plaintiff is not entitled to recover. Judgment will, therefore, be entered in favor of defendant.

Case No. 12,770.

SHERMAN v. TRADERS' NAT. BANK.

[9 Biss. 216.] [1]

Circuit Court, N. D. Illinois. Dec., 1879.

BANKRUPTCY—SECURITIES FROM INSOLVENT DEBTOR—ASSETS—RECEIPT FOR UNDELIVERED GOODS—SECURITY ON PERSONAL PROPERTY.

1. Where a creditor obtains a security upon property, the debt being incurred and the security obtained in good faith, making the security available at a time when the creditor knows that the debtor is insolvent does not prevent the security operating to the benefit of the creditor.

2. And when in such case the security given the creditor was a receipt for coal, not separated, but remaining mingled with other coal in the yard of the debtor, and the creditor took possession of such coal, after discovering the insolvency of the debtor, but before the filing of the petition in bankruptcy, *held*, that the assignee in bankruptcy could not maintain a suit to recover the value of the coal.

3. Though the transaction was nothing more than security in the nature of a chattel mortgage on personal property remaining in the hands of the mortgagor for the benefit of the mortgagee, yet under the ruling of the supreme court it must be *held*, that the security can be maintained for the benefit of the creditor.

4. Clark v. Iselin, 21 Wall. [88 U. S.] 360, commented on.

[This was an action at law by Judson G. Sherman, assignee, against the Traders' National Bank.]

H. O. McDaid and C. A. Knight, for plaintiff.

E. G. Asay, for defendant.

DRUMMOND, Circuit Judge. This is an action by the assignee of John T. Cutting, a bankrupt, to recover from the defendant the value of a certain quantity of coal, alleged to have been the property of the bankrupt, and which was sold by the defendant and the proceeds received December 19, 1876. On November 27, 1876, the bankrupt borrowed of the defendant the sum of three thousand dollars and gave his promissory note payable in thirty days after date. The note was payable to Mr. Rutter, the president of the bank, but there is no question that the money belonged to the bank, and the note was given to the president for its benefit. Accompanying the note was a warrant of attorney given at the same time by the bankrupt authorizing the confession of a judgment at any time after the date of the note. The bankrupt at that time was a coal merchant and had a yard at the foot of Huron street in Chicago; and to secure the note given at that time, the bankrupt gave to the bank a receipt signed by him in which he said that he had received in store at the yard at the foot of Huron street for account of Traders' National Bank of Chicago eight hundred tons of coal, subject to their order free of all charges. This seems to have been treated by the parties in the nature of a warehouse receipt, or an acknowledgment given by the bankrupt to the bank that he held so much coal for it, and of course, deliverable on request. The receipt spoke of two different kinds of coal, four hundred tons of chestnut Lackawanna coal, and four hundred tons of Briar Hill coal, but this coal does not appear to have been separate, but was mingled with other coal. The president of the bank on the 2d of December, a few days after the execution of the note and the delivery of the receipt, became alarmed, so he says, in consequence of some facts which he learned between that time and the date when the money was loaned, and he resolved to take possession of the coal named in the receipt, and gave a written order to a person to that effect to hold the coal for the bank; and possession was taken by him, and the coal, with the consent of the bankrupt, was sold from time to time at the market rate and the proceeds applied to the payment of the note. There was no delivery of the coal on the 27th of November except what might be implied from the receipt, and the bankrupt from that time to the 2d of December continued in his regular business of selling coal, and from both piles of coal in which was the property in controversy. He on the 2d of December agreed that the bank might take possession of the coal. At the time that these transactions took place the coal in the bankrupt's yard, including that in controversy, had only been partially paid for by the bankrupt, a large portion of it having been purchased of the coal dealers in this city and elsewhere.

There is no doubt but that the bankrupt was insolvent at the time the note was given and the property delivered; and on the 20th day of December, 1876, a petition in bankruptcy was filed against him, and on the 10th of January, 1877, he was duly adjudicated a bankrupt by the proper court. The president of the bank states that he believed Cutting was solvent at the time the note was executed and the money loaned. The bankrupt states that the bank never author-

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

ized him to sell the coal covered by the receipt, but that it knew that he was conducting a coal business at the time. But the bankrupt intended, in making the sales, as he says, always to reserve coal enough to meet the receipt that he had given to the bank.

Now the question is, whether under this state of facts, the assignee of the bank, the plaintiff herein, is entitled to recover the value of the coal. The difficulty in this case grows out of this fact: that the property at the time the receipt was given, which was in the nature of a security, and was not within the terms of the law strictly a warehouse receipt, was not delivered over to the bank, or to Mr. Rutter for the bank, but remained in the possession of the bankrupt, he being clothed thereby with all the indicia of ownership of the property. This may be called a chattel mortgage which was not recorded. It was nothing more, in other words, than security on personal property remaining in the possession of the mortgagor for the benefit of the mortgagee, and the question is, whether under such circumstances this security can be maintained for the benefit of the bank. My own opinion has always been that this cannot be done; that it was really under the circumstances of the case a mere security on personal property remaining in the possession of the mortgagor, and where he appears to all the world as the owner of the property; but I do not understand that such is the opinion of the supreme court of the United States. I have not been able to distinguish this case in principle from the case of Clark v. Iselin, 21 Wall. [88 U. S.] 360, which we have to encounter so often in deciding these cases. That was a case where a debtor gave a warrant of attorney to confess a judgment, and at the time it was supposed by the creditors that the party was solvent. In point of fact he was not solvent; and at the time the warrant of attorney was entered up and judgment obtained, the creditor knew that the debtor was insolvent and so it was a case of a warrant of attorney given and received in good faith, but entered up at the time when the creditor knew that the debtor was insolvent. I have never believed that ought to be permitted, but the supreme court has sustained it, and I do not know how in principle this case is different from that. This is not a warrant of attorney, but it is a case where at the time the debt was incurred, and the money loaned and security taken, it was in good faith on the part of the creditor, and, as he says, he had no suspicion at that time—and there is nothing to contradict his statement—that the debtor was insolvent. He obtained some intelligence between the date of the transaction and the time he took possession of the property which alarmed him, but I do not know that we can infer from his statements that that information was of a character to induce him to believe he was actually insolvent, but only there were circumstances which made him think that it was necessary for him to exercise the power with which the bank was clothed by the receipt, and take possession of the property. So that under the principle decided in the case of Clark v. Iselin [supra], inasmuch as the creditor took possession of the property with the consent of the bankrupt, it was actually delivered, because that is the legal effect of what was done. And it was sold by the custodian of the bank with the consent and knowledge of Cutting, and all of this was before the petition in bankruptcy was filed. I understand the principle established by the supreme court, though under a strong protest on the part of a minority of the court, to be this, namely: that where a creditor obtains a security upon property, the debt being incurred and the security obtained in good faith, the fact that the security is made available at a time when the creditor knows that the debtor is insolvent does not prevent the security from operating to the benefit of the creditor. And it seems to me I must hold that this security was available for the benefit of the bank and therefore that the assignee cannot recover the value of the property.

The property was sold for more than the amount of the debt. The plaintiff will be entitled to the difference between the amount received for the coal, which was $3,201.62, and the amount loaned on the 27th of November, $3,000 less the discount. I do not think I could allow any interest after they took possession of the property, so there would be really only five days' interest from the time that they took possession, which was on December 2d.

SHERMAN (WILSON v.). See Case No. 17,833

SHERMAN (WOODWORTH v.). See Case No. 18,019.

Case No. 12,771.

SHERRARD v. LAFAYETTE COUNTY.

[3 Dill. 236; [1] 2 Cent. Law J. 347.]

Circuit Court, W. D. Missouri. April 27, 1875.

COUNTIES — BONDS — LEGISLATIVE AUTHORITY TO ISSUE—BONA FIDE HOLDER.

The bonds in suit held void in the hands of a bona fide holder, for want of legislative authority to issue them

[Cited in Merriwether v. Saline Co., Case No. 9,485.]

This case came on for trial upon the declaration, answer and reply thereto, and upon the facts as admitted by the pleadings, and as stipulated by the parties.

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

The case being thus submitted, the court specially found the facts to be as follows, to wit:

1. The plaintiff's action is on bonds and coupons amounting to $2,640 and interest thereon; these bonds were issued and delivered by the defendant to the Louisiana & Missouri River Railroad Company, to pay the subscription of defendant to the capital stock of said railroad; said bonds are dated June 9, 1869, and were executed and delivered about the date last named, and are of the following tenor, to-wit: "No. 5. State of Missouri. $200. Lafayette county bonds. Five years after date the county of Lafayette promises to pay to the Louisiana & Missouri River Railroad Company, or bearer, the sum of two hundred dollars, with interest thereon from date hereof, at the rate of ten per cent per annum, which interest shall be payable annually on the presentation and delivery at the office of the treasurer of said county, of the coupons of interest attached. This bond being issued under and pursuant to an order of the county court of Lafayette county, and by authority of an act of the general assembly of the state of Missouri, incorporating the Louisiana & Missouri River Railroad Company, and authorizing the county courts of counties through which said road passed to subscribe to the capital stock of said railroad company, and to issue bonds of such counties in payment of such subscription, approved March 9, 1859, and an amendatory act thereto, approved March 14, 1868. In testimony whereof, the said county of Lafayette has executed this bond by the presiding justice of the county court of said county, under the order thereof, signing his name hereto, and by the clerk of said court, under order thereof, attesting the same and affixing hereto the seal of the court; this done at the city of Lexington, county of Lafayette, aforesaid, the 9th day of June, 1869. Ninian W. Lattvie, Presiding Justice of the County Court of Lafayette County. Attest: Wm. Hixon, Clerk of the County Court of Lafayette County, Mo."

2. Said bonds were issued pursuant to an order of the county court of Lafayette county, and by authority of an act of the legislature of Missouri, entitled "An act to incorporate the Louisiana & Missouri River Railroad Company," approved March 10, 1859,[2] and by authority of an amendment thereto, entitled "An act to amend an act entitled 'An act to incorporate the Louisiana & Missouri River Railroad Company' by increasing the amount of the capital stock of said company, defining more explicitly the power of the board of directors, to fix the western terminus of said road, authorizing the location and construction of a branch road, and conferring upon said board the necessary powers to carry into effect the several objects contemplated by this charter, and also by striking out sections 11, 18, 27, 30 and 31 of said act," approved March 24, 1868.

3. The plaintiff [Joseph L. Sherrard] is a citizen of West Virginia, and he bought the bonds and coupons in suit for a valuable consideration before due, and is an innocent holder of the same for value without notice or knowledge of any irregularity in the subscription or issue of said bonds, except as may appear upon their face and such as he was bound in law to take notice of, and is now the owner and bearer of the same, and that defendant at different times for several years paid the interest on these bonds as they fell due.

4. By the original charter of the company, to-wit, the act of March 10, 1859, recited in the bonds in suit, the line or route of said company is confined to the north side of the Missouri river, and by the said original charter the said company could in no event locate its line or route or any part of the same in any county south of the Missouri river, and the right of counties to subscribe to the stock of said company by said original charter is expressly confined to those counties in which a part of the route of said railroad might pass or be located.

5. The defendant county is, and since its organization always has been south of the Missouri river and not within the limits of the original charter of said railroad company, of March 10, 1859. State v. Saline Co. Court, 51 Mo. 350; State v. Callaway Co. Court, Id. 395.

6. The railroad of said company, although surveyed in the defendant county, was never constructed therein or south of the Missouri river, under the original charter or under the amendatory act of March 24, 1868, recited in the bonds in suit, but of this fact the plaintiff had no knowledge when he purchased the bonds.

7. The bonds were issued without the question of their issue ever being submitted to the voters of the people of the defendant county as required by section 14, of article 11, of the constitution of the state, which went into effect July 4, 1865, and no such election was held and no attempt to hold such an election was made.

Ewing & Smith, for plaintiff.
Rathburn & Graves, for defendant.

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

[2] [From 2 Cent. Law J. 347:] The act of March 10, 1859, contains the following provisions: Section 35: "Said company shall have power to mark out, locate and construct a railroad from the city of Louisiana, in the County of Pike, by way of Bowling Green, in said county, to some suitable point on the North Missouri Railroad, intersecting said road between the southern limits of the town of Wellsburg, in Montgomery county, and the northern limits of the town of Mexico, in Audrain County; thence to the Missouri river to the most eligible point on a line the most suitable and advantageous." Section 29: "It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company," etc.

DILLON, Circuit Judge. The defendant county is south of the Missouri river and not within the limits of the original charter of the railroad company, and under the constitution of the state (article 11, § 14) [3] and the decisions of the supreme court of the state referred to in the statement of the case, we are of opinion that the county had no legislative authority to issue the bonds.[4]

Judgment for defendant.

Case No. 12,772.

SHERRARD v. PONSONBY.

JOHNSON v. SAME.

[1 Cranch, C. C. 131.] [1]

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

EXECUTION—FOREIGN JUDGMENT.

An execution upon an exemplification from Maryland, against a person not resident, nor having property within the district of Columbia, will be quashed on motion.

Motion by Mr. Gantt, for defendant, to quash these executions, upon the defendant's affidavit, that he is not and never was a resident of the District of Columbia, but now resides and for many years past has resided at Bladensburg, in the state of Maryland; that he has not and never had any property, real or personal, in the District of Columbia.

The executions had issued upon exemplifications of judgments from Maryland, according to the 13th section of the act concerning the District of Columbia, 27th of February, 1801 (2 Stat. 107).

THE COURT, nem. con., quashed the executions.

SHERRON (CONWAY v.). See Case No. 3,147.

SHERRON (DAVIS v.). See Case No. 3,652.

SHERWIN, Ex parte. See Case No. 9,658.

[3] [From 2 Cent. Law J. 347:] Section 14 is as follows: "The general assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

[4] [From 2 Cent. Law J. 347:] Several payments of interest have been made on these bonds from funds derived from taxation, but this can make no difference. In Citizens Sav. & L. Ass'n v. Topeka [20 Wall. (87 U. S.) 655], the supreme court of the United States decides that want of power cannot thus be cured. Such corporations may, by their acts, become estopped from defenses based on irregularities of their officers, but want of power is an inherent defect not subject to estoppel in this manner.

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

Case No. 12,773.

In re SHERWOOD.

[9 Ben. 66; [1] 17 N. B. R. 112.]

District Court, S. D. New York. March 10, 1877.

BANKRUPTCY — TRADER — SALOON KEEPER — DISCHARGE.

A person whose only regular business is keeping a saloon and selling there for cash and on credit, at retail, liquors and cigars bought in quantities, partly on credit, is a "merchant or tradesman," within subdivision 7 of section 5110 of the Revised Statutes, requiring the keeping of proper books of account as a condition to a discharge in bankruptcy.

[In the matter of Benson Sherwood, a bankrupt.]

F. Bien, for bankrupt.

Stewart & Townley and G. W. Palmer, for creditors.

BLATCHFORD, District Judge. The second specification is founded on the seventh sub-division of section 5110, which declares, that a discharge shall not be granted, if the bankrupt, being a merchant or tradesman, has not at all times kept proper books of account. The bankrupt, from March, 1875, to March 1, 1876, carried on what he called "a regular saloon business—liquors and cigars." He says that he had no other business "worth speaking about" during the period he was conducting the saloon business, although, perhaps, he built during that time two stages in theatres. He conducted his saloon business by buying liquors and cigars in quantities, and some on credit, and selling them at retail for cash and on credit. The only book he kept in that business was what he calls "a pass book of accounts," which book he produces. It does not show his purchases of liquors and cigars during the period it was kept, nor does it show any receipts of money taken in for goods sold for cash, or any payments of cash for any purpose. It contains nothing but accounts against various persons for liquors and cigars sold on credit, and money lent to such persons, and credits of payments thereon. All sales were made in the saloon and the articles were largely consumed there.

It was contended, for the bankrupt, that he was not a merchant or tradesman, in such business, and that it was not necessary for him to keep books of account. I cannot assent to this view. The business was, on the evidence, the only regular business of the bankrupt at the time. He had been in the same business, with a partner, at the same place, for four months before March, 1875. He then bought his partner out and continued the business with regularity and permanence for fourteen months. His bankruptcy schedules show that when his petition

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

was filed, in October 1876, he owed six creditors, for liquors and cigars purchased during such fourteen months, the sum of $1,000. Of such six creditors three have proved their debts, to the amount of over $500. One of these three, with a debt of $35, assents to a discharge. One, with a debt of $282.75, is an opposing creditor. The third, with a debt of $186.06, neither assents nor opposes.

A discharge is refused.

Case No. 12,774.

In re SHERWOOD.

[1 N. B. R. 344 (Quarto, 74); 25 Leg. Int. 76; 1 Am. Law T. Rep. Bankr. 47; 6 Phila. 461.] [1]

District Court, E. D. Pennsylvania. 1868.

BANKRUPTCY—REGISTER'S CHARGES—HOW RAISED—ITEMS—BOOKS AND PAPERS—HOW KEPT.

1. A question as to charges of a register in bankruptcy may be raised by an exception, or may, at the request of a party, be certified by the register. The court will not, in all cases, refuse to entertain such a question upon a certificate by the register of his own motion.

[Cited in Re McGrath, Case No. 8,808.]

2. It seems that the register may, besides the charges for attendance, &c., specified in the forty-seventh section of the act of congress [of 1867 (14 Stat. 540)], and in general order No. 30, make reasonable charges for his additional services in the business of the private sittings preceding the warrant, the business of the first public meeting of creditors or its adjourned sittings, and the business of another public meeting after the application for a discharge.

3. At the last of these public meetings before the register, or at any adjourned session of it, the bankrupt's examination may be finished; and if no assets have been discovered, any business performable under the twenty-seventh and twenty-eighth sections of the act may also be transacted.

4. For all these purposes the notices may be included in the notices for the hearing in court on the bankrupt's application for a discharge. If the business of the meeting before the register is not finished, or the papers are not filed in the clerk's office before the day appointed for the hearing in court, weekly continuances are entered by the clerk, so that the notices may remain in force; and the time for entering opposition is, on the return of the papers, enlarged, for ten days from the next stated weekly session.

5. Services of the register for any of the above mentioned purposes in any one of the counties for which he has been appointed, whether he resides in it or not, are not services under a special order of the court, within the meaning of the forty-seventh section of the act.

6. For his mere attendance, exclusive of any additional services, he is not entitled to more than three dollars per day, unless he should be allowed five dollars for the first day on which he may attend under the order of reference when he does not himself appoint the time.

7. Such an allowance of five dollars cannot be made if he thus attends on the first day in two or more cases, and makes a distinct charge for attendance in each. He cannot then receive more than three dollars in each, for the same day.

8. The fees and charges of a register, including those for expenses, may fall short of, or may exceed the amount of the deposit of fifty dollars, required by the forty-seventh section of the act to be made in order to secure them. But it seems that in an unopposed case, in which there is no estate, he cannot be allowed his actual travelling and incidental expenses in journeys to and from any county, however remote, within the limits for which he has been appointed, to an amount exceeding any reasonable proportional part of this deposit.

9. Nor can the business in bankruptcy of such a county be postponed until its accumulation may enable him to lighten such charges by distributing them among several cases.

10. The books and papers in a register's office should be as open to inspection at the local seat of justice, as those in the office of the clerk of a court.

The register certifies that in the course of the proceedings the following question arose, to wit:

The bankrupt in this case [Benjamin Sherwood], living at Honesdale, the county seat of Wayne county, filed his petition on the 30th day of July, 1867, and on February 6, 1868, the register certified to the court his conformity to the bankrupt act. Pursuant to directions received, the register held a monthly court in bankruptcy, in Honesdale, travelling thither from Easton, a distance of about 136 miles via Scranton, and about 170 miles via New York City, and back again six (6) times before the completion of the case; occupying from three (3) to six (6) days on each journey—travelling in all about sixteen hundred (1,600) miles, and consuming in all twenty-one and one half days. The labor performed is that of an ordinary unopposed case, and the expense of travelling for the register, as distributed among all cases at Honesdale, is seventeen dollars and forty-five cents ($17.45). In making up the fee bill, the register finds no difficulty as to two items, to wit: For minimum fees in ordinary unopposed cases, $50; for travelling expenses, $17.45. As regards the third item—compensation for the number of days employed—the register asks what sum he is entitled to charge per day, for every day employed in visiting the county seats within his congressional district, under instructions from the court, and by the desire of the bankrupt and his attorney? If the clause in section 47 of the bankrupt act of March 2, 1867, "for every day's service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court," comprehends the case, as it seems to the register to do, then he prays the district court to allow him such sum per diem for twenty-one and one half days as may seem just and reasonable. The above case is stated in order to decide fifteen cases now pending in bankruptcy at Honesdale.

The court returned the following answer:

CADWALADER, District Judge. The certificate states no point or matter on which

[1] [Reprinted from 1 N. B. R. 344 (Quarto, 74), by permission. 2 Am. Law T. Rep. Bankr. 47, contains only a partial report.]

a party desires an opinion. Nor does the register certify any case or question as having been stated by parties for my opinion. Whether such a certificate is directly authorized by the sixth section of the act of congress, may be doubted. The regular mode of raising a question as to the propriety of charges of the register is by exceptions on the part of the assignee, or, in some cases, on the part of the bankrupt. But where parties may have no disposition to take such exceptions, or the register desires to receive instruction as to his official duty, there is perhaps no objection to his adopting, as he has done here, a course analogous to that prescribed by the sixth section. If so, however, the question submitted should not be decided in his favor unless the parties opposed in interest have been so notified as to afford full opportunity for contestation. As the certificate under the sixth section of the act "may be varied by the judge," I will state in answer the following important preliminary questions: First. Can a register in bankruptcy fulfil the requirements of his official duty by holding stated or occasional monthly sessions, in a county of his district in which he does not reside, on days of his own appointment? Second. Can he fulfil those requirements without having in every county in which he may act within his district, an office always open, attended by himself or by a resident clerk, where the docket, minutes, and papers of every bankruptcy in such county are securely and methodically kept, and are there open every day during the hours of business, to the inspection of those interested? Third. Does any enactment of congress, or general order of the judges of the supreme court, or course of practice in this court, authorize any such charge by a register as "for minimum fees in ordinary unopposed cases, fifty dollars?" These three questions are prefatorily answered in the negative.

As to the first and second, the register cannot fulfil the duties of his appointment for any county in which the business in bankruptcy must wait upon his convenience, or in which he cannot hold sessions whenever the business may require them, or cannot continue them at convenient short intervals, if not from day to day, as long as may be required. Nor can he fulfil the requirements of his official duty, as to any county in which the books and papers are not so open to inspection, at the local seat of justice, as those in the office of the clerk of a court should be.

As to the third question, the act of congress requires, not payment in advance of the sum of fifty dollars, but, on the contrary, the deposit of it as a security. Against this amount are to be charged all the specific amounts earned for services under the forty-seventh section of the act and the thirtieth general order. Some of the registers take so strictly limited a view of their rights, as to make, I believe, no charge whatever beyond these amounts, for expenditures. Opinions of district judges on this point have, I believe, differed, some of them denying, others doubting, but others admitting, the right to a reasonable allowance for the revision of the papers, and the performance of other duties, requiring the exertion of intellectual effort, and the aid of legal science and experience. I am strongly disposed to make such an allowance, if I can do so without infringing legislative prohibition, express or implied. But such a question cannot be definitely decided ex parte. The allowance, if made, must be measured cautiously. I have as yet had no conception that in any ordinary unopposed case, where travelling expenses have not been incurred, the specific charges and additional allowance can together exceed fifty dollars. Where no assets are to be accounted for, and the creditors are few, the registers have, in some instances, accounted to the assignees for a surplus or balance of the deposit of fifty dollars. Of course this amount may be exceeded by the charges, in cases in which complicated questions concerning proofs or assets arise, or in which the solicitor of the bankrupt is extraordinarily inattentive. I have no present recollection of any peculiar complexity of any case in the county to which the present certificate refers.

The foregoing remarks may serve to introduce the observation, that the services performed by this register under the fifth and other sections of the act of congress have not been rendered under any special order of the court, within the meaning of the provision of the fourty-seventh section of the act. They have, on the contrary, been ordinary services, under its general requirements. I have, however, been disposed to admit a single qualification of this view in the case of the first day's attendance of a petitioning debtor before the register, because the register's attendance on this day is not appointed by himself, but is ordered (and, as I would have said specially ordered), by the court. But other district judges have expressed a contrary opinion, after considering the question more maturely. The point here involved is only the difference between five and three dollars, for attendance on the first day. This point will not require decision, because the register has, I believe, never attended in this county, under such an order, in less than two cases, on the first day. As he will thus be allowed six dollars or more for this day, that is to say, three dollars in each of two or more cases, there can be no sufficient reason for the special allowance, though such reason might have existed if there had been a single case only. For every day's attendance at the seat of justice of this county, in the case of this bankrupt, three dollars will therefore be the proper charge, if allowable under the conditions prescribed by general order 6. This does not include the days consumed in travelling to and from the county

seat. They will be next considered. The travelling expenses of the register, whether chargeable under the fifth section of the act or independently of it, appear to have been properly apportioned among the several cases, and should be allowed. He also, as I understand, proposes to charge as to every journey, for two days consumed, one in going and the other in returning, as for days of service rendered in the proceedings. This charge, in addition to the travelling expenses will, if made, be subject to exception. I cannot therefore decide ex parte in favor of it. But my present inclination is to allow it, if it does not exceed six dollars (that is to say three dollars per day), provided the charge of six dollars is, like that of the travelling expenses, averaged among the cases for which the journey was made. As a charge of the full amount in every one of the cases, it cannot be allowed. In this case, its proportion will, if allowed, make a small addition to the item of $17.45.

I have already intimated, under the head of the third preliminary question, that some allowance to a register beyond the payment of his expenses, and for his daily attendances, and of the other items specified in the forty-seventh section of the act, and in the thirtieth general order, may possibly be proper, even in an unopposed case in which the assignee receives no assets. Recurring to this intimation, I will make some explanatory suggestions. In unopposed cases, it is not the course of practice to appoint special commissioners for the performance of occasional incidental or collateral functions, not within the specified official duty of the register. He, nevertheless, performs many such unofficial functions, for which the appointment of a special commissioner would be inconvenient and expensive. This extra work is of such a kind as no person who is not a lawyer could perform. It includes reports, explanatory statements, answers to questions, &c. For such work, a master in chancery, auditor, or commissioner ordinarily receives compensation, beyond his per diem allowances and specific charges. Moreover the register, in at least three stages of an unopposed case in which the petitioner swears and the assignee certifies that there are no assets, must study the case in its general and particular relations. The first stage is that which precedes the issuing of the warrant. The second stage is that of the first public meeting of creditors, and any adjourned sittings of it. In a later stage, there must, for several reasons, be at least one other public meeting of creditors. One reason is that all proofs of debt made before the assignee are necessarily more or less provisional, and that under the act of congress remissness cannot be imputable to a creditor who does not prove his debt at the first meeting, if it is proved at a second meeting. A more important reason, which is twofold, is that, at a private session of the register, the non-existence or hopelessness of available assets cannot be safely determined, nor can the irresponsibility of the bankrupt, and of the assignee, for the want of assets be definitively ascertained. For the same reasons, and others, the examination of such a bankrupt cannot, with any propriety, be closed otherwise than at a public meeting. In this judicial district, such arrangements under these heads are carried into effect, through the register, that the general and particular notices of the meeting for these purposes really cost nothing. Upon the bankrupt's application for a discharge they are included in the notices for the final hearing in court. Under the useful provision of general order 25, the notices for the transaction, at the same public meeting, of any business under sections 27 and 28 of the act of congress, are likewise thus included. The great importance of this public meeting before the register, prior to the day appointed for the final hearing in court, has appeared in the fact that notwithstanding an interval of many days between them, registers who have diligently prosecuted the business, have, in some cases, been unable to complete it until after the day in court. In such cases, through recorded continuances in court, from week to week, the notices remain in force until the papers have been filed by the register in the clerk's office, when all inconveniences are obviated by an order enlarging the time for objections to the discharge for ten days after the next stated weekly session. The amounts of labor of the register in the primary, and in the ultimate stage, are often inversely proportional to each other; and in some cases, the last examinations have developed important disclosures.[2]

In ordinary unopposed cases of this kind, an additional charge of at least five dollars in every one of the three stages, and, in many cases, of ten dollars in one or more of them, would be very moderate. The question whether it is allowable may, as I have said, be raised by an exception. There would be a dangerous tendency, perhaps, of such charges, if allow-

[2] On the 26th December, 1867, the following memoranda were furnished in the form of a circular letter, by the court for the assistance of the registers: "The papers of every bankrupt should, in order to entitle him to his discharge, contain a complete list of his debts and inventory of his estate, a satisfactory exposition of the cause of his insolvency, an account of his losses, with a precise and full statement and explanation of every transfer, disposition, payment, or appropriation, &c., not made in the regular course of his ordinary business for full and valuable consideration, or in the necessary expenses of living of himself and his family, and all other information which may be material as to his business debts or estate. His examination should not be passed without such full disclosure, affirmative and negative, as may be required under each of these heads. As to his debts and his estate, no repetition of the contents of the petition, or of any former additions or corrections of it by way of amendment, will be required. The last examination, should, however, state whether any omissions in these respects have occurred. The principal purpose of this examination is to obtain disclosure under the several other heads above mentioned."

ed, towards undue expansion.[3] Justice may, nevertheless, require their measured allowance.

The most embarrassing consideration which the present certificate suggests, appears to be that, in future, this register will not be able, as heretofore, to lighten the burden of his travelling expenses by dividing it among many cases. It would, of course, be impossible to sanction the postponement of a non-resident register's visits to such a remote county until he may, through the accumulation of business, become able so to distribute the charges. From the burden of examinations under the twenty-sixth section of the act, and of other such business, the court might, at his request, relieve him by the occasional special appointment of a resident local commissioner. But in all cases the presence of the register in every one of the three stages which have been mentioned, seems to be indispensable. In many cases he must attend oftener, and in some cases much oftener. If he retains the appointment of this county he cannot expect full reimbursement of his travelling and incidental expenses in all cases. In a case in which there is no expectation of assets, I think that he should not be paid for more than three journeys, though he may make more than three, and that he should not receive more money than twelve dollars for any one journey, though he may expend more money.[4] I trust that he may be able, without injustice to himself, to acquiesce in these restrictions. He is a most useful officer of the court, and highly respected and esteemed. The appointment of a register who resides in this county would not benefit the inhabitants of it otherwise than by reducing the charges and increasing the facility and frequency of recourse to the officer.

Case No. 12,775.

SHERWOOD v. BURGESS.

[1 Hayw. & H. 132.] [1]

Circuit Court, District of Columbia. March 29, 1843.

USURY—LEASE WITH RIGHT TO PURCHASE.

A party bought a piece of real estate from a mortgagor thus preventing it from being sold at auction under the mortgage, paying him cash for the same and receiving a deed in fee. After the sale the grantee gave the grantor a lease of the same at a greater rent than the legal interest would have amounted to if the purchase money was really a loan, but with the privilege of repurchasing during the term for the same price it sold for. *Held*, that the transaction was not usurious.

In equity. Suit [by Adiel Sherwood against Richard Burgess] to quiet title to real estate.

Clement Cox, for complainant.
Henry M. Morfit, for defendant.

BY THE COURT. The bill states that the complainant bought certain real estate of the defendant. That the said real estate was about to be sold to satisfy a deed of trust made to secure an amount loaned to said defendant. That after purchasing the said property the complainant leased it to the defendant with the privilege of re-purchasing the property at any time during the continuation of the lease for the same amount as the purchase money. That after the lease had expired the defendant claimed that the amount paid by the complainant was a loan to be returned, and that the rent to be paid was only a cloak for usury, as it was in excess of the legal rate of interest. This bill is brought to clear the cloud in the title to the said real estate.

The testimony of one of the witnesses gives a statement of the facts that led to the purchase. The defendant appealed to the said witness to raise the money and thus prevent a forced sale under the trust. About the time he was so hard pressed the complainant came to said witness and wanted to invest $2,000 profitably. Knowing that the complainant did not want to loan the money, as he desired to make it more productive than legal interest, and determined not to implicate himself in any usurious loan, the witness suggested to the defendant a sale of the property with the right of re-purchase at the same price within a given time, a form of investment of which several instances had occurred in said witness' observation and which said witness understood was entirely legal, and recommended this to the defendant as saving a general sacrifice of the property and affording him time to effect the most advantageous final sale of his property, and to the complainant as giving him the present title and possession of a productive property that would yield him a large income, and which if not re-purchased would be a bargain as a permanent investment. The result was a sale of the premises and a lease by the complainant to the defendant. There was no obligation of any kind taken from the defendant for the repayment of the said sum of two thousand dollars and interest.

The cause, coming on to be heard on bill, answer, general replication and proof, was duly heard and determined. THE COURT decreed that the defendant be enjoined from disturbing or impeaching the title, possession or enjoyment of the complainant, his heirs or assigns in, of and into the said real estate.

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[3] Where sordid motives would induce such an expansion of the charges, they might no less induce an improper multiplication of meetings if the charges were not allowable. Such motives cannot be imputable to any of the present registers. I do not consider precedents under English tariffs of charges applicable.

[4] So high a charge would probably not be allowed under this head, in the district of any other register.

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

Case No. 12,776.

SHERWOOD v. GENERAL MUT. INS. CO.

[1 Blatchf. 251;[1] 5 N. Y. Leg. Obs. 406; 18 Hunt, Mer. Mag. 186.]

Circuit Court, S. D. New York. Dec. 4, 1847.

MARINE INSURANCE — PERILS OF THE SEA — DAMAGES PAID IN COLLISION.

1. A policy of insurance against "the perils of the sea," comprehends the damages paid by the insured vessel to another, in consequence of a collision between them at sea.

2. And the underwriters are liable in such case, even though the collision is produced through negligence and misconduct on the part of the insured vessel.

[Cited in Nelson v. Suffolk Ins. Co., 8 Cush. 504.]

3. The damages sustained by the injured vessel are the direct and immediate consequence of the collision, and no less so in being imposed by judgment of law on the insured vessel, than if they had accrued to her bodily by the collision.

4. And the policy covers not only the immediate damages occasioned by the collision, but the costs and expenses incurred in a suit brought to recover those damages.

5. It also covers counsel fees, beyond taxable costs, paid by the insured vessel in such suit.

6. The claim on the policy in such case is for indemnity, and the defence in the suit against the insured vessel is *held* to have been for the benefit of the insurer.

After the decision in the case of The Emily [Case No. 4,452] the claimant [Ebenezer B. Sherwood] brought an action in this court against the insurers of the Emily, to recover the amount so decreed against that vessel, he having paid it.

Francis B. Cutting, for plaintiff.

Theodore Sedgwick and Alexander Hamilton, Jr., for defendants.

BETTS, District Judge. The declaration in this case is very special, setting forth all the facts upon which the action is grounded, or which might probably be brought out on the defence. The brig Emily, owned by the plaintiff, was underwritten by the defendants, amongst other risks, against "the perils of the sea." Before the termination of the voyage, and at sea off the port of New-York, she came in collision with the schooner Virginian, by which the latter vessel was sunk, and, with her cargo, totally lost. A suit in rem was prosecuted, in the district court for this district, by the owners of the Virginian against the Emily, to recover the damages sustained by occasion of the collision. The court held, that there was negligence and misconduct in the management and navigation of the Emily, and decreed against her $6,000 for damages sustained by the Virginian, besides costs of suit. This decree was affirmed on appeal to the circuit court, and the present action on the policy of insurance seeks to recover from the defendants the amount so decreed against the Emily, and which the plaintiff avers he has paid and satisfied.

The defendants demur to the first and second counts of the declaration, which detail these facts, and the issues at law presented upon the pleadings are: 1. Whether a policy against "the perils of the sea" comprehends the damages paid by the insured vessel to another in consequence of a collision between them at sea; 2. Whether the underwriters on such policy are liable, when the collision is produced through negligence and misconduct on the part of the insured vessel.

These points have been argued with great fulness and ability, and with a critical examination of the principles recognized in the American and English courts, and the maritime codes of Europe, on the subject. We think both questions are embraced within decisions rendered by the supreme court, and that they are not now open for consideration by this court on general principles, and accordingly we shall restrict the discussion in this opinion, to a very concise statement of our views of the effect and bearing of the cases decided by the supreme court.

In the first place, we understand it to be explicitly settled in the case of Peters v. Warren Ins. Co., 14 Pet. [39 U. S.] 99, that a vessel insured against the perils of the sea is entitled to be remunerated under the policy, to the extent of the contributions she has been obliged to make for injuries to another vessel in consequence of a collision at sea between the two. That is the general doctrine. The court also determined that the policy covered not only the immediate damages occasioned by the collision, but the costs and expenses incurred in enforcing the contribution.

That case disposed of another point supposed on the part of the defendants in this case to merit great consideration. It was emphatically declared that the proximate cause of loss was the collision, and not the adjudication of the tribunal attaching the loss to the insured vessel, or the lex loci establishing her liability. The objection raised on the argument before us, that the loss was not within the perils insured against, because it was imposed upon the Emily immediately by the decrees of the district and circuit courts, condemning her in damages and costs, and that her exposure to litigation could not, in the event of such litigation, be deemed a peril of the sea, is, therefore, precisely met and answered by that case. We accordingly regard the first proposition raised by the demurrers as fully covered by the decision of the supreme court, and no longer a subject of discussion.

The point, however, most relied upon by the defendants is, that by the commercial law of the United States and of the continental states of Europe, underwriters on a marine policy are not liable for a loss pro-

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

duced by the carelessness, ignorance or misconduct of the assured; and that the later English cases which have declared a different rule are in opposition to the better settled principles of the law of that kingdom also. It is conceded that the case of Hale v. Washington Ins. Co. [Case No. 5,916] is in consonance with the recent decisions in England, and applies the case of Peters v. Warren Ins. Co. [supra] to a class of facts entirely analogous to those stated in the declaration in this case and, by the demurrers, admitted to be true. But it has been most strenuously insisted, that the decision of the supreme court in no way sanctions the principles adopted by Judge Story and claimed by the plaintiff in this suit. It is true the case before the supreme court arose out of a collision which happened through accident or mutual fault. That circumstance was recognized by the Hamburg tribunal as the ground for compelling a mutual contribution by the colliding vessels. But the judgment of the supreme court was in no respect governed by that circumstance. It is placed upon a broader consideration; one which may be fairly regarded as embracing every loss not barratrous. It adjudged the damages sustained by the injured vessel to be the direct and immediate consequence of the collision, and no less so in being imposed by judgment of law on the insured vessel, than if they had accrued to her bodily by the collision.

The case did not demand the judgment of the court upon the particular point here relied upon by the defence, and no direct opinion was expressed in respect to the influence or effect of proving negligent or blamable conduct in those managing the insured vessel. But it is manifest that the fact, if it existed, would in no way have influenced the decision; because the court express their dissatisfaction, in toto, with the decision of the queen's bench in England, in De Vaux v. Salvador, 4 Adol. & E. 420, and a prominent ingredient in that case was one of fault on both sides. The distinction would not have escaped notice, had the supreme court considered the absence or presence of negligence or fault tending to produce the loss, as varying at all the principle adopted and adjudged in the case. We accordingly think the spirit of the decision in Peters v. Warren Ins. Co. [supra] well warranted the conclusion drawn from it and applied in Hale v. Washington Ins. Co. [supra], and that full authority is furnished by these cases to support the present action.

But, furthermore, we regard the point as in effect determined by the supreme court, by repeated decisions antecedent to the case of Peters v. Warren Ins. Co., and that, accordingly, that case proceeded upon a principle which had become the settled law of the court. The rule, after the most ample examination of American and European authorities, had been deliberately declared and established, that underwriters are liable for a loss arising directly out of a peril insured against, although the negligence or misconduct of persons in charge of the property insured, may have occasioned the loss. Patapsco Ins. Co. v. Coulter, 3 Pet. [28 U. S.] 222. That was a marine policy. The same doctrine was reiterated in Columbia Ins. Co. v. Lawrence, 10 Pet. [35 U. S.] 507, which was a fire policy on real property. The principle is repeated with increased emphasis in Waters v. Merchants' Louisville Ins. Co., 11 Pet. [36 U. S.] 213.

These principles have now been incorporated into the jurisprudence of many of the individual states. Henderson v. Western Marine & Fire Ins. Co., 10 Rob. (La.) 164; Copeland v. New England Marine Ins. Co., 2 Metc. [Mass.] 432; Perrin v. Protection Ins. Co., 11 Ohio, 147. In the last two cases cited, the courts have retracted or qualified the doctrine previously governing their decisions, in order to conform to the judgment of the supreme court, and render a principle of law of such extensive and important influence uniform throughout the United States, corresponding with the rule now definitely established in England. Busk v. Royal Exch. Assur. Co., 2 Barn. & Ald. 73; Walker v. Maitland, 5 Barn. & Ald. 171; Bishop v. Pentland, 7 Barn. & C. 219; Shore v. Bentall, Id. 798, note b; Dixon v. Sadler, 5 Mees. & W. 405, and s. c. (in error) 8 Mees. & W. 895.

The counsel for the defendant contend that the principles settled by these strong cases, have relation, at least in the United States courts, to fire policies, and that policies covering sea risks are to be construed and enforced on different considerations. It is sufficient to observe that the cases in no instance note that fact as affording a different liability or right, or calling for a different rule of interpretation. On the contrary it would seem that the liability of assurers, notwithstanding the loss was occasioned by the fault or negligence of the assured, was first established in cases of sea risks proper, and was subsequently applied, because of its justness and the plain purpose of the contract, to fire risks at sea and on land. Copeland v. New England Marine Ins. Co., 2 Metc. [Mass.] 432; Busk v. Royal Exch. Assur. Co., 2 Barn. & Ald. 73; Columbia Ins. Co. v. Lawrence, 10 Pet. [35 U. S.] 507; Waters v. Merchants' Louisville Ins. Co., 11 Pet. [36 U. S.] 213.

In our opinion, it is now incontrovertibly established, by the authority of the highest court of the land, that the defendants would be liable under this policy, on the facts stated in the declaration, for the damage directly received by the Emily in the collision, although produced by the negligence or misconduct of her crew. It would be one of that class of losses which ship owners would have most reason to apprehend, and, accordingly, seek first to be guaranteed against. The inattention, care-

lessness and faults of mariners, must invariably enter, more or less, into every damage and loss sustained by a ship on her voyage. In the present case the blamable absence of the lookout for a few moments, a mistaken manœuvre of the vessel insured, or a wrong order given by an officer on deck, produced the collision, and was the cause for which the colliding ship was charged with the damages inflicted on another. But, most assuredly, these facts could not affect her right to protection by the underwriters against the direct injury received by her also, by the act of collision. It would be taking away from a policy all its essential properties of an indemnity against perils of the sea, if such circumstances connected with a peril, discharged the assurer from liability to the assured. The courts, in the opinions pronounced, have adverted to this consequence of that doctrine and strongly repudiated it. The primary responsibility of the underwriters for the direct injury to the Emily being then unquestionable, the case of Peters v. Warren Ins. Co. supplies all the authority required, for including within the indemnity, as part and parcel of the loss, the damages decreed against the insured vessel, and which she was compelled to bear because of such collision.

A decree must accordingly be entered overruling the demurrers.

After this decision an inquest was taken, and the question arose whether the defendants were liable for counsel fees paid by the plaintiff to advocates in the suit against the Emily, amounting to $450, beyond taxable costs. The defendants had notice from time to time of all the proceedings in that suit. After its termination the plaintiff, under the advice of counsel, settled the claims against the Emily by paying a sum in full satisfaction, each party paying his own costs. The sum paid was considerably less than principal and interest on the decree. There was a clause in the policy in this suit as follows: "And in case of any loss or misfortune it shall be lawful and necessary to and for the assured to sue, labor and travel for, in, and about the defence, safeguard and recovery of the said vessel or any part thereof, without prejudice to this insurance, to the charges whereof the said insurance company will contribute, according to the rate and quantity of the sum herein insured."

THE COURT held that the case was one of indemnity, that the defence against the libel was for the benefit of the insurance company, and that the counsel fees ought to be allowed.

[NOTE. Upon the rendering of the judgment in favor of the plaintiff upon the demurrer the defendants did not interpose any other answer to the two special counts, but to the common counts (3, 4, 5, and 6) they pleaded the general issue. The cause was then tried by jury, and verdict entered for the plaintiff for $4,536.34. Upon a writ of error, the judgment of the circuit court was reversed and the cause remanded, with directions to enter a judgment for the defendants on the demurrer to the first two counts and award a venire facias de novo to try the general issue pleaded to the other counts. 14 How. (55 U. S.) 351.]

Case No. 12,777.

SHERWOOD v. HALL et al.

[3 Sumn. 127.] [1]

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

PLEADING IN ADMIRALTY — DENIAL IN ANSWER — EVIDENCE NECESSARY TO OVERCOME — SHIPPING — MINOR — MARITIME TORT — MEASURE OF DAMAGES.

1. Courts of admiralty do not recognise the rule in equity, requiring two witnesses, or one witness and strong corroborative circumstances, in order to overcome the denial in the answer.

[Cited in note to Hutson v. Jordan, Case No. 6,959. Cited in The Australia, Id. 667.]

2. A master shipped a minor, who had run away from another vessel, under circumstances amounting to notice that the shipment was unauthorized by, and against the will of, the father. *Held*, that this was a tort of the master, for which the ship-owners were responsible in damages.

[Cited in Mendell v. The Martin White, Case No. 9,419; McGuire v. The Golden Gate, Id. 8,815; Cutting v. Seabury, Id. 3,521; The G. H. Starbuck, Id. 5,378; The Florence, Id. 4,880; Simpson v. The Ceres, Id. 12,881; The A. Heaton, 43 Fed. 596.]

[Cited in Gabrielson v. Waydell, 135 N. Y. 7, 31 N. E. 969.]

3. The measure of damages was held in this case to be the amount of the wages which the minor was earning on board the other vessel at the time of the abduction, down to the termination of the voyage; and $50 besides, to cover extra expenses and losses.

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

Libel [by William Sherwood against Isaac Hall and Thomas Curtis] in a cause of damage for abduction of the libellant's son on a voyage from Boston to Trieste, and back again to Boston. The facts of this case will sufficiently appear in the opinion of the court. At the hearing in the district court, the libel was, by consent of the parties, dismissed [case unreported] with a view to argue the same cause upon the appeal in this court.

Charles P. Curtis, for libellant.

Franklin Dexter, for respondents.

STORY, Circuit Justice. The present is a libel for a maritime tort, technically called a cause of damage, for the asserted abduction of the minor son of the libellant, and employing him as a seaman on board of the brig Rupee, owned by the respondents, and of which one John Freeman, Jr., was then master, on a voyage from Boston to Trieste, and Palermo, and back again to Boston. There is no dispute that the minor went on the voyage; that he was, at the time of the sailing of the brig, known to Freeman (the master) to be a minor, and to have run away from another vessel, then in the port of Bos-

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

ton; and that the circumstances were such that Freeman must have had information, amounting to full notice, that the shipment of the minor was unauthorized by, and against the will of, his father. All this is, as I think, fairly inferrible from his own testimony (he being made a competent witness by a release from the respondents), either from direct admissions in it, or from clear and determinate presumptions, arising from it. I think, that the testimony of Capt. Meeker goes farther, and establishes satisfactorily, that Freeman was expressly warned and admonished, not to take the minor on board; and that he would be held responsible for his conduct, if he did. Under such circumstances, it was clearly his duty not to take the minor on board; but to discharge him. After such notice, he acted at his peril, and if he were now before the court, he would have no right to complain, if his conduct was visited by severe, if not by exemplary damages. He had no right, after such notice, to rush blindly on his course; and if he chose to make no inquiries, and to give no heed to his proper duty, the law might justly be taxed with a want of vigor, if it could not reach him in the shape of damages. But the present libel is brought against the respondents, as owners; and unless they had a direct or positive notice of the facts, there is not any strong reason for making them responsible, beyond a fair compensation in damages, for the misconduct of their master. The first question, then, that arises properly in the case, is, whether they had any such direct or positive notice. It has been argued, on behalf of the respondents, that they had no such notice; that in their answer to the libel, put in under oath, and responsive to the libel, they declare, that they never had any personal notice of the facts; and that, under such circumstances, their answer must stand for verity, unless overcome by two witnesses, or one witness and strong corroborative circumstances.

The argument proceeds upon the ground, that the same rule applies to an answer in courts of admiralty, responsive to the libel, as evidence, as does apply to an answer, responsive to the bill, in courts of equity. But no such rule has, to my knowledge, ever been recognised in courts of admiralty. The libellant in the admiralty has a right to require the respondent to answer, under oath, to the allegations of the libel; and also to put the respondent to answer special interrogatories, growing out of the allegations of the libel, in order to supersede the necessity of making any proof of facts, which are not contested or denied by the latter. This practice is borrowed from the civil law, where the actor, or plaintiff, first puts in his positions, answering to our libel; and then required the answer thereto by his adversary, the "reus," or defendant. After the answer of the latter was put in, the actor proposed special interrogatories to the defendant, respecting the matters of the positions, which interrogatories were technically called, in the civil law, libellus articulatus. See Gilb. Forum Rom. 90, 91, 218; Hare, Disc. 223; Story, Eq. Plead. § 39. In modern times, in the admiralty, at least in this country, the libel embraces the positions and the interrogatories of the civil law in one instrument, and therefore becomes emphatically a libel articulate (libellus articulatus), in the double sense of a narrative of facts, and a special interrogation as to these facts. It is true, that, in the civil law, two witnesses were ordinarily required to the material facts, if they were not admitted by the defendant, or were put in contestation by him. Thus, we find it laid down in the Code: "Simili modo sanximus, ut unius testimonium nemo judicum in quâcumque causâ facile patiatur admitti. Et nunc manifeste sancimus, ut unius omnino testis responsio non audiatur, etiamsi præclaræ curiæ honore præfulgeat." Cod. lib. 4, tit. 20, l. 9; 2 Browne, Civ. Law, 380, note 47; 2 Story, Eq. Jur. § 1530. This, it is observable, was a general rule of evidence, and wholly independent of the denials in the answers of the defendant. And I have not been able to find, in the civil law, any proof of the existence of the rule adopted by our courts of equity in relation to the authority of the answer of the defendant, as evidence in matters responsive to the allegations of the bill. The general rule of evidence in the civil law, requiring two witnesses, seems to have stood upon a broader ground. It was early repudiated in our courts of common law; and has never, to my knowledge, been admitted, as a controlling and fixed rule in our courts of admiralty, in modern times. In the case of The Thomas and Henry v. U. S. [Case No. 13,919], Mr. Chief Justice Marshall held the doctrine, that the answer of the defendant, though responsive to the libel, was not evidence for the defendant, as it is in equity. The learned judge of the district court of Maine (Judge Ware) has held the same doctrine as has my own learned Brother (Judge Davis) in this court. Many cases, I am fully persuaded, have been decided upon the satisfactory testimony of a single witness, against the positive denials of the answer in admiralty proceedings; and upon a late occasion, I did not hesitate to overrule the doctrine now contended for. It is from the importance of the point, as one of general interest to the profession, that I have dwelt upon it in this place, though nothing material to my present judgment turns upon it. I do not think, that positive and direct knowledge of the facts is, in the present case, satisfactorily brought home to the respondents. But I am of opinion, that constructive notice is brought home to them by the knowledge of their agent, the master of the Rupee. And, at all events, I hold, that, upon the well established principles of the maritime law, in cases of this sort, the owners are responsible for the torts of the master in acts, relative

to the service of the ship, and within the scope of his employment in the ship. This is so well settled, that I need not do more than to allude to a few passages in the excellent treatise of Lord Tenterden on the Law of Shipping (Abb. Shipp. pt. 2, c. 2, pp. 98, 99, §§ 9, 11), and to the authorities collected in the last American edition of the same work in 1829 (page 99). It will be found, that, in cases of collision, and injuries from negligence and illegal captures, and other torts from the fault of the master, the owners are, by the maritime law, made responsible for his acts and omissions of duty.

It remains only to add, that I think that the owners are responsible for the full wages which the minor was earning, as mate of the packet Hudson, at the time of the abduction, to the termination of the voyage on the brig's return to Boston, which I estimate, according to the evidence, to be at the rate of twenty-five dollars per month, deducting one month's advance wages at the beginning of the voyage, and other reasonable advances properly made to the minor in the course of the voyage, for necessaries, &c. To this sum I shall add fifty dollars, to cover extra expenses and losses, with costs.

Case No. 12,778.

SHERWOOD v. McINTOSH.

[1 Ware (109) 104.] [1]

District Court, D. Maine. Dec. Term, 1826.

SEAMEN—RIGHT OF MASTER TO DISRATE—INTEMPERANCE—DESERTION—WHEN JUSTIFIED—WAGES.

1. When a seaman ships for a particular service and is found to be not qualified for that duty, the master is authorized to put him to a different service, and may make a reasonable deduction from his wages. But he is not authorized to put him on a different duty without a reasonable cause.

[Cited in Allen v. Hallet, Case No. 223.]

2. Dishonesty or habits of intemperance are sufficient causes for degrading a steward and putting him before the mast. But a single instance of intemperance is not.

3. Cruel and oppressive treatment on the part of the master will justify a seaman in deserting the vessel before the termination of the voyage.

[Cited in Bush v. The Alonzo, Case No. 2,223; The Alvena, 22 Fed. 862.]

4. When a seaman is compelled to desert by the cruelty of the master, he does not forfeit his wages, but will be entitled to receive them in full to the prosperous termination of the voyage.

[Cited in Gabrielson v. Waydell, 135 N. Y. 19, 31 N. E. 969.]

This was a libel for seaman's wages. The libel set forth a contract on the part of the libellant, to serve as steward on board the ship Elizabeth, on a voyage from Portland to New Orleans and from thence to Europe and back to the United States, at the rate of wages of eighteen dollars per month. It alleged that he faithfully performed his duty as steward until the arrival of the ship at New Orleans, where he was degraded by the master from the office of steward, and put before the mast; that he continued on board the vessel and did duty as a seaman until the arrival of the vessel at Havre; that then, in consequence of the continued ill-treatment that he experienced, he was afraid to remain longer in the ship, and left her. The several instances of assaults and ill-treatment are minutely and particularly set forth in the libel, and relied upon as a justification for abandoning the vessel, and full wages are claimed to the termination of the voyage.

The respondent admits the contract as alleged in the libel, and admits that he degraded the libellant from the office of steward and put him before the mast, and justifies the act by the allegation that on the outward voyage to New Orleans he was found to be unfaithful and an habitual drunkard; he denies, in toto, the charges of ill-treatment and cruelty, and alleges a desertion of the libellant as a bar to any claim of wages.

C. S. Daveis, for libellant.
Mr. Greenleaf, for respondent.

WARE, District Judge. This case has been very elaborately and very ably argued upon the facts and the law, and now stands for decision upon the allegations of the parties and the proofs produced in the case. The respondent admits the contract as set forth in the libel, and the libellant admits on his part the desertion as it is alleged in the answer. It is a familiar and well-known principle of the marine law that desertion operates a forfeiture of all wages antecedently earned. By admitting the desertion, the libellant takes upon himself the necessity of withdrawing his case from the operation of the general rule, that is, of justifying the desertion.

For the libellant, it is contended that the desertion was justified, first, by his degradation from the office of steward, and his being required to perform duties which he did not contract to perform; and secondly, that it was justified by the cruel and oppressive conduct of the master to him. The simple fact that the libellant was degraded and put before the mast is not, in itself, a justification of desertion. When a mariner contracts for a particular service or duty on board a vessel, he engages both for fidelity in the performance of that duty, and for that capacity and those qualities which will enable him to perform the service in a satisfactory manner. If the master finds, upon trial, that there is on the part of the man either a want of fidelity or a want of capacity which disqualifies him for the service, he will be justified in putting him upon a different duty. And in such a case the master will also be justified, not in refusing altogether to pay him wages, but in making from them

[1] [Reported by Edward H. Daveis, Esq.]

a reasonable deduction. Atkyns v. Burroughs [Case No. 618]; Mitchell v. The Orozimbo [Id. 9,667]. But when the man has contracted for a particular service, the master is not authorized to change the terms of the contract capriciously and without a good cause, and require of him duties for which he did not engage. The master, in this case, alleges as a justification of his act, first, the want of fidelity and the dishonesty of the libellant; and secondly, a constant habit of intemperance. These are grave charges, and either of them, if proved, would be a justification.

The only testimony applying to the first allegation is that of Proctor, the first mate. He states that a barrel of rum was put on board the vessel, for the sailors' use, at Portland, and that on their arrival at New Orleans it was found to be almost entirely gone, and that the consumption very greatly exceeded the allowance to the men. As it was in the custody of the steward, the inference is that it must have been wasted by him. As this fact rests on the testimony of the mate alone, and as this witness is principally relied upon to prove the other allegation, of habitual intemperance, it becomes important to determine what degree of credit is to be given to his testimony. It is contended by the counsel for the libellant that he is utterly discredited, and that his testimony must be entirely laid out of the case. The whole credit which we give to parol testimony is founded on two presumptions; first, the intelligence and good sense of the witness, which will prevent him from being deceived himself; and secondly, upon his good faith and integrity, which will prevent his intentionally deceiving others. If, then, it is proved beyond any reasonable doubt, that a witness is guilty of prevarication, either in deliberately stating what is not true, or in wilfully suppressing material and important facts which are within his knowledge, one condition upon which we yield our belief to human testimony fails. If the witness deals falsely with the truth in one case, no assurance can be felt that he will not in another, and of course no confidence can be placed in any part of his testimony, and hence the maxim falsus in uno, falsus in omnibus.

It is proved beyond the reach of doubt that the libellant received a severe injury at New Orleans, a short time before his first imprisonment, nor does there appear to be much if any more doubt that this was inflicted by the hand of the master, in the cabin. If so, the mate, who, according to his own statement, was in his state-room, abed but not asleep, must have known the circumstances, and he was the only witness who could have known them. Sherwood, according to the account of this witness, came into the cabin about half past nine o'clock, on his way to the steerage to turn in for the night. There was a light in the cabin and a window in the door of his state-room, looking into the cabin, so that he could see what took place. The captain, he says, charged Sherwood with breaking a lock; Sherwood denied it, and the charge and the denial, as the witness states, were several times repeated, when the captain told him if he did not go to bed he would flog him. Sherwood replied that he might as soon as he would. He thought from Sherwood's voice that he was intoxicated. He heard, as he says, no noise except a little rumbling like the moving of a chair. The rest of the crew were in the forecastle, and the whole space between that and the cabin was filled with hay, so that a noise in the cabin could not be heard by the men. The next morning Sherwood was seen by Harmon, a witness introduced by the captain, "with his face bloody, his upper lip cut, holding his handkerchief, which was covered with blood, to his face; his under lip also appeared to be cut and swollen, and the lower part of his face, from below his eyes to his chin, was bruised." Afterwards, either that day or the next, the same witness says that he saw him "in his berth, with his handkerchief to his mouth, and he could but just speak so as to be understood." Jordan, another witness examined for the captain, saw him also, bloody, and with his lips cut and swollen. This comes from witnesses whom the master himself has called in the defence. The witnesses for the libellant give a more highly colored picture of that night's disaster. On the same morning when those marks of brutal violence were observed, Sherwood asked this witness, the mate, to look into his mouth, and see the wound which he had received. He declined, but what is remarkable, when his attention was particularly called to the subject, he could see no marks or bruises on his face. Now unless all the other witnesses in the case are guilty of flagrant perjury, the libellant appears with his lips cut and swollen, his face covered with gore and bruised from the eyes to the chin, and, as one of the libellant's witnesses says, with fresh blood still oozing from the unclosed wounds of his mouth, and yet, when the attention of this witness was called directly to the subject, he could see nothing—no blood, no wounds, no swelling, no marks of violence whatever. How is it possible to resist the conviction that this is a case in which the words of the old proverb are verified, that none are so blind as those who will not see? But the credit of this witness is not left here. A witness for the libellant was called, of unimpeachable character, who says that after the mate returned from New Orleans, he was employed at work on a vessel of which this witness was first officer; that having heard the rumor of this affair, and being acquainted with Sherwood's family, he inquired of him about it, and that he told him that, upon the night in question, while he was abed in his state-room, he heard a noise in the cabin as though one man was strang-

ling another; that he got up and opened the door, and asked what was going on. The captain answered as though it was a trifle, and the witness then replied, "There must be no murder here." The mate now utterly denies this conversation, and the witness, when called again, directly reaffirms it. I cannot hesitate which to believe. Taking the whole testimony together, bearing on this part of the case,—and it is proved by that clearness and force of evidence to which the mind cannot withhold its assent, that there was perpetrated in the cabin on the night in question, a deed of dark and barbarous cruelty, the circumstances of which were known to this witness, and which he has refused to discover,—he has shown himself capable of prevarication to such an extent as destroys all the confidence which otherwise might be felt in his testimony.

There being no evidence in support of the charge of unfaithfulness but the testimony of Proctor, I dismiss it as not sustained by proof. The other cause alleged by the master for degrading the steward, is habitual intemperance. Now the only evidence of a habit of intemperance we have, is found in the testimony of Proctor. That, for the reasons already stated, I lay out of the case. Harmon, the apprentice of the master, says that Sherwood was intoxicated the morning of sailing from Portland, but that he never saw him intoxicated at any other time on the passage to New Orleans. Jordan, another witness, says that he saw him frequently intoxicated on the passage from New Orleans to Havre; that he would drink all he could get, and often more than his allowance when he could get it of the other men, but that he never saw him drunk on the passage to New Orleans. The habits of intemperance of which Jordan speaks, were after the master had degraded him from the office of steward, and after the cruelties which were practised upon him while the vessel was lying at New Orleans. This subsequent misconduct of Sherwood, which from the whole evidence it seems reasonable to attribute to the harshness and severity with which he was treated by the captain, can be no apology for the captain's removing him from the place of steward, and requiring of him duties which he had not engaged to perform. The whole proof in support of this allegation of the answer is resolved into a single instance of intoxication. I am not disposed to look upon intemperance as a slight offence. It disqualifies a man, for the time, from discharging the obligations of his contract, whatever may be his duty on board the vessel. It is an offence particularly noxious in a steward, who is intrusted with the ship's stores; and if a habit of intemperance had been proved I should feel no difficulty in holding it a justification of the master in degrading him from office, or perhaps in discharging from the vessel altogether. Black v. The Louisiana [Case No. 1,461]. But in the administration of the maritime law, especially in controversies which arise between the master and mariner, regard must be had to the ordinary habits of this class of men; habits which very naturally grow out of the nature of their employment. It is, unfortunately, too common for them to indulge in enjoyments of this kind, and it would be applying to them too rigorous a rule, to hold that a single instance of excess was a disqualification. The Exeter, 2 C. Rob. Adm. 264. The master has therefore entirely failed in proving a justification of the act of degrading the libellant, and the requiring of him the performance of duties for which he did not engage. It is contended that this was, of itself, a dissolution of the contract on the part of the master, and absolved the libellant from all obligation of remaining longer in the vessel. But it is unnecessary to inquire what were the rights of the parties at this stage of the business, because the libellant actually continued in the vessel and performed the voyage to Havre.

I pass, then, to the second ground alleged by the libellant as a justification of his desertion, the oppressive and cruel treatment of the master. The libellant relies upon the general and habitual ill-usage from the master, as well as on the particular instances of cruel and undeserved punishment set forth in the libel. The first instance is that which has already been mentioned. The only person who witnessed this, as we have seen, was the first mate. If it be admitted that all the provocation existed that he has stated, it cannot be for a moment pretended that it can justify such a barbarous outrage as was committed by the master. The second instance of ill-usage, relied upon in the libel, is the imprisonment at New Orleans. The next day after the affair in the cabin, Sherwood went on shore to obtain medical aid. For this he was noted in the log-book as absent four hours without leave. The two following days he is noted as absent the whole time, without leave, and is recorded in the log as a deserter. During this time he had entered a complaint against the master for an assault and battery, the master had been before the magistrate, and there had been a hearing upon the complaint. It cannot for a moment be pretended that this was a desertion, in the sense of the marine law. To constitute a desertion, within the meaning of the general maritime law, something more is required than a single absence without leave. There must be an absenting of the seaman furtively with the intention of keeping himself out of the reach of the master, and of abandoning the vessel altogether. A single absence without leave, for a temporary purpose, does not, upon the general principles of the law, amount to a desertion, working an entire forfeiture of wages. The statute of the United States is indeed, in this particular, more rigorous than the general law, and considers an absence of forty-eight hours, with-

out leave, as a desertion, and applies to it the forfeiture of all wages due at the time. Act July 20, 1790, § 5 [1 Stat. 133]. But it does not touch wages subsequently earned. But was there, in this case, a desertion within the meaning of the statute? He had not absconded; he did not secrete himself, and avoid the master. He was during the whole time appealing to the laws of his country for a redress of his wrongs, and had summoned the master to meet him before a public tribunal to answer his complaint. No case has been cited in which an absence without leave, under such circumstances, has been held to be a statute desertion, nor can it be supposed that the statute intended to inflict a forfeiture upon a seaman for appealing for redress of injuries, real or supposed, to the justice of his country.

The day after Sherwood was noted as a deserter, he voluntarily came on board, and asked for his clothes. By order of the captain he was apprehended as a deserter, and sent to prison, and was held in prison under this commitment for the space of 132 days, from the 14th of December to the 24th of April. During this time, he repeatedly applied to the captain to be liberated, and offered to return to duty. But the captain was inexorable; and when he was finally discharged, after more than four months' imprisonment, it seems to be the fact, though the evidence is not distinct on this point, that he was discharged by the local authorities, and not on the application of the captain. At the argument it was not pretended that he was discharged by the captain's order. Admitting that the imprisonment was originally justifiable, which is not conceded, it becomes wrongful after these repeated applications to be discharged, and offers to return to duty. It is a well-known and familiar principle of the marine law, that if a seaman is guilty of a fault and afterwards repents and tenders amends, he shall be pardoned. Cleirac, p. 51; Jugemens D'Oleron, 12; Whitton v. The Commerce [Case No. 17,604]. But the punishment was here continued more than four months, and that while the ship was advertised for sale, as well as freight, and while it was quite uncertain whether the voyage would not be broken up at that port. It is said that the master refused to liberate him from prison, because he had reason to fear that if he did, Sherwood would desert again. But it surely cannot be urged as a reason why the master should not pardon a man upon his repentance and offer to return to duty, because he feared he would commit the same fault a second time. If so, the master may always intrench himself behind his own suspicions, and a seaman who has once committed a fault can never rehabilitate himself and regain his place in the vessel. It is equivalent to saying that a master is not bound to pardon a repentant seaman, unless he chooses to do so. The law I take not to be so, but that the master is bound to take back and restore a repentant seaman who gives reasonable evidence of the sincerity of his repentance. It is urged that the fact that he did desert again, soon after his liberation, is a proof that the master's apprehensions were well founded. After the sample he had experienced of the master's temper, I must say that it is not surprising that he was desirous of making his escape. But it by no means follows that he would have deserted if the captain had himself liberated him from confinement, and treated him with humanity. He was again retaken, and by the captain's order imprisoned a second time, from the 13th of May to the 9th of June, when he was taken on board the vessel upon the day of her sailing for Havre. Here it is said that Sherwood again forfeited his wages. He was arrested on a warrant, issued by a magistrate under the seventh section of the act of July 20, 1790. By the provisions of that section of the act, the master is authorized to charge the expenses of the commitment on the seaman, and deduct them from his wages. Can he also insist upon the entire forfeiture of his wages under the fifth section? It was held in the case of Bray v. The Atlanta [Case No. 1,819], that the penalties in these two sections are not cumulative; that the master may take his remedy under one or the other, but if he elects to imprison the seaman, under the seventh section, he waives the forfeiture under the fifth.

On the passage to Havre there was another instance of ill-usage, particularly relied upon by the libellant. While he was aloft in the night time, furling the sails, he is charged with using insolent language to the mate. The mate did not hear it, but it seems the captain did, and he was ordered down, when the mate, by the captain's order, flogged him with a rope. From twenty to thirty blows were given and the outcries of Sherwood were such as to call upon deck not only the crew who were below, but also the passengers. The next morning his back was seen by some of the crew, who testify to the marks of the blows. It is undoubtedly the duty of the master to require a respectful demeanor on the part of the men to his subordinate officers, as well as to himself. But the punishment in this case was indicative of the harsh and unrelenting temper of the master, and altogether disproportionate to the offence. Other instances of unwarrantable severity are stated in the libel, but these are the principal. There is also an allegation in the libel that the conduct of the master was habitually harsh and oppressive. The general deportment of Sherwood is differently represented by the witnesses. Those examined in behalf of the captain say that he appeared by his conduct desirous to provoke the captain to strike him, while the others say that he appeared to be in terror whenever the captain spoke to him. The same acts might undoubtedly produce different impressions upon different minds, and a carriage and demeanor that

sprung from terror, might have some of the appearance of impertinence. But that a man of the libellant's slight form and almost puny appearance, of whom light work was only required, because he was unable to perform the duties of an able seaman, should, after the experience he had of the captain's temper and muscular strength, have sought opportunities to encounter them, is to me altogether incredible. Some time after the vessel arrived at Havre, Sherwood again abandoned the vessel, succeeded in eluding the pursuit of the captain, and returned home in another vessel. He now claims his entire wages for the voyage, alleging the griefs which he has set forth in the libel as amounting to a violent dissolution of the contract on the part of the master.

That cases may exist which will justify a seaman in abandoning the ship before the termination of the voyage, cannot be doubted. There are reciprocal duties between the master and his men. The seaman engages for the faithful performance of the services for which he contracted; the master, on his part, engages to treat his men with humanity, and this obligation of the master is not the less imperative because masters do not think it necessary to insert any stipulations in the contract, which may look like restrictions on their power. If the master, instead of exercising the authority with which the law invests him, with moderation and humanity, and for sustaining a proper discipline on board the ship, gives himself up to a harsh and cruel temper, and flogs and beats a man with unreasonable severity, or if, yielding to a personal pique or prejudice, he harasses a man by capricious tyranny, and punishes him without cause, or punishes him for slight and venial faults with unreasonable and wanton cruelty, even if a seaman cannot show that his life would be endangered by remaining in the vessel, he is not bound to submit himself as an object of sport to the ungoverned passions of the master. He may abandon the vessel without subjecting himself to a forfeiture of his wages. The libellant has stated in his libel that he was in fear, and dared not trust himself in the captain's power. From the evidence in the case of the outbreakings of a violent and unchastened temper on the part of the captain, as well as for the cold and unrelenting severity manifested by the long imprisonment at New Orleans, I can readily believe the allegations to be true, and I think he was justified in seeking his own safety by abandoning the ship. My opinion is also that he is entitled to his wages, not only to the time when he left the vessel, but to the termination of the voyage. If the master dismisses a man before the end of the voyage for which he has contracted, without a justifiable cause, he may follow the vessel and recover the same wages he would have been entitled to if he had remained in the vessel until the voyage was ended. Jugemens D'Oleron, art. 13; Laws of Wisbuy, art. 25. The reason is to the full as strong for allowing full wages, when the cruelty of the master has compelled him to leave the vessel from a regard to his personal safety. And so it has been decided both in this country and in England. Limland v. Stephens, 3 Esp. 269; Relf v. The Maria [Case No. 11,692]; Ward v. Ames, 9 Johns. 138.

I decree full wages at the stipulated price of eighteen dollars a month, to the termination of the voyage, deducting the payments which had been made in advance and during the voyage.

Case No. 12,779.

SHERWOOD v. MUTUAL INS. CO.

[The case reported under above title in 5 N. Y. Leg. Obs. 406, and in 18 Hunt, Mer. Mag. 186, is the same as Case No. 12,776.]

SHERWOOD (PATRICK v.). See Case No. 10,804.

Case No. 12,780.

SHERWOOD v. SHERMAN.[1]

[3 App. Comr. Pat. 312.]

Circuit Court, District of Columbia. May 2, 1860.

PATENTS—FIXING DATE OF INVENTION.

[1. The fixing of the date of an invention by reference to another circumstance, the date of which latter is sworn to by another witness, is sufficiently definite for the purpose of a claim of priority.]

[2. Priority of invention of an improvement in skeleton hoop-skirts awarded to Sherwood on the evidence in the case.]

Appeal [by Samuel S. Sherwood] from the decision of the commissioner of patents, upon an interference declared [awarding priority of invention to Sylvester I. Sherman for an improvement in skeleton hoop-skirts].

MERRICK, Circuit Judge. The interference in this case arises out of the respective claims of the parties for an improvement in skeleton hoop-skirts for ladies' dresses, and consists in so arranging the vertical cords which connect the several hoops composing the skirt that while they tie and secure the hoops at stated distances from one another, they shall at the same time be passed through the textile covering of the hoops so as to be kept firm in their places and not slip laterally along the hoop. In other words, the claim is in each case for passing the vertical cord through the covering of the hoop at the same time that it is tied or fastened in any familiar manner by looping or otherwise around the

[1] [Not previously reported.]

hoop, thereby keeping the horizontal hoops and their vertical supports all and each in their original relative positions towards one another.

The mode of making the loop or knot independent of the combination of the vertical with the lateral fastening is not, nor can be, an element in the claim. The loop and the knot being both well known and applied in thousands of every day analogous uses, are manifestly equivalents for each other, and the selection of the one rather than the other has no bearing upon the applications of the parties. The whole case rests upon the testimony of the witnesses as to the priority of invention. The appellee proved by a single witness (Chas. Williams) that he exhibited to him the invention in question at the time he was doing some work for Mr. Busher, and by producing his book, he establishes the date of his entry of Busher's order as January 20th, 1858, and remembers the work was finished by the 1st of February following. No other witness on the part of the appellee is called to show that he ever saw such an article in his possession during the year 1858.

On the part of the appellant three witnesses prove that the invention was constantly used and claimed by him for about two years previous to the taking of their testimony, and one of these witnesses, Robert Sands, fixes the period of its first production, not indeed by an absolute recollection of the date, but by reference to another fact, to wit, the first sale of a certain other kind of skirts known and described by the witness as the "patent expansion skirt" or the "expansion skirt," and this other fact, the first production of the expansion skirt is fixed by another witness, Thomas Oakly the salesman of Sherwood, at the middle of December, 1857. Now, the witnesses are equally positive on both sides, and for aught that appears equally credible. The one knows of Sherman's invention because it was exhibited to him while he was doing a certain piece of work, which piece of work he fixes by his book. The other knows of Sherwood's invention because it fell under his observation before a certain other thing was done. About this he is unequivocal in his answers to the 8th and 12th questions, and the confirmatory witness, Oakly, is equally positive that the act referred to was done in the middle of December, 1857.

Now, according to the known operations of the intellect, time cannot any more than a straight line be measured by the senses by regarding its continuity, and is best fixed in the memory by the relation or succession of events. These and their order are the proper material for the memory to act upon, and therefore when a person can affirm that he can and does recall the succession of one event to another, which other is susceptible of independent ascertainment, the certainty of the latter is fully reflected upon the former. In the report of the office and in the argument of the appellee's counsel, it is however insisted that the testimony of Oakly does not confirm itself with the testimony of Sands, because the term "patent expansion skirt" or "expansion skirt" used by them does not point to any particular kind of skirt, and that, peradventure, in using that term the two witnesses may have been speaking of different things. But when it is considered that they were both employed in the same store and spoke of the business of that one house, and when regard is had to the particular shape of the questions and answers of both witnesses in which the term occurs, it will be evident that they both used the term to designate a certain article well known under that name, in the immediate transactions of their own business. This view of the matter fixes the invention of Sherwood as early as the middle of December, 1857, and so antedates Sherman by at least one month. The argument that if the date be carried back so far it must go back to the spring of 1857, because Sands connects it with the spring trade, and if before the spring of 1858 it must have been in the spring of 1857, possesses no force, for two reasons: 1st, Sands himself says the spring trade might be said to open by the 1st of January; and in the next place he did not enter the service of Douglass and Sherwood until towards the end of the spring trade proper of 1857, viz.: in the middle or last of March of that year, and he would have remembered and said it was about the time he entered their service if it had been so, and would not have limited himself to "about two years," as the earliest date of his knowledge, as he certainly does throughout his testimony.

But, again, it would serve the appellee nothing towards establishing his claim to show that the article was invented and used by Sherwood three years ago. It might, indeed, defeat Sherwood, if the fact were so, as amounting to an abandonment on his part. But if it were so, and the appellee really believed that since the spring of 1857 Sherwood and Douglass were selling the invention in open market, he would hardly be at the expense and trouble, not to speak of the moral turpitude, of claiming under oath as his own invention what the world was notoriously possessed of for nearly a year before his discovery.

Upon the whole, I am of opinion that the first reason of appeal is well taken and that there is error in the decision of the office awarding priority of invention to Sylvester I. Sherman. The said decision is for the foregoing reasons reversed and priority of invention is hereby adjudged in favor of Samuel S. Sherwood, and a patent will accordingly be issued to him; the rights of any others not parties to this record not being prejudiced by this decision; all which premises and judgment are hereby certified to the

Hon. Philip F. Thomas for his further proceedings according to law and in conformity herewith.

Case No. 12,781.

SHERWOOD v. SUTTON.

[5 Mason, 1.] [1]

Circuit Court, D. New Hampshire. Oct. Term, 1827.

SALE—FRAUDULENT MISREPRESENTATIONS—MEASURE OF DAMAGES—SHIPPING.

Case for a deceit in selling a vessel as a British vessel, she being in fact not British, or entitled to a British national character. It was *held*, that the plaintiff was entitled to damages to the extent of the difference of value of the vessel as sold, and her value, if her real character had been known, and also to damages to the amount of such repairs made on her, on the faith of the representation of her British character, as had not been remunerated by her earnings or in any other way.

[Cited in McAroy v. Wright, 25 Ind. 30; Morse v. Hutchins, 102 Mass. 440. Cited in brief in Moses v. Taylor, 6 Mackey. 261. Cited in Munson v. Hallowell, 26 Tex. 475; Whitney v. Allaire, 1 N. Y. 312.]

Case for fraud and deceit in the sale of a vessel. There were five counts in the declaration. The fifth, which was mainly relied on at the trial, was in substance as follows: That the defendant [Richard Sutton], on the 13th of October, 1816, at St. Barts in the West Indies, having procured a certain foreign vessel or brig, not British built, &c. nor having a British register, &c., and having fraudulently procured a certain colourable paper purporting to be a British register of said brig, therein called the Anna, and in said register representing and setting forth one William Hillyer as a British subject to be the sole owner of said brig, and having fraudulently obtained and caused to be executed a certain paper purporting to be a power or instrument of attorney from the said William Hillyer to the defendant to sell &c. the said brig as the property of him the said William Hillyer, with the fraudulent contrivance to sell the said brig as such British vessel, &c., and having navigated her to Portland, with intent to defraud the plaintiff [Richard Sherwood] in the premises, at Portland, to wit, at Portsmouth, in the district of New Hampshire, being in possession of said vessel, the defendant, pretending to act by virtue of the said supposed power of attorney and to represent the said William Hillyer, on the 1st of March, 1817, in a certain conversation &c. concerning the sale of the said brig to the plaintiff, and in furtherance of his corrupt intent, then and there fraudulently represented to the plaintiff that the said brig was a true and proper British vessel, duly registered, &c., and entitled to the privileges thereof, and pretending to be the attorney of the said William Hillyer offered to sell to the plaintiff the same, as such British vessel, and then and there represented to the plaintiff that she was such, in order to induce the plaintiff to become purchaser thereof; that the plaintiff, confiding in the representations so made, &c., did purchase the same for the sum of 1,500 dollars; and paid the said sum therefor, and received a conveyance of the said brig from the defendant, executed by him as such attorney of William Hillyer. The count then proceeded to negative that she was a British vessel, built or owned &c. and averred, that she was in fact a Spanish vessel, owned by the defendant, or by the defendant jointly with one Marwick, and that they were then and there both citizens of the United States; that the plaintiff was then and there a British subject; that the defendant well knew all the facts, and by reason of the fraud aforesaid, the plaintiff lost the benefit of such purchase of a British vessel in British trade and navigation, and all the freight accruing therein; and that the said vessel hath been wholly lost to him, and a cargo of lumber, &c., of the value of 10,000 dollars, and also large sums of money expended by him in repairs after the purchase thereof. The other counts averred among other things a condemnation of the vessel upon a seizure under the British laws for her not being a genuine British vessel, entitled to trade and navigate as such. There were other special averments as to her original character as a Spanish vessel. But as nothing particularly turned upon these counts they are omitted. The defendant pleaded (1) the general issue, not guilty; (2) the statute of limitations of New Hampshire, that the cause of action did not accrue within six years. Upon both pleas issue was joined. At the trial the following facts and circumstances were given in evidence.

In March, 1817, at Portland in Maine, a negotiation took place between the defendant and the plaintiff respecting the purchase of the brig in question, which was then called the Anna, and so appeared to be on the ship's papers. The defendant then represented to the plaintiff, that she was a British vessel, entitled to a British register, and belonging to one William Hillyer, a British subject, and that the defendant was authorized by him to sell her as such. He produced a letter of attorney from Hillyer, authorizing him to employ the vessel at his discretion, and also to sell her; and he also produced a certificate that the brig had entered and cleared at New York as a British vessel, and had conformed to the rules of the British consulate there. He further represented the brig to be the British brig Anna, which had been condemned as a prize of war in the British vice-admiralty court at Halifax and had subsequently been sold, and had lawfully received a British register, and was duly entitled to such register, as such prize vessel. The plaintiff also introduced evidence to prove that the brig was not in fact the British brig Anna, or any other British vessel;

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

but was a Spanish vessel, named the St. Antonio, and had been bought by the defendant, knowing her to be a Spanish vessel, and that at the time of the sale to the plaintiff, she really belonged to the defendant (who is an American citizen), and that Hillyer was a nominal, and not the real owner; that the defendant had procured for her a false register as the British brig Anna; that as a Spanish vessel at the time of the sale to the plaintiff, she was not worth more than 500 dollars; that the plaintiff upon the representations made by the defendant purchased her upon the faith of the truth of that representation for 1,500 dollars, and paid the price accordingly to the defendant, who executed a bill of sale of her to the plaintiff, as attorney of Hillyer; that the plaintiff was a British subject, and bought the vessel for the purpose of carrying on British trade and navigation. After the purchase, the plaintiff repaired the brig at Portland at a large expense, about 1,900 dollars, she being found upon examination very much out of repair and in a bad and defective state. After those repairs were made, the brig, if really British, would have been worth in the West Indies 5,000 or 6,000 dollars; but as a Spanish vessel not more than 500 dollars. The brig, after being repaired, was employed by the plaintiff about two years in trade between the West Indies and the United States as a British vessel, and was subsequently seized and condemned by the British authorities in the West Indies; but the sentence of condemnation did not state the particular cause of condemnation. There was also evidence to prove, that the plaintiff did not know, that the vessel was not British until within six years next before the commencement of the suit, which was left to the jury; and also to prove, that the defendant was the true and real owner of the vessel, and Hillyer only nominal owner, and that the name of Hillyer was kept in the ship's papers to preserve an ostensible British ownership, and entitle the brig to trade as a British vessel; and that the defendant wilfully and fraudulently made the representations at the time of the sale, with a view to induce the plaintiff to make the purchase; and that if he had known or suspected her to be Spanish, he would not have purchased her, his sole object being to employ her in British West India trade. There was also evidence in the case, that on the first voyage, which the brig made from Portland to Jamaica after being repaired, the plaintiff felt uneasy on account of the papers of the brig; that he procured a new register and other papers at Jamaica for her, as a British vessel, and then said, "he felt safe." But the particular cause of the plaintiff's uneasiness did not appear in proof; but circumstances only conducing to prove, that it arose from difficulties made at the custom-house at Jamaica on account of the repairs of the vessel at Portland. Long before the sale to the plaintiff, viz. in October 1816, the defendant had employed a carpenter at Portland to grave and caulk the brig. He commenced caulking and cutting her, and worked six days upon her, and, as far as she was opened, she was found to be in so bad and defective a state, that she was deemed by him not worth repairing. She was then removed to a cove, and was farther opened, and was in a situation to be examined by any person. The statute of 26 Geo. III. c. 60, was cited from Abb. Shipp., to show that the repairs of 1,900 dollars on her, under such circumstances, were sufficient to deprive the vessel of her British character.

Mr. Saltonstall, for defendant, contended, that the four first counts were not proved, for there was no proof of any condemnation or seizure for the cause asserted in these counts. Then as to the fifth count it is not proved. The material averments in it are, that the vessel was Spanish, and that the defendant, and not Hillyer, was owner of her. These facts are not established by any competent evidence. The proof, so far as it goes, is, that Hillyer was owner, and so was represented by the defendant. The bill of sale was made to the plaintiff by the defendant as attorney of Hillyer. Again: The plaintiff has sustained no damage. The vessel has been condemned, it is true, but non constat for what cause. It may have been for a totally different cause, and illegal proceeding on the part of the plaintiff. She was successfully employed by him for two years after the purchase in trade as a British vessel. Besides, the repairs of the vessel at Portland after the sale were so great, that they would per se deprive her of her British character by the British registry act (26 Geo. III. c. 60, § 2). Abb. Shipp. 39. So, that in fact she has lost her British character by his own illegal act and trade. The plaintiff must, from the circumstances, have known the real character and history of the vessel as well as the defendant at the time of the sale. It is not reasonable to presume his ignorance of it. Then, as to the statute of limitations, there is no proof of any concealment, much less of a fraudulent concealment by the defendant. And we deny that any such concealment, if fraudulent, is a good answer to the plea. Troup v. Smith's Ex'rs, 20 Johns. 33; 3 Barn. & Ald. 288.

Mason & Cutts, for plaintiff, contended è contra. Here was a fraudulent misrepresentation. The vessel was represented to be British; she was not so, and the defendant knew the fact. We rely mainly on the fifth count. The gist of our action is the false affirmation, that the vessel was British, and not the particular ownership. But the defendant was the real owner. All the acts of the parties, and the circumstances of the case prove it. Hillyer was merely a nominal owner; and so stated in the papers because it was necessary, that a British subject should appear as the owner. The defendant is an

American citizen. The plaintiff could not at the time of the purchase have known that the vessel was Spanish. As such she could not have been worth 1,500 dollars at that time. So is the proof. He bought her as a British vessel for British trade. As to the repairs forfeiting the British character of a real British vessel, that is nothing to us. It is no part of our case. This is not a real British vessel. The fraud upon us was complete at the time of the sale, and the subsequent repairs furnish no excuse from damages for the fraud. As to the statute of limitations, there is no pretence of any discovery of the fraud by the plaintiff until within six years. He had no means of discovering it; as soon as he did, he brought his action. The defendant has not proved, that he ever made it known to any person, who could have told us, or given any public information.

STORY, Circuit Justice (charging jury). Upon the issue joined between the parties upon the statute of limitations, the real question is, whether the fraud of the plaintiff alleged in the declaration was concealed by the defendant, so that it never came to the knowledge of the plaintiff until within six years before the commencement of this suit. There is no pretence, that either Hillyer, or the defendant himself, ever communicated the facts to the plaintiff, or to any other persons, so that they could be publickly known or communicated to the plaintiff at an earlier period. Under such circumstances the jury must draw their own conclusions from the natural presumptions arising from the facts in evidence and the situation of the parties, and find their verdict accordingly. It is not controverted, that this vessel was in fact the Spanish brig Antonio; and was not a British vessel. The defendant has not attempted to maintain, that she was the British brig Anna, or bona fide entitled to use the British register belonging to that vessel. If then the jury are satisfied, that the register used for the brig Antonio, though genuine, belonged to the British brig Anna, and that the defendant at the time of the sale to the plaintiff knew the fraud, and was a party to it, and also knew, that the brig Antonio was a Spanish vessel, it seems to me, that the averments in the declaration, negativing the British, and averring the Spanish character of the brig, are completely made out. But it is said, that the repairs made at Portland were such, that if the brig had possessed a genuine British character, she would, by the British registry acts have forfeited her national character; and if she afterwards sailed under her register, she was liable to seizure and condemnation therefor. And I am called upon to state, that if the repairs so made exceeded fifteen shillings a ton, these repairs did in fact destroy her national character. I cannot give such an instruction to the jury, for several reasons. In the first place, there are not sufficient facts established in the case to enable the court to say, that such would be the necessary effect of the repairs in the present case under the British registry acts. If this had been a real British vessel, and the repairs were no more than were necessary to enable her to return to a British port, and prosecute her voyage thither; and if the necessity for such repairs had arisen since her last departure from a British port, it is by no means clear to my mind, that the case would not be fairly within the reach of the exceptions of the British registry acts, as they have been read at the bar from Mr. Abbott's treatise on the Law of Shipping. As far as my recollection goes, the British courts have been disposed to put an indulgent construction upon those acts in cases, where there has been a clear necessity for the repairs to prosecute the voyage. Now the evidence does not show in particular when, or how, or under what circumstances, or at what time the necessity for these repairs arose. The plaintiff was not privy to her former history, and cannot be presumed to be acquainted with facts occurring previous to his purchase. Nor has it been established in proof, that if the brig had been bona fide British, she would in fact have lost her national character by these repairs. There is no evidence, that she has been seized or decreed to be forfeited on this account. It is admitted, that upon her return to Jamaica after these repairs, she was allowed upon the change of ownership to receive a new register at that port, as a British vessel; and though there seems to have been some hesitation or difficulty about the matter, the final decision affords some presumption, that the repairs (great as they were) were not deemed ipso facto to destroy her British privileges and character. But this point is the less material, because, however the case might be as to a real British vessel, if this brig had not that character, the repairs could not bar the plaintiff's right of recovery. She is not proved to have been seized or condemned on account of these repairs; and the injury done to the plaintiff by the fraudulent misrepresentation of the defendant gave him a complete title to an action for damages.

The right of action then being complete by the fraudulent misrepresentation (if sufficiently proved), independently of any subsequent events; the next question is, what damages the plaintiff is entitled to recover. My opinion is, that he ought to recover to the extent of the actual injury sustained by him. The true rule of damages in cases of this nature is, to allow the difference between the value of the vessel, if her real character had been known, and the price, at which she was bought under the faith of her being a vessel entitled bona fide to the privileges and benefits of such a British character. To this extent at least he has sustained a loss. Now it is in proof, that as a Spanish vessel, at the time of the pur-

chase, she was not worth more than 500 dollars, that is, than the value of her materials, if she were broken up. As a British vessel she was worth 1,500 dollars; and on the faith of the representation made of her possessing such character, the plaintiff gave that sum for her. The difference between these sums is a loss actually sustained by the plaintiff, for he had paid 1,000 dollars more for the vessel than she was worth, and that upon a false representation of the defendant. But it farther appears, that upon the faith of this representation the plaintiff went on and expended about 1,900 dollars in repairs; and I am of opinion, that of this sum the jury are at liberty to allow the plaintiff such portion as they deem reasonable to remunerate any loss, for which the plaintiff has not received any indemnity or compensation by the subsequent earnings of the ship or otherwise. For the loss was a direct consequence of the fraudulent representation.

It has been argued, that the plaintiff ought not to recover any more than nominal damages, because the condemnation may have been caused by the amount of the repairs. But I am of a different opinion. In the first place, as has been already observed, there is no sufficient proof of the real cause of the condemnation. In the next place, if the averments in the declaration are proved, the plaintiff has manifestly sustained more than a nominal damage. He has at least paid 1,500 dollars for what was worth no more than 500 dollars; and this by the fraud of the defendant. What answer to him could it be to say, I have cheated you out of 1,000 dollars, and because you have lost the vessel by another cause, I am entitled to retain the money? There appears to me to be sufficient evidence (if believed) to show, that the plaintiff has sustained more than nominal damages; and the jury are bound to allow him such as in their judgment he has sustained in consequence of the fraud.

Verdict for the plaintiff, $4,364.50.

NOTE. A bill of exceptions was filed, and a motion made in arrest of judgment, which was argued at May term, 1828, and decided at October term, 1828. [Case No. 12,782.]

Case No. 12,782.

SHERWOOD v. SUTTON.

[5 Mason, 143.] [1]

Circuit Court, D. New Hampshire. Oct. Term, 1828.

SALE—FRAUDULENT MISREPRESENTATIONS—STATUTE OF LIMITATIONS—CONCEALMENT—PRACTICE IN EQUITY.

1. In New Hampshire, in an action on the case, for a deceitful representation in a sale, the statute of limitations was pleaded in bar. The plaintiff replied, that there was a fraudulent concealment of the deceit, until within six years. It was *held*, that the replication was a good answer to the plea.

[Cited in Veazie v. Williams, Case No. 16,907; Carr v. Hilton, Id. 2,436; U. S. v. Maillard, Id. 15,709; Bailey v. Glover, 21 Wall. (88 U. S.) 348; Andrews v. Dole, Case No. 373; Tyler v. Angevine, Id. 14,306.]

[Cited in Bowman v. Sanborn, 18 N. H. 208; Conyers v. Kenan, 4 Ga. 308; In re Deake, 80 Me. 55, 12 Atl. 50; Encking v. Simmons, 28 Wis. 281; Fee v. Fee, 10 Ohio, 473; Fisher v. Tuller, 122 Ind. 34, 23 N. E. 523; Persons v. Jones, 12 Ga. 371; Quimby v. Blackey, 63 N. H. 78; Reynolds v. Hennessy, 17 R. I. 178, 20 Atl. 307, and 23 Atl. 639; Rice v. White, 4 Leigh, 478; Sheldon v. Rockwell, 9 Wis. 183; Wear v. Skinner, 46 Md. 262, 268.]

2. In cases of concurrent jurisdiction, such as accounts, bailments, &c. courts of equity construe the statute of limitations as courts of law do, and create no other exceptions, than those created by the statute. Courts of equity, in such cases, act in obedience to the law, and not merely in analogy to the law.

[Cited in Hall v. Russell, Case No. 5,943; Anibal v. Hancock, 2 Fed. 172.]

[Cited in Phalen v. Clark, 19 Conn. 436.]

[This was an action of trespass on the case by Richard Sherwood against Richard Sutton for fraud and deceit in the sale of a vessel. There was a verdict in favor of plaintiff for $4,364.50. Case No. 12,781. The cause is now heard upon a motion in arrest of judgment.]

Mr. Mason, for plaintiff.

Mr. Saltonstall, for defendant.

STORY, Circuit Justice. Upon the posture of this case, the single question now presented for the consideration of the court is, whether the replication to the plea of the statute of limitations is, in point of law, (the issue upon it having been found in favour of the plaintiff,) a sufficient avoidance of the plea, so as to entitle the plaintiff to judgment upon the verdict.

The statute of limitations of New Hampshire, of 16th June, 1791, (N. H. Laws, p. 164,) is, in substance, a transcript of the statute of 21 Jac. I. c. 16, so far as it respects personal actions of this nature; and it contains like exceptions in favour of infants, femes covert, &c. It contains no special exception, however, as to actions founded on fraud, where the fraud has been concealed during the period of the common limitation; and therefore, the legal propriety of creating such an exception must depend upon the same principles here, as it would depend upon in the courts of Westminster Hall. There is, indeed, this consideration of no inconsiderable weight, that as there is no state court in the judicial establishment of New Hampshire, which possesses general equity powers, the remedy, if it is to be administered at all, must be administered in such cases through the instrumentality of a court of law; and hence the doctrines of courts of equity, where they are susceptible of incorporation into remedies at the common law, find a more ready admis-

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

sion in the state courts, than perhaps would occur, if courts of chancery had an independent existence. It would not, therefore, be matter of surprize, if in such state courts, in the construction of the statute of limitations, cases should be extracted by implication from the reach of its provisions, which a court of equity would hold to be saved by virtue of its general principles. It is certainly true, as has been contended at the bar, that the decisions of courts of equity in respect to the construction of statutes are not always to be admitted to be safe guides for courts of law, because they often arise from principles of remedial justice, wholly confined to the former courts, and inapplicable to the latter. It is not uncommon for courts of chancery to give relief in cases of unwritten contracts respecting land, against the letter of the statute of frauds, as in cases of part performance, fraud, and other springing equities, where courts of law would wholly abstain from any interference. The reason is, that the nature and extent of the relief to be granted depends so much upon circumstances, and is so much to be modified by the exercise of a sound discretion, that the proper decree could never be made to assimilate to a judgment at law. An attempt therefore to afford a remedy by a mere general judgment for either party would often work as much or more injustice, than it would cure. But such abstinence is not always observed; and an illustration of the opposite course, working a beneficial effect, may be derived from the known class of decisions under the acts for the registry of deeds of real estate. In this class of cases, courts of law have silently created an exception, in favour of a prior unrecorded deed, against the second grantee, having notice of it at the time of his purchase, following, in this result, the clear doctrine of courts of chancery. The reason is, that the same effectual remedy may be applied, by postponing the second, to the first deed at law, upon the ground of intentional fraud, as equity would administer by a decree directing a perpetual injunction, or a conveyance of the estate in favour of the first grantee. The statute of limitations does not, in its terms, embrace suits in equity, but appropriates its language to actions at law. And, primarily, the legislative intention must be deemed to be limited to such actions. But it must be obvious, that where courts of equity deal with legal titles and legal demands, it could never have been the legislative intention, that they should not be bound by the provisions of the statute. It would otherwise happen, that a legal title or demand, utterly extinct at law, would be recognized as subsisting in equity. It was, therefore, very justly said by Lord Redesdale, in Hovenden v. Lord Annesley, 2 Schoales & L. 607, 630, "that the statute must be taken virtually to include courts of equity; for when the legislature by statute limited proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated, that equity followed the law; and, therefore, it must be taken to have virtually enacted, in the same cases, a limitation for courts of equity also." With reference to such cases, (i. e. of legal titles and demands,) the remark of his lordship is emphatically true, that courts of equity do not act merely by analogy to the statutes, but in obedience to them. This doctrine is strictly applicable to all cases, where courts of law and equity possess a concurrent jurisdiction, such as in matters of account, in certain kinds of fraud, bailments, &c., where the statute is just as much pleadable, as a bar, in equity as at law. On the other hand, there are many cases, where courts of equity act, in the application of the statute of limitations, by way of analogy only; as when they apply it to merely equitable rights and titles, not at all cognizable at law. In refusing or granting relief, they here consider the lapse of time, as furnishing a rule to bar the claim, by reference to the positive rules prescribed by the statute of limitations in legal titles or demands of a kindred nature. I do not go over the cases: but the whole doctrine will be found expounded with admirable clearness and force in Bond v. Hopkins, 1 Schoales & L. 413, 428, and Hovenden v. Lord Annesley, 2 Schoales & L. 607, 629, by Lord Redesdale; and in Cholmondeley v. Clinton, 2 Jac. & W. 1, by Sir Thomas Plumer, whose doctrine was confirmed in the house of lords by Lord Eldon and Lord Redesdale; 2 Jac. & W. 189, note; by Mr. Chancellor Kent, in Kane v. Bloodgood, 7 Johns. Ch. 90, 110; and by Mr. Chief Justice Spencer, in Murray v. Coster, 20 Johns. 576, 582. I gladly refer to such authorities, lest I should weaken the strength of the reasoning by my own imperfect comments. In the recent case of Robinson v. Hook [Case No. 11,956], in this court, the subject was discussed very much at large, so far as it touched implied trusts. Now, whatever may be said as to the authority of those decisions upon the statute of limitations, which courts of equity, acting upon equitable titles and demands only, have made by way of analogy to the law; it can scarcely be said, that the decisions in cases of concurrent jurisdiction, in which they profess to act in obedience to the law, ought not to be of great authority, as just expositions of the true intent of the statute. And hence, as I think, this class of cases has been very properly relied on in courts of law to furnish just rules for the legal interpretation of the statute; for courts of equity, dealing with legal rights and demands, are just as competent, as courts of law, to ascertain their extent and limitations.

Let us, then, in the first place, examine the decisions of courts of equity in cases of concurrent jurisdiction, so far as they apply to

the question now in judgment. The present is such a case. It is an action for a fraudulent representation and deceit; and the jury have found, that there has been a fraudulent concealment of the deceit, until within six years before the commencement of the suit. How far has such a concealment been held to constitute an avoidance of the bar of the statute of limitations? One of the earliest cases is that of Booth v. Lord Warrington, 4 Brown, Parl. Cas. 163, which was a case of concurrent jurisdiction, upon the ground of money paid by imposition, and now sought to be recovered back. The money had been paid more than nine years before the commencement of the suit, but the imposition was not discovered or known to the plaintiff, until after the lapse of the nine years. The statute of limitations was pleaded in bar, and finally overruled, and the decision was confirmed by the house of lords. Lord Redesdale says, (2 Schoales & L. 634,) that the ground of the decision was, "that as fraud is a secret thing, and may remain undiscovered for a length of time, during such time the statute of limitations shall not operate, because, until discovery, the title to avoid it does not completely arise." And from the questions put to the judges, it may be fairly inferred, that the decision proceeded upon grounds common to courts of law and equity. The case of Western v. Cartwright, Sel. Cas. Ch. 34, 2 Eq. Cas. Abr. 10, pl. 11, appears to justify the same conclusion, as Lord Redesdale has justly observed, in the case already referred to. S. C. 13 Vin. Abr. "Fraud," Z, pl. 3, p. 542. See, also, Kane v. Bloodgood, 7 Johns. Ch. 90, 122. Then came the case of South Sea Co. v. Wymondsell, 3 P. Wms. 143, where the doctrine was amply confirmed, and the true ground of Booth v. Lord Warrington, 4 Brown, Parl. Cas. 163, was clearly stated. Deloraine v. Browne, 3 Brown, Ch. 633, manifestly proceeded upon the assumption of the same doctrine; and, indeed, the counsel on both sides admitted its general correctness. I cannot find, that the authority of these cases has ever been doubted or denied; and it is very certain, that in analogous cases, even of mere equitable titles and demands, principles of the like nature have been constantly acted upon by courts of chancery. The inference deducible from this view of the cases is, that the construction adopted by these courts, that the concealment of the fraud avoids the bar of the statute of limitations, is founded in solid sense, and is a natural limitation upon the language of the statute. I do not stop to inquire, whether it is to be deemed an implied exception out of the words of the statute, or whether the right of action, in a legal sense, does not accrue until the discovery of the fraud. The authorities present some diversity of judgment in this respect. Perhaps the true mode of considering it would be, that it is a continuing fraud during the whole period of its concealment, thus knitting it to the original wrong. Nor do I perceive any thing in Battley v. Faulkner, 3 Barn. & Ald. 288, which prohibits us from taking this view of the point. That case proceeds upon the ground, that the plaintiff's right of action was complete, the breach of the contract being known to him more than six years before the commencement of the action. The only question was, whether a subsequent special damage created a new cause of action, and the court held, that it did not.

In the next place, let us see, how this case has been treated at law. Now, the first remark, that suggests itself is, that there is not to be found a single case in England, during the period of two centuries since the enactment of the statute, in which a court of law has been found to deny the application of the doctrine to suits at law; and more than a century ago, the very question was put, by the house of lords, to all the judges, and no trace can be found of any adverse opinion given by them. On the other hand, there is the leading case of Bree v. Holbech, 2 Doug. 655, where, upon the face of the pleadings, the direct question was put, whether fraud would, if concealed, put aside the plea of the statute of limitations. The difficulty in that case was, that the replication did not impute any fraud to the defendant, though it was clear, that the mortgage was a mere forgery. Lord Mansfield there said, "there may be cases, too, which fraud will take out of the statute of limitations. But here, every thing alleged in the replication may be true, without any fraud on the part of the defendant. If he (the defendant) had discovered the forgery, and then got rid of the deed, as a true security, the case would have been very different." It is by no means a just representation of this case to consider this language as a mere dictum of Lord Mansfield. He must be understood to have spoken in the name of the court; and the leave granted to the plaintiff to amend, and reply fraud in the defendant, is proof, that the court entertained no doubt upon the principal point. If they had entertained any doubt, as there was an ample argument, why should it not have been expressed? This case has been often cited, both at law and in equity, since its decision, and the doctrine of Lord Mansfield has never been denied in England. It has often been quoted, as the citations at the bar abundantly show, as good law by elementary writers. See 4 Bac. Abr. (by Gwillim) "Limitations," D, p. 476; Esp. Dig. N. P. 151; 2 Com. Cont. 499; 2 Starkie, Ev. 890. In Short v. M'Carthy, 3 Barn. & Ald. 626, the case of Bree v. Holbech was cited by counsel on both sides without objection, and was not in the slightest degree impugned by the court. The principal point there was, that the new promise, relied on to take the case out of the statute, was substantially different from the original cause of action; and the original cause of action, which was negligence in an attorney, was held to have accrued at the time the

negligence occurred, though the plaintiff had no knowledge of it until a subsequent period. Mr. Justice Bayley, on that occasion, said "if the want of knowledge could take the case out of the statute of limitations, it would be competent to the plaintiff to state this in his replication." It was not so stated; nor was there the slighest pretence of fraud. In Clark v. Hougham, 2 Barn. & C. 149, the action was for money had and received, and the statute of limitations was pleaded, and the parties were at issue upon the general replication of a promise within six years. The plaintiff obtained a verdict, and upon a motion for a new trial, one of the questions argued at the bar was, that there had been fraud and misrepresentation, which took the case out of the statute. But the court were of opinion, that the pleadings did not raise that point, and if intended to be made, there should have been a special replication of the fraud. Mr. Justice Best however said, "It has been answered, that fraud prevents the operation of the statute of limitations. It is not necessary to decide that now; but I think it would have done so, had the replication raised the point." In Granger v. George, 5 Barn. & C. 149, which was trover for the non-delivery of certain deeds, there was a plea of the statute of limitations, and the general replication, that the action did accrue within six years. Upon the trial, there was no proof, that the plaintiff knew of the conversion until within six years, although it had taken place long before. The court were of opinion, under such circumstances, that the case was not taken out of the operation of the statute, the action accruing at the time of the conversion, "there not being evidence of any fraud practised by the defendant in order to prevent the plaintiff from obtaining knowledge of that which had been done." The mere fact of a want of knowledge, without fraud, was not of itself sufficient. It appears to me difficult to escape the conclusion, that if, in these late cases, where the point was brought directly to the judgment of the court, the doctrine in Bree v. Holbech had been seriously doubted, that some suggestion to that effect would have fallen from the bar or bench. A total silence, under such circumstances, would not be insignificant. But the positive affirmance of the doctrine by Mr. Justice Best is strong evidence of the actual state of the law in England.

It remains to examine the American cases, which, with one exception, which I shall have occasion hereafter to mention, are admitted to be all one way, and in conformity to Bree v. Holbech. One of the earliest cases is Jones v. Conoway, 4 Yeates, 109, where the point was directly decided by the court. Then came First Massachusetts Turnpike v. Field, 3 Mass. 201, where to a plea of the statute of limitations, there was a replication of a fraudulent concealment of the breach of the contract; and the court, upon full argument, sustained the replication, affirming, that the cause of action ought not to be considered as having accrued, until the plaintiff could obtain the knowledge, that he had a cause of action. "If," said the chief justice, "this knowledge is fraudulently concealed from him by the defendant, we should violate a sound rule of law, if we permitted the defendant to avail himself of his own fraud." And he relied on the cases of South Sea Co. v. Wymondsell, and Bree v. Holbech, as authorities. The doctrine of this case has been fully recognised and acted upon in the recent cases of Homer v. Fish, 1 Pick. 435, and Welles v. Fish, 3 Pick. 74, and constitutes the settled law of Massachusetts. In Bishop v. Little, 3 Greenl. 405, the same principle was sustained; at the same time, that it was denied, that want of knowledge without fraud would take a case out of the statute, following the line of distinction in the cases of Short v. M'Carthy, and Granger v. George. The case of Troup v. Smith's Ex'rs, 20 Johns. 33, which was an action of assumpsit on a special contract, and contained the money counts also, certainly supports a contrary doctrine, and being decided upon special pleadings, where the very point was presented by an averment, "that the fraud and deceit were not discovered by the plaintiff until a long time after the contract was to be performed," &c., and was deliberately considered, must be admitted to possess high authority. The replication did not aver in terms, that the fraud had been concealed by the party so as to prevent a discovery; but only, that the fraud was not discovered by the plaintiff. The court, however, reasoned the case upon the general principle. The decision was, that the right of action did accrue as soon as the original fraud was consummated; and not at the time when the plaintiff first discovered it; and that a fraudulent concealment was not a good answer to a plea of the statute. Mr. Chief Justice Spencer, in delivering the opinion of the court, examined the authorities with his usual accuracy and clearness. He considered the cases in courts of equity inapplicable, upon the ground, that they resulted from their peculiar jurisprudence, operating upon the conscience of the party, and the statute not being addressed to, or obligatory upon them. The case of Bree v. Holbech was adverted to by him as containing only a dictum of Lord Mansfield, and therefore unfit to guide the judgment of a court of common law in this point. In the absence of all controlling authority, he deemed it the duty of the court to adhere to the letter of the statute, and not to introduce an exception not included in any of its provisos. If the point were entirely new, and left untouched, both at law and in equity, the reasoning of the learned judge would justify much hesitation in introducing such an exception. Perhaps it would be conclusive against any attempt to go beyond the precise terms of the savings of the statute, as a limitation of duty most

fit for those, who are to construe the statute, and not to create an exception beyond its terms. But it is to be remembered, that most, if not all the statutes of limitations existing in the several states of this Union have borrowed the language of the statute of 21 of James. In all the revisions since the American Revolution, the same general enactments have been preserved; and it cannot be doubted, that the expositions of the statute, which had been adopted in England, both at law and in equity, were well known to those, who framed our own. Under such circumstances it would not be unnatural to suppose, that these expositions were received as the true interpretation of the text. It does not strike me, therefore, that the expositions of the statute by courts of chancery are to be rejected in such cases, unless they turn, not upon the words of the statute, but upon some equity peculiar to such courts, and not cognizable at law. For if such courts profess to expound the statute upon a general principle, which must equally apply to courts of law; and a fortiori, if they profess to follow the law, (as they certainly do in cases of concurrent jurisdiction,) then, as has been already remarked, their decisions may justly be deemed authorities for the guidance of courts of law. With great deference it appears to me, that the learned judge has not adverted to, or given sufficient weight to this consideration; and I cannot but think, that if his own luminous judgment in the subsequent case of Murray v. Coster, 20 Johns. 576, in which the distinction is so clearly drawn, had been then before him, he would not have been disposed to have pressed the argument against this class of chancery decisions quite so far. At all events, my own judgment does not justify me, in a case of concurrent jurisdiction, in rejecting their just influence as authoritative expositions of the statute, "valere quantum valere possent." In this conflict of American decisions, it is the duty of the court to adopt that, which seems built upon the better reason, or at least which upon an equipoise seems most consonant with public convenience and justice. I put the case in this way, because I am not called upon to discuss the point, as if it was an original one of first impression, unaffected by judicial intimation or opinion. I desire to be understood, as utterly disclaiming any intention of expressing what, under such circumstances, my opinion would be. The case is affected by judicial decisions, and the choice is fairly given to follow that, which is most consonant to the local jurisprudence of New Hampshire.

What, then, is the reason, upon which this exception has been established? It is, that every statute is to be expounded reasonably, so as to suppress, and not to extend, the mischiefs, which it was designed to cure. The statute of limitations was mainly intended to suppress fraud, by preventing fraudulent and unjust claims from starting up at great distances of time, when the evidence might no longer be within the reach of the other party, by which they could be repelled. It ought not, then, to be so construed, as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation; and cases of fraud, therefore, form an implied exception, to be acted upon by courts of law and equity, according to the nature of their respective jurisdictions. Such, it seems to me, is the reason, on which the exception is built, and not merely, that there is an equity binding upon the conscience of the party, which the statute does not reach or control. Nor is this mode of interpretation of statutes new in courts of law. The case under our registration acts concerning real estate, where notice deprives a second grantee of his priority, has been already mentioned; and, as far as I know, the doctrine pervades the courts of law throughout this Union. It certainly is the received doctrine in every state of the first circuit. Many other cases will be found collected in Bac. Abr. tit. "Statute," H, 5, 6, 7, 8; and Com. Dig. "Parliament," R, 10–16. Even the statute of limitations has received an equitable construction in cases, where the mischief was the same as that expressly provided for. Lethbridge v. Chapman, 15 Vin. Abr. 103, Wilcocks v. Huggins, 2 Strange, 907, Fitzg. 170, 289, and Kinsey v. Hayward, 1 Lutw. 97, which are recognized as good law in Hickman v. Walker, Willes 27, 29, are strong examples. The cases of Strithorst v. Graeme, 2 W. Bl. 723, 3 Wils. 145, Ruggles v. Keeler, 3 Johns. 267, White v. Bailey, 3 Mass. 271, and Fowler v. Hunt, 10 Johns. 464, through less stringent, appear to me to carry the construction beyond the literal import of the words to the substantial objects of the statute. See also Com. Dig. Temps. G, 9, &c., 5 Dane Abr. c. art. 1, 10. Now, if any exception out of the words of the statute is to be created by implication, I can scarcely conceive of one, which stands upon better reason than that now insisted on; for it is in furtherance, and not in evasion of the legislative intention. It is material to state, that the point is not, whether mere ignorance of the fact on the part of the plaintiff ought to remove the bar; but whether this ignorance, resulting from the fraudulent concealment of the fact by the defendant, ought to have that effect. It was said, at the bar, that the reasoning of Mr. Chief Justice Parsons, in 3 Mass. 201, is not characterized by his usual ability and strength. But it seems to me, that it meets the objection in the only manner, in which it can be met, that is, by affirming, that the court would violate a sound rule of law, if it permitted the defendant to avail himself of his own fraud. That is not denied by Mr. Chief Justice Spencer, who puts his opposition to the doctrine up on the words of the statute, and the inability of a court of law to dispense with its obligation, or to create exceptions. It may be fairly presumed, that the fact, that in New York cases of this sort were remediable in chan-

cery, had some influence in inducing him to adhere to the letter of the statute. For myself, I must say, that in a case of concurrent jurisdiction, if remediable in equity, it ought to be so at law; for the same reason applies to both courts.

My opinion accordingly is, that the replication is good, and the plaintiff is entitled to judgment upon the verdict. I found myself upon this ground, that in England there is an uniform course of equity decisions in favour of the doctrine, and no inconsiderable weight of common law authority in the same direction, and none, not even a dictum, against it; that in America, courts of law, in at least four states, have adopted it; that if a different rule be proper in states having a general equity jurisprudence, the same rigid construction ought not to apply to other states, where it is excluded; and that in the state courts, which are governed by a legal jurisprudence most consonant with, and influencing that of New Hampshire, it has been established in the most solemn manner.

Let judgment therefore be entered for the plaintiff. See Robinson v. Hook [Case No. 11,956].

Judgment accordingly.

SHICK, In re. See Case No. 12,455.

Case No. 12,783.

SHIEFFELIN v. WHEATON.

[1 Gall. 441.] [1]

Circuit Court, D. Rhode Island. June Term, 1813.

INSOLVENCY—RHODE ISLAND ACT—DEBT NOT YET DUE.

The insolvent act of Rhode Island extends to discharge the party from debts and contracts not yet due, and the bar created thereby applies to the debt or contract, in whatever court it is sued, where the contract was made in the state.

[Cited in Woodhull v. Wagner, Case No. 17,975.]

This action was brought to recover the contents of a promissory note, dated at Providence, &c., given by the defendant [Levi Wheaton] to the plaintiff [Jacob Shieffelin], payable at a certain time, which had elapsed before the suit was brought. The defendant pleaded a discharge under the insolvent act of Rhode Island, after the note was given and before it became due. To this plea there was a general demurrer and joinder.

Tristram Burgess, for plaintiff.

Mr. Robbins, for defendant.

STORY, Circuit Justice. It appears, that the plaintiff is a citizen of New York, and the defendant a citizen of Rhode Island, and the note was made at Providence in Rhode Island, and (for ought that appears) to be executed there. Under these circumstances, the cause is to be governed by the lex loci contractus; and a discharge good by the law of the place, where the contract is made and is to be executed, is good every where. It has been argued, that the insolvent act of Rhode Island does not bar a debt not due at the time of the insolvency. But on examining the act, the words are sufficiently broad to discharge the party from all debts, which have not then fallen due. Such debts have been always admitted to be proved under the commission, and have been uniformly held by the state courts to be barred by the act. A construction of so old a statute, which has been uniformly sanctioned by the judicial courts of the state, and recognised in practice, I should not feel at liberty to disturb, even if more doubts accompanied that construction, than I profess to feel.

It has been further argued, that the act was designed to bar the remedy only in the state courts, and not in the United States courts; but I am satisfied that this construction cannot be supported. The language of the act is too explicit to admit of doubt. It gives the party coming in under it a complete discharge from all contracts within its purview. It has been suggested, that in point of fact the consideration of the present note was a satisfaction of a judgment obtained by the plaintiff against the defendant, in the state courts of Rhode Island, on a contract originally made between the parties in New York, and that, if these facts would vary the legal result, the plaintiff would withdraw his demurrer by leave of the court and reply the special facts. I do not perceive how these facts can vary the legal principles applicable to the case. The court can only look to the place of the present contract, and not to the place of any former contract, which gave rise to the present. If money had been lent in Rhode Island, and a note afterwards given in New York, and payable there, for the amount, there could be no doubt that the contract would be governed by the law of that state.

No question has been made, as to the constitutionality of the insolvent law of Rhode Island. On that point, therefore, I give no opinion. But on the other grounds, I adjudge the plea in bar good, and let judgment be entered accordingly.

Judgment for the defendant.

Case No. 12,784.

In re SHIELDS.

[4 Dill. 588; [1] 15 N. B. R. 532; 4 Cent. Law J. 557; 24 Pittsb. Leg. J. 190.]

Circuit Court, D. Iowa. May Term, 1877.

BANKRUPTCY — ATTACHMENT — COMPOSITION PROCEEDINGS.

Where an involuntary petition in bankruptcy is filed against an alleged bankrupt, and, prior

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

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

to an adjudication thereon, composition proceedings are instituted and a composition had with the creditors of such alleged bankrupt, *held*, that such composition will not dissolve an attachment issued and levied within four months from the date of filing such petition, as against a creditor who took no part in such composition proceedings.

[Cited in Sage v. Heller, 124 Mass. 214; Shaw v. Vaughan, 52 Mich. 409, 18 N. W. 126.]

September 14, 1875, Armill brought an action in the district court of Iowa, in Scott county, against Shields, by attachment, and upon the same day levied upon certain personal property of Shields. Immediately thereafter, certain creditors of Shields filed an involuntary petition in bankruptcy against him, and, upon the same day, Shields applied for a composition meeting, under the provisions of section 17 of the act of congress, entitled "An act to amend and supplement an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March 2, 1867 [14 Stat. 524], and for other purposes," approved June 22, 1874 [18 Stat. 178]. A meeting was called, under the direction of the court, for that purpose. On the 20th day of October, and prior to the convening of said composition meeting, Armill obtained judgment in the state court against Shields, and a special execution was authorized to be issued against the property attached. After the rendition of the judgment aforesaid, said meeting of creditors was held, at which said Shields proposed a composition with his creditors, which was duly accepted and confirmed by the requisite number of creditors, and, upon hearing before the court, approved and ordered recorded as provided by law. Shields was not adjudged a bankrupt, nor was any assignee appointed, nor any assignment made of his estate. Armill had notice of all proceedings in the court of bankruptcy, but took no part therein. Armill refused to accept payment under the terms of the composition, but threatened to issue execution upon his judgment and sell the attached property; and thereupon Shields filed this bill in the court of bankruptcy, asking that Armill be enjoined from proceeding under his judgment.

Brown & Campbell, for Shields.
Stewart & White, for Armill.

LOVE, District Judge. The precise question in this case is, whether or not a composition under the bankrupt law, without an adjudication and assignment, operates to displace or dissolve an attachment in a state court, levied within four months of the proceedings in bankruptcy.

There is nothing in the amendment of the bankrupt law providing for compositions, that in express terms affects attachments in the state courts. The original act, which is still in force, provides that the "assignment shall relate back to the proceedings in bankruptcy; and thereupon, by operation of law, the title to all the bankrupt's property and estate, both real and personal, shall vest in said assignee, although the same shall then be attached on mesne process as the property of the debtor, and shall dissolve any such attachment within four months next preceding the commencement of said proceedings."

There is no doubt that the attachment in this case would have been dissolved, if the composition had been consummated after an adjudication and assignment; not, however, by virtue of the composition, but in consequence of the adjudication and assignment. There was, in fact, no adjudication and assignment. It cannot be claimed, therefore, that the attachment was displaced by the very terms of the law; but the complainant insists that the composition operated to produce the same result. The argument of the complainant, and of the cases which he cites, is that the composition extinguishes the debt, and that no attachment lien can continue after the debt is discharged. This argument, manifestly, proves too much; for by the same reasoning all other liens, as well as attachment liens, would be destroyed by the composition. The composition, like a regular discharge, releases the debtor from the personal obligation to pay his debts; but neither the one nor the other affects the creditor's rights in rem, or his security by valid and subsisting liens. On the contrary, the bankrupt law in express terms preserves to the creditor all valid liens upon property, and to that extent undoubtedly keeps his debt alive. To this, the solitary exception is the case of attachments levied within four months of the commencement of the proceedings in bankruptcy, and this not by implication or inference, but by the express terms of the law.

Now, in my judgment, the composition clause of the law should receive a strict construction, because it is in plain derogation of common right. It compels the dissenting minority of creditors to accept just as much upon their claims as the debtor and the requisite majority see fit to resolve that all shall accept. It takes from the minority the common right of making their own terms with their debtor, and releases the obligation of the latter to them against their will, and upon terms imposed by the majority. Certainly, therefore, the provisions of this clause should not be extended by construction to embrace more than the words clearly and manifestly import.

Let us consider the matter from another point of view. The debtor and the required majority of creditors, without waiting for any adjudication, and before it is judicially determined that the debtor is insolvent, enter into an agreement of composition by which it is stipulated that the debtor shall pay a certain per cent upon his indebtedness to those who dissent as well as to the assenting creditors, and the bankrupt law annexes a certain legal consequence to this agreement. The law provides that, by virtue of this com-

position, the debtor shall be discharged from all personal obligation to pay his debts, beyond the stipulated sum. This clause of the law makes no provision whatever as to the displacement of liens, whether by attachment or otherwise. The basis of this adjustment is covenant. All the creditors are parties to it—the majority by their own voluntary assent, and the minority by operation of law.

But it is contended that it is to be treated as precisely equivalent to a proceeding in which the debtor is regularly adjudged to be insolvent and required to surrender all his property to his creditors, and in which the court further decides that the debtor is by misfortune and without fraud a bankrupt, and therefore entitled to a full discharge from personal liability to his creditors. As in the latter case certain attachments are by the express terms of law dissolved, so in the former, attachments in the same category are to be considered displaced without any express provision whatever to the same effect. This position does not seem to me to be logical. I should say, rather, that attachments within the four months are dissolved by the assignment, because the law provides that they shall be; and attachments in the same predicament are not displaced by a composition, because the law does not provide that they shall be so affected.

Again, have creditors with attachment liens with the four months a right to participate in the composition meeting? Judge Treat, in Re Scott [Case No. 12,519], held, upon what seems to me very solid grounds, that attaching creditors have no right to participate in and vote at the composition meeting. If so, it seems clear that such creditors should not be in any wise affected by the results arrived at by the parties to the composition. This question has been variously decided by the supreme courts of Iowa and Maryland on the one side, and Judges Treat and Lowell on the other.

It seems to me that the Iowa case is not at all conclusive upon this point, because the court expressed themselves as content to follow the decision of the supreme court of Maryland, "without entering upon examination and determination of the question." See Smith v. Engle, 44 Iowa, 265.

Turning to the case of Miller v. McKensie 43 Md. 404, and others decided by the supreme court of Maryland, one cannot but be struck with the unsatisfactory character of reasoning of the court in support of its decision. The court takes no notice whatever of the manifest distinction between the attaching creditor's claim in rem and in personam, but insists upon the proposition that the composition extinguishes the debt, and therefore discharges the attachment. With equal justice might the court say that the final discharge, which releases the bankrupt debtor from personal liability, necessarily discharges all liens upon property by attachment or otherwise, because there can be no lien where the debt is extinguished—a proposition true enough as a general principle, but utterly fallacious when applied to the subject of liens, as recognized by the bankrupt law.

Perhaps the true answer to the argument of the Maryland court is, that the discharge or composition in bankruptcy affects rather the remedy than the debt itself. It is a defence that must be set up specially in bar of the remedy, like the statute of limitations; and it is, perhaps, not accurate to say that the discharge or composition extinguishes the debt. It seems to me that the reasonings of Judges Lowell and Treat touching this question are solid and conclusive; and, without the least disparagement to the state supreme courts, I consider those learned judges the safer guides, because, while the attention of the state courts to the bankrupt law is casual and infrequent, that enactment has necessarily been to the judges referred to a subject of constant reflection and profound study.

Bill dismissed with costs. Decree accordingly.

Case No. 12,785.

In re SHIELDS.

[1 N. B. R. 603 (Quarto, 170);[1] 15 Pittsb. Leg. J. (O. S.) 391.]

District Court, W. D. Pennsylvania. May 9, 1868.

BANKRUPTCY — EXEMPTED PROPERTY — REPORT OF ASSIGNEE—TWENTY DAYS' LIMIT.

The rule requiring the assignee to make a report of exempted property within twenty days, is to receive such a construction as to prevent injustice to the bankrupt, and it may be extended by the court and leave granted to the assignee to make a further report.

[In the matter of David Shields, a bankrupt.]

By JOHN N. PURVIANCE, Register:

In this case it appears by the report of the assignee, John W. Rohrer, Esq., that a sale was made by the sheriff of Armstrong county, of a large portion of the bankrupt's personal property, subsequent to the filing of his petition in bankruptcy; and that the proceeds of the sale of said property are in the hands of the sheriff, awaiting a decision of the court of common pleas of that county as to whether the same should be paid to the assignee of said bankrupt's effects, or to the creditors upon whose judgment it was sold.

Until that question be decided, it is deemed proper that the assignee should not be required to make a final report of exempted property or be precluded from making an additional report, in case such should become necessary, so that the assignee may be able to set apart so much of the proceeds, arising from the sale of the personal property, as would secure to the bankrupt the amount al-

[1] [Reprinted from 1 N. B. R. 603 (Quarto, 170), by permission.]

lowed to him as exempted by the bankrupt act.

Rule 19, requiring assignees to make report to the court within twenty days after receiving the articles set off to the bankrupt by them, is to be strictly observed in all ordinary cases, but it is to receive such a construction as to prevent injustice to the bankrupt; and in cases like the present, where the property has not come into possession of the assignee, and a question, as to his right to it, is pending in court, it would seem to be a just and reasonable construction of the rule, and the only one that could give proper effect to the provisions of the fourteenth section of the bankrupt law [14 Stat. 522], that the time shall be computed from the date of the final decision of the court, so as to give twenty days after the property is adjudged to be within, or under, the control of the assignee.

In this view of the question, the register is of opinion, that, for the reasons stated by the assignee in his report (as herein substantially restated), the time for making an additional return of exempted property, as prayed for by the assignee, should be granted.

PER CURIAM. The decision of the register is approved, the time is extended, and leave granted to assignee to make further report.

Case No. 12,786.

SHIELDS v. MIDDLETON.

[2 Cranch, C. C. 205.] [1]

Circuit Court, District of Columbia. June Term, 1820.

STATUTE OF FRAUDS — DEBT OF ANOTHER — ACCEPTANCE OF ORDER.

A verbal acceptance of an order, drawn at the foot of the account of a third person against the drawer, is not a promise to pay the debt of another, within the statute of frauds.

Assumpsit, against the acceptor of Bates' bill on the defendant, which was in this form: "Washington, December, 1817. Mr. Bates, to James Shields, Dr. To 32 brls. lime, at $3 per brl., $96.00. Mr. J. S. Middleton—Sir: Please to pay the above bill and oblige. Yours, respectfully, Reuben Bates."

Mr. Caldwell, for defendant, objected that this is a promise to pay the debt of another, and that as the promise to pay was not in writing, it was void by the statute of frauds.

But THE COURT (nem. con.) instructed the jury that this order was a bill of exchange, that the defendant's promise to pay it was equivalent to an acceptance, and that such an acceptance was not within the statute.

SHIELDS (MOORE v.). See Case No. 9,775.
SHIELDS (ROOT v.). See Case No. 12,038.

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

Case No. 12,787.

SHIMER v. HUBER et al.

[19 N. B. R. 414; 14 Phila. 402; 36 Leg. Int. 339; 8 Reporter, 393.] [1]

Circuit Court, E. D. Pennsylvania. Aug. 15, 1879.

PARTNERSHIP—TRANSFER TO CO-PARTNERS—CREDITORS—BANKRUPTCY—EXECUTION.

1. In a partnership the transfer by one partner of his interest to his co-partner, as against firm creditors, is a question of good faith. If the transaction is honest, for the purpose stated in the agreement, it does so transfer the interest as it purports to do, and the firm creditors having no lien on the property, or equity in respect thereto, independent of the partners, cannot complain.

2. Executions issued on judgments, the warrants for which were signed and delivered a year before a petition in bankruptcy filed, are valid; and the hold on the property under them is good, unless the debtor actively interfered to have the seizures made.

On April 30, 1877, a petition on the part of firm creditors of the firm of Huber & Mohr was filed in the district court for the Eastern district of Pennsylvania, on which they were adjudged bankrupts. On April 24, 1877, three executions had been issued against C. Lewis Huber, one of the members of this firm, out of the court of common pleas of Lehigh county. One by Walter P. Huber, guardian of Chas. T. Ritter, for $2,000, dated April 14, 1874, and entered of record April 24, 1877; one by Rebecca Wagner, dated April 1, 1874, entered of record April 24, 1877, for $3,879; and one by Milton Cooper, dated December 7, 1875, entered of record April 24th, 1877, for $1,500. There was also another execution issued by the Coopersburg Savings Bank on April 28, 1877, on a judgment note dated March 29, 1877, and entered of record in the court of common pleas of Lehigh county, April 2, 1877. The last judgment was against C. Lewis Huber and Thomas Mohr. On April 30, 1877, this bill was filed, praying for an injunction against these execution creditors and against the sheriff of Lehigh county. The Coopersburg Savings Bank was brought in on a subpœna subsequently issued on application of the plaintiffs. Walter P. Huber is a brother, Mrs. Rebecca Wagner a sister, and Milton Cooper the father-in-law of C. Lewis Huber.

Before the formation of this partnership, C. Lewis Huber was in partnership with C. Wilson Dech and T. J. Kichline, trading in the firm name of Huber, Dech & Kichline. They carried on a boot and shoe factory at Allentown, Pa. About the 1st of June, 1876, the firm of Huber, Dech & Kichline was dissolved. The stock was then valued at about $20,000. Thomas Mohr, one of the bankrupts, then took a half interest in the business, and C. Lewis Huber the other half, and they entered into a co-partnership, trading in the firm name of Huber & Mohr. It

[1] [Reprinted from 19 N. B. R. 414, by permission. 8 Reporter, 393, contains only a partial report.]

appears that on the 29th of March, 1877, the firm of Huber & Mohr was dissolved. Mohr transferred his half interest to Huber, who assumed the firm liabilities. At the time of this dissolution the firm was practically insolvent, but the transaction was bona fide, and Huber then expected to be able to carry it through, although he was also personally insolvent at the time, though this fact was not known to Mohr. Subsequently, being aware of his insolvent position, C. Lewis Huber intimated to certain of his private creditors that he proposed to make an assignment. As a result of such intimation, judgment notes, the warrants of which were signed and delivered a year prior to the petition in bankruptcy filed against Huber & Mohr, held by his brother, Walter Huber, his sister, Rebecca Wagner, and his father-in-law, Mr. Cooper, being all personal claims, were entered up, executions issued, and levy made upon the stock of the late firm within a month previous to the petition in bankruptcy filed by the firm creditors. The judgment to the Coopersburg Savings Bank had been confessed by the firm of Huber & Mohr prior to the dissolution, but no knowledge was shown on the part of the bank of the insolvency.

The case came up in the circuit court on a motion to restrain proceedings upon these four executions.

Winslow Wood and Jas. S. Biery, for complainants.

P. K. Erdman and R. E. Wright & Son, for respondent.

BUTLER, District Judge. Three questions are presented by this case: First, did the agreement of March 29, 1879, between the partners, Huber & Mohr, transfer the firm property to Huber as against the firm creditors? Second, were the seizures under the executions of Walter Huber, Mrs. Wagner, and Mr. Cooper, procured by the debtor, Lewis Huber? Third, is the judgment of the Coopersburg Savings Bank, of April, 1877, valid, and, if so, was the seizure under it procured by the debtor?

The first question is one of good faith, simply. If the transaction was honest—designed for the purpose stated in the agreement signed—it transferred Mohr's interest to Huber; and the firm creditors, having no lien on the property, or equity in respect thereto, independent of the partners, cannot complain. The insolvent condition of the firm at the time is unimportant, except as the fact may bear on the question of good faith. T. Pars. Partn. 502, note L; Lindl. Partn. *535; McNutt v. Strayhorn, 3 Wright [39 Pa. St.] 269; Doner v. Stauffer, 1 Pen. & W. 198; Baker's Appeal, 9 Harris [21 Pa. St.] 82; Walker v. Eyth, 1 Casey [25 Pa. St.] 216; Siegel v. Chidsey, 4 Casey [28 Pa. St.] 279; York Co. Bank's Appeal, 8 Casey [32 Pa. St.] 446; Cope's Appeal, 3 Wright [39 Pa. St.] 284; Vandike's Appeal, 7 P. F. Smith [57 Pa. St.] 9; Lefevre's Appeal, 19 P. F. Smith [69 Pa. St.] 122; Potter v. Hicks [Case No. 11,328], Cir. Ct. E. D. Pa. 1878. An examination of the evidence has satisfied us that the transaction was honest; that Mohr sold his interest to Huber in good faith for the consideration stated in the agreement. The firm was insolvent, according to the sense in which this term is used in the bankrupt law, we have no doubt; they could not meet their ordinary business obligations. But Huber, a hopeful, energetic, visionary man, believed his individual resources equal to all contingencies, and supposed he could prosecute the business successfully. In this opinion Mohr (who believed Huber had considerable separate property) fully concurred. Huber went to work earnestly, borrowed money, involving his father-in-law to a considerable amount; but the burden was too heavy, and very soon he sank under it.

Second, were the executions of Walter Huber, Mrs. Wagner, and Mr. Cooper, procured by the debtor, Lewis Huber? The judgments on which the executions issued having been entered in pursuance of warrants signed and delivered a year before the petition in bankruptcy was filed, are valid; and the hold on the property under them is good, unless the debtor actively interfered to have the seizures made. An examination of the evidence has satisfied us that he did so interfere. The burden of proof is on the plaintiff; and we approached the case with a natural inclination in favor of the execution creditors, whose judgments are not only honest, but for money loaned; but the testimony tending to show an arrangement that the debtor should interfere to save these creditors, if danger threatened, at the expense of others, is too strong to be disregarded. That he should be inclined to prefer them, may be presumed; they were his near relations; that he informed them of his condition, and that they, in consequence, and in a body, seized his property, is clearly proved. In the absence of repelling evidence, an inference that his motive in thus informing them was to induce the action they took, and that he did it in pursuance of an understanding, would be justified. But there is more in the case. Mr Deck, a creditor, testifies that Huber told him, when pressing for payment, months before, "that suing would do no good; that he had money of his brother, sister and father-in-law; that he would not leave them out in the cold." Mr. Wood, who called about a claim, as counsel, testifies that Huber told him substantially the same; "that his sister, brother and father-in-law, had judgments; that his creditors could gain nothing by pushing; that if they pushed he would have his relations sell him out; that they would use up the whole stock; that these debts were sacred, and he thought it his duty to protect them first." And Walter Huber, one of the execution creditors, says he would have entered his judgment earlier had it not been for

Lewis' statement that it would injure him, and a promise to tell him when danger approached. "I relied on this; that is the reason I did not enter it sooner; I entered it the next morning after he told me he was going to make an assignment." The business connected with these claims was attended to by Walter Huber and Mr. Cooper. They resolved to issue all the executions, immediately upon learning the debtor's condition, and did issue them. It is unimportant that Lewis may not have communicated directly with Mrs. Wagner. We cannot regard the denials of the parties to the transaction as a sufficient answer to this evidence.

Third, is the judgment of the Coopersburg Savings Bank valid, and, if so, was the execution which issued on it procured by the debtor? The warrant on which this judgment was confessed was signed within a month of filing the petition in bankruptcy. That the debtor was then "insolvent," as before remarked, cannot be doubted. Knowledge of this fact on his part, and an intention to prefer the bank in confessing the judgment, may, therefore, justly be inferred. But we fail to discover any evidence to warrant a conclusion that the bank had reasonable cause to believe him insolvent, or knowledge that his act was in fraud of the bankrupt law, without which the insolvency and improper motives of the debtor, are unimportant. Mere suspicion of insolvency or fraud will not answer. Grant v. National Bank, 97 U. S. 80. The officers say they believed him to be solvent, and the fact that they discounted his note at this time, supports their statement. The judgment must therefore be regarded as valid. And we find no evidence whatever that the debtor procured the execution which issued upon it. He had no motive to do so, such as existed in the other cases; and the testimony before referred to as applying there, is inapplicable here.

A decree will therefore be entered, enjoining and restraining Milton Cooper, Walter Huber, and Rebecca Wagner, their respective agents, servants and attorneys, from proceeding under their aforesaid executions against the property of C. Lewis Huber, seized as before mentioned, or in anywise interfering or intermeddling with the same, or the proceeds thereof, as prayed for, and dismissing the bill as respects the Coopersburg Savings Bank.

Case No. 12,788.

In re SHINE et al.

District Court, D. Massachusetts. March 3, 1877.

BANKRUPTCY—COMPOSITION.

One creditor of a bankrupt, who was endeavoring to obtain a resolution of composition, wrote to another creditor, who had not signed, desiring him to help forward the composition as much as possible, by his signature and otherwise, and said: "I shall consider your doing so a personal favor, upon the strength of which you may depend upon my trade in future." *Held*, that it was improper to obtain the signature of a creditor in such a manner, and leave to record a resolution of composition containing such signature was refused.

[Cited in 15 Alb. Law J. 293, to the foregoing proposition. Nowhere reported; opinion not now accessible.]

[In the matter of Shine & Sons, bankrupts.]

Case No. 12,789.

SHINN v. McKNIGHT.

[4 Cranch, C. C. 134.] [1]

Circuit Court, District of Columbia. April Term, 1831.

HARBORS—FEES—BAY CRAFT—VIRGINIA STATUTE.

The harbor master in Alexandria, D. C., has no right to charge fees upon vessels which come from Philadelphia through the Delaware canal, from the Delaware bay to the Chesapeake bay, and thence to Alexandria. They are to be considered as bay craft.

Appeal from the judgment of a justice of the peace for harbor master's fees in the port of Alexandria, D. C.

CRANCH, Circuit Judge, delivered the opinion of the court (THRUSTON, Circuit Judge, absent). It is understood by the court that the vessels for which the harbor master, McKnight, the appellee, has charged his fees, in this case, were vessels employed as packets which came from Philadelphia through the Delaware canal, from the Delaware bay to the Chesapeake bay, and thence to Alexandria. These vessels, we think, come within the meaning of the term bay craft, in the act of assembly of Virginia, respecting harbor masters, January 18, 1798, pp. 14, 381, and that the harbor master is not entitled to fees in such cases. The act does not confine the term "bay craft" to Virginia vessels, nor is there any evidence that it has been so confined during the long practice under the law. Bay craft belonging to, or coming from Maryland, have been considered, in practice, as much exempt from fees as Virginia bay craft; and the fact that the craft came from Philadelphia through Delaware and Maryland cannot make any difference in principle. If the act could be considered as giving an exclusive advantage to Virginia vessels, I doubt whether it would not be void, as derogating from the exclusive right given to congress by the constitution of the United States, to regulate commerce among the several states. I am therefore of opinion that the judgment of the justice was erroneous, and must be reversed with costs.

MORSELL, Circuit Judge, concurred.

Judgment reversed, with costs.

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

SHIP.

[Cases cited under this title will be found arranged in alphabetical order under the names of the vessels; e. g. "The Ship Sabioncello. See Sabioncello."]

Case No. 12,790.

SHIPLEY v. THOMPSON.

[2 Balt. Law Trans. 244, 300.]

Circuit Court, D. Maryland. April 21, 1869.

WAR — RECOVERY OF MONEY PAID FOR THE RELEASE OF CAPTURED PROPERTY.

James Mackubbin and Thomas Donaldson, for plaintiff.

R. J. Brent and Wm. Meade Addison, for defendant.

Before GILES, District Judge.

This is an action of assumpsit to recover $400 paid by [Joshua N. Shipley] to obtain the release of horses levied upon under a military order of Gen. Wallace, in order to indemnify [John W.] Thompson for the loss of a horse taken from him by Confederate soldiers in September, 1864. Thompson represented to Gen. Wallace that his horse had been taken by a son of Shipley; and applied to him for protection. On the witness stand he admitted that he received the money levied, but denied that he requested Gen. Wallace to issue the particular order offered in evidence, for a levy on plaintiff's property in order to indemnify himself. On the other hand, witnesses on the part of the plaintiff proved admissions of Thompson that he had instigated the levy, also that he had become satisfied that his horse had not been taken by young Shipley, and that the levy was wrongly made.

The plaintiff's counsel offered prayers to the effect that if the property of the plaintiff was levied upon and taken possession of by force, under a military order, and that he was obliged to pay the money to obtain the release of his property, and that the amount was levied at the suggestion of Thompson and for his benefit, and that the money of Shipley was paid over to him in accordance with the order, then the plaintiff is entitled to recover.

The defendant relies upon the military order of General Wallace as a complete defence; but also insists that the action is barred, because not being brought within two years, the limitation fixed by the 7th section of the act of congress of March 3, 1863. There is no plea of limitation, but the defence is made under the general issue.

By the consent of the counsel the further consideration of the case was postponed until Wednesday, the 21st [of April], when the law points will be argued.

Verdict for the defendant.

Case No. 12,791.

In re SHIPMAN.

[2 Hughes, 227;[1] 14 N. B. R. 570.]

Circuit Court, W. D. North Carolina. Oct., 1875.

BANKRUPTCY—EXEMPTIONS—PRIOR JUDGMENTS.

1. A bankrupt against whom judgments were rendered, before his bankruptcy, upon debts contracted prior to the adoption of the constitution of North Carolina, is not entitled to his homestead exemption under the act of congress of March 3, 1873 [17 Stat. 577], as against such judgments.

[Cited in Re Martin, Case No. 9,152.]

2. When the homestead exemption of such bankrupt has been allotted, the judgment creditors are entitled to have such allotment set aside, and their judgment liens enforced.

In bankruptcy.

BOND, Circuit Judge. This is a motion on the part of creditors to set aside an application for the allowance of a homestead exemption out of property incumbered by judgments upon debts created antecedent to the adoption of the constitution of North Carolina, which provides for that exemption. It seems to me that this application is similar to that in Gunn v. Barry, 15 Wall. [82 U. S.] 610, which was made under a like provision in the constitution of Georgia, and which the supreme court declared with some emphasis could not be allowed; and it is precisely the Case of Dillard [Case No. 3,912], decided in the Eastern district of Virginia. The act of congress of March 3, 1873, which was passed, as is maintained at bar, to overrule the decision of Gunn v. Barry [supra], and to make the homestead exemption paramount to the liens of antecedent judgments, was, by the same court, Chief Justice Waite delivering the opinion, in Deckert's Case [Case No. 3,728], declared to be unconstitutional. The application on the part of the bankrupt must be refused, and the motion to set aside granted.

Case No. 12,792.

In re SHIPPING COM'R OF PORT OF NEW YORK.

[13 Blatchf. 339.][2]

Circuit Court, S. D. New York. May 11, 1876.

SHIPPING COMMISSIONERS — FEES — CLERK HIRE — OFFICE EXPENSES.

Under the act of June 7, 1872, (17 Stat. 262,) authorizing the appointment of shipping commissioners, (now title 53 of the Revised Statutes,) although it is provided that "the salary, fees and emoluments" of a commissioner shall not be more than $5,000 per annum, and that "any additional fees shall be paid into the treasury of the United States," and that the com-

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

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

missioner may engage clerks "at his own proper cost," and that he shall lease, rent or procure premises "at his own cost," yet the necessary and proper expenses of his office for clerk hire, and rent of premises, and other matters are first to come out of the fees he receives, and then he may retain, as his emolument, out of such fees, $5,000 per annum, and then any of the fees which remain are to be paid into the treasury.

[Cited in Re Accounts of Shipping Commissioner of Port of New York, Case No. 12,793; U. S. v. Reed, 9 C. C. A. 563, 61 Fed. 415.]

George Bliss, Dist. Atty., for the United States.

Erastus C. Benedict and Robert D. Benedict, for the shipping commissioner.

BLATCHFORD, District Judge. A reference having been made by the court to one of the masters thereof to examine and pass the accounts of the shipping commissioner for the port of New York, and to report to the court in reference thereto, he reports that the said shipping commissioner has rendered accounts of the receipts and expenditures of his office from August 8th, 1872, to January 1st, 1876, duly verified, and which are in great detail and comprise a vast number of items, each item of disbursement being accompanied by its corresponding voucher; that it appears, from such accounts, that the receipts of the shipping commissioner's office were, from August 8th, 1872, to January 1st, 1873, $20,303 50—from January 1st, 1873, to January 1st, 1874, $37,765 15—from January 1st, 1874, to January 1st, 1875, $54,826 00—from January 1st, 1875, to January 1st, 1876, $50,459 00; and that the expenditures were, from August 8th, 1872, to January 1st, 1873, $20,954 50—from January 1st, 1873, to January 1st, 1874, $38,534 25—from January 1st, 1874, to January 1st, 1875, $53,243 78—from January 1st, 1875, to January 1st, 1876, $51,114 04; and that he has not taken any testimony or made any examination as to the propriety or necessity of the various items of expenditure charged, for the reason that the question meets him in limine, whether the shipping commissioner is "authorized, under the act of congress which creates his office, to apply to the payment of rent, clerk hire and the other necessary expenses thereof, the fees by him received in excess of the sum of $5,000," or whether all of the expenses necessarily incident to the conduct of his office are "to be paid out of the sum of $5,000 which the act gives him as his salary or compensation." The master also reports, that the only provisions of law which he has been able to find relating to the question are in title 53 of the Revised Statutes of the United States (chapter 1, §§ 4505, 4507, 4594); and that, therefore, before making any further investigation into, or report upon, the shipping commissioner's accounts, he submits to the court for interpretation the sections above mentioned, that he may then, if required, proceed further, in the light of its decision.

The shipping commissioner for the port of New York was appointed under the provisions of the act of June 7, 1872 (17 Stat. 262), entitled "An act to authorize the appointment of shipping commissioners by the several circuit courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen." The 1st section of that act provides, that "the several circuit courts of the United States, in which circuits there is a seaport or seaports for entry, shall appoint a commissioner for such seaport within their respective circuits, as, in their judgment, may require the same, and which shall also be ports of ocean navigation; such commissioners to be termed 'shipping commissioners;' and may, from time to time, remove from office any of the said commissioners whom it may have reason to believe does not properly perform his duties; and shall provide for the proper performance of such duties until another person is duly appointed in his place; shall regulate the mode of conducting business in the shipping offices to be established by the shipping commissioners, as hereinafter provided; and shall have full and complete control over the same, subject to the provisions herein contained." The provisions of such 1st section are now to be found in section 4501 of the Revised Statutes. Under these provisions the present shipping commissioner for the port of New York was duly appointed in July, 1872, by the circuit court of the United States for the Southern district of New York.

The 2d section of the act requires, that "every shipping commissioner so appointed shall enter into bonds to the United States, conditioned for the faithful performance of the duties required in his office," and that he shall take and subscribe, "before entering upon the duties of his office," an oath, the form of which is set forth in the section, and which is an oath that he will "support the constitution of the United States," and "truly and faithfully discharge the duties of a shipping commissioner," to the best of his ability and according to law. The commissioner in question gave such bond and took such oath. The provisions of such 2d section are now to be found in section 4502 of the Revised Statutes.

The 3d section of the act provides, that "every shipping commissioner may engage a clerk or clerks to assist him in the transaction of the business of the shipping office, at his own proper cost, and may, in case of necessity, depute such clerk or clerks to act for him in his official capacity; but the shipping commissioner shall be held responsible for the acts of every such clerk or deputy, and will be personally liable for any penalties such clerk or deputy may incur by the

violation of any of the provisions of this act; and all acts done by a clerk, as such deputy, shall be as valid and binding as if done by the shipping commissioner. Each shipping commissioner shall provide a seal with which he shall authenticate all his official acts, on which seal shall be engraved the arms of the United States and the name of the seaport or district for which he is commissioned. Any instrument, either printed or written, purporting to be the official act of a shipping commissioner, and purporting to be under the seal and signature of such shipping commissioner, shall be received as prima facie evidence of the official character of such instrument, and of the truth of the facts therein set forth." The provisions of such 3d section are now to be found in sections 4505 and 4506 of the Revised Statutes.

The 4th section of the act provides, that "every shipping commissioner shall lease, rent, or procure, at his own cost, suitable premises for the transaction of business, and for the preservation of the books and other documents connected therewith, and which premises shall be styled 'the shipping commissioner's office.' And the general business of a shipping commissioner shall be, first, to afford facilities for engaging seamen, by keeping a register of their names and characters; secondly, to superintend their engagement and discharge, in manner hereinafter metioned; thirdly, to provide means for securing the presence on board at the proper times of men who are so engaged; fourthly, to facilitate the making of apprenticeships to the sea service; and to perform such other duties relating to merchant seamen and merchant ships as are hereby, or may hereafter, under the powers herein contained, be committed to him." The provisions of such 4th section are now to be found in sections 4507 and 4508 of the Revised Statutes.

The 5th section of the act provides, that "such fees, not exceeding the sums specified in the table marked 'A,' in the schedule hereto annexed, shall be payable upon all engagements and discharges effected before shipping commissioners as hereinafter mentioned, and such shipping commissioners shall cause a scale of the fees payable to be prepared, and to be conspicuously placed in the shipping office; and the shipping commissioner may refuse to proceed with any engagement or discharge, unless the fees payable thereon are first paid." Table A in the schedule is as follows: "Scale of fees for matters transacted at shipping commissioners' offices: First. Fee payable on engaging crew, for each member of the crew, (except apprentices,) $2 00. Secondly. Fee payable on discharging crew, for each member of crew discharged, 50 cents." The provisions of such 5th section and table A are now to be found in section 4592, and table C in the schedule annexed to title 53 of the Revised Statutes.

The 6th section of the act provides, that "every owner, consignee, agent, or master of a ship, engaging or discharging any seamen or seaman in a shipping office, or before a shipping commissioner, shall pay to the shipping commissioner the whole of the fees hereby made payable in respect of such engagement or discharge, and may, for the purpose of in part reimbursing himself, deduct, in respect of each such engagement or discharge, from the wages of all persons (except apprentices) so engaged or discharged, and retain, any sums not exceeding the sums specified in that behalf in the table marked 'B' in the schedule hereto annexed." Table B in the schedule is as follows: "Sums to be deducted from wages of seamen in the partial repayment of the fees payable in table A: In respect of engagements, from the wages of each member of the crew, 25 cents. In respect of discharges, from the wages of each member of the crew, 25 cents." The provisions of such 6th section and table B are now to be found in section 4593, and table E in the schedule annexed to title 53 of the Revised Statutes.

Section 7 of the act provides, that "any shipping commissioner, or any clerk or employee in any shipping office, who shall demand or receive any remuneration whatever, either directly or indirectly, for hiring or supplying any seaman for any merchant ships, excepting the lawful fees payable under this act, shall, for every such offence, incur a penalty not exceeding two hundred dollars." The provisions of such 6th section are now to be found in section 4595 of the Revised Statutes.

The act then goes on to prescribe, in a large number of sections, the details of the business of the shipping commissioner, being details of the general business mentioned in the 4th section of the act. The commissioner is required to aid in apprenticing boys to the sea service, receiving a fee of $5 from the master or owner for each boy bound, including the indenture; to see that shipping agreements are signed in his presence; to see that seamen are discharged, and their wages are paid, in his presence; to make awards between master and seaman, on matters submitted to him; to examine as to provisions and water on board of vessels; and to take charge of the effects and wages of deceased seamen.

The 66th section of the act then provides as follows: "That in no case shall the salary, fees, and emoluments of any officer appointed under this act be more than five thousand dollars per annum; and any additional fees shall be paid into the treasury of the United States." The provisions of such 66th section are now to be found in section 4594 of the Revised Statutes.

It is apparent that the principal scheme of the act in question was to provide a system of engaging and discharging seamen, under

the supervision of a shipping commissioner, which should afford protection to seamen, and facilities to masters and owners of vessels. It provides for written shipping articles to be signed by all seamen in the presence of a shipping commissioner; that wages shall be advanced to seamen only in the presence of the shipping commissioner; and that, at the end of a voyage, a seaman shall be discharged and paid off only in the presence of the shipping commissioner. For the shipping and the discharge of seamen the fees above named are to be paid by the owner or master of the vessel to the shipping commissioner, who is to keep them, and one-eighth of the shipping fees and one-half of the discharging fees are to be retained by the master or owner out of the wages of the seaman. In return for so much of the fees as the master or owner does not get back from the seaman, facilities for procuring seamen are furnished by the shipping commissioner in the register he is to keep of the names and characters of seamen, and in the means he is required to provide for securing the presence on board of vessels, at the proper time, of seamen for whom he makes engagements. In return for so much of the fees as the seaman pays, he has the protection afforded by the various provisions of the statute. The statute also contemplates that clerks may be necessary to assist the shipping commissioner in the transaction of the business of the shipping office; that such clerks are to be paid; that suitable premises for the transaction of the business of the office, and for the preservation of the books and other documents connected therewith, are to be leased, rented, or procured; that the expense of such premises is to be paid for; that registers of the names and characters of seamen are to be kept; that a register of indentures of apprenticeship is to be kept; and that various documents and certificates may be necessary to be prepared and given by the shipping commissioner. As the statute provides that "the salary, fees, and emoluments" of any officer appointed under it shall not be more than $5,000 per annum, and that "any additional fees shall be paid into the treasury of the United States," it is contended, on the part of the United States, that the shipping commissioner must pay into the treasury of the United States all fees received by him in excess of the sum of $5,000, and must, therefore, pay out of such sum of $5,000 all the expenses of his office, for clerk hire and rent of premises, and other matters. It is further contended that this view is fortified by the provision in section 3 of the act, that the commissioner may engage clerks "at his own proper costs," and by the provision in section 4 of the act, that he shall lease, rent, or procure premises, "at his own cost."

The act, as passed, provides, in its first 65 sections, for the performance of certain duties by the shipping commissioner and for the taking by him of certain fees for the performance of some of those duties. Many duties are prescribed to be performed by him for which no specific fee is to be paid. The only fees to be paid to him are for engaging and discharging seamen and for apprenticing boys. So far as the first 65 sections are concerned, he may retain all of those fees. If he does, as he must have clerks and an office and books and printed blanks, and make other expenditures in discharging properly the duties imposed on him by the act, he must pay for these things out of such fees, and only the surplus left can go to him as salary or emolument. If the fees are not sufficient to pay for these things, not only will he have no emolument, but he must, in addition, pay for these things out of other resources, if he has and provides for these things. It is meaningless to say to him, in the statute, that, as between himself and the fees, he may pay for these things out of the fees or out of his private resources other than the fees. He could do so, without the statute. The true meaning of the provisions as to "his own proper cost" and "his own cost" is this: The United States were creating an office and providing for the appointment of an officer, who was to be an officer of the United States, appointed by a court of law, within the provision of subdivision 2 of section 2 of article 2 of the constitution; and to give a bond to the United States, and to take an oath of office, and have a seal engraved with the arms of the United States. Duties were imposed upon such officer of such a character as to make it necessary that he should have a permanent place of business, with clerks therein, and books of record open to be consulted at all times. It would, therefore, seem proper that the United States should pay out of the treasury the salary of the officer, and the expense of clerks and premises and books. Instead of that, a system of fees is established, which fees the officer is to receive, and it is provided that the officer shall, at his own cost, as such officer, having such fees of office, pay out of such fees, which otherwise would be his own, the expenses referred to, and that such expenses shall not be a charge on the treasury of the United States. As regards such treasury, such expenses are at the proper cost of the office and of the officer, if they are paid out of the fees of the office. The commissioner must, indeed, see to it that the expenses do not exceed the fees; because, as to any such excess, no claim can exist against the United States. Congress had prescribed fixed fees, and no compensation beyond such fees and no other fees than those prescribed were authorized. Yet, it might happen that the fees would amount to such a sum over the expenses as to leave an improperly large surplus as emolument to the commissioner. Hence, at the close of the act, it is provided, in the 66th section, that the salary, fees and emoluments of any commissioner shall not be more than $5,000 per annum, and that any surplus beyond that sum shall be paid into the treasury of the

United States. Unless it be the proper construction of the act, that the expenses are first to come out of the fees, and that then the commissioner is to be allowed to retain, as his emolument, $5,000 per annum out of the fees, and that then any of the fees which remain are to be paid into the treasury, it follows, that the only proper construction of the 66th section must be, that, when the commissioner has received fees up to the amount of $5,000, he must pay into the treasury the fees thereafter received. This would, in respect to the aggregate amount of fees set forth in the report of the master as received by the commissioner from August 8th, 1872, to January 1st, 1876, namely, $163,353 65, require the payment into the treasury of probably over $145,000, while the commissioner would probably have nothing for his own emolument. Certainly, in every seaport where the duties of the commissioner are onerous, he would have less compensation than in a seaport where his duties are light. Such results would, of course, render the act wholly inoperative. A construction which would lead to such results ought not to be adopted unless it is clear that no other construction is possible. The construction contended for on the part of the United States would defeat the plain intention of the statute. Well settled principles in the construction of statutes have established the propositions, that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and that a thing which is in the letter of a statute, is not within the statute, unless it be within the intention of the makers. The act in question is not a revenue law. There is in it no intention manifested to raise any revenue for the United States out of the fees to be paid under it. It is entirely consistent with its scope and purpose, that congress designed that the system established by it should be self-sustaining as to expenses and emoluments, and that any surplus thereafter of fees should be paid into the treasury, in order that congress might, in view of the amount, if any, of such surplus, so readjust the fees as to make the system no more than self-sustaining.

It follows, that the proper construction of the provisions referred to is, that the shipping commissioner is authorized to apply to the payment of necessary and proper rent, clerk hire and other expenses, the fees received by him, and that such expenses are not to be paid out of the sum which the statute allows for his salary or emolument. Of course, the question of the necessity and propriety of any payments made by him for such expenses is one not now considered, but it is one to be considered by the master and reported upon by him and finally determined by the court, under the general power of regulation and control given to it by the 1st section of the act.

An order will be entered to the above effect, to be settled on notice.

JOHNSON, Circuit Judge. I concur in the opinion of Judge BLATCHFORD.

Case No. 12,793.

In re Accounts of the SHIPPING COM'R OF PORT OF NEW YORK.

[16 Blatchf. 92.] [1]

Circuit Court, S. D. New York. March 24, 1879.

SHIPPING COMMISSIONER—PORT OF NEW YORK—ACCOUNTS—SALARIES OF DEPUTIES.

1. The question of the salaries of employees in the office of the shipping commissioner of the port of New York, considered.

[Cited in Re Accounts of Shipping Com'r of New York, 17 Fed. 139, 20 Fed. 212.]

2. The question of allowing to be paid out of the receipts of the office in one year, expenses incurred in the previous year, and not then paid because the receipts of that year were not large enough for the purpose, considered.

3. The shipping commissioner has, under section 4505 of the Revised Statutes of the United States, the power to appoint clerks with the title of deputy commissioners.

Objections to master's report.

Stewart L. Woodford, Dist. Atty., for the United States.

Erastus C. Benedict, for shipping commissioner.

BLATCHFORD, Circuit Judge. The items and principles of the accounts of the shipping commissioner, in regard to expenses, for the years 1872, 1873, 1874, and 1875, were examined and approved by the master to whom such accounts were referred, and his report thereon was confirmed, on notice to the United States attorney, by an order made by Judge Johnson on the 9th of January, 1877, and said order authorized the shipping commissioner to charge, as against the fees received in his office, the expenses set forth in said report as expenses of his office. The United States attorney filed no exceptions to such report. That report showed that Deputy C. D. Duncan received $1,000 salary for 21 weeks in 1872, $3,500 salary for the year 1873, $3,900 salary for the year 1874, and $4,000 salary for the year 1875; that Deputy G. F. Duncan received $645 salary for 21 weeks in 1872, $3,000 salary for the year 1873, $3,900 salary for the year 1874, and $4,000 salary for the year 1875; and that Deputy F. C. Duncan received $900 salary in the year 1873, $3,900 salary for the year 1874, and $4,000 salary for the year 1875. In regard to those salaries, the shipping commissioner stated, under oath, before the master, November 1, 1876, as follows: "The salaries paid to my deputies were the result of an understanding with Judge Woodruff. There is no fund but the fees of this office, out of which its expenses can be paid. The amount of that fund yearly is uncertain and irregular, while certain of the office expenses, such as commissioner's salary, rent, salaries of the clerks and outdoor men, are necessarily fixed, and should be paid. It was, there-

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

fore, arranged with all the deputies, that, after paying all such fixed expenses, the balance of fees should be apportioned among them, not, however, to exceed $4,000 for any one year. By this arrangement, the deputies, in engaging for each year, have never known what their salary would amount to until the year ended, and they have received, in this way, salaries varying from $2,400 to $4,000. This year," that is, 1876, "the business of the office has been very much below that of any previous year. So far, my sons have had to be content with sums, or pay," for 1876, "averaging a rate of $1,400 each per year, and Mr. Pentz with $200 per month, or at the rate of $2,400 per year. I have graded them according to their necessities. Their duties were about equal, and, in doing even this, I have had to give up about $1,500 on my own salary. There is no means of knowing what the remaining two months of the year will do to improve our finances, but this is the situation at the end of ten months already passed." Mr. Pentz, referred to, was chief deputy, and received in 1872, 1873, 1874, and 1875, the same salaries as C. D. Duncan. There was another deputy, Mr. Jenks, who received in 1872 (for 21 weeks) $1,000 salary; in 1873, $1,322.52 salary; and in 1874 (for 49 weeks), $1,225 salary. There was another deputy, Mr. Kingsbury, who received, in 1872 (for 21 weeks), $1,000 salary. There was another deputy, H. E. Duncan, who received, in 1873, $3,000 salary; in 1874, $3,900 salary; and in 1875, $4,000 salary. There were thus, in all, 5 deputies in 1872; 6 in 1873; 6 in 1874; and 5 in 1875. In 1872, the salaries to deputies (for 21 weeks) were $4,645; in 1873, $15,222.52; in 1874, $20,725; and in 1875, $20,000. There was also a bookkeeper, who received, in 1872 (for 21 weeks), $525 salary, in 1873, $1,350 salary; in 1874, $1,375 salary; and in 1875, $1,325 salary. There were, in 1872, 6 clerks, who received (for 21 weeks) $2,559 salary; in 1873, 7 clerks, who received $4,948.52 salary; in 1874, 12 clerks, who received $9,688 salary; and in 1875, 10 clerks, who received $8,372.66 salary. There were, in 1872, 12 outdoor officers, who received (for 21 weeks) $3,965.60 salary; in 1873, 10 outdoor officers, who received $5,559 salary; in 1874, 6 outdoor officers, who received $4,798 salary; and in 1875, 6 outdoor officers, who received $5,274.50 salary. There was, in 1872, one watchman who received $10 salary. There were in 1872, one messenger, who received $99 salary; in 1873, 2 messengers, who received $98 salary; in 1874, 2 messengers, who received $374 salary; and in 1875, 2 messengers, who received $671 salary. There were in 1872, one boy, who received $3 salary; in 1873, one boy, who received $2 salary; in 1874, one boy, who received $59 salary; and in 1875, one boy, who received $29 salary. The commissioner himself appears to have had, as salary, in 1872, $2,500; in 1873, $5,000; in 1874, $5,000; and in 1875, $5,000. In 1872, the receipts were $20,303.50, and the expenses $20,960.50, creating a deficiency of $657. In 1873, the receipts were $37,765.15, and the expenses (including said $657) were $39,191.25, creating a deficiency of $1,426.10. In 1874, the receipts were $54,826, and the expenses (including said $1,426.10) were $54,699.88, leaving a surplus of $126.12. In 1875, the receipts (including said $126.12) were $51,361.12, and the expenses $51,794.54, creating a deficiency of $433.42. The order of January 9, 1877, must be regarded as sanctioning the charge of the foregoing expenses against the fees, and the principle set forth as to the fixed expenses and the salaries of the deputies, and the propriety of paying a deficiency of one year out of a surplus of a succeeding year. It is, of course, always open to the district attorney to show that any particular expenses or salaries are too large, if he raises the point at a proper time and in a proper manner.

The shipping commissioner filed, on the 11th of January, 1877, his detailed report of receipts and expenditures for the year 1876. It showed the receipts for the year 1876 to have been $30,576.25, and the expenses (including the said deficiency of $433.42 at the end of 1875) to have been $31,149.03, leaving a deficiency, at the end of 1876, of $572.78. The salaries paid in 1876 were as follows: C. C. Duncan, commissioner, $4,275.51; John H. Pentz, deputy, $2,450; C. D. Duncan, deputy, $2,450; F. C. Duncan, deputy, $2,450; G. F. Duncan, deputy, $2,450; H. E. Duncan, deputy, $1,100; one bookkeeper, $1,300; 6 clerks, $2,274.32; 7 outdoor officers, $2,631; one messenger, $170; and four boys, $293. The master to whom it was referred to examine said account and report in reference thereto, reported, in his report filed February 14, 1877, that he had been attended by the shipping commissioner and the district attorney, and had examined the shipping commissioner under oath, respecting said accounts, and had carefully investigated their details, and had examined the vouchers, 472 in number, for the items of expenditure, and had passed said account, leaving said debit of $572.78. No order has ever been made confirming said report, or acting thereon, nor has the district attorney filed any exception thereto.

The shipping commissioner filed, early in 1878, his detailed report of receipts and expenditures for the year 1877. It showed the receipts for the year 1877 to have been $28,650.25, and the expenses (including the said deficiency of $572.78, at the end of 1876) to have been $28,870.58, leaving a deficiency, at the end of 1877, of $220.33. The salaries paid in 1877 were as follows: C. C. Duncan, commissioner, $5,000; F. C. Duncan, deputy, $3,800; G. F. Duncan, deputy, $3,800; John H. Pentz, deputy, $1,400; C. D. Duncan, deputy, $1,900; one bookkeeper, $1,360; 4 clerks, $2,587.50; 5 outdoor officers $2,258.50; one engineer and messenger, $155; and 3 boys $298.

The master to whom it was referred to examine said account and report in reference thereto, reported, in his report filed February 26, 1878, that he had been attended by the shipping commissioner and the district attorney, and had examined the shipping commissioner under oath, in a deposition annexed, and had carefully investigated the details of said account, and had examined the vouchers, 451 in number, for the various items of expenditure therein, and had passed said account, leaving said debit of $220.33.

On the 6th of March, 1878, the United States, by the district attorney, filed exceptions to said report filed February 26, 1878, to the effect, that, upon said deposition of the shipping commissioner, the master should have reported that the salaries paid to the three deputy commissioners, F. C. Duncan, G. F. Duncan and C. D. Duncan, at the rate of $3,800 per year each, were entirely too large for the work performed by them; that the item of $572.78, deficiency at the end of 1876, should not have been allowed as a charge against the receipts of 1877; that it appears, from said deposition, that the deputy shipping commissioners' duties at the port of New York consist only of shipping and discharging sailors; that there was but one person apprenticed to sea service during 1877; that the power of the shipping commissioner to employ clerks, granted to him by § 4505 of the Revised Statutes, does not authorize the appointment of deputy commissioners; that it appears from the accounts of said shipping commissioner on the files of this court, that the receipts of said shipping commissioner have amounted to various sums from $28,000 to $50,000 a year, and have been entirely consumed by the charges of said commissioner; that it appears to be the practice of said commissioner to make such a disposition of the receipts of the office as to use them up; that the salaries of the deputy commissioners were $2,500 each for the year 1876, and $3,800 each for the year 1877; and that the commissioner undertakes to explain such increase in salaries by stating that the salaries are flexible and states no other reason therefor.

In the deposition referred to the shipping commissioner testifies as follows, on his direct-examination: "From the time of my first appointment, in 1872, when the shipping law took effect, I consulted with Judge Woodruff at every step. The rental of the offices, the salaries of the deputies and other employees, were arranged with his full knowledge and consent. The expenses of the office could only be borne out of the fees, which were fluctuating, and it was decided, that, while certain expenses, such as rental, clerk hire, outdoor officers, fuel, lights, &c., had to be fixed and provided for, the salaries of myself and the deputies must needs be flexible. It was arranged, that all the deputies, at the beginning of each year, should sign an agreement, by which they should render their services for the entire current year, accepting such pay therefor as the fees of the office would yield after the beforementioned fixed expenses were paid, such salaries in no case to exceed four thousand dollars. Under this arrangement the salaries of the deputies have varied, from year to year, from $1,200 to $4,000. I have never, in any one year, received my own salary entire for that year. The salaries of the deputies, in 1876, were $4,000 each. In 1877, it was $2,550 each. The first four months of 1877 would have yielded the deputies $1,800 a year, one $2,400 a year, and myself about $3,500 a year. I submitted the whole matter to Judge Johnson personally, on my first interview with him, and he used the expression: 'I don't see, under the circumstances, how you can do any differently.' The salaries for that year amounted to $3,800, the largest; one, a half year, at $1,900; and Mr. Pentz $200 a month until he died, which, I think, was in August." On his cross-examination by the assistant district attorney, he testified as follows: "Q. What is the character of the services required of the deputies? A. They begin by assisting captains in forming their agreements with their crews. They assist captains in selecting crews on the floor. They explain to each seaman the nature of the contract. They witness and certify the signature of each seaman. They issue an advance note to each seaman and put it in his own hand, while sober. They supervise the preparation of every ship's papers outward. They supervise the putting of ship's crews on board, in difficult cases doing it in person themselves. They go on board ships in the harbor and quell mutinies and arrange disputes. When seamen are scarce, they go to neighboring ports, even as far as Chicago, to bring crews here. They examine every sailor's account, as rendered, with the captain, and correct it, when correction is needed. They arrange minor differences with seamen, in their settlement. They witness officially the discharge and payment of every seaman, while sober. They issue certificates of discharge to every seaman. They receive and pay out cash due to seamen to the amount of about $100,000 a month. They attend to all steamers on board, without troubling them to come to the office, and maintain perfect order and discipline through the building. Q. Can you state how much has been received as fees, under the schedule providing for the payment of fees for apprenticeships? A. Five dollars. Q. You have office hours each day. What are they? A. From half past 8 a. m., until 5 p. m., for indoor employees, and as much longer as may be necessary. The work often keeps them till 6 or 7 o'clock. The outdoor men have to be in readiness for duty at all hours, day and night; very frequently on duty at 4 o'clock in the morning, to get

the crews on board, to suit the tide. This will also apply to deputies. Q. Are the men, your employees, engaged every day? A. Yes, every day. Q. Won't you state generally the method by which the crews are shipped and discharged? A. A captain comes, for instance, to-day, in the morning, and opens his articles, arranges the form of agreement, with the deputy, on blanks which we have there, for the voyage which he is about to enter on. He applies to the deputy on the shipping side of the office. He signs a written request for me to furnish the crew that he requires. He appoints a time, generally, the next day, for the shipment of his crew. At the hour given, which we make known, the floor is usually well filled with sailors seeking employment at the shipping commissioner's office. The sailors must all be sober and orderly. The captain and my deputy stand behind a rail and desk. The captain selects such men as he chooses, and calls them in one by one. The nature of the voyage is thoroughly explained to the seaman, and, if my deputy knows anything bad about the man's record, the captain is informed of it before the man signs. After the whole crew have signed articles of agreement, which they do in that room, they are cautioned by my deputy to pay no blood money for their chance. This is a tax exacted by captains, mates and landlords, for supposed influence in procuring them situations. Their advance notes are then filled out. Each sailor, on leaving port on a foreign voyage, is entitled, by custom, to advance wages, for from one to two months. This is paid by what is called an advance note, given to the sailor and payable three days after the ship sails, if he is on board and earning his wages. These notes are handed to the seamen after they have shipped. This completes the shipment of seamen. After this the captain notifies the deputy the day and hour at which he wishes the crew on board for departure. The deputy details this work to our outdoor officers, who, at the proper time, gather up the sailors from their different boarding-houses, and put them on board. If, at this time, sailors are drunk and disorderly, who have shipped, they are, at the request of the captain, removed, and others taken in their places. The entire crew, being on board at the dock, sober and orderly, are mustered by my officers and examined touching their settlements with their landlords. Complaints of foul treatment, if any, are heard and reported to me. The names of all on board are checked and reported to the deputy at the office by the officer, and, at the proper time, the advance notes of all men so checked as being on board are paid, generally to the landlords, who hold the sailors' endorsements of them. Complaints of unfair dealings by such landlords are investigated and settled by the commissioner, before these notes are paid. As to the method of discharge: Twenty-four hours prior to the time for the payment of sailors' wages inward, the captain comes, bringing his accounts with his seamen, his articles of agreement, and his official log. An appointment is made with him for an hour next day, to meet these men and pay them off, at my office, which appointment is always posted on the bulletin board of the shipping hall. The deputy in the paying off department examines these accounts, each one thoroughly, and corrects them, when necessary, and then passes them over to the clerk in that department, whose duty it is to make the payment. At the hour appointed, the captain and crew meet, and, in the presence of the deputy of the department, a clerk, having first received the cash from the captain, pays to each man, into his own hand, while sober, the balance found to be due him. Small differences arising between the captains and their seamen are adjusted on the spot by the deputy. Large ones are usually referred to me, and I adjust them, parties frequently appearing by counsel. On the completion of the payment of seamen's wages, the captain and the seamen sign what is called a mutual release, and the seaman is furnished with a discharge paper, embodying his character and capacity, and the particlars of the voyage just closed. My office is 187 and 189 Cherry street. It consists of one large hall, 50 feet by 120 feet, extending from Cheery street to Water street; the commissioner's office, about 30 feet by 20 feet; and the cash department, on the lower floor, about 30 feet by 60 feet. There are four departments—shipping, paying, cash, and steamship departments. I have stated the general services performed in my office, except my own duties, which I have not touched upon. My duties consist of general supervision of all the departments, in holding arbitration courts, hearing complaints of seamen, answering correspondence touching missing seamen, from all parts of the world, and instructing ship-masters and owners. Q. I see F. C. Duncan, G. F. Duncan and C. D. Duncan on the pay roll of the shipping commissioner for 1877, the first two receiving salaries of $3,800 each and the third receiving $1,900 for six months. Are they relatives of yours? A. Sons. C. D. Duncan, my son, owned, and still owns, a plantation in Florida, from which I called him to assist me and to which he has since returned. F. C. Duncan was master of the Kate Davenport, a large ship in the East India trade, which I requested him to leave and come to my assistance. George F. Duncan was engaged in the jewelry business, and I requested his assistance also. All this in 1872, when I first came into the office."

The receipts of the shipping commissioner's office, from shipping fees, were, in 1872 (from August 1st), $15,922; in 1873, $29,762; in 1874, $41,500; in 1875, $39,200; in 1876, $23,062; in 1877, $22,625. Its receipts from paying-off fees, on discharge, were, in 1872

(from August 1st), $4,381.50; in 1873, $8,003.15; in 1874, $13,326; in 1875, $12,035; in 1876, $6,711.25; in 1877, $5,825.25. The number of seamen shipped by the office was, in 1872 (from August 1st), 10,541; in 1873, 16,756; in 1874, 26,636; in 1875, 25,408; in 1876, 13,346; in 1877, 12,165. The number of seamen paid off by the office, on their discharge, was, in 1872 (from August 1st), 7,785; in 1873, 15,832; in 1874, 27,756; in 1875, 24,277; in 1876, 13,477; in 1877, 11,660. The amount of money paid by the office into the hands of seamen for wages due and accruing to them, was, in 1872 (from August 1st), $384,241.82; in 1873, $1,182,103.17; in 1874, $1,653,186.08; in 1875, $1,517,762.23; in 1876, $946,844.21; in 1877, $856,220.43. The amount of money collected by the office and paid into this court, for wages of deceased seamen, was, in 1872 (from August 1st), $847.56; in 1873, $3,945.10; in 1874, $3,333.58; in 1875, $1,923.69; in 1876, $3,205.28; in 1877, $1,485.80.

1. As to the allegation, that, on the deposition of the shipping commissioner, the master should have reported that the salaries, at the rate of $3,800 a year, paid to the three deputy commissioners, F. C. Duncan, G. F. Duncan and C. D. Duncan, were entirely too large for the work performed by them. There is nothing to show that any such point was taken by the district attorney before the master. Nor was any evidence introduced before the master, by the district attorney, to show that the salaries of the deputies were too large for the work performed by them. No witness expresses an opinion to that effect, nor was the shipping commissioner asked whether he could not have obtained competent persons to discharge the duties so performed for a less compensation, nor was any evidence given that he could. The arrangement made is testified to have had the sanction of each of my predecessors, Judges Woodruff and Johnson. The three deputies named were deputies from the beginning. The arrangement was one which sanctioned a salary of $4,000 to each of them, if the fees of the office would pay it. It has never exceeded that sum. The commissioner and the deputies had a right to rely on the arrangement, until it should be shown, on notice and hearing, that the salaries ought to be reduced. These observations cover the above named accounts. I do not intend to say, however, that the salaries of the deputies and of other subordinates ought not to be reduced and their number fixed for the future, nor do I intend to say that they ought. The propriety of the salaries paid was not questioned before the court by the district attorney until the report for the year 1877 was brought up, although the arrangement was fully explained by the shipping commissioner in his deposition of November 1, 1876, in regard to the accounts down to the close of 1875. Under section 4501 of the Revised Statutes, the court has power to regulate the mode of conducting business in the office of the shipping commissioner, and has full and complete control over the same. If the district attorney desires an order of reference to a master to take proof as to what the number of employees in the office of the shipping commissioner should be for the future, and what their salaries should be, and what would be a proper arrangement in regard to those matters, to be sanctioned by the court, such an order will be made.

2. As to the claim that the $572.78 should not have been allowed by the master as a charge against the receipts of 1877, I do not think the exception can be allowed. It does not appear that the point was raised before the master. The practice was sanctioned by the district attorney, in reference to the deficiency of $657, in 1872, and in reference to the deficiency of $1,426.10 at the end of 1873, and in reference to the surplus of $126.12 at the end of 1874, and in reference to the deficiency of $433.42 at the end of 1875, by his not excepting to the report in reference to the accounts for those years. This court, in May, 1876, in Re Shipping Commissioner [Case No. 12,792], said, in reference to the accounts down to the close of 1875: "The act in question is not a revenue law. There is in it no intention manifested to raise any revenue for the United States out of the fees to be paid under it. It is entirely consistent with its scope and purpose, that congress designed that the system established by it should be self-sustaining as to expenses and emoluments, and that any surplus thereafter of fees should be paid into the treasury, in order that congress might, in view of the amount, if any, of such surplus, so readjust the fees as to make the system no more than self-sustaining." The shipping commissioner had a right to rely on the principle, as an established one, that he would be allowed to charge the $572.78 against the receipts of 1877. If a change in that respect is to be made for the future it should be made by an order of the court, on notice and hearing.

3. As to the claim that the power of the shipping commissioner to employ clerks, granted to him by section 4505 of the Revised Statutes, does not authorize the appointment of deputy commissioners. The proceedings before recited show that there have been deputy commissioners from the beginning, and that the propriety of their appointment has been sanctioned by the master and the court and the district attorney. Section 4505 provides, as follows: "Any shipping commissioner may engage clerks to assist him in the transaction of the business of the shipping office, at his own proper cost, and may, in case of necessity, depute such clerks to act for him in his official capacity; but the shipping commissioner shall be held responsible for the acts of every such clerk or deputy, and will be personally liable for any penalties such clerk or deputy may incur by the violation of any of the provisions of this title; and all acts done by a clerk, as such deputy,

shall be as valid and binding as if done by the shipping commissioner." The deputies are only clerks, but it is wholly in the discretion of the commissioner to judge of the necessity of deputing such clerks to act for him. It does not appear that there has been any other appointment of deputy commissioners than such deputing of clerks as is authorized by the statute.

4. The other matters embraced in the exceptions are statements as to what is contained in the deposition of the commissioner and in the accounts.

For the reasons before stated, the matters of the exceptions, considered as objections to the confirming of the report, must be overruled, and an order must be entered confirming the report of the master in regard to the accounts for 1876, and a like order must be entered confirming the report of the master in regard to the accounts for 1877.

Case No. 12,794.

SHIRK v. PULASKI COUNTY.

[4 Dill. 209; [1] 4 Cent. Law J. 390.]

Circuit Court, E. D. Arkansas. April, 1877.

COUNTIES — COUNTY WARRANTS — DEFENCES — RIGHTS OF HOLDER.

1. Warrants issued by counties in Arkansas are not commercial paper, free from legal and equitable defences in the hands of a subsequent holder, but such holder takes them subject to such defences.

[Cited in Goldman v. Conway Co., 10 Fed. 889.]

[Cited in Board of Sup'rs v. Catlett's Ex'rs (Va.) 9 S. E. 1001.]

2. Under the laws of Arkansas, warrants issued for more than the sum actually due a claimant in order to make the warrant worth in money the amount of the debt due from the county, are void as to the excess, and may be defended against accordingly. The act of the county authorities, in auditing the claim and issuing the warrants, is not conclusive, as a judicial determination, upon the parties.

[Cited in Board of Com'rs of Hamilton Co. v. Sherwood, 11 C. C. A. 507, 64 Fed. 107.]

3. Under the circumstances, the court treated the holders of such warrants as the equitable assignees of the valid legal claim of the payee, or of the holder's proportionate share of such claim where several warrants were issued therefor, subject to any payments the county may have made to any holder of a warrant representing a portion of such claim.

[Cited in Wood v. Louisiana, Case No. 17,948; Gause v. Clarksville, 1 Fed. 357; Thompson v. Searcy Co., 6 C. C. A. 674, 57 Fed. 1033.]

4. The statutes of Arkansas, as to calling in warrants "in order to cancel, reissue, and classify the same," construed.

At law.

Kimball & Rose, for plaintiff.

Mr. Brown, for defendant.

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

DILLON, Circuit Judge. This is an action upon a great number of county warrants, issued at various times, and of various classes, by the defendant county. Some of these are warrants that were rejected by the county court, under the "calling-in" order of April 19th, 1875; some are warrants which were not presented under that order; some are warrants presented under that order, and reissued by the county court; and some of the warrants rejected, and some of the warrants reissued under that order, are what is popularly known as "five-to-one" or "ten-to-one" warrants. Upon consideration of the demurrer to the answer, which has been fully and ably argued on both sides, the court rules the following propositions:

1. That the order of April 19th, 1875, made under the act of February 27th, 1875 (Laws 1875, p. 189), requiring all outstanding warrants and scrip issued by the defendant county prior to October 30th, 1874, to be presented to the county court on or before the 30th day of July, 1875, "in order to cancel, reissue, and classify" the same, was unauthorized and void. Following the decision of the supreme court of the state in Parsel v. Barnes, 25 Ark. 261, the act of February 27th, 1875, above referred to, can only operate on warrants issued after that act went into effect. The general law on this subject (Gantt, Dig. Laws Ark. § 614) prohibits such "calling-in" orders oftener than once in three years. It is admitted on the record that there was a previous call by the defendant, in July, 1873, requiring warrants to be presented by the 1st day of October, 1873, and the above mentioned order of April 19th, 1875, was within that period. For these reasons, we hold that the order of April 19th, 1875, was beyond the authority of the county court, and void. We feel more assured of the correctness of this conclusion, since the counsel for both parties conceded that this was the true view; at all events, it was not seriously controverted by the learned counsel for the county.

2. It results as a corollary from the foregoing proposition that the legal rights of the holders of county warrants issued prior to October 30th, 1874, were in no manner affected by the order of April 19th, 1875. All action under it by the county court was coram non judice, and this irrespective of the question as to the effect of the county court not being in session on the 30th day of July, 1875, the time fixed and limited by the "calling-in" order for the presentation of the warrants. Therefore, whether the holders of warrants issued prior to October 30th, 1874, failed to present them under the order of April 19th, 1875, or presented them and they were rejected, or presented them and received reissued warrants, their rights are in no wise affected by what was done under that order. They were not bound to present them under that order; the county, by virtue of that order, had no legal power to reject

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

them; and the warrants reissued under that order derived no validity from the order of reissue which they did not before possess.

3. As to "five-to-one" or "ten-to-one" warrants, so-called. In many cases the county court (according to the answer, which is to be taken as true on the demurrer), for legal fees to county officers, the amount whereof was definitely fixed by statute, and for the support of paupers, and for work and labor in respect of matters which were county charges, issued warrants for five or ten times the legal fees of the officers, or the money or currency value of the support of the paupers, or work and labor done for the county.

The reason for this was the depreciation of warrants, and the corresponding difference between money and warrants. The statute of this state, at the time the warrants were thus issued, contained the following provisions, applicable to this question:

"Sec. 601. It shall be unlawful for any board of supervisors to allow any greater sum for any account, claim, demand, or fee-bill against the county, than the amount actually due thereon, dollar for dollar, according to the legal or ordinary compensation for services rendered, materials furnished, salaries or fees of officers, or to direct the issuance of county warrants upon such accounts, claims, demands, or fee-bills, for more than the actual amount so allowed, dollar for dollar.

"Sec. 602. Before any account, claim, demand, or fee-bill shall be allowed by any board of supervisors, said board shall require the person or persons, or their legal representatives, claiming the same to be due, to attach to said account, claim, demand, or fee-bill, an affidavit that the same is just and correct, and that no part thereof has been previously paid; that the services charged for, or materials furnished, as the case may be, were actually rendered or furnished, and that the charge made therefor does not exceed the amount allowed by law, or customary charges for similar services or materials, dollar for dollar; which account, claim, demand, or fee-bill, together with the affidavit thereto, shall be filed with the county clerk, and kept in his office for the term of ten years, and the same shall be subject to inspection by any member of the grand jury of the county, at each term of the circuit court, or by the prosecuting attorney of the circuit.

"Sec. 603. In all cases the board of supervisors shall require an itemized account of any claim presented to them for allowance, sworn to as required by the preceding section, and may in all cases require satisfactory evidence, in addition thereto, of the correctness of the account, and may examine the parties and witnesses, on oath, touching the same, and shall have power to compel the production of all books, accounts, papers, or documents, which may be necessary in the investigation of any matter coming properly before them, and within their jurisdiction.

"Sec. 604. Boards of supervisors are hereby prohibited from auditing and allowing to any officer any fee or allowance not specifically allowed such officer by law; and in no case shall constructive fees be allowed to or paid officers, by any county of this state.

"Sec. 605. Whenever any allowance shall be made by a board of supervisors, and an order therefor entered upon the records, the county clerk shall, when requested by the person in whose favor such allowance has been made, issue a warrant for the amount of such allowance, which warrant shall be in the following form." (Here follows the form of the warrant.)

It is our opinion that the effect of this legislation is to prohibit the county from issuing a warrant for any greater sum than such sum as would pay "the amount actually due" the creditor in money, "dollar for dollar;" a dollar in warrants for each one hundred cents of his demand.

It is probable that, even without such direct prohibition, the county court, unless expressly authorized, would have no such power. And so the point has been adjudged. Foster v. Coleman, 10 Cal. 278.

4. It is insisted, however, by the warrant-holder, that the auditing of claims by the county court, or by its predecessor, the board of supervisors, and the issuing of a warrant for the amount found due a claimant, is a judicial act and a judicial determination of the question of the county's liability, which is binding on both the claimant and the county, unless reversed on appeal, or set aside in some direct manner; and, as a consequence, that the liability of the county on warrants, or the consideration therefor, cannot be inquired into collaterally, or by way of defence to an action on the warrants.

The statute of this state gives the county court power "to audit, settle, and direct the payment of all just demands against the county." Gantt, Dig. § 595. The claimant may appeal from the allowance, or refusal to allow, but it has been decided that the county cannot. Chicot Co. v. Tilghman, 26 Ark. 461.

There is nothing peculiar in the legislation of Arkansas in the matter of auditing claims and issuing warrants therefor; and it has been decided in many states, and repeatedly, that such settlements have not the force of judicial judgments, which estop or conclude either the claimant or the county. Among the many cases on this subject, the following are directly in point: Webster Co. v. Taylor, 19 Iowa, 117, 120, and cases cited; Clark v. Des Moines, Id. 199; Clark v. Polk Co., Id. 248; School Dist. Tp. v. Lombard [Case No. 12,478]; Keller v. Commissioners Leavenworth Co., 6 Kan. 510; Goodnow v. Board Com'rs Ramsey Co., 11 Minn. 31 [Gil. 12]; Dill. Mun. Corp. § 412, and cases cited; Mayor of Nashville v. Ray, 19 Wall. [86 U.

S.] 468, 477. Many more cases might be cited, but it is hardly necessary. The true rule is this: Within the limits of their power, as conferred by statute, the action of the county court, in determining the amount due a creditor of the county, in the absence of fraud, or, perhaps, mistake, binds the county; but the county court cannot bind the county by ordering a claim to be paid, which is not made a county charge by statute, or by allowing more than the statute distinctly limits, or by an allowance in the face of a statutory prohibition.

Any other principle would ruin municipalities and counties; and the danger which would result from it is well exemplified in this case, where ten dollars have been allowed for one, and where, it is said, the officers of the defendant county have in this manner issued $400,000 of warrants within a few years, which are yet outstanding.

5. This practice having so long obtained, and these warrants having been issued and passed freely into circulation without objection, they are, doubtless, in many cases, in the hands of parties who have received them for value in good faith. Each holder is the equitable assignee of the valid, legal claim of the payee, or of the holder's proportionate share of such claim, where several warrants have been issued therefor, subject to any payments the county may have made to any holder of a warrant representing a portion of such claim.

We have some doubt as to whether the holder of these "five-to-one" or "ten-to-one" warrants can recover on them even thus far, but, under the circumstances, we see no injustice which a recovery to this extent, and subject to these limitations, can work to the county; and it is but just to the present holders of the warrants, who may have taken them in good faith and for value—a result which would have been avoided if the county or the people had promptly stopped, as they ought, this bad business.

Wherever the original claimant could have recovered against the county, there is no inconsistency in subrogating the holder of warrants issued for such a claim to the rights of the payee. And such a principle was in reality adopted in School Dist. Tp. v. Lombard [supra], by Mr. Justice Miller, for there is no substantial difference in the rights of the parties, whether the county files a bill in equity to cancel a warrant for illegality, or is allowed for that reason to make a defence thereto.

A judgment on the demurrer to the answer will be entered, in conformity with these views. Judgment accordingly.

NOTE. The circuit court of the United States for the Eastern district of Arkansas, April term, 1876, upon a review of the legislation of that state touching the indebtedness of counties on warrants, and the provisions of the new constitution on the subject of county indebtedness, decided the following propositions:

1. That the county court, in case the county is indebted, owes a legal duty to the creditor, or warrant-holder, to exert the power of levying taxes to the maximum limit allowed by law, if necessary, to pay the outstanding indebtedness of the county. The maximum rate can in no event be exceeded. Dill. Mun. Corp. § 689.

2. That a creditor, who has obtained a judgment in this court against a county, may, after proper demand on the county court to discharge its duty in this regard, and a neglect or refusal on the part of the court to comply with such demand, have a mandamus to compel the performance of such duty. There must be such a demand, or averment of facts of such a nature as will dispense with the demand.

3. Under the new constitution (article 16, § 9), as to indebtedness then existing, there is a duty, which creditors may enforce, resting on the county court, to levy a tax, not exceeding one-half of one per cent. Such tax, when levied and collected, cannot "be used for any other purpose" than the payment of such indebtedness (article 16, § 11), and must, according to our present impression, although the court does not hold itself concluded on the point, be collected in money, and not in other warrants. See U. S. v. Miller County [Case No. 15,776].

Case No. 12,795.

SHIRLEY et al. v. The RICHMOND.

MERCHANTS' MUT. INS. CO. v. The RICHMOND and The SABINE.

[2 Woods, 58.] [1]

Circuit Court, D. Louisiana. Nov. Term. 1874.

COLLISION—LOOKOUT—RULE OF NAVIGATION ON MISSISSIPPI RIVER.

1. A neglect to keep a proper lookout, which does not in any way contribute to a collision, cannot be alleged as a ground on which to recover damages caused by the collision.

[Cited in The Ping-On v. Blethen, 11 Fed. 615.]

2. A neglect of the well established rule, for navigating the Mississippi river, that ascending boats shall run the points, and descending boats the bends, which results in a collision and loss, renders the boat which disregards the rule liable for the damages.

[Cited in Baltimore & O. R. Co. v. Wheeling, P. & C. Transp. Co. 32 Ohio St. 140, 148.]

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

About half past two o'clock on the morning of the 11th of February, 1872, the steamers Sabine and Richmond collided with each other a short distance below Twelve Mile Point on the Mississippi river. As a result of the collision, the Sabine sank in about five minutes, and the Richmond received some damage. The owners of the Sabine [J. W. Shirley and others] have filed their libel against the Richmond to recover for the damages sustained by the collision which they place at the sum of $37,500, and charge that the Richmond was solely in fault. The master and owners of the Richmond have filed their answer and cross-libel, in which they claim

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

$12,000 damages from the owners of the Sabine, alleging that the collision occurred through her fault. The Merchants Mutual Insurance Company has filed its libel against both steamers, alleging that the company has been compelled to pay a large insurance loss, and that both steamers were in fault. These two causes were consolidated by order of the court, and were tried and submitted together.

R. H. Marr and B. Egan, for Shirley and others, libellants.

M. M. Cohen and A. Voorhies, for Merchants' Mutual Ins. Co.

E. C. Billings, A. de B. Hughes, L. A. Sheldon and Given Campbell, for the Richmond.

WOODS, Circuit Judge. The main question presented for decision is, Where does the fault which occasioned the collision lie? The prominent facts in the case appear to be as follows: The Richmond left the elevator, in the city of New Orleans, about one o'clock a. m., of the 11th of February, 1872, bound up the Mississippi river. She kept up the east bank of the river as far as Carrolton, and then crossed over and got under, and rounded Nine Mile Point on the west bank of the river. She kept close under the west bank until she reached the Kennedy plantation, about a mile above Nine Mile point and two miles below Twelve Mile point. The claimants say, that from Kennedy's plantation, the Richmond started to make a long crossing of the river towards the east bank, under Twelve Mile point, with a purpose to run up along the east bank, and round Twelve Mile point. The libellants, the owners of the Sabine, say, that the Richmond did not start to cross at the Kennedy plantation, but kept up the west bank of the river to the Waggaman plantation, deep in the bend of the river, opposite Twelve Mile point, and then made a square crossing and came near the east bank, just under Twelve Mile point. In the meantime, the Sabine was descending the river with a cargo, principally of cotton. She rounded Twelve Mile point, on the east bank of the river, and came in collision with the Richmond, just under the point, and between seventy-five and one hundred and fifty yards from the east bank. At the moment of the collision, the Richmond was headed for the east bank, and the Sabine was headed down stream. The stem of the Richmond came in contact with the Sabine on the starboard side, four or five feet aft the flag-staff, and cut through her in the direction of the capstan, a distance of about fourteen feet. The stem of the Richmond was deflected to the starboard by the force of the collision.

The Sabine charges the fault of the collision upon the Richmond:

1. Because she did not cross the river at the usual place, in the usual manner, but ran up deep in the bend to the Waggaman plantation, and from thence made a square crossing to the place of the collision, just under Twelve Mile point. The evidence to support this claim of the Sabine is entirely from persons who were on board of her. The witnesses that speak to this point, who were upon the Richmond, all say that she commenced to cross at Kennedy's, just above Nine Mile point, which is the usual place to commence crossing at that part of the river. The probabilities favor the theory of the Richmond. No possible motive is shown why the Richmond should take the circuitous and unusual course to run up to Waggaman's, deep in the bend, and then make a square crossing. Duffy, the pilot of the Richmond, testifies that he commenced at Kennedy's to make the usual long crossing, and that he had completed his crossing and was about a mile below Twelve Mile point, and within one hundred and fifty yards of the east bank, when he first saw the Sabine coming around the point. This evidence is corroborated by Cayton, also a pilot on the Richmond, by Court, the mate, by Davies, second mate, and by Williams, Kane and Keheloe. The witnesses for the libellants upon this point speak, not in a positive way, but, with the exception of Howison, the pilot of the Sabine, testify that she "looked" to be coming up the river near the bend shore. These witnesses had, by no means, so favorable an opportunity to know the course of the Richmond as those who were upon her, and whose duty it was to select and control her course; they speak of what appeared to be the course of the Richmond, and their version of the facts is not a probable one, for no motive is shown or can be conceived why the Richmond should run up to the Waggaman place and then make a square crossing. This course would have been unsusal, circuitous, unnecessary and dangerous. It is in evidence that Waggaman's, where the crossing was commenced by the Richmond, according to the theory of the libellants, was nearly opposite to, or a little above Twelve Mile point. The river is nearly a mile wide at that place. The Sabine blew her first whistle when she was nearly opposite Twelve Mile point, and the Richmond did not change her course to cross the river until after that whistle. If these are the facts, it was impossible for the Richmond to cross the river and collide with the Sabine two or three hundred yards below Twelve Mile point. I conclude, therefore, that the witnesses for the Richmond give a correct account of her course from the time of leaving Nine Mile Point up to the time of the collision.

2. There is a complaint that the Richmond had two red lights, and not a red and a green one as required by rule 16 for western rivers, and that one of the red lights was on the jackstaff, behind the pilot house. There are several witnesses for the libellants who testify that they did not see the green light, but the evidence is incontrovertible that the Richmond had both a green and red light, each in its proper place. The two clerks of the

Richmond testify that they saw the green light on the starboard chimney after the collision, and the watchman says he took it down in the morning after the collision, lit and burning.

3. Libellants claim that there was no proper look-out on the deck of the Richmond at the time of the collision. But the evidence of Lanz, the steward, Duffy, the pilot, Court, the mate, and Green, the master, of the Richmond all show that both the master and the mate were on the roof before the collision occurred. Court was on the roof when the first signal was blown by the Richmond, which was before she crossed the river from Nine Mile point. This first signal was not blown for the Sabine, but for the cars. The captain was on the roof immediately after the first signal was blown for the Sabine, and remained there until the collision. But even if there had been no look-out, it would not alter the case, for the pilot of the Richmond saw the Sabine as soon as she rounded Twelve Mile point, which was at as early a moment as any man on the look-out could have seen her.

I will now consider the misconduct alleged against the Sabine, in doing which, I shall notice other charges made against the management of the Richmond. It is charged against the Sabine that she was out of her proper place on the river, and that this was the cause of the disaster. The testimony of numerous witnesses shows that it is the common law of the Mississippi river for the ascending boat to run the points, and the descending boat to run the bends; in other words, that the descending boat is required to keep in the main current or follow the thread of the stream, and the ascending boat to keep near the shore, crossing over from point to point so as to shorten the distance as much as possible, and at the same time sail in the eddy water near the banks. This rule is not only spoken of by the witnesses, but has been recognized by the decisions of the courts. Sinnot v. The Dresden [Case No. 12,908]; Bates v. The Natchez [Id. 1,102]; Goslee v. Shute's Ex'r, 18 How. [59 U. S.] 466; The Magenta [Case No. 8,946]; Williamson v. Barrett, 13 How. [54 U. S.] 106; Jones v. Pitcher, 3 Stew. & P. 135; Drew v. The Chesapeake, 2 Doug. (Mich.) 33; Steamboat Co. v. Whilldin, 4 Har (Del.) 228; Moore v. Moss, 14 Ill. 106. This rule is as well settled and as generally observed as the rule of the road: "Keep to the right." Boats navigating the Mississippi river have the right to presume that it will be observed, and to act on that presumption.

The testimony in this case establishes conclusively that at the place where the collision happened, the river was nearly a mile wide, and that the boats collided within about one hundred and fifty yards of the east bank of the river. It is incontestibly shown that the Richmond was in the proper place for an ascending boat. She was near the east bank, under Twelve Mile point. The Sabine being the descending boat should, according to the common law of the river, have been out towards the middle of the stream, following the main current, and should have passed the Richmond one-third or half a mile to the right. Instead of this, it cannot be disputed, that when she was rounding Twelve Mile point, instead of taking the middle of the stream, she clung to the east bank of the river, just where she might expect to meet an ascending boat. To the disregard of this rule of the river by the Sabine, the collision must be attributed. If the Sabine had observed the rule, the collision would have been impossible. I have carefully examined the record, and I can find no excuse for the conduct of the Sabine. No reason is given and none existed why she could not keep the thread of the stream. The rule under consideration is not only one of great convenience and economy, but also of safety. It ought to be carefully observed. After the Sabine rounded Twelve Mile point, and the two steamers came in sight of each other, it is quite evident that each did all it could to avoid a collision; of this there can be no doubt. There is much testimony in the record about the signals given by the two boats after they came in sight of each other, and some conflict of evidence; also about the management of the boats, how they were headed, whether their engines were stopped or not, whether they had head way or stern way at the time of the collision. There cannot be the slightest doubt that whatever seemed likely to avoid a collision was done. It was a moment of excitement and alarm. The officers of the boats could not be expected to act with coolness and unerring discretion. In the hurry and terror of the imminent collision, they ought not to be held to any strict rule. They did their best to avoid a collision, after it became imminent, and failed. The fault lay further back. It lay, in my judgment, with the Sabine in not observing the salutary rule of the river: The ascending boat shall run the points and the descending boat the bends.

On this issue, therefore, I find for the Richmond. Accordingly there must be a decree dismissing the libel of the owners of the Sabine against the Richmond, and in favor of the owners of the Richmond against the Sabine for such damages as the Richmond suffered from the collision.

In the case of the Merchants' Mutual Insurance Company against the Richmond and the Sabine, the libel must be dismissed as to the Richmond, and a decree against the Sabine for such damages as the insurance company suffered from the collision.

Case No. 12,796.

SHIRLEY v. TITUS.

[1 Sumn. 447.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1833.

APPEAL—TO CIRCUIT COURT—AMOUNT IN DISPUTE.

No appeal lies by any party from a decree of the district court, unless on his part the matter in dispute exceeds the sum or value of fifty dollars, under the acts of congress.

[Cited in brief in Lubker v. The A. H. Quimby, Case No. 8,586.]

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

Libel in personam for seamen's wages. At the hearing in the district court, there was a decree for the libellant [James Titus] for twenty-eight dollars, and costs, the original demand being over fifty dollars. [Case unreported.] The respondent [Charles Shirley] appealed, but there was no cross appeal by the libellant.

B. Sumner, for appellant.

C. G. Loring, for appellee.

STORY, Circuit Justice. This court has no jurisdiction in the case. The acts of congress [2] give no appeal from the district court, except in cases where the matters in dispute, exclusive of costs, exceed the sum or value of fifty dollars. Here, there being no cross appeal by the libellant, the only matter in dispute is the twenty-eight dollars awarded by the district court to the libellant. It would have been different, if there had been a cross appeal by the libellant, since he demanded more than fifty dollars by his libel. Appeal dismissed.

Case No. 12,797.

SHIRLEY v. TRIPLETT et al.

[12 Pittsb. Leg. J. (O. S.) 337.]

Circuit Court, D. West Virginia. 1865.

WAR—LIABILITY OF CONFEDERATE RAIDERS.

For property taken by members of a raiding party connected with the Confederate army, without consent of the owners, each of the raiders are individually liable, whether present at the taking or not.

This action was brought in trespass to recover the value of twenty-five head of cattle carried away by the defendants on the 5th of May, 1863. Two of the defendants, Triplett and Yerkey, appeared by counsel and pleaded not guilty. The substance of the evidence was, that a rebel raid was made into the county about the first of May, 1863, one of the purposes of which said raid was, to take and carry away cattle from the county for the use of the raiding army; that all of the defendants, except the defendant Yerkey, belonged to or were in some way connected with the raiding party, and were along with them at the time they were in the county; that the said raiding party took twenty-five head of cattle belonging to the plaintiff, of the value of $25 per head, without his consent, and carried them away with them; but it was not proved that any of the defendants were actually personally present when the cattle were taken, or that they ever knew that they were taken.

After the evidence was closed, Mr. J. A. Ovington, for plaintiff, asked the court to instruct the jury as follows: "If the jury believe, from the evidence, that about the last of April, or the first of May, 1863, a body of men came into this county, without the consent of the owner or owners thereof, that the said body of men did take and carry away the cattle of the plaintiff, without his consent, and that the defendants, or any one or more of them, belonged to the said body of men at that time, or were in any way connected with them, then it is the duty of the jury in this case to find a verdict in favor of the plaintiff against the said defendants or such of them as belonged to the said body of men or were in any way connected with them for the value of the cattle so taken, with interest on such value from the time the cattle were taken, although the said defendants may not have been personally present at the time the cattle were taken."

Judge Edmonson, for defendants, asked the court to instruct the jury that if they found the cattle were taken by the so called Confederate army, or by the defendants as members of said army, then the said defendants are not liable to the plaintiff.

B. Maxwell and Ovington & Carr, for plaintiff.

S. B. Edmonson, for defendants.

THE COURT upon mature deliberation refused to give to the jury any of the instructions asked for by the counsel for the defendants, and gave to the jury the instructions asked for by the plaintiff's counsel, and the case being submitted to the jury on the evidence and instructions, they found a verdict for the plaintiff for the amount claimed against all of the defendants but Yerkey. The counsel for defendant Triplett then asked for a new trial, on the ground that the verdict of the jury was contrary to law and evidence, but the court overruled the motion, and entered judgment on the verdict.

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

[2] Act Sept 24, 1789, c. 20, § 21 [1 Stat. 83]; Act March 3, 1803, c. 93, § 2 [2 Story's Laws, 905; 2 Stat. 244, c. 50].

Case No. 12,798.

SHIRLY v. HARRIS.

[3 McLean, 330.] [1]

Circuit Court, D. Indiana. May Term, 1844.

NOTES—CONSIDERATION—AGREEMENT TO PAY EXPENSES—CONTRACT.

1. An agreement to pay ten per cent, if a certain note, given some time before, should not be paid punctually when due, is without consideration, and cannot be enforced.

[Cited in Adams v. Hastings, 6 Cal. 127.]

2. But where in such agreement the maker of the note bound himself to pay the note to him in Missouri, the residence of the payee, and in the event of failing to pay, that he would pay the expenses of the payee in coming to Indiana to collect it, may be enforced.

3. The consideration arises from the expense incurred, by reason of the default of the maker of the note.

At law.

Fletcher & Butler, for plaintiff.

Wick & Barbour, for defendant.

OPINION OF THE COURT. This action is brought on a sealed obligation in which was recited, that "the defendant had given a joint note with Beverly Wallace for the sum of $400 payable to the plaintiff, or order, on 3d October, 1842, dated December, 1840." And the defendant covenanted that the money should be paid to the plaintiff, in Missouri, at his residence, when due, or he would pay ten per cent. interest and the expense of plaintiff in coming to Indiana for the money. And the plaintiff averred that the money was not paid, and the expenses in coming for the money is averred, &c.

The defendant pleaded: (1) Nil debet; and (2) that the instrument was given voluntarily and without consideration. To the first plea the defendant demurred. The demurrer must be sustained. By his deed the defendant is estopped from saying that he is not indebted. The plaintiff tendered an issue to the second plea. A statute of Indiana authorises the second plea. The plaintiff proved to the jury that the money not being paid when due, the plaintiff came from Missouri to Indianapolis to collect it; and he proved the amount of his expenses. It is not pretended that this contract was not a bona fide one. It was entered into fairly, and the only question which is raised, is, whether it is legal and can be enforced. As regards the ten per cent. we think it cannot be recovered. There was no consideration to support the obligation. Six per cent. is the legal rate of interest in Indiana, though a higher rate, not exceeding ten per cent. will be valid, if agreed to be paid in writing. The note on which this interest was to be paid had been given, before the date of the agreement on which this action is brought.

There is no consideration then, for the payment of the ten per cent. interest. It was a voluntary undertaking, and cannot be enforced. But, that part of the agreement which regards the expenses of the plaintiff, is not without consideration. By the note he was bound to pay the money at the time stipulated, and if he failed to do this, and the plaintiff was under the necessity of making a trip to Indiana, he bound himself to pay his expenses. Here is an expense incurred, by reason of the default of the defendant, and which he agreed to pay. We see no principle which forbids such a contract, it being bona fide, and the jury will find for the plaintiff such expenses as the plaintiff incurred on the trip and has proved.

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

SHIVE (UNITED STATES v.). See Case No. 16,278.

SHIVERS (FAIRCHILD v.). See Case No. 4,611.

SHOE MACH. MANUF'G CO. (HASKELL v.). See Case No. 6,194.

SHOE MACH. MANUF'G CO. (THOMAS v.). See Case No. 13,911.

Case No. 12,799.

In re SHOEMAKER.

[4 Biss. 245.] [1]

District Court, D. Indiana. July, 1868.

BANKRUPTCY—OMISSION FROM SCHEDULE—FRAUDULENT TRANSFER—DISCHARGE—OPPOSITION TO.

1. Where a bankrupt omitted to state in his schedule the amount of money in the hands of a receiver appointed by a state court in a suit between him and his co-partner in relation to partnership property, but stated that the partnership assets would not more than pay the expense of their litigation, and that he was not able to state their exact amount: *Held*, that the omission was no ground for refusing a discharge; and that an affidavit to the truth of the schedule was not prima facie perjury.

2. A suit was brought by a partner against his co-partner in a state court, charging waste, and praying the appointment of a receiver. A receiver was appointed, and took control of the partnership assets. Soon after, the plaintiff in that suit was adjudged a bankrupt on his own petition. *Held*, that the proceedings in the state court did not amount to a fraudulent transfer by the bankrupt of his property, so as to preclude him from his certificate of discharge.

3. Opposition to the discharge of a bankrupt must be in writing, and must disclose the name of the opposing creditor or creditors.

In bankruptcy.

Dye & Harris, for the application for discharge.

Hanna & Knefler and Clough & Wheat, contra.

McDONALD, District Judge. In this court, on the twentieth of January last, Robert H. Shoemaker was, on his own petition, adjudged a bankrupt. He now applies for a certificate of discharge. Messrs.

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

Hanna & Knefler, representing the creditors, oppose this application.

This opposition is founded on two charges: First, that the bankrupt has committed perjury in the affidavit to his schedule. Second, that he has transferred his property to defraud his creditors. We will examine each of these charges.

1. It is alleged that the bankrupt "willfully swore falsely in his affidavit annexed to his schedule and inventory, in this that he did not state that a certain receiver who had been appointed by a court in Kansas had in his hands four hundred and thirteen dollars and seventy-four cents belonging to the bankrupt."

In support of this charge, an authenticated copy of a judicial proceeding in the district court of Leavenworth county, Kansas, is produced in evidence. By this transcript it appears that, on the 19th of June, 1867, the bankrupt filed his bill or petition in said court against his partner in the nursery business, C. McRay Dinsmore, charging him with wasting the partnership effects, asking for an injunction, and praying the appointment of a receiver. On this petition a receiver was appointed, who, on the 11th of November, 1867, made a report to that court, by which it appeared that he had then in his hands the balance of four hundred and thirteen dollars and seventy-four cents of said effects. It does not appear by the transcript that that court has ever made any disposition of said sum, or even that the suit in Kansas is ended.

The only references in the schedule to this four hundred and thirteen dollars and seventy-four cents, are as follows:

"On a settlement of the account of Dinsmore and Shoemaker, there will be due me large sums of money. But as Dinsmore has absconded after creating the debt mentioned in schedule A, without rendering any account, your petitioner regards the claim as worthless, and is unable to fix the amount.

"The nursery business of Dinsmore & Shoemaker was placed in the hands of M. C. Shoemaker (the receiver) in Leavenworth, Kansas. But the assets will not more than pay expenses of settlement. I am unable to state the exact amount."

This is all the evidence before me touching the charge of false swearing.

The 29th section of the bankrupt act [of 1867 (14 Stat. 531)] provides, that no discharge shall be granted if the bankrupt has willfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory.

Does the evidence, as above stated, prove that the bankrupt, in his affidavit to his schedule, willfully swore falsely? Without entering largely into particulars, I may safely say that the evidence does not prove the charge. The schedules are loosely drawn. The four hundred and thirteen dollars and seventy-four cents, though obscurely alluded to, is not stated. It ought to have been stated, if known to the bankrupt. As he was a party to the suit in Kansas, he is prima facie presumed to have known that the four hundred and thirteen dollars and seventy-four cents was in the hands of the receiver. But as this is only a disputable presumption; and as he states that he is "unable to state the exact amount," I think this fairly rebuts the presumption. At all events, it is clear that there is not sufficient evidence in the case to fix on the bankrupt the charge of perjury.

2. It is charged that the bankrupt, in contemplation of bankruptcy, "made a transfer, assignment, and conveyance of part of his property, for the purpose of preventing the property from coming into the hands of the assignee, and of being distributed under the bankrupt act."

The only evidence of the fraudulent transfer here charged is found in the transcript, already referred to, of the judicial proceedings in Kansas. Counsel opposing the bankrupt's discharge insist that the appointment of a receiver on the application of the bankrupt, as shown by said transcript, amounts to such a fraudulent transfer. They argue that the appointment of the receiver vested in him the title to the partnership property, and amounted to a voluntary transfer of it within the meaning of the bankrupt act.

It may be that the appointment of a receiver by a court of equity vests the title to the property in dispute in him temporarily. But it seems to me an error to suppose that, even if done at the instance of a failing partner, it would be such a fraudulent transfer of his property as is contemplated and provided by the bankrupt act. If, in June, 1867, Shoemaker found that his partner was wasting their partnership property, it was perfectly lawful for him to apply to a state court for redress, whether at that time he was insolvent or not. In doing so, the best way to put a stop to that waste would probably be to put the property into the hands of a receiver. Such a course would be likely to contribute to his own advantage and to the security of his creditors. And to argue that in doing so he committed a fraud, either on his creditors or on the bankrupt act, appears to me to be most unreasonable.

Moreover, there is no evidence before me indicating that, at the time when this receiver was appointed, Shoemaker either was insolvent, or contemplated insolvency or bankruptcy. For anything that appears, he may then have been worth millions. There is nothing in this objection.

If all these objections were proved, the opposition to the discharge must fail, as not being properly presented on paper. The thirty-first section of the act provides "that any creditor opposing the discharge of any

bankrupt, may file a specification in writing of the grounds of his opposition." And the twenty-fourth rule promulgated by the supreme court requires that such creditor "shall enter his appearance in opposition" to the discharge. Beyond all doubt, a compliance with this provision and this rule would require that the "specification in writing" should state the name of the creditor or creditors who make opposition to the discharge, else, should they fail, they could not be adjudged to pay costs. Here, however, the specification in writing gives the name of no creditor. All that it contains concerning the creditors is thus: "Hanna & Knefler, Clough & Wheat, attorneys for opposing creditors." This is not sufficient. The name of every opposing creditor should have been stated.

The motion for a discharge is granted.

NOTE. A mere failure on the part of the bankrupt to schedule property is not a ground for refusing his discharge. Though the act makes a concealment of the same a ground for such action, it must be averred and proved that it was willful. In re Eidom [Case No. 4,315]. But leave will be given to the bankrupt to amend his schedule; then he will be entitled to a discharge. In re Connell [Id. 3,110].

Swearing to schedules from which certain property is omitted is not perjury unless the schedules were willfully so sworn to. In re Keefer [Case No. 7,636]; In re Rathbone [Id. 11,580]; In re Wyatt [Id. 18,106].

SHOEMAKER (CHILDS v.). See Case No. 2,681.

Case No. 12,800.

SHOEMAKER v. FRENCH.

[Chase, 267.] [1]

Circuit Court, D. Virginia. Nov. Term, 1868.

FEDERAL JURISDICTION—EFFECT UPON PROCEEDINGS IN STATE COURTS.

An application for an injunction having been made in the United States circuit court, and the defendant served with notice thereof, all jurisdiction of the state courts in regard to matters cognate thereto is ousted, or must be exercised in subordination to the jurisdiction of the federal court.

[Cited in Sharon v. Terry, 36 Fed. 356.]

Shoemaker filed a bill in this court against French for an injunction to prevent his acting or claiming to act as president at the Alexandria and Washington Railroad Company, and the court passed an order directing French to be served with notice of motion for injunction. After this order was passed, French filed his bill in the state court at Alexandria, praying an injunction against Shoemaker for matters cognate to the bill in this court.

CHASE, Circuit Justice. The jurisdiction of this court as to these matters attached when Shoemaker's bill was filed here, and the order passed by this court. Therefore the jurisdiction of the state court was ousted, or must be exercised in subordination to the jurisdiction of this court.

The injunction is granted according to the prayer of the bill.

[NOTE. This cause came on for final hearing from a bill, answer, and replication, and upon the cross-bill, answer, and replication, and upon the proofs. James M. French, the defendant in the original bill, was perpetually enjoined and restrained from any use of the name or title of the president of the Alexandria & Washington Railroad Company, and it was further ordered that the said French pay the costs in the cause. Case unreported. An appeal was then taken to the supreme court, where it was heard on motion to dismiss and for supersedeas. The motion for supersedeas was denied. 12 Wall. (79 U. S.) 86. The appeal was regularly heard in 1872, and the decree of the circuit court affirmed. 14 Wall. (81 U. S.) 314.]

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

Case No. 12,801.

SHOEMAKER v. NATIONAL MECHANICS' BANK.

[2 Abb. (U. S.) 416; [1] 1 Hughes, 101; 1 Thomp. Nat. Bank Cas. 169; 1 Balt. Law Trans. 195.]

Circuit Court, D. Maryland. March, 1869.

BANKS—SUIT BY STOCKHOLDER—MISAPPLICATION OF FUNDS—FORFEITURE OF FRANCHISE—NATIONAL BANKS—POWERS UNDER ACT OF CONGRESS—INJUNCTION.

1. A circuit court has jurisdiction, upon a proper bill filed by a stockholder of a national bank, to enjoin the officers of the bank from misapplying its funds to the prejudice of the stockholder's interest therein, by acts which are not warranted by the charter, or amount to a breach of trust.

2. The general principles which govern courts of equity in granting preliminary injunctions, and in dissolving them upon the filing of the answer,—stated.

3. A loan made by a national bank in excess of the restriction imposed by section 29 of the national banks act of June 3, 1864 (13 Stat. 99), which provides that the total liabilities to any banking association, of any borrower, shall not at any time exceed one-tenth of the capital stock,—is not void, upon that account. The loan may be enforced; though by section 53, the bank is exposed to forfeiture of its franchise, and the officers participating are declared personally liable.

[Cited in brief in Penn v. Bornman, 102 Ill. 524, 526. Cited in Weckler v. First Nat. Bank of Hagerstown, 42 Md. 587.]

See Stewart v. National Union Bank [Case No. 13,425].

4. A national bank has power to lend money upon the note or other personal obligation of the borrower secured by a pledge of stock of a corporation as collateral security.

5. Section 8 of the national banks act of June 3, 1864 (13 Stat. 101), which authorizes such banks to exercise under that act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, &c., by receiving deposits, by buying and selling exchange, &c.,

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

by loaning money on personal security, and by issuing, &c., circulating notes,—contains five distinct grants of power; and neither grant is a limitation upon any other.

6. An averment that the officers of a bank have loaned its funds to a specified person "upon the collateral security of railroad stock," does not show a violation of section 8; for the phrase "collateral security" imports a security additional to the personal obligation of the borrower; and, by the fourth of the powers conferred by section 8, the bank may loan upon personal security not embraced in the first power.

Application for an injunction.

GILES, District Judge. This bill is not filed to have the charter of defendant as a national bank declared null and void for the causes mentioned in section 53 of the act to provide a national currency, &c., passed June 3, 1864. This would not be the appropriate proceeding for such a purpose. That could only be accomplished by a suit instituted by the comptroller of the currency. But this is a bill filed by one of the stockholders in the National Mechanics' Bank of this city, to restrain the president and directors of the said bank from pursuing a course which, he alleges, is in violation of the requirements of their charter under the said act, and by which they are wasting the assets of the said bank, to the loss and injury of the complainant and its other stockholders.

Such being the object of the bill, if its allegations were admitted by the answer, or proved on final hearing to the satisfaction of the court, it would be its duty to restrain the officers of the said bank from any further misapplication of its funds which might result from any act not warranted by its charter, or which would amount to a breach of trust.

This is clear from the decision of the supreme court in the case of Dodge v. Woolsey, 18 How. [59 U. S.] 341. In that case the court says: "It is now no longer doubted, either in England or the United States, that courts of equity in both have jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction to restrain those who administer them from doing acts which would amount to a violation of charter, or to prevent any misapplication of their capitals or profits which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchise of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust."

The motion for this injunction has been heard on bill and answer. And the principle is now almost universally recognized that, where the answer denies all the circumstances upon which the equity of the bill is founded, the court will refuse the writ of injunction.

It becomes necessary, therefore, to carefully examine the bill and answer; the bill, that we may learn what are the facts which it sets forth, and on which it claims the equitable interference of the court, and the answer, that we may see if these facts are admitted or denied. Now there are many things stated in the bill, and replied to in the answer, with which we have nothing to do, on this motion. Whether the loan to Bayne, by the defendant, was made under such circumstances as will render the officers who made it responsible to the stockholders for any loss the bank may incur therefrom, can only be answered when this case comes before the court on final hearing. And it may be doubtful whether such question could even be decided on the pleadings in this case; it would seem to require a bill to be filed against the officers who made the loan individually. This is a bill against the bank in its corporate capacity. The allegations on which the preliminary injunction is asked are the following: "That in violation of said express prohibition, and in violation of the trust as aforesaid confided to its officers, the said bank and its officers lent to Bayne and Bayne & Co., of the funds or capital of the said bank, from time to time, divers sums of money, in the whole largely exceeding one-tenth of the capital stock of said bank actually paid in, and that for many months the amount of money so loaned exceeded three hundred thousand dollars." And it is further alleged that said loans were made upon collateral security of shares of stock, &c., some of which were spurious, and that among these were twelve hundred and fifty shares, purporting to be the stock of the Washington, Georgetown, & Alexandria Railroad Company, a corporation which the bill charged never had any legal existence, &c. And that said bank is joining in the prosecution of or has been made party to certain suits, touching or concerning the interests of said railroad company.

It also charges that the said defendant, by its officers and agents, has offered to pay into the circuit court of the United States for the Eastern district of Virginia the sum of twenty thousand dollars of the funds of said bank, in a cause therein depending, in which the said bank has no interest whatever, and to which it is not a party, and did actually pay in said cause two hundred dollars fees to commissioners, and did actually pay one hundred dollars to the trustees of Bayne & Co., upon some illegal and unauthorized agreement as to said securities, taken by them from Bayne, and that they are negotiating for and offering to expend the money and funds of said bank in and about the repairs and reconstruction of the bridge of the said railroad company across the Potomac river, in which said bank has no sort of interest, and cannot legally have any. Said bridge, it is estimated, will cost over one hundred thousand dollars to repair it. And it concludes with a prayer that the said bank, its officers, agents, and attorneys, may be restrained from farther prosecuting or de-

fending any one or more of said suits at the cost or charge or in the name of said bank.

The answer admits that Bayne & Co. did pledge with its cashier, early in the month of February, 1866, as collateral security for its money loaned and advanced to the said firm, one thousand two hundred and fifty shares of the capital stock of said railroad company, of the par value of one hundred dollars each, and that the trustees of Bayne & Co. did subsequently, for one hundred dollars, assign all the equity of redemption of said stock to the cashier of this defendant.

It also admits that as a holder of stock of the said railroad company, it did agree with certain stockholders of said company to advance a portion of the sum of twenty thousand dollars, which was offered to be paid into the circuit court of the United States for the Eastern district of Virginia, in a cause in which the said railroad company and others were defendants, and Adams Express Company was complainant, to abide the decision of said cause, with the purpose of preventing the said railroad from passing into the hands of a receiver, to be appointed by said court; but said offer was refused by said court, and no money was paid on account thereof, and that this defendant was to have been adequately secured if said money had been actually advanced, and that it did advance about forty dollars, part of defendant's commissioners' fees, in said cause. And this defendant denies that it is negotiating or offering to expend its money or funds in the repair and reconstruction of the railroad bridge across the Potomac. It also denies that it, or any of its officers, at the time said stock was issued in the name of its cashier, or previous thereto, had any knowledge or good reason to believe that the said railroad company had no legal existence, or that the certificates were fraudulently issued, but that as late as May, 1866, the stock of the said railroad company was held and esteemed as a valuable stock, at par or over par, and that as late as the middle of May, 1866, large loans were effected upon the pledge of its certificates of stock at or about par.

Now, the only fact admitted in the answer, pertinent to the present inquiry, is that the defendant did receive from Bayne & Co. a pledge of the railroad stock as collateral security for loans made to said firm, and that said bank is now, in company with other stockholders of said railroad, engaged in suits, upon whose final decision depends the very existence of said road and the value of its stock. Will these facts warrant the granting of a preliminary injunction? Now, the granting or refusing of an injunction is a matter resting in the sound discretion of a court of equity. It is one of the highest powers confided to a court of equity, and its exercise ought, therefore, to be guarded with extreme caution, and the remedy applied only in very clear cases.

As to the first charge in this bill against the defendant, in reference to the amount loaned to Bayne & Co., in violation of section 29 of the act of congress passed June 3, 1864, (under which act the defendant became a national bank), I would only say that the loan made under such circumstances is not void—it can be enforced as any other loan made by the bank. This I apprehend is clear, from the fact that section 29 provides no penalty for its violation, and section 53 of the same act, for all violations of the provisions of the said act, provides two penalties: First, a forfeiture of the privileges and franchises of the said bank, derived from the said act, to be adjudged in a suit brought for that purpose in the federal court; and second, a personal liability by every officer of a bank who participated in or assented to such violation, for all damages which the bank may sustain in consequence thereof.

Indeed, this clause was not pressed in the very able argument of the learned counsel who closed on behalf of complainant. The point so forcibly made by him was that the defendant was prohibited by its charter from making this loan on a pledge of stock, and if so, no title to this stock passed from Bayne & Co. to the defendant. Clearly, if the defendant's title to this stock depended on a purchase as an investment by it, such purchase would be beyond its corporate powers, and void. The learned counsel, however, contended, that by the true construction of section 8, this loan was not embraced among the enumerated powers of the bank,—"that no loans are valid except those made on personal security." The language of that section is, "and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security, by obtaining, issuing, and circulating notes, according to the provisions of this act."

I understand that the language I have quoted contains five distinct grants of power, and that no one grant is a limitation on any other. By the first, the bank is authorized to discount promissory notes, drafts, bills of exchange, and other evidences of debt; second, to receive deposits; third, to buy and sell exchange, coin, and bullion; fourth, to loan money on personal security (I understand by this, on any other personal security than is mentioned in the first grant); fifth, to obtain, issue, and circulate the national currency. If I am right in this construction, then the loan to Bayne & Co. was authorized by the said section, as the charge in the bill is that the loans to Bayne & Co. were made upon paper evidences of debt; upon bonds, notes, checks, &c.; and upon collateral security of stocks, &c.; and the answer states that the stock in said railroad was pledged with its cashier as collateral

security for its money loaned. If collateral security, then collateral to personal responsibility of Bayne & Co., on the notes, checks, and bills of exchange, cashed for said firm by this defendant; for collateral security in bank phraseology means some security additional to the personal obligation of the borrower. But admit that this construction is doubtful, it is not so doubtful as that construction which would limit the banks to the power of loaning money only on personal security, and deny to them the power of taking a pledge of stock as collateral security for notes or bills of exchange cashed by them. And, as I said before, a court of equity should never grant a preliminary injunction in a doubtful case.

However, I have no doubt that the taking this collateral security from Bayne & Co. was a valid transaction, and whether it will ever avail the defendant anything, will depend upon the decisions of those tribunals before whom is now pending the question of the validity of the charter of the said railroad company, and the character of its stock.

The preliminary injunction asked for in this case is refused.

For authorities to sustain the view I have taken of the law governing this case, I refer to the following cases: Bates v. Bank of Alabama, 2 Ala. 462; Magruder v. State Bank, 18 Ark. 9; Bank of Middlebury v. Bingham, 33 Vt. 636; Farmers' Bank v. Burchard, Id. 348; and Rock River Bank v. Sherwood, 10 Wis. 230.

Injunction refused.

SHOEMAKER v. NATIONAL UNION BANK. See Case No. 12,801.

SHOEMAKER (UNITED STATES v.). See Case No. 16,279.

Case No. 12,802.

In re SHOENBERGER.

[4 Cin. Law Bul. 965.]

District Court, S. D. Ohio. 1879.

BANKRUPTCY—INSOLVENCY—ILLEGAL PREFERENCE—KNOWLEDGE OF CREDITOR.

1. A merchant for whose accommodation a note was given and indorsed by him, is within the definition of the supreme court of insolvency.

2. The knowledge, by the creditor to whom such note was indorsed, that the condition of his affairs was such that he could not pay such debts as they matured is reasonable cause to believe him insolvent.

3. Securities and payments received by the creditor under such circumstances, are in contravention of the bankrupt law.

4. Where the creditors, without actual fraud, received as security a nonforfeitable policy of insurance and afterwards paid installments of premiums thereon, such entitles him to a pro rata value of the policy.

[In the matter of Joseph Shoenberger, a bankrupt.]

The question in this case now before the court arises upon exceptions to the report of Register Ball, upon an application of the assignee to expunge the proof of debt with security by the Western German Bank.

Wulsin & Worthington, for assignee.

Long, Kramer & Kramer, for German American Bank.

SWING, District Judge. On the 25th day of November, A. D. 1875, J. K. Skaats executed and delivered his promissory note to Joseph Shoenberger for $2,116^{22}/_{100}$, payable four months after the date thereof, at the Western German Bank. This note was indorsed by Shoenberger to the bank. The proof shows that the note was made for the accommodation of Shoenberger, and that he agreed with Skaats to take care of it. The note was not paid at maturity, and upon the day of its maturity, after having been returned to the bank from the clearing house, and after banking hours, a member of the banking house notified Shoenberger that the note had not been paid, and requested him to waive demand, notice and protest, which was done by Shoenberger. He also demanded of Shoenberger security for the payment of the note, which Shoenberger agreed to give, and on the next day Shoenberger assigned to him the chattel mortgage and policy of insurance in contest in this case, and afterwards, on the 5th day of April, A. D. 1876, he paid upon this note $450. The bank, after the transfer of the policy of insurance, paid three installments of the premiums of $250 each. The policy of insurance is nonforfeitable. The register finds that at the time of the transfer of the mortgage and policy and the payment of the money Shoenberger was insolvent, and that the bank had reasonable cause to believe him insolvent, and directs the payment to the assignee of the money received upon the mortgage and that which was paid by Shoenberger, and that the reassignment of the policy of insurance, but holds that the bank having paid three installments, and Shoenberger four installments, of the premiums for the insurance, that it shall hold three-sevenths of the value of the policy, and to this finding of the register the bank has excepted.

Upon these exceptions the question presented is, was Shoenberger, at the date of these transfers, insolvent? And had the bank reasonable cause to believe that he was insolvent? The proof in the case shows that Shoenberger was in fact at the date of the transfers largely insolvent, but the proof does not show that the bank knew that such was his condition. So that the question becomes one as to how far in law the bank is to be held to have had reasonable cause to believe him insolvent.

What insolvency of a trader or merchant is under the bankrupt law is well settled by the supreme court of the United States, it

is defined to be, "when a trader or merchant whose business affairs are in such a condition as that he is unable to pay his debts as they become due in the ordinary course of his business, as men in trade usually do, he is insolvent." Toof v. Martin, 13 Wall. [80 U. S.] 40; Buchannan v. Smith, 16 Wall. [83 U. S.] 277; Wager v. Hall, Id. 584. It is very clear that such was the condition of Shoenberger not only on the 5th of April, but on the 29th day of March, 1876. He was not only therefore insolvent in fact, but was clearly within the legal definition of insolvency.

The next question to be determined is, had the bank reasonable cause to believe that Shoenberger was insolvent? The supreme court of the United States has also defined what shall constitute reasonable cause to believe a party is insolvent, and it is that when the condition of a debtor's affairs are known to be such that prudent business men would conclude that he could not meet his obligations as they matured in the ordinary course of his business there is reasonable cause to believe him insolvent. Merchants' Nat. Bank v. Cook, 95 U. S. 342.

The evidence in the case shows that on the day of the maturity of the note that one member of the bank called upon Shoenberger after banking hours, when the note had been dishonored, and requested of him security for its payment, he does not say he demanded payment of him, but it is very certain that on that day his affairs were not in such a condition as that he could meet the obligation, nor were they in such condition the next day, and that fact must have been known to the bank, else why was it not met, and why the demand and acceptance of security for its payment?

But it is said that in this case that Shoenberger was the indorser only of this note, that he was not the debtor in the sense in which that term is used by the supreme court, and that therefore the rule which we have stated cannot apply. I think this distinction cannot be maintained. Whilst it is true that he was the indorser, it is nevertheless true that he was the debtor of the bank, and under the laws of Ohio he could have been sued without joining the maker, and the entire debt could have in the first instance been collected from him; and indeed in this case it seems as if the bank did look to him alone for the payment thereof. They never called upon the maker for payment, but procured from the indorser a waiver of demand for payment. I think therefore that this case does not come within the rule laid down by the supreme court.

That Shoenberger was insolvent in fact and in law when this transfer was made and when the money was paid. That they were made by him when he could not secure or pay all his creditors, or could have reasonably hoped to have done so. That their effect was to give a preference to the bank, and that under such circumstances the law presumes that such was his intent in making them. That the bank had reasonable cause to believe him insolvent in law, and that they must be charged in law with the knowledge that such transfer and payment was intended to be in fraud of the bankrupt laws. The bank will therefore be required to surrender the preference thus obtained by paying to the assignee the amount realized from the foreclosure of the mortgage, to transfer the policy of insurance to the assignee, and to pay him the sum of $450 with interest from the date of its receipt.

There is more difficulty in regard to the payment of the installments by the bank, upon the policy of insurance. It has been held that where a preference was taken in fraud of the bankrupt laws that the parties receiving it would not be allowed for the payments of liens or charges upon it, but there does not seem to have been in this case any actual intention of fraud upon the part of the bank, or upon the part of Shoenberger, and the rule would be a severe one. But the policy in this case was non-forfeitable, and the bank was under no obligations to pay these installments. It was not necessary to preserve its life. It must therefore be held to have made them at its own risk. But it should be entitled to have whatever interest accrued by reason of such payments. The bank having paid three installments, and Shoenberger four, the bank will be entitled to three-sevenths of the value of the policy, and the assignee to four-sevenths of such value.

Case No. 12,803.

SHOMERS' CASE.

[See Case No. 12,808.]

SHONNIGER MELODEON CO. (HITCHCOCK v.). See Case No. 6,537.

SHOOK (CARILLO v.). See Case No. 2,407.

Case No. 12,804.

SHOOK et al. v. RANKIN et al.

[6 Biss. 477; 2 Law & Eq. Rep. 236; 8 Chi. Leg. News, 345; 3 Cent. Law J. 569; 22 Int. Rev. Rec. 239.] [1]

Circuit Court, N. D. Illinois. Oct., 1875.

COPYRIGHT—TRANSLATIONS OF PLAYS—INJUNCTION—PRACTICE.

1. Where the translator of a play, by consent of the author, has obtained a copyright upon it, the owner of such copyright can maintain a bill enjoining any other person from using or representing such translation, or any part of it.

2. Affidavits, evidently intended to be used in a case, but not entitled in it, will be allowed to be read on motion for injunction.

[Cited in Tompkins v. Halleck, 133 Mass. 34.]

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 3 Cent. Law J. 569, contains only a partial report.]

[This was a bill in equity by Sheridan Shook and others against Arthur McKee Rankin and others.] Complainants' bill alleged that prior to February 1, 1875, a dramatic composition or play, entitled "Les Deux Orphelines," was designed and composed in the French language by Adolph D'Ennery and Eugene Cormon, residents and citizens of France. N. Hart Jackson, a resident of the United States, became the owner by purchase and assignment of the original manuscript, for representation in the United States. Before February 1, 1875, Jackson, with the consent of D'Ennery and Cormon composed and arranged a translation from the French play into the English language, and entitled the translation "The Two Orphans," being a literal translation of "Les Deux Orphelines," and adapted his translation for performance and representation to English-speaking audiences. February 1, 1875, by and with the consent of D'Ennery and Cormon, and before publication, Jackson obtained a copyright on his translation, as author, under the copyright laws of the United States. Complainants afterwards became the sole owners and proprietors of the original manuscript in French, the translation by Jackson and his copyright, by purchase and assignment from Jackson. Complainants alleged that the original "Les Deux Orphelines" had never been translated or published with the knowledge or consent of its authors, except the translation by Jackson; that defendants had announced and had on divers nights publicly performed, the "Two Orphans" at the Adelphi Theater in Chicago, without the consent and license of complainants; that defendant Rankin and his associates had previously, and while in the complainants' employ, performed and acted the "Two Orphans," and had thereby familiarized themselves with it, and were acting the same translation at the Adelphi. Prayer for an injunction and accounting. The bill was supported by several affidavits, among which were complainants' and Jackson's. The affidavits were sworn to in New York, but were not entitled of the suit or court until filed. The affidavit of L. F. Post, one of complainants' counsel, was filed, showing these affidavits were made and sworn to for the purposes of this suit and for no other purpose. The defendants denied that Jackson acquired any rights by his translation or copyright; that "Les Deux Orphelines" was translated by consent of the authors by John Oxenford, of London, prior to Jackson's translation; that defendants had obtained from London Oxenford's translation, and intended thereafter to perform the latter and not Jackson's translation. Motion for an injunction upon bill and affidavits to restrain the defendants from publicly performing the "Two Orphans." Upon hearing, defendants objected to the reading of complainants' and Jackson's affidavits, because not properly entitled when sworn to.

[A preliminary injunction had been granted in this cause. Case No. 12,805.]

S. M. Millard and L. F. Post, for complainants, in support of the motion cited, on the point that an author might be a translator, 21 Morgan's Law of Literature, 315-321; as to what constitutes infringement, Boucicault v. Wood [Case No. 1,693]. What is prima facie evidence of copyright? Roberts v. Myers [Id. 11,906].

Clarkson & Van Schaack and Norman J. Emmons, for defendants.

DRUMMOND, Circuit Judge. It seems to me that the complainants are entitled to an injunction to prevent the defendants from performing the work which has been translated from the French of D'Ennery and Cormon by N. Hart Jackson into English, and adapted by him for representation on the stage in this country.

The court can go no farther in deciding a motion of this kind than the proofs of the case clearly warrant. What are the facts established here beyond controversy? They are these: D'Ennery and Cormon were the authors of a drama in the French language called "Les Deux Orphelines"; Jackson translated it into English and adapted it to representation on the stage. This was with the consent of the authors. After this was done, he applied under the law for a copyright; and the question is whether there was any valid objection to his obtaining a copyright for the play, thus translated into English.

I do not see that there was. He was the translator of the play. He adapted it to representation on the stage, and was, in the sense of the law, the author of that for which he obtained a copyright. No one could complain of this, except the authors of the play in French, and it affirmatively appears that they assented to this action on the part of Mr. Jackson. Then I do not see why he was not protected under the law for his translation and adaptation of the work to the stage, and of which he was in one sense the author.

That being so, has the defendant infringed his rights by performing this unpublished drama? To decide that, it is only necessary to determine the effect to be given to sundry affidavits which have been introduced in the case—those of Mr. Shook, Mr. Palmer and Mr. Jackson. I think it is proper for the court to receive these affidavits for the purpose for which they were filed. It is well known that the courts are much more liberal upon this subject than they were in former times. They do not reject affidavits simply because there may be some clerical error or omission, provided it appears that they were intended for the case which the court is called upon to investigate.

It affirmatively appears, I think, that these affidavits were made for the purpose of being used in this case; and conceding that they did not at the time contain the proper title of the cause, still they were made and for-

warded to counsel, who may be presumed to be authorized by the parties to give the proper character to them by stating the name of the cause in which they were to be used. It seems to me that it would be adopting a very rigid rule, and one hardly in accordance with the liberal practice of the present day, to declare that the affidavits should be rejected because at the time when the affidavits were made and signed by the parties, the name of the cause was not stated, provided they knew that they were to be used in the cause, although they did not know the technical description of the title of the same.

Then, these affidavits being received, as I think they should be, there can be no doubt that these defendants—the principal defendants who have performed this play—have been using the translation of Mr. Jackson, as adapted by him for representation on the stage.

They acquired their familiarity with it in consequence of the direct action of the translator or his assignees, and it would be hardly fair under the circumstances of the case that they should be permitted to go on and use it contrary to the wishes of the owners. It has been said that they do not propose to use it any longer; but in view of the facts the court cannot assume that they will not do so, or refuse an injunction on that ground. It is not controverted that these complainants are Jackson's assignees, and are entitled to all his rights. I do not think that, because Mr. Jackson, or, possibly, the complainants, may have been mistaken as to their legal rights, or as to the particular character annexed to their rights of property subsisting in this drama, the court should be prevented from acting in this case. The court will not go into a collateral issue upon this question of injunction. The only point is whether complainants have rights which have been violated by the defendants, and whether they are entitled to an injunction upon the facts as they are presented in the case.

I have no doubt that they are, and therefore an injunction will issue, restraining the defendants from performing the play, which has been translated from the French of D'Ennery and Cormon, by N. Hart Jackson, and adapted by him for representation on the stage, or any part thereof.

As to the romance of the "Two Orphans": It purports to be a story in narrative form, founded, as I suppose, upon the play of the "Two Orphans"; but, so far as I have been able to examine it, I do not see, even conceding that its publication was made with the consent of the complainants, that it deprives them of the right to the play of the "Two Orphans," as translated by Mr. Jackson.

It would take much time for me to go through this story in detail, and compare it with the drama, which I have not had an opportunity of doing. But so far as I have looked at it, I think it does not deprive the complainants of a right to an injunction on that account.

As to the translations of the French play, I know there may be certain phrases which may be identical in them, as translated by Jackson and Oxenford. There are or may be the same translations of some French words; but, of course, the fact of there being identity of a few phrases does not make them one play as translated.

It always must be a question to be decided by comparison whether or not there is any essential part of the play taken as translated by Mr. Jackson. What I mean is, that they have no right to take any part of this, the work of Mr. Jackson, and use it.

So far as I can see, the translations are made by two distinct persons, and independent of each other. I do not, therefore, touch the Oxenford play in this decision at all. The order will be that the defendants shall not use the whole or any part of Mr. Jackson's translation—the drama which he has translated and adapted for representation on the stage in this country. As at present advised, I shall not enjoin the defendants from using Oxenford's translation.

NOTE. The question of the right to use the Oxenford translation, came up subsequently before Judge Drummond on a motion to attach McKee Rankin for contempt, and he decided that the defendants had the right to use that translation, but that they must be careful not to interpolate any phrases of Jackson's translation.

The consent of an author to publication abroad places him in the position of a foreign author, and is an abandonment of his rights under our statute. Boucicault v. Wood [Case No. 1,693]. The representation of a play upon the stage is not at common law a publication, nor is it a dedication to the public. Crowe v. Aiken [Id. 3,441]. The author's rights at common law have not been taken away or limited by any existing act of congress. Id.

Case No. 12,805.

SHOOK et al. v. RANKIN et al.

[3 Cent. Law J. 210.] [1]

Circuit Court, D. Minnesota. Sept. 16, 1875.

COPYRIGHT — PRELIMINARY INJUNCTION — PRIMA FACIA CASE—AFFIDAVITS.

A preliminary injunction was applied for to restrain the performance by the defendants of a play called "The Two Orphans." Upon the bill and affidavits the court found: First. That there has been no memorization of this play by the defendants or any body in their employ, which would entitle them without authority from the complainants to represent the play of "The Two Orphans" in this district. Second. That there has been no dedication by any voluntary act, which would prevent the complainants in this case from exclusively representing this play. Third. That the prima facie case made out by the bill has not been overcome by the affidavits which have been presented by the defendants; and thereupon the court awarded a preliminary injunction as asked.

[1] [Reprinted by permission.]

[This was a bill in equity by Sheridan Shook and others against Arthur McKee Rankin and others.]

Motion for a preliminary injunction to restrain the performance by the defendants of the play called "The Two Orphans."

W. P. Clough and L. F. Post, for complainants.

J. H. Davidson, for defendants.

NELSON, District Judge. It is important that there should be a speedy decision of this motion; and while delay would perhaps enable me to present my views more elaborately, and satisfactorily to myself, it would not change the result I have arrived at, and I shall, therefore, proceed to announce my decision in this matter, giving my reasons for it briefly. I think that upon an examination of this case, it will be found that no new principles are involved. The complainants, Messrs. Shook and Palmer, allege that they are owners of the copy-right of a certain play, entitled, "The Two Orphans," derived from an assignment to them by one N. Hart Jackson, who is alleged to have obtained this copy-right under the laws of the United States; and they charge the defendants, enumerating them in their bill, with an infringement of their rights in this copy-right, to-wit: that they are now and have been presenting the play copy-righted as aforesaid, and assigned to the complainants, in the city of Saint Paul, in this district, without any authority or license. That is, briefly, the substance of the bill; and upon it, accompanied by the certificate of copy-right and additional affidavits, they ask that a preliminary injunction be granted by this court. The complaint has attached to it, (and the original has been presented,) a copy of the certificate, duly issued in accordance with the laws of the United States, to N. Hart Jackson, and a proper assignment from Jackson as the author or proprietor, to the complainants. They also present with their bill of complaint, the affidavit of N. Hart Jackson, which more in detail sets forth his right to obtain from the government this copy-right, alleging that he is the joint author of this play with some French citizens, and the purposes for which the joint production was translated into English, for exhibition in this country. Now, there is no question if all these allegations are true, and if it shall be established on the final hearing in this cause that the copy-right was legal and valid, that the complainants would be entitled to an injunction. Upon the face of the papers which they present here, they have established what in law is termed a prima facie case, and the burden is thrown upon the defendants, who are charged with an infringement of their right to overcome it. This is valuable property. It has been said that dramatic compositions are the most valuable of all literary works, and there is some reason in it. While authors of literary productions, as a general thing, are compelled to await the printing, manufacture and sale of their books before they can derive any profit from them, the dramatic manuscript can be readily put on the stage, and if it is an amusing and entertaining production, and well brought out, it immediately becomes a source of profit. If it has a successful run, this profit and value are increased, so that it seems to me the assertion is true in some respects, that the authors of literary dramatic compositions are entitled to the great protection which has been accorded to them by the copy-right laws of this country, for the reason that they are the most valuable of literary compositions.

Have the defendants overcome the prima facie case which has been established here by the complainants? One of the defendants only, A. McKee Rankin, has put in an answer under oath. He has accompanied his answer with a voluminous affidavit setting forth more in detail the defences which he alleges in his answer to overcome the prima facie case established on the part of the complainants; and in order to defeat the application which is made here, and other affidavits, some of them the affidavits of the co-defendants, and of other parties, relating to other portions of the answer, have also been introduced and read. The defences which are set forth relate, first, to the right of the complainants to the exclusive representation of the play entitled "The Two Orphans;" second, to the authorship which is set forth as belonging to N. Hart Jackson, the immediate assignor of complainants; and so far as the affidavits are concerned, these defenses may be classed as follows: First. That the representation of this play is made from a version obtained from memory, and consequently its representation upon the stage in the Opera House in this city is not an infringement of any rights of complainants. Second. That the complainants themselves have dedicated to the public any rights which they obtained in the assignment to them. Third. The denial of authorship in N. Hart Jackson, who is set forth in the bill of complaint as the proprietor, and joint author with two Frenchmen.

Now, so far as the first line of defence is concerned, let us examine it. It has been claimed, and with some reason, that the presentation of the version of a play obtained by process of memory is an infringement of no rights, either of the author, or of his assignees; and in a very early case, it will be found upon examination that Justice Buller decided in England, that where the version of the play had been obtained by frequent attendance upon its representation, and afterwards produced by the party, it was not an infringement upon the rights of the author, and an injunction was refused. It was refused upon this principle: That a court of justice cannot enjoin the memory of a man; that where a party by mere strength of memory was enabled to commit a play and all its parts, and afterwards write it out with-

out any assistance from the original play itself, it was the exercise of memory alone, and a court would appear ridiculous in attempting to enjoin the memory of a man. It was regarded at the time as a novel precedent; still it has been undisturbed, and a case was decided I think in New York City upon that principle. See article by J. A. Morgan in Am. Law Reg., April, 1875, where Lester Wallack commenced a suit against Barney Williams, some six or seven years ago. He produced upon the boards of his theatre the celebrated play of "Caste," and a short time afterwards Barney Williams also produced the play of "Caste" in another theatre, much to the astonishment of Mr. Wallack, and of everybody else who were informed of the means by which Mr. Williams obtained possession of the play, and of his rights in the premises. Upon suit being instituted by Mr. Wallack, claiming under the common law right, and not under any copy-right, it appeared that the brother-in-law of Barney Williams, Mr. Florence, in his affidavit, testified that he had obtained possession of this play by a process of memory. From frequent attendance at the performance in Mr. Wallack's theatre he had been enabled to obtain possession of the play, and had actually produced it; which seemed an extraordinary exertion of bare memory, as it was, undoubtedly, if true. When that affidavit was presented, the court in New York declined to grant an injunction, following the precedent laid down in the English case.

Now without discussing the question whether the right of property—the right of an author in his property—depends upon any peculiar process, which may be used in obtaining it from him without his voluntary act, I think that even assuming that a court of equity would not interfere in a case of that sort, this is not the mode in which the version used by defendants was obtained, according to the allegations of the answer. They do not claim that this version which is represented here was obtained by frequent attendance upon the play, and listening to it; but they aver that by familiarizing themselves with it when represented, they being leading actors in the representation, it was memorized. They were not listeners, they were not a portion of the audience, but were persons who had been engaged by the managers who brought out the play, and obtained all they knew by repeating it as actors. So far, therefore, as this defence is concerned, the facts do not bring it within the rule laid down by Justice Buller, even admitting that the decision is founded upon true principles of equity.

Second. Have the complainants in this cause, by any voluntary act, dedicated to the public the right to use this drama, and thus abandoned all exclusive rights as the assignees of the person who obtained the copy-right? I see nothing in the defence which would show any publication of this play within the legal meaning of that term as applied to copy-rights. What are the facts? It appears that the complainants authorized the publication of a novel, or what is called an adaptation of "The Two Orphans," in the form of a book, which was purchased by Munroe & Co., in New York. There is no pretence here that Messrs. Shook & Palmer authorized the publication of the drama, with all its gestures, stage entrances, scenic effect, as they were representing them upon the stage of the Union Square Theatre, but they entered into a contract by which they gave to Munroe & Co. authority to publish a novel founded upon the incidents of this drama which they were representing; and it appears from a hasty examination which I made yesterday of the copies presented, that they are substantially the same. It may be admitted that by authorizing this publication founded upon the drama, the complainants dedicated to the public the right to the novel. The question then is, whether the publication of a novel founded upon this drama which is the original act, is an abandonment of the right to exclusively represent the drama. I think the case cited by counsel for complainants in the English reports—Reade v. Conquest, 11 C. B. (N. S.) 479—conclusively establishes the fact that where the drama is the original literary effort, and the novel is based and founded upon the drama, its publication is not such a dedication to the public as will authorize the novel to be dramatised and put upon the stage without the authority of the persons owning the copy-right to the original literary effort.

Third. I come now to the last defence, that is, the one attacking the copy-right. Have the defendants overcome the prima facie case established by the complainants? It is alleged in the answer upon information and belief, that D'Ennery and Cormon, two Frenchmen, are the authors of the play, and not Jackson, and, in order to sustain that allegation, the affidavit of Vandenhoff has been read. He testified that long prior to the taking of the copy-right, but not prior to the allegation in the bill, Jackson was joint author with the Frenchmen, and he saw an English version of "The Two Orphans" which was in all particulars substantially the same as the play, upon the stage in two theatres in London. This version of the play is not produced. There is an allegation in the affidavit of Mr. Rankin, that he expects to produce it; but upon this preliminary motion there is nothing but the mere naked testimony of Vandenhoff that he saw in the London theatres a representation of this play, substantially as played by Shook & Palmer in the Union Square Theatre. Does that overcome the prima facie case charged and alleged in the bill? I think not. If the answer, or affidavits had been accompanied by a copy of this English version of the play, and set forth who was the author of the same, it might present a different case, and lead to a different result.

Now, what is the rule in equity governing a court where a preliminary injunction is

asked? The general rule is (and this case presents no exceptions), where the act charged in the bill is either admitted, or not denied—and here the act charged in the bill is the representation of this play—and the injury which results is not easily remedied if the injunction is refused, a court of equity will grant an injunction unless the bill or the case made out by the bill is absolutely refuted. This is the rule in equity which governs a court in all cases where a preliminary injunction is asked for. It may be that on the final hearing of the case, when all the evidence has been introduced on the part of the defence, and on the part of the complainants, the court will decline to grant the relief which is prayed for; but it is impossible upon a preliminary application of this kind to decide upon the merits. The complainants at final hearing may not show themselves entitled to the permanent relief which they claim, but they ask that so long as they have established a prima facie case, and their right to this property, that a restraining order or a preliminary injunction shall be granted.

Without further elaborating this case, I have arrived at these conclusions:

First. That there has been no memorization of this play by the defendants or anybody in their employ which would entitle them, without authority from the complainants, to represent the play of "The Two Orphans" in this district.

Second. That there has been no dedication by any voluntary act which would prevent the complainants in this case from exclusively representing this play.

Third. That the prima facie case made out by the bill has not been overcome by the affidavits which have been presented by the defendants.

It follows, therefore, necessarily, that an injunction must issue, restraining the defendants from representing the play of "The Two Orphans." Injunction awarded.

[NOTE. This cause was again before the courts for final hearing upon motion for an injunction upon bill and affidavits. It was held that the complainants were entitled to an injunction to prevent the defendants from performing the work which had been translated by N. Hart Jackson, but the defendants were not enjoined from using Oxenford's translation. Case No. 12,804.]

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